CONFLICTS OF LAW IN CONTRACTS OF SALE
(Draft Convention of the International Law Association)

BY GLEESON E. ROBINSON

In contracts between persons in different countries for the sale of moveables the parties frequently neglect to provide what law is to govern the contract. In the event of any dispute arising on the interpretation of the contract, or if it becomes necessary to enforce the contract on default of either party, very difficult questions arise as to what law will be applicable. The answer to this question will probably depend on whether the litigation is commenced in the country of one party or the other, for the private international laws of different countries vary as to the rules applicable for determining the territorial or purely domestic law to be applied. Under some systems of private international law, the proper law of a contract is held to be the law of the place where the contract is to be performed, other systems adopt the law of the place where the contract was entered into, or the law which the parties are presumed, according to certain rules, to have intended to be the proper law of the contract. The uncertainty resulting from these differences in the private international law of various countries leads to great inconvenience in international trade as it is impossible to determine beforehand what will be the interpretation and effect of the contract, and it can only be stated that these will in the first instance depend on whether litigation is commenced in one country or the other.

In November, 1924, the International Law Association appointed a committee to examine and report on the conflict of laws in relation to contracts. This committee has held a number of sittings, and after consultation with the International Chamber of Commerce a report was submitted to the International Law Association at its meeting in Vienna in 1926, and pursuant to the representations of
that report a draft Convention was adopted by the International Law Association by a resolution which expressed the opinion that a Diplomatic Conference should be called. The Executive Council of the Association was requested to take the necessary steps in collaboration with the International Chamber of Commerce to arrange, if possible, for such a Conference. The draft Convention dealt with contracts of sale, contracts for work and contracts for services. The question of contracts of sale was taken up by the Netherlands Government and included in the agenda for the Conference at The Hague last January. At this Conference the difficult questions arising were partially discussed and referred to a committee for fuller investigation.

The subject is one of very great interest to all international lawyers, and many very serious difficulties arise in considering the various alternative solutions which might be adopted to obtain uniformity in private international law. It is proposed here to discuss the draft Convention adopted by the International Law Association at Vienna, and the proposals therein put forward for dealing with contracts of sale. It will be advisable also to consider some further proposals on the same subject which were discussed at meetings of the Committee of the International Law Association held at Frankfurt in June, 1927, and at Ostend in July, 1927, but which have not yet been considered by the Association, and on which the members of the committee were not unanimous.

The first fundamental principle adopted by the draft Convention approved by the International Law Association is that it shall not interfere in any way with the freedom of the parties to a contract to choose what law is to be applicable to their contract, and it is provided that where it is stated in the contract itself or is otherwise clear that the parties have agreed that the rules of the Convention shall not apply, the Convention shall not be applicable. The result of this provision would be that the parties would be just as free in the future to determine the law applicable as they have been in the past, and the law thus chosen, whether expressly, or by presumption from other circumstances, should be applied, subject as at present to any
rules of the *lex fori* affecting the freedom of the parties to choose their own law. An alternative proposal on this question will be discussed later in this Article.

The second fundamental principle adopted by the draft Convention is that it shall not interfere with questions of national law as to capacity of parties, the form of contracts, or other provisions of the nature of public policy. It is therefore proposed that “the courts of any country may refuse to apply the Convention to any question of capacity of the parties, or to the form of the contract, or in any case in which the courts on grounds of public order or on any other grounds whatsoever would refuse to give effect to an agreement of the parties as to the law governing the contract.” It has been contended that this clause is too wide and that an effort should be made to define internationally what is meant by “ordre public,” and to omit the general words as to any grounds whatsoever. The difficulty as to such a solution is that there is no universal conception as to what is meant by “ordre public,” and moreover the very nature of the subject renders it impossible for any country to submit to any restriction on its freedom to apply in its courts as positive law any rules dictated by public policy, morality, or natural justice. The only hope for the adoption of any international convention as to which law shall be regarded as the proper law of any particular classes of contracts, is that there should be complete safeguards in this respect, so that each country will be in a position to prevent abuses or evasions of the compulsory provisions of domestic law which are regarded as essential for the well-being of society and the proper control of commerce.

Subject to these general rules which have been referred to above as the two fundamental principles, the Convention proceeds to determine what shall be the law applicable in particular contracts, where the parties have not manifested any clear intention as to the law applicable.

As to the sale of Immovables, it is only necessary to say that it is proposed that the law applicable should be the territorial law of the country where the property is situate,
and that the territorial law of the same country shall determine also whether the property is an immovable. This question causes no difficulty whatever and would probably meet with universal acceptance.

It is in dealing with contracts for the sale of movables that the real difficulties are encountered. Under the private international law of most, if not all, countries it is recognised that a contract will not necessarily be concerned with only one law, but that frequently it will in its different parts be subject to different laws. A very cursory consideration of the subject will show that it would not be feasible for any convention to attempt to provide that only one territorial law should be applicable to each contract. The reasons for this are obvious, and are incidentally referred to hereafter in the course of dealing with the proposals of the draft Convention. It was, however, necessary for the International Law Association, in drafting the Convention, to decide what general rule should be adopted as to the law applicable. In arriving at such a decision, it is necessary to bear in mind that one of the chief requirements is that the parties to contracts should be able to decide for themselves at the time of the contract, or at latest, before going into Court, what law is applicable to the various parts of the contract, insofar as they have not themselves clearly manifested an intention as to what is to be the proper law of the contract. It may be noted in this respect that certainty is an important consideration, and that therefore the rule of the Convention should apply unless the parties have clearly manifested a contrary intention, and the question should not be dependent on vague or ambiguous evidence as to what the parties may have agreed or intended. For similar reasons the doctrine of "renvoi" should be excepted, and the rules should directly decide what "territorial or purely domestic law" is to be applicable.

Alternative suggestions which have been put forward from time to time, but which have not been adopted by the International Law Association in their draft Convention, are that the proper law of the contract should be regarded
as the *lex loci solutionis*, the *lex loci contractus celebrati*, or the *lex debitoris*. Great difficulties arise in adopting any of these. To determine what is the place of performance, there must first be a general agreement in different systems of law as to what amounts to performance, and where an act may be said to be performed, particularly in the case of acts performed at a distance, e.g., delivery of communications or goods through some transport institution, e.g., a railway or post-office, which may, under different systems of law, be the agents of the sender or of the receiver or of neither. Moreover it is necessary to determine what is the legal obligation of performance, and until it is determined what law is to apply, it is impossible to determine the legal obligations. For similar reasons, it is difficult to arrive at any general conclusion for international purposes as to what is the *lex loci contractus celebrati*, and to do so it would first be necessary to reconcile the laws of different countries as to the effect, for instance, of posting a letter and to determine whether the making of an offer or the acceptance of an offer is to be regarded as effected in the country where the letter containing it is posted, or in the country where the letter is delivered to the addressee. The differences between the laws of various countries in this respect are differences depending on principles of general law, as to which it would not be feasible to effect any alteration. The third alternative, viz: *lex debitoris* would be open to similar objections as to uncertainty, and would also result in the very frequent application of different laws not only in different parts of a contract, but sometimes in the same part.

A further alternative is to adopt either the law of the seller or the law of the buyer as governing contracts of sale generally, and to make such exceptions as might appear to be necessary to meet special circumstances. In choosing whether to apply the law of the seller or the law of the buyer, it is important to remember that in a contract of sale, the duties of the seller are of a more varied and complicated nature than the duties of the buyer, and it would not be convenient or feasible to require the seller to inform himself as to the laws of the country of the buyer.
which may have no other connection with the contract or
the subject of the contract than that the buyer is resident
there. Cases in which the law of the buyer would appar­
tently be more equitable and convenient than the law of
the seller can be provided for by general exceptions to the
general rule of any Convention, or by agreement of the
parties. The draft Convention has therefore selected the
law of the seller as the law generally to be applied, but
there are certain exceptions under which the law of the
buyer, or the law of the country where the contract is con­
cluded, or certain movables requiring registration are reg­
istered, is to apply.

The draft Convention lays down certain criteria for de­
termining what is the law of the seller, viz:

1. If the sale is effected by an individual in the course
of commerce carried on by him, or by a firm, as­
association or corporation, the law of the seller shall
be the territorial law of the country where, at the
date when the contract is concluded, the office,
whether principal or branch, which concludes the
contract, is situate.

2. If the sale is effected by an individual, but not in
the course of commerce carried on by him, the law
of the seller shall be the territorial law of the coun­
try where he has his habitual residence at the date
when the contract is concluded.

The term “habitual residence” was chosen as the most
convenient term to express what under some systems of
law is expressed by the juridical term “domicile”. The
juridical meaning of domicile in other systems of law is
not determined necessarily by residence, but may depend
on intention. It was therefore impossible to adopt the term
domicile as a juridical term having a definite and similar
meaning in all systems of jurisprudence.

So much for the general rule adopted by the draft Con­
vention. It remain to consider the exceptions which con­
stitute an important part of the scheme. It is proposed that
the law of the buyer—to be ascertained in accordance with
similar principles to those above stated for determining the law of the seller—should apply in the following cases:

1. Where the seller or his agent or representative concludes the contract during a visit to the country of the buyer.

2. Where the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer and the agent or representative concluded the contract in his own name.

3. Where the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer, and the movables at the date when the contract is concluded are situate in the country of the buyer.

The country of the buyer for the purpose of this Convention shall be the country where the office of the buyer, whether principal or branch, which concludes the contract, is situate at that time, or if the purchase is effected by an individual, but not in the course of commerce carried on by him where he then has his habitual residence.

The only question which it appears to be necessary to raise in regard to the above cases in which the law of the buyer is to be applied, arises from a consideration of cases 2 and 3 with regard to contracts concluded through an office of an agent or representative of the seller situate in the country of the buyer. If the seller comes to the buyer's country, either personally or by acting through an agent, there is no reason why the seller should not properly inform himself of the provisions of the law in the country where he is, through his agent, carrying on business. There is also every reason why the buyer, who contracts in his own country with an agency of the seller should be relieved from having to consider whether he may inadvertently be submitting himself to the provisions of a foreign law. Buyers frequently have no information or very incomplete information as to who are the firms for which agents are
contracting, or where they carry on business or have their chief establishments. Orders are given to agents sometimes without enquiry on these matters, and frequently it is the custom for the agent to give no written confirmation in the name of his principal of the order. It is only at a later date that a confirmation copy of the order is sent from the actual seller, and this may be sent through the agent or direct. It is sometimes a matter of some difficulty to determine whether a contract must be regarded as having been actually concluded by the agent, or by the principal after the opening of negotiations through the agent. In all these cases the circumstances really amount to a trap for the unwary purchaser, who may, in the present state of the law in many countries, find that he has without warning entered into a contract under which foreign law is applicable. There seem therefore to be good grounds for contending that the Convention should provide in quite general terms that the law of the buyer should apply wherever “the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer.” By omitting the provisions as to the agent or representative concluding the contract “in his own name,” it is possible also to omit clause 3 above as to the particular case where the movables at the date of the contract are situate in the country of the buyer. This clause is manifestly impracticable, because the buyer cannot know at the time, and may have great difficulty in discovering or proving at a later date, where the goods were at the time the contract was entered into. Moreover part of the goods may already be in the country of the buyer, but it may be necessary to import the remainder to implement the contract. This difficulty would be entirely removed by making the law of the buyer applicable, as it should be, whenever the contract is entered into through an agent of the seller, in the country of the buyer. Even here, however, there is an ambiguity as to whether a contract is concluded by an agent when negotiations have been carried on by him, and confirmation of the contract is sent by post from the principal. This ambiguity could be remedied by inserting after the word “concludes” the words “or wholly or partly negotiates.”
The draft Convention proceeds to provide for exceptions in the case of particular types of contract as follows:

1. When the contract of sale is concluded on a stock or other exchange or at a fair, or by auction or in case of sale by judicial process, by order of the Court or under an execution, the territorial law of the country where the contract is concluded shall apply.

2. As regards contracts of sale of ships, vessels, and aircraft which are registered, the law applicable shall be the territorial law of the country where the ship, vessel, or aircraft is registered.

A further important exception to the general rule as to the law of the seller is provided as regards performances or obligations of the contract which concern the buyer more than the seller. The reasons which supported the law of the seller as the general rule to be applied to contracts of sale, viz: that it was the seller who had chiefly to perform as regards what may be called the material objects of the contract as distinguished from the pecuniary, demand that in certain cases where the buyer has to perform duties or exercise rights, the law to be applied should be the law of the place where the buyer's duties have to be performed or his rights exercised. This may or may not be the law of the buyer, as it is proposed that

"The territorial law of the country where movables delivered are to be examined by the party receiving them is applicable as regards:

1. The method of examining the movables;
2. The manner of giving notice in case of defects in the movables or of any other breach of contract;
3. The manner of notifying the rejection of the movables or claims subject to which the movables are accepted;
4. The time within which the examination and notice referred to in (2) and (3) are to be effected; and
5. The duties and rights of the party receiving the movables as to dealing with them if rejected."

It would seem advisable that the law of the place where the goods are to be examined by the party receiving them should regulate also the remedies of the buyer when the goods are defective or the seller has committed some other breach of contract. Under different laws, the buyer will have varying rights as to rejection or merely a claim to damages, and unless the buyer knows or can easily ascertain what his rights are in this respect, he may be prejudiced by taking some step inconsistent with them, or failing to take some necessary step in time.

The draft Convention contains no reference to the law governing the passing of property in the goods, which is quite distinct from the law governing the obligations of the parties. There is a growing adherence as regards the passing of property to the lex rei sitae, and it should be made clear that it is not intended that the Convention should affect this.

General provisions are included, as to the application of the Convention by Arbitrators, and also showing that the rules for contracts of sale are intended also to apply to contracts for making or producing movables, where the party undertaking such making or producing has himself to furnish the material.

It only remains to deal with a further suggestion which was not embodied in the draft Convention, but which has been considered subsequently by the committee of the International Law Association, but on which the committee was unable to reach any agreement. The question was also discussed at length, but without any agreement at The Hague. The suggestion was that the validity of any agreement of the parties as to the law applicable to their contract, should be determined by the law which, but for such agreement, would by the terms of the Convention be applicable.

The issue thus raised is whether the Convention is to lay down compulsory rules which may be binding notwith-
standing an agreement of the parties as to the law applicable, or whether the effect of the Convention is merely to be that, if and so far as the parties to any contract have not agreed as to the law applicable, then the rules of the Convention shall apply, but that if the parties have agreed as to the law applicable, then the Convention does not apply, and the validity of such an agreement of the parties as to the law applicable is to be determined according to whatever laws exist in each country as to the validity of such agreements as to the law applicable, and no country shall, by subscribing to the Convention, bind itself beforehand to accept and enforce the laws of another country on this question.

The whole basis on which the proposals for the Convention have been put forward, has been that it would not be practicable to persuade different countries to adopt a uniform system of territorial law, or to adopt any convention which would in any way restrict the power of their courts to apply such rules as are from time to time applied by the *lex fori* whether based on *ordre public* or on other compulsory rules of law. If the countries which become parties to the Convention were to bind themselves beforehand to apply and enforce the laws of another country as to the Validity of an agreement of the parties as to the law applicable to a contract, the extent of such an obligation would be uncertain and unlimited. There is no definite information showing exactly to what extent the laws of different countries might prohibit any party to a contract from contracting out, so that it is impossible to say with certainty in what circumstances the law of a vendor or of a purchaser, as ascertained by the rules of the Convention, would prohibit the parties to a contract from contracting out. There is also no definite knowledge as to how such laws might on future occasions be interpreted, or what extension of compulsory rules might arise in the different countries concerned, either by legislation or judicial decision. It would be impossible for any country to become a party to a Convention under which it would be bound to recognise and enforce such compulsory rules affecting the validity of an agreement of the parties as to contracting out.
It seems clear therefore that the Convention ought not to impose any compulsory rules, but ought merely to provide which law should be applicable where the parties had not agreed as to the law applicable, and that such provision as to the law applicable should expressly be subject to the power of the Courts of any country to refuse to apply that law in a proper case. If and so far as the proposal—whereby the validity of any agreement to contract out would be determined by the territorial law which would have been applied by the convention—is subject to the reservation under which the Courts can take exception on grounds arising under the provisions of their own law as to ordre public, or other compulsory rules, the stipulation is of no practical use, because all systems of law would be in agreement in holding valid a clearly expressed intention of the parties as to the law to be applied to the contract, unless there are some reasons based on public policy, e.g., rules of ordre public or other compulsory rules whereby the parties should not be at liberty to agree as to the law governing their contract.

Alternatively, if and so far as the Courts of any country could not apply compulsory rules of their own law in determining whether the agreement as to the law applicable to the contract is valid, the result would be that all countries which might adopt the convention would be binding themselves to abandon their own compulsory rules, and to be subject to those of some other country. For instance in a case where the law of the buyer would be applicable under the convention, the parties may agree that such law or some other law than the law of the seller is to apply, although the goods might be in the country of the seller. In such a case the country of the seller would never bind itself to regard the sale as valid merely because the parties had agreed that the sale should be subject to the law of a country where it would be valid. In a case also where the contract is for the sale and importation of goods into the country of the buyer and where under the convention the law of the seller would be applicable in the absence of an agreement of the parties to contract out, and the parties agree that the contract is to be subject to the law of the seller
or some other law than the law of the buyer, there may be compulsory provisions of the domestic law of the country into which the goods are to be imported, which do not amount to rules of *ordre public* but under which the Courts must have power to take exception to the contract.

There should, therefore, be complete freedom under the *lex fori* for exception to be taken to contracts on any grounds, whether under rules of *ordre public* or other compulsory rules of positive law.
INTERNATIONAL RADIO RELATIONS
By W. JEFFERSON DAVIS

At the Washington Radio Conference, which convened October 4th last, the United States for the first time was in a position of creative leadership in building a new structure of international law. America has always been on the receiving end of common, statutory and international law. It has accepted the patterns which have come from the codes of Justinian, through the English common law, and the pronouncements of international law, as first evolved by Grotius. Now, as the metes and bounds of the air are being charted, and wave lengths policed and regimented, the United States will do some broadcasting on its own account.

Economic necessity is the underlying, basic motive actuating the call by Washington to the nations of the world to a radio conference this year. Primarily, the scope of this conference was the revision of the 1912 London Convention and the extension of international regulation to other services as well as marine.

Representatives of some fifty foreign countries were in attendance. The American delegation included Herbert Hoover; Admiral W. H. G. Bullard, Chairman of the Federal Radio Commission; Honorable Wallace H. White, Congressman from Maine, and author of the Federal Radio Control Act of 1927; Major General C. McK. Saltzman, Chief Signal Officer of the Army; and Judge Stephen Davis, former Solicitor of the Department of Commerce, and now a corporation lawyer in New York. The American Bar Association, which sponsored the Radio Control Law, is represented at the conference. In fact, it may be said that the American Delegation has turned its big guns of the radio world on the problem of radio communications.

While the American radio experts have been sitting at their desks preparing for the Washington Conference, the International Radio Congress has been in session at Geneva and the foreign delegations include many distinguished diplomats who were at Geneva this summer.
Radio has become "big business" not only in America but in other countries. It also has raised international problems and issues imperatively demanding solution. Requirements for a world-wide, uniform legal code governing the future commercial development of radio, and for new legal definitions and agreements which will clear international communications of perplexity and confusion have made the forthcoming conference imperative.

Decent behavior and responsibility for international proprieties will be one of the important considerations of the conference. Russia has been accused of tossing Soviet propaganda into her neighbors' back yards. What principle of law will govern the right of any nation to close the air to subversive material? Taking the problem in its less flagrant aspects, just how far may any nation go in establishing censorship at its air boundaries and just how far could such censorship be enforced?

Only in one sense can radio broadcasting in Europe today be said to be controlled. The countries have accepted this new medium of communication as an indication of international fellowship, and while the various governments have made no attempt at government control of wave lengths, yet all possible control is exercised and a strict censorship is maintained, in order to avoid the broadcasting of material by one country which would give offense to other countries.

The importance of broadcasting in furthering good will between the nations is so obvious that every effort will be made at Washington to effect harmonious agreements as soon as possible.

There are some exceptions to this prevalent spirit of cooperation, however, and occasionally one nation throws a "monkey wrench" into the broadcasting machinery. For example, during the general strike in England, the only means of disseminating information which existed between the government and the public was the broadcasting station. The most important of these was Daventry, transmitting on 1,600 meters. It was found, however, that the transmissions during the time of the strike were subject to
insurmountable interference from another station, which afterwards showed itself to be Moscow. Whether the Russians were interfering deliberately or not is beside the point. The fact remains that one country can entirely spoil the transmissions from one or more stations in a foreign country in Europe, if it desires to do so.

Last year, news items from Bucharest indicated that the Russian Radio Broadcasting Station at Moscow was broadcasting criticisms of the Roumanian government and was appealing to its Roumanian audience to start a revolution. The War Minister of Roumania instructed one of the military radio stations to set up a counter " buzzing" whenever the Soviet News Station began to broadcast. In the case of the Daventry incident, it was not known whether the interference from Moscow was intentional or not. The Bucharest example presents quite the different situation of one government deliberately intruding itself through the medium of radio into the internal workings of another country to the latter's detriment. The necessity for the establishment of international rules and regulations is therefore very evident.

The development of radio in its early stages from ship to shore added a new means of communication, resulting in the saving of life from loss at sea. The wireless S. O. S. call for help made a vivid impression upon the imagination and the world was quick to realize what it meant in terms of human life. The radio apparatus became an essential part of every ship's necessary equipment.

Since the London Convention of 1912, which followed shortly after radio was first brought into use for practical communication over the water, and in fact, within the last six years, the art of broadcasting came into use. Broadcasting is but one form of radio telephony, but like any other startling innovation, it has developed without legal precedent, and completely changed the habits and thought of entire nations. Countless millions now depend upon radio not only for education and instruction, but for their amusement, entertainment and relaxation. In the opening of the recent trans-Atlantic long distance circuit between
London and New York, by which telephone conversation is stepped up over a great gap in space, we have witnessed the most notable achievement in radio telephony for strictly business purposes.

The radio legal problems therefore have assumed an international aspect, and it is not enough for nations to content themselves with national laws on the subject. International codes must be drawn up. This is to say, the international principles and rules governing radio must be drafted by mutual agreement. Mr. Hughes has very succinctly defined international law as the principles and rules adopted by civilized states as binding upon them in their dealings with each other.

With the exception of a few treaties or conventions there is no international law at this time controlling radio communication, and we have only fundamental general principles upon which to depend. Except for marine use, we do not as yet find in the international field either allocation of wave lengths or other regulatory measures.

It is toward the formulation of an international radio code that the Washington Conference directed its attention when it convened on October 4th. The London convention of 1912 provided for revision at five year intervals. The World War destroyed that possibility. Afterwards the matter drifted until there was a very decided pressure from European countries for a new conference to revise the London convention and to bring it down to date. The proposals for modifications submitted by the various countries through the Berne Bureau have been compiled and circulated. These proposals approximate from 1,600 to 1,700 in number and make a book of some 600 or 800 pages. Obviously the objective of the Washington conference is to take these proposals as submitted and from them compile a new international convention. The main issues of the Conference centered around such questions as freedom of the air, transmission of communications, secrecy of communications, transmission of news and security of human life; questions of commercial and industrial property, and intellectual, literary and artistic copyrights.
The problem of broadcasting copyright productions is much more acute in Europe than in the United States, due to the great number of different language countries all within radio speaking and hearing distance of each other. Already specific laws have been passed to protect the author of a literary or musical composition. In Norway, for instance, an author has the right to forbid, with the consent of the ministry of education, the broadcasting of his work, and if it is broadcasted by his consent, he is given compensation on a yearly basis.

The chief topic of the second annual meeting of the Confederation of Authors and Composers which met recently at Rome, was the revision of the Berne convention. The United States is not an adherent to the present Berne convention, although the American Authors' Society has for years been trying to make us a signatory. It is virtually certain that at the Washington Radio Conference the United States will be asked to approve of the Berne Convention as revised.

One hundred years ago a postmaster general of the United States recommended to Congress that some way be devised to carry the mail through the air, but even twenty-three years after birth the air industry had made little progress in the utilization of this field of commerce and was so slow in reaching maturity that its growth seemed permanently stunted.

On the other hand, its air twin—broadcasting—a lusty infant of scarcely more than six summers, has displayed such precocity that its voice can be heard nightly from one end of the country to the other, or on occasions of any national significance, through the medium of super-stations, and has become literally a necessity in all of the homes, not only in our own country, but abroad as well.

The distinguishing feature about American broadcasting is that its service is free to its audience of listeners. In Great Britain a tax is levied upon receiving sets, and in Europe generally the entire industry is conducted upon the principle of "Let him who receives, pay."

The first International Wireless Telegraph Convention
was signed at Berlin in 1906, and was the result of joint conferences between representatives of the United States and European countries held in Berlin in 1903 and 1906. Various drafts of conventions were discussed, but without appreciable result.

When the London Convention of 1912 was held, radio was just beginning to be used as a means of communication over the water. Consequently, its provisions applied to all radio stations, both coastal and on shipboard "open to public service between the coast and vessels at sea." No other forms of radio communication then being used, such systems as broadcasting and point to point radio telegraph, are today still open for international agreement.

The American delegates noted a reservation as to rates, and the Convention was ratified by the United States Senate.

The Berlin Convention of 1906 is still effective for questions arising between the United States and countries signatory to it, but which have failed to ratify or adhere to the London Convention of 1912.

The International Convention on Safety of Life at Sea, was signed at London in 1914, providing for radio equipment on vessels, but lacking complete ratification, is not binding.

At the Conference on Limitation of Armaments, the signatory powers by resolution provided for a Commission of Jurists. This Commission met at The Hague, and in 1923 promulgated rules for the control of radio in time of war. The United States has indicated its willingness to enter into a treaty, embodying the rules as adopted.

Article 16 of the Rules of Air Warfare provides that any aircraft transmitting intelligence while engaged in a flight, is deemed to be engaged in hostilities.

The Hague Conventions of 1899 and 1907 deal to some extent with the status of radio stations in time of war, as does also the Land War Neutrality Convention.

In 1920, the Washington Conference on Electrical Communications made an unsuccessfu l attempt to obtain a general allocation of wave lengths throughout the world. Due
to difference in time, there has been no interference between European and American transmission. But in that period where government control of wave lengths was ineffective, in the United States, the piratical seizure by some few American broadcasting stations of channels set aside by agreement for Canadian use, caused interference, and made necessary the early adoption of some immediate agreement.

In Europe, however, most of the broadcasting stations have a far greater range than the area of the country in which they are located, and equitable broadcasting agreements are imperative.

The right to broadcast copyright productions, and the question of payment to authors is still a moot subject. It is hoped that some definite plan will be formulated for solving this problem at the Washington Radio Conference.

This was on the program of the National Radio Conference at Washington in the fall of 1926. A special committee of the Conference was appointed, headed by the Hon. Wallace H. White, member of Congress from Maine, to hear the conflicting interests.

After several sessions of the Committee, it appeared impossible to reconcile the two divergent views: that of those representing the society of authors, composers and publishers and individual owners of copyrights on the one hand, and broadcasters on the other. No definite action was taken by the Conference. The formation of the committee, and the hearings held by it were a clear recognition, however, of the importance and complexity of the subject.

It should be recalled that in the early days of broadcasting in the United States, there was no objection to the "publication by radio" of copyright productions by their owners. It was believed that the advertising value to the owner of the copyright in such publication was adequate compensation. In process of time, however, following the organization of the Society of Authors, Composers and Publishers, there began to be affirmative objection to the use of copyright matter by broadcasters without the con-
sent of the owners, and except upon terms and conditions prescribed by the Society and by the owners.

The title of the copyright owner, and the question of whether the broadcasting of his production forms its publication has been passed upon by several courts in the United States. Under the Copyright Act, an author has the exclusive right,

"to perform the copyright work publicly for profit. . . .

"and for the purpose of public performance for profit."

Therefore, in all litigation on the subject, the two questions for determination have been,

1. Whether the broadcasting of a musical composition is a "public performance," and,

2. Whether, if a performance, it is "for profit."

What law exists on the subject at the present time was formed by the decision of the United States Circuit Court of Appeals in litigation evolving out of the broadcasting of a copyright song called "Dreamy Melody." * The holding of the court was that the broadcasting "was a public performance" and one "for profits." In its decision, the court said:

"Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered audience, and is therefore participating in a public performance."

It was contended on the part of the broadcasting station that the performance was not for profit, as no direct compensation was received, but the court, in answering this contention, said:

"It suffices that the purpose of the performance be for profit. . . . It is immaterial, in our judgment, whether that commercial use be such as to secure direct payment for the performance by each listener, or indirect payment, . . . or a general commercial ad-

vantage, as by advertising one's name in the expectation and hope of making profits through the sale of one's products, be they radio or other goods."

In substance, the decision means that the station was broadcasting for the publicity it received, and that its business was the selling of radio sets, accessories, etc., and that therefore the broadcasting was done "publicly for profit," within the meaning of the Copyright Act.

At the time of the National Radio Conference of 1926, it seemed to be generally agreed upon by both parties that broadcasting did constitute "publication for profit," and that the owner of the copyright had the legal right to demand payment and to impose terms and conditions. The difficulty between the two organizations, the Society of Authors, Composers and Publishers, and the Broadcasting Associations, was not as to this general principle, but rather was as to the proper basis for pay, and as to what terms and conditions might be properly imposed.

Congress, in its efforts to frame radio legislation, has not dealt specifically with this subject. The legislative proposals before Congress during recent years with respect to radio have been directed primarily to a control of radio transmission. It has apparently been the conception of the committees of the House and Senate, charged with jurisdiction over radio, that this copyright question involved our copyright laws rather than a radio transmission problem.

It may also be said that the immediate parties to this controversy, that is the copyright owners and the broadcasters, have acquiesced in this view, and the matter, so far as it has been presented to Congress by either of these groups, has been brought to the attention of those committees of the House and Senate having jurisdiction over patents and copyrights.

It is true, of course, that transmission by radio is one form of "publication" and this might justify the treatment of this subject in radio legislation. It has seemed, however, that this is but one of many forms in which there might be a publication and that the legislation on this subject
ought to deal with the principle, and the general law of copyrights, rather than with a particular feature of it.

As another example of Europe's consideration of this subject, there is the following proposal by the Lugano Conference, as Article II bis, to the Berne Convention:

"The authors of literary and artistic works enjoy the exclusive right to authorize the communication of their works to the public by telegraphy or telephony with or without wire, or by any other analogous means for the transmission of sounds and pictures.

"The artists who execute literary and artistic works have the exclusive right to authorize the diffusion of their performance by one of the means mentioned in the previous paragraph."

The chief topic of the second annual meeting of the Confederation of Authors and Composers, just ended in Rome was the revision of the Berne Convention.

A similar resolution was passed by the Comité Internationale de la Telegraphie Sans Fil at Paris in 1925:

"The authors of a production, literary, artistic, cinematographic or scientific production, have the exclusive right to authorize the communication or the diffusion by telegraph or telephone, wire or without wire, or by every other similar means of transmitting sounds or images.

"Royalties must be paid by all the stations transmitting, relaying, or re-transmitting, for every radio diffusion of the product of production."

There is no question in the United States that the "broadcaster is actively engaged in transmitting to the radio audience the original unauthorized production," and that he will be responsible to some measure for his unauthorized act.

The whole question of copyrights came up for determination by the Washington Conference, which was asked to adopt the provisions of the Berne Convention of 1886, and to evolve some definite rule, by which the rights of authors and composers will be better protected in the immediate future.
Official government delegates, representing jurists and broadcasting organizations, were the participants at the second international radio congress of the Comité International de la Telegraphie sans Fil. Fourteen countries were represented officially. At Geneva, I joined the Honorable Wallace H. White, the other American observer at the Congress, and we both were in attendance at all the sessions. As Mr. White also represented the United States government at the Paris Conference of 1925, his viewpoint in regard to the proceedings of the Congress was of great value. The Union Internationale de Radiophonie and the Comité Juridique International de la Telegraphie sans Fil are the most important of the radio organizations in Europe, and were both well represented.

It is significant that among the official government representatives attending the Geneva Congress were six delegates who represented their respective governments officially at the Paris Conference of 1925, and each of these delegates is included among those in attendance at the Washington Conference now in session.

The International Radio Congress is presided over by M. Tirman, Counselor of State and President of the French Inter-Ministerial Commission for Wireless. While essentially an organization formed as a center of legal studies, it functions as a permanent organization of arbitration, and under the guidance of M. Tirman, president, and M. Robert Homburg, secretary general, it was been able to formulate a doctrine which the participating states can follow in the elaboration of international radio statutes and the correlation of respective legislation.

At its first international congress in Paris during April, 1925, representatives of twenty-three countries participated. The Comité has recently established an international radio library in order to make widespread distribution of its reports, which are published in the International Review of Radio Electricity.

The Union Internationale de Radiophonie, an affiliated organization which is represented at the present congress, meets at Geneva four times a year. Its assemblies are
usually held at the Palais des Nations, Geneva. The president of the Council this year is Admiral Carpendale, Comptroller of the British Broadcasting Company, which has a listening public of approximately two and one-half million subscribing listeners. The Vice-Presidents are Messrs. H. Giesecke, Chairman of the Riechs Rundfunkgesellschaft,—German Federation of Broadcasting Organizations,—with one million, three hundred and sixty thousand licensed listeners, and M. Robert Tabouis, Vice-President of the French Federation of Private Broadcasting Stations.*

Broadcasting in Europe seems to present highly complex problems which require international control. This

*The following delegates represented their respective countries officially:

FRANCE—M. Charles E. Drouets, Delegue du Gouvernement francais.


RUSSIA—Eugene Hirschfeld, Chief of the Department of International Communications.

FINLAND—Honorable Raffael Erich, Minister from Finland to Switzerland.

CZECHOSLOVAKIA—Dr. Otto Kucero, Chief of Radio Communications.


LEAGUE OF NATIONS—Dr. Ulrich Huber-Noodt.

ITALY—Count Constantin de Chataneuf, Consul General of Italy at Geneva.

MONACO—R. Eles, Chief Consul of the Principality of Monaco.

SWITZERLAND—Dr. Charles Kubick.

AUSTRIA—Dr. Maximilian Hartwich, Minister of Commerce and Communications.

POLAND—Henri Konic, Delegue du Gouvernement Polonais.

GERMANY—Dr. W. Hoffman, Delegate du Gouvernement Allemand.

FINLAND—Paul Hjelt, Chief of the Technical Service of Military Aviation.
is due to the fact, as the International Union expresses it, that:

1. Wireless waves know no frontiers.

2. Broadcasting stations are everywhere increasing in number and power.

3. Broadcasting programs are private property.

There being no prescribed allocation of wave lengths in Europe, this is one problem which has to be solved by mutual agreement, hence the necessity has arisen for clearing houses such as the Comité Juridique and the International Union of Broadcasting Organizations, which are the two dominant organizations represented at the Conference. One of the most recent examples of their influence has been the putting into practice with the consent of governments of a new European wave plan for stations transmitting on wave lengths between 200 and 600 Meters, also a new European wave plan capable of world wide application for broadcasting stations operating above 600 meters (contingent upon the decisions of Washington.)

The Congress convened on Monday, May 30th, and was in session until June 3rd. At the opening session Mr. F. de Rabours of the Swiss Delegation was elected president of the Congress, and Mr. Homburg of the French Delegation, Secretary General. The proceedings of the Conference were in French and officially reported.

The first two days of the Congress were devoted to consideration of proposals with reference to the Washington Radio Conference, being a discussion of the general principles of the Washington Conference; a suggested revision of the general plan of these principles, and to a discussion of questions concerning Freedom of the Ether, Transmission of Communications, Secrecy of Communications, Transmission of News and Security of Human Life. It seemed to be the thought of the delegates that broadcasting, as distinguished from other forms of communication, was not fully dealt with under the Washington proposals, that the general grouping was inadequate, and one of the most important of the resolutions passed by the Congress in my judgment is the one relating to the re-grouping of these
The French Delegates laid great stress on Liberty of the Ether and the corresponding resolution passed with reference thereto. A similar attempt, it will be remembered, was made to obtain a statement in the preamble to the federal radio law in the United States, declaring that the ether belonged to the Federal Government. A joint resolution passed by our Congress, and approved December 8th, 1926, was based on this idea of ether proprietorship. The theory is immaterial to say the least. It involves title to something which does not exist.

The questions of "Commercial and Industrial Property" and "Intellectual, Literary and Artistic Copyright" received very full consideration. Apparently all European countries consider them of the utmost importance. While the Geneva Congress was in session, the second annual meeting of the Confederation of Authors and Composers was just ending at Rome. The chief topic of the Rome meeting was the revision of the Berne Convention. A conference of diplomatic representatives will meet again in Rome to formulate such a revision, and it is certain that at the Washington Conference, the United States will be asked to approve of the Berne Convention, as revised. I believe the United States is not an adherent to the Present Berne Convention, but it is certain that the European delegations attending the Washington Conference will join with the American Authors' Society in trying to bring about its ratification. I presume the whole question of copyrights will come up for determination by the Washington Conference.

The question of "Rights of Owners and Lessees in connection with the installation of Wireless Apparatus," is a matter purely national and not properly the subject of international negotiation.

I pass from the Congress to some observations on European radio problems:

With the advent of the technique of broadcasting, and its application in the different countries, many problems have arisen in connection with the establishment of national
broadcasting services, which must be solved by some international or inter-European agency or by inter-European agreements.

There are at least three problems which are of importance:

(1) An inter-European plan for the allocation of wavelengths for broadcasting purposes. (This is being developed by the Union Internationale de Radiophonie).

(2) The establishment of an inter-European agency for the exchange of programs by whatever technical means available, that is, by wire, by radio or exchange of mechanical reproductions of national programs.

(3) The establishment of an international agreement as to the rights of artists, authors, composers, etc., in regard to the payment of royalties on programs performed in the broadcasting station studios. This includes the question of re-transmissions as outlined in (2).

It may be said that Europe has more problems to cope with than the United States. A spirit of cooperation is everywhere very apparent. The problems are being discussed generally and solutions would seem to be forthcoming. The importance of broadcasting in furthering good will between the nations of Europe is so apparent that every effort should be made to effect harmonious agreements as soon as possible.

The International Radio Congress at Geneva this last summer did much to focus attention upon the consideration of questions which were later solved at the Washington Conference. Proposals were then made on which there was substantial agreement on many of the most important, underlying principles. The Washington meeting amplified and formulated more explicitly these basic statements. Representatives of participating nations will now lay the conclusions of the Conference before their respective governments for incorporation into a new international convention.
SEARCHES AND SEIZURES UNDER THE NATIONAL PROHIBITION ACT

By J. NEWTON BAKER

WHEN the Volstead Act went into effect, in 1919, it was obvious and inevitable that innumerable difficulties would arise and new solutions must be instituted to bring about some kind of enforcement by the Federal Government. Many persons declared that their personal rights were invaded and did not hesitate to criticize the legislature and Federal Government even to a point of condemnation. Liberty, especially personal liberty, makes a strong appeal to all of us, because we are all selfish, and the term personal liberty means to each of us the liberty to do what suits each of us personally. There may be too many laws, state and national, but a federal law for the benefit of the entire nation should be enforced both by a state and the Federal Government. The principle is fundamental that law being a standard enables man to get more out of life by an orderly system of production and exchange by strict observance. All laws must adapt themselves to the economic conditions of time and our economic life has changed more in the years since 1919 than during the 50 years prior to the enactment of the Volstead law. These changes are apparent to the educated person because the wealth of production and distribution has exceeded all estimates. Each new law must overcome stiff resistance when first introduced but few have been repealed, especially those affecting the daily life of individuals. One of the benefits of prohibition enforcement has been the marvellous progress in business organizations. Both friends and enemies must admit that the purchasing power of the masses has greatly increased since prohibition has become effective. The progress of science has brought about much social legislation because it has taught us the social reactions of things which were formerly supposed to concern only the individual.

The Prohibition law has been resented as a violation of the personal rights by people who have not yet learned
the reason for its enactment and its important benefits to society. When people are aware of the evil united and voluntary action can be obtained for enforcement of new legislation. Effective enforcement must follow amendments to our Constitution although our Constitution was not adopted to secure absolute liberty; rather it aims to secure the blessings of liberty. To be a blessing liberty must not be left to the crude egotism of the individual but must foster the general welfare of the people and promote progress under the restraints of law.

The Bureau of Prohibition has the immense duty of enforcing the three constitutional prohibitions against the manufacture, sale and transportation of intoxicating beverages. To make the enforcement more effective the United States is divided into 25 districts with an administrator in charge of each district making the personnel of 4000 operatives under the direction of the Commissioner of Prohibition. These employees gather the evidence, make arrests of violators and turn them over to the various prosecuting officers. Closely allied with the Prohibition Bureau is the Customs Bureau, one of the services of the Government, which particular Bureau has charge of the importation and exportation of commodities and collects customs taxes and duties. This Bureau has an operative force of 8500 employees. One of its duties is to prevent smuggling into the United States of all kinds of merchandise, including liquors. The great coast lines of the Atlantic and Pacific Oceans, the Republic of Mexico, and the boundary lines of the Dominion of Canada are under constant guard to prevent illegal entry of goods into the United States. The only source of obtaining real liquor, except for medical purposes, in the United States today is through smuggling from Canada. Another agency closely allied with the Customs Bureau is the Coast Guard of 11,000 operatives and 500 boats of different sizes engaged to prevent smuggling into the United States from the seas. These boats constantly cruise off our coasts while harbor cutters are stationed at all our important posts for the inspection and examination of ships that come in with merchandise and passengers from abroad. All kinds of methods are
used to disguise ships in order to afford them an opportunity to discharge their unlawful cargoes. Thus in all there are 24,000 operatives active to enforce the prohibition laws. Consequently the business of smuggling is becoming too hazardous, forcing many to abandon for fear of capture and prosecution which may result in imprisonment.

The extent of unlawful transportation of beverages from Canada may be grasped from the Government reports of Ottawa just available showing that intoxicating beverages valued at $23,457,000 were exported from Canada into the United States in 1927. Frequently it is asked why Canada does not assist to prevent smuggling into the United States but this is easily answered because the laws of Canada do not prohibit the exportation of liquor. Export liquor from Canada does not have to pay the $10 Canadian tax, making it profitable to export liquor and if desirable to smuggle it back into Canada for home consumption. The City of Detroit, on account of its geographical location, is the center of smuggling operations from Canada. The $23,457,000 which represents the value of liquor imports from Canada into the United States in 1927 appears insignificant when compared with the American drink bill of 1917, the last year before prohibition, which was $2,500,000,000.

This is the ninth year for the Eighteenth Amendment and the past year was a notable one in the history of law enforcement. Congress passed a law signed by President Coolidge creating a Bureau of Customs in charge of a commissioner, and a Bureau of Prohibition in charge of a commissioner. Those two bureaus together with the Coast Guard have been placed under the supervision of one Assistant Secretary of the Treasury, thereby creating a closely related and co-ordinated organization for the enforcement of the prohibition laws.

President Coolidge in his annual address to Congress said:

"After more than two generations of constant debate, our country adopted a system of national prohibition under all the solemnities involved in an Amendment to the Federal Constitution. In obedience to this
mandate, the Congress and the States, with one or two notable exceptions, have passed required laws for its administration and enforcement. This imposes upon the citizenship of the country, and especially on all public officers, not only the duty to enforce, but the obligation to observe the sanctions of this constitutional provision and its resulting laws. If this condition could be secured, all question concerning prohibition would cease.

“The Federal Government is making every effort to accomplish these results through careful organization, large appropriations and administrative effort. Smuggling has been greatly cut down, the larger sources of supply for illegal sale have been checked, and by means of injunction and criminal prosecution the process of enforcement is being applied. The same vigilance on the part of local Governments would render these efforts much more successful. The Federal authorities propose to discharge their obligation for enforcement to the full extent of their ability.”

During the fiscal year 1927 prohibition administrators seized 1,463,000 gallons of spirits, 5,971,900 gallons of malt liquors, 389,568 gallons of wine, mash, 21,085,000 gallons, automobiles, 7,137, valued at $3,529,000. The total appraised value of property seized and destroyed was $12,498,000, of this amount $6,308,000 was confined to the State of New Jersey, which shows where the greater part of unlawful manufacture, sale and smuggling takes place. Sixty-four thousand persons were arrested by Federal prohibition officers and of this number New York furnished 16,583. Persons arrested by state officers assisted by federal officers were 13,506. Distilled spirits gauged and withdrawn from warehouses aggregated 370,000,000 tax gallons. Grain and other materials used in production of distilled spirits amounted to 48 million pounds. Wine fortified in 1917 was 21 million gallons and in the past year of 1927, 1,717,000 gallons, self-explanatory of the rapid decrease under prohibition. 637,838 gallons of wine were delivered for sacramental purposes.
The National Prohibition Act of October 28, 1919, "To Prohibit Intoxicating Beverages, etc."
provides:

"Sec. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

In *Gouled v. United States*, the Court said:

"The Fourth Amendment reads, 'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.' The part of the Fifth Amendment here involved reads, 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and the court (in *Boyd v. United States*, 116 U. S. 616; in *Weeks v. United States*, 232 U. S. 383, and in *Silver-*
thorne Lumber Co. v. United States, 251 U. S. 285) have declared the importance to political liberty and to the welfare of our country of due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decision is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property;' that they are to be regarded as the very essence of constitutional liberty."

It has been repeatedly declared that these two amendments should receive liberal construction so as to prevent stealthy encroachment of rights secured by the imperceptible practice of courts or by well-intentioned but mistakenly over zealous executive officers.3

The restrictions of the Fourth and Fifth Amendments to the Constitution of the United States apply to any exercise of the power of the Federal Government through any of its authorized agencies. 

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the

judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 4

Section 25 of Title II of the National Prohibition Act imposes the duty of arrest and seizure where liquor is being illegally transported, not only upon the Commissioners of Internal Revenue, his associates and inspectors but also upon "any officer of the law," which term as used refers only to Federal officers. State officers must be authorized to make arrest, search and seizure under the direction of Federal officials and working in conjunction with Federal officers solely for the purpose of aiding in the Federal prosecution. But the rights guaranteed by the Fourth and Fifth Amendments to the Constitution may be invaded as effectively by co-operation as by State officials acting under the direction of Federal officers. 5 Evidence obtained by state officials through search and seizure made without a warrant and without probable cause, but in the presence of a Federal official, was held inadmissible. 6 The admission of evidence of liquor wrongfully seized violates the rights of defendants as guaranteed by the Fourth and Fifth Amendments. 7

Searches and seizures may be made legally either without a warrant or with a warrant, except that in accordance with section 6 of the act of November 28, 1921, supplemented to the National Prohibition Act, it is unlawful for any officer or agent of the United States engaged in the enforcement of any law of the United States to search without a warrant any private dwelling occupied as such. Private dwelling under the law includes the room or rooms used and occupied not transiently but solely as a residence in any apartment house, hotel, or boarding house. It is essential that reasonable ground shall exist and the exist-

4 Weeks v. United States, supra, n. 3.
5 Compare Silverthorne v. United States, supra, n. 3.
ence of unreasonableness must be determined by the officer at his own risk. The Constitution prohibits unreasonable search and seizure, but does not prohibit search without a warrant. Unreasonable search and seizure is always illegal and reasonable search always permissible. Therefore whether the search or seizure is reasonable or unreasonable depends upon its legality or unlawfulness. Whether a search or seizure in a criminal case is or is not unreasonable must be determined according to the facts and circumstances of every particular case. Generally, if an officer has reason to believe that an offense is being committed he may search without a warrant just as he may arrest without a warrant when an offense is committed in his presence. Where an officer is apprised by his senses that crime is being committed, it is committed in his presence, so as to justify an arrest without a warrant. Under Federal and State statutes the officer to render a search and seizure or arrest without a warrant must have direct knowledge or belief through his hearing, sight, or other sense that a crime is being committed. This knowledge from the employment of his senses must be such as to cause him, honestly and in good faith, to entertain the belief that the law is being violated. Where prohibition officers smelled raisins cooking in a nearby house, which through their experience told them that a crime was being committed, their entry and search of the house, the arrest of defendants therein operating an illicit still, and seizure of the apparatus were not illegal. In this case the record does not show whether the house was a private dwelling or not; also, it will be noted that this decision was rendered May 24, 1920, prior to the enactment of Section 6 of the Act. Had that section been in force at the time of the search and had the house been occupied as a private dwelling then the entry and seizure would have been unlawful. The right of the people to be secure in their

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houses and effects against unreasonable search and seizure is not limited to dwelling houses but extends to a garage, when latter is searched without a warrant.\textsuperscript{11} The facts in this case showed that the officers had no knowledge, through their hearing or other senses, that a crime was being committed in or through the use of said garage. An unlawful or unreasonable search is not made legal by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It is against such prying on a chance of discovery that the constitutional amendment was intended to protect the people.\textsuperscript{12} Officials of the law, while claiming to act officially as authorized federal agents in the enforcement of the federal law they claim also the right to search and seize \textit{ad libitum}, without being subject to the restraining influence of the Constitution. No search warrant is necessary to justify an officer in entering a building where he has reasonable grounds to believe a felony is being committed, and in such cases he may break doors to get in and apprehend the felon.\textsuperscript{13} The essential elements are that a crime is in progress and that the officer, honestly and in good faith, from a knowledge through his sight, hearing, or other senses believes such to be the fact. The claim of good faith in making search without warrant is materially supported by the subsequent discovery of evidence that the law was then and there being violated.\textsuperscript{14} Where defendants, who for some weeks had been under surveillance as suspected dealers in narcotics, were seen with a grip to enter a drug store which was a notorious rendezvous for narcotic peddlers, and the proprietor of which was then under indictment, there was probable cause to believe they were engaged in the commission of a crime, which justified the officers in searching and arresting without warrant.\textsuperscript{15} Officers executing a search warrant to search a dwelling oc-

\textsuperscript{11} United States v. Slusser, 270 Fed. 818.
\textsuperscript{12} United States v. Slusser, \textsl{supra}, n. 11.
\textsuperscript{13} United States v. Chin On, 297 Fed. 531.
\textsuperscript{14} United States v. Vatune, \textsl{supra}, n. 9.
\textsuperscript{15} Green v. United States, 289 Fed. 326.
ocupied by a family should search thoroughly in every part of the house where there is reason to believe the objects searched for may be found, they should consider the comfort and convenience of the occupants, and be careful to do no more injury to the property than reasonably necessary.

Search may be made at the time of arrest and in cases where the officer made the arrest without a warrant, he may without a warrant search the person so arrested. Where defendants were seen by federal agents to deliver packages and to receive money under circumstances such as to justify their arrest for selling narcotics and search their persons without warrant, a search of their dwelling, from which they issued immediately before, was not an unreasonable search.¹⁶ Where a person was arrested in the commission of a crime, papers found upon search of his person and connected with such crime are not within the immunity against unlawful search and seizure.¹⁷ The constitutional rule is simple in form, and simple in statement, there are no subheads and no exceptions. That the right of the people to be secure in their homes and effects against unreasonable searches and seizures shall not be violated is the rule. As the expression of one excludes the other, there is no right in the people to be secure from reasonable searches and seizures, therefore, the only question in every case is whether under the evidence there was unreasonable action. Unreasonableness is matter of fact, a fact question decided by generations of judges instead of being left to juries, and commonly called a question of law.

The purpose of a search warrant is to obtain possession of contraband property, of property, agencies or instruments used as a means of committing a crime; or of stolen and forfeited goods. A warrant may be issued to seize property used as means of committing a felony, but all papers and documents which are evidence of the commis-

¹⁵ Agnello v. United States, 290 Fed. 671, rev’d as to Agnello, aff’d as to rest, 269 U. S. 20, 70 L. ed. 145, 46 S. Ct. 4.
¹⁷ United States v. Kraus, 270 Fed. 578.
sion of the crime but which were not the means or agen­
cies of committing it are immune from seizure.18 Mer­
chandise, the importation and exportation of which is pro­
hibited can be seized; also smuggled goods that may come
to the notice of the agents. Neither may a search warrant
be issued solely for the purpose of searching a man's office
or house and papers for evidence to be used against him
in a criminal proceeding; nor can papers or other property
in which the sole interest of the Federal Government is
their value as evidence, to be taken from the owner's home
or office under a search warrant. All papers and docu-
ments, valuable solely as evidence and necessary to the
presentation of a case in a criminal proceeding should be
secured under a subpoena ducès tecum. Bear in mind that
a defendant as an individual cannot be legally forced to
produce his personal and private books and papers or prop-
erty, as this would be in violation of the Fifth Amendment
to the Constitution. But adversely the books, records, and
any other property of a corporation, either extant or dis-
solved, are obtainable by means of a subpoena ducès tecum
for use as evidence against any of its officers, directors,
stockholders and employees.19 Search warrants under the
Fourth Amendment can only be issued upon probable cause
supported by oath or affirmation whether for use of fed­
eral officers or private individuals; the rule does not dis­
criminate in any case.

In the Carroll case where the defendants were appre­
hended while driving in an automobile containing smug­
gled liquor, the Supreme Court said that on reason and
authority the true rule is that the search and seizure are
valid when made without a warrant upon probable cause,
that is, upon a reasonable belief based on the circumstances
prior to the seizure that the automobile or other vehicle
contains that which by law is subject to seizure and de­
struction.20 It would be intolerable and unreasonable if a

18 Gouled v. United States, supra, n. 2.
538; Grant v. United States, 227 U. S. 74, 57 L. ed. 423, 33 S. Ct. 190.
790, 45 S. Ct. 280.
prohibition agent were authorized to stop every automobile on the chance of finding liquor and subjecting persons travelling the highway to the indignity of search. The measure of legality of such seizure is that the seizing officer shall have reasonable and probable cause for believing that the automobile which he stops and seizes has contraband liquor illegally transported. The right to search is dependent on the reasonable cause the officer has for belief that the contents are offending against the law. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. An agent or officer may suspect, but suspicion is not enough to justify a search and seizure without a warrant; there must be probable cause. In cases where the securing of warrant is reasonably practicable it must be used. In cases where seizure is impossible without a warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

A state search warrant, based on information alleging that affiant has good reason to believe and does believe defendant has in his possession intoxicating liquors, instruments and materials used in the manufacture of such liquors, cannot, under the Fourth Amendment, sustain a federal search and seizure of defendant's home. When a federal officer participates officially with state officers in a search so that in substance and effect it is their joint operation, the legality of the search and of the use of evidence of the things seized, is to be tested, in federal prosecutions, as it would be if the undertaking were exclusively his own.21

The admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments. The wrongful arrest, search and seizure was made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. It is true that the troopers were not shown to have acted

21 Byars v. United States, supra, n. 6.
under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such cooperation, as by the state officers’ acting under direction of the federal officials.22

In the Ole Berkeness case,23 the proceeding was brought in Alaska to enjoin and abate a nuisance alleged to exist in Berkeness’ private dwelling at Fairbanks. That said defendant had for a long time prior to the 5th day of May, 1925, kept and maintained said premises as a common and public nuisance, and has, during said time, kept intoxicating liquor in his possession, and stored in said premises. It was dismissed because unsupported by competent evidence.

A warrant issued May 5, 1925, by the U. S. Commissioner at Fairbanks commanded the Marshal to search the premises then occupied by Berkeness as a private dwelling for intoxicating liquors, alleged there to be kept, possessed and stored by him contrary to the Act of Congress, approved February 14, 1917. The preceding affidavits did not charge the use of the dwelling for unlawful sale of intoxicants or for any business purpose. The trial court declared the warrant invalid and rejected all evidence. Notwithstanding known difficulties attending enforcement of prohibition legislation, Congress was careful to declare in the National Prohibition Act that mere possession of liquor in one’s home “shall not be unlawful” and to forbid procurement of evidence through warrants directing search of dwellings strictly private not alleged to be used for unlawful sale. The definite intention to protect the home was further emphasized by Section 6, Act of 1921.

The Court below held that by the legislation subsequent to the Act of February 14, 1917, Congress imposed “a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States.”

22 Compare Silverthorne v. United States, supra, n. 3.
23 United States v. Ole Berkeness, 275 U. S. 149, 72 L. ed. —, 48 S. Ct. —.
Act of June 15, 1917, states that a person who maliciously or without probable cause procures a search warrant to be issued and executed, or an officer in executing a search warrant wilfully exceeds his authority or exercises it with unnecessary severity shall be fined not more than $1,000 or imprisoned not more than a year. Section 140, Criminal Code, reads as follows: "Whoever shall knowingly and wilfully obstruct, resist, or oppose an officer in serving or attempting to serve or execute a search warrant, or shall assault any such officer, knowing him to be an officer so authorized, shall be fined not more than $300 or imprisoned not more than one year.

A person may waive his constitutional rights or immunity from illegal search and seizures, but such waiver must be shown and sustained by clear and positive testimony, and submission on his part, without objection, to the acts of the officer will not be regarded as consent to an unlawful search, unless the evidence clearly shows that the submission was voluntary with the desire to invite search. Consent on the part of the wife or his agent will not be an acquiescence which will deprive him of his constitutional rights against unlawful search and seizure. If the accused, as shown by uncontradicted testimony, consented that certain letters might be taken, he cannot complain of the admission of such letters on the ground that they were seized in violation of his constitutional rights.

Any person engaged as an employee of the Federal Government who regards the information in his possession sufficient to justify the use of a search warrant to seize property should consult the United States attorney, if possible, or commissioner, wherein the property is located. A judge of the United States district court, or the commissioner is authorized by the act of June 15, 1917, to issue

24 Internal Revenue Laws, p. 604.
a Federal search warrant. The judge or commissioner before issuing the warrant must examine on oath or affirmation the complaint and any witnesses he may produce and require their affidavits or take their depositions in writing and have same subscribed to by the witnesses. The facts set forth in the affidavits or depositions must be such as to establish in the commissioner's mind probable cause for the issuance of the search warrant. The name of the accused person must be inserted in the warrant and affidavit if he is known. The affidavits must set forth the particular objects sought to be obtained. If the facts set forth are such that a reasonably prudent and discreet man would be led to believe that there was a commission of the offense charged, then there is probable cause justifying the issuance of the warrant. When the affidavit states facts sufficient in the mind of the judge or commissioner to constitute probable cause it then becomes his duty to issue the search warrant. The warrant must give the grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof and must be signed in the name and official title of the person issuing it. It must be directed to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, and must command him forthwith to search that particular person or place named or the property specified and to bring it before the judge or commissioner. The description of the place to be searched is sufficient if such as to enable the serving officer to locate the property with certainty, as by street and number, but a misdescription as to ownership will render the warrant invalid. The description is sufficient if such that any person not familiar with the locality can by inquiry identify the premises described in the warrant.28 The judge or commissioner must insert a direction in the warrant that it be served in the daytime, sunrise to sunset, unless the supporting affidavits are positive that the property is on the person or in the place to be searched, in which case he

may insert a direction that it be served any time of the day or night.  

A warrant cannot be amended by telephone communication from the judge or commissioner who issued it, nor without evidence to support its amendment, neither has the serving officer any right or authority to alter or change the warrant in the slightest respect. Where property was seized under a search warrant unlawfully issued, the seizure cannot be legalized by the issuance of a second warrant based on information secured under the first search and seizure.

Upon arrival at the place to be searched the officer must announce his identity and disclose the contents of the warrant before proceeding to search the premises or person. If the doors are locked and no one responds to the knock, he must announce his identity and the purpose of his visit and then, if admittance is refused, may break open any door or window to execute the warrant, and may also break open anything in the house. He should confine his search to the premises stated in the warrant, and no property should be seized or carried away except that which the warrant directs unless other things are discovered which would constitute the commission of an offense in the presence of the officer or the possession of which are forbidden by law. The serving officer must deliver a copy of the warrant together with a receipt for the property taken, specifying all property in detail to the person from whom it is taken by him or in whose possession it was found, or in the absence of any person he must leave a copy of the warrant and the receipt in the place where the property was found. These requirements are directory and their absence are not fatal. An officer taking property under a search warrant must forthwith return the warrant to the judge or commissioner and deliver to him an inventory of the property taken within ten days after its date and verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time as: "I, A. B., the officer by whom this warrant was

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executed, do swear that the above inventory contains a true and detailed account of all the property taken by me in the warrant.” Warrants must be executed within ten days of their date or become void.\textsuperscript{31}

The enforcement of a law by the impairment of rights may be too costly and the repeal of a good law may be brought about by its harsh and reckless enforcement. When search of automobiles and suit cases is made without warrant, it is essential that reasonable grounds therefor shall exist; but in such cases, by reason of its being impracticable to procure a warrant, the conclusion as to the existence of such reasonableness must be determined by the officer at his risk. Officers above all should obey the law and should not, by undue enthusiasm or narrowed vision, wrongfully trespass upon the rights of others. For instance, they should not jeopardize lives by firing at automobiles in the hope of puncturing tires when a slight misaim may result in death, even though the automobile might be occupied by a violator of the law. An innocent person may occupy the automobile and a fleeing automobile may be defiance of the law, but a badly aimed shot may be murder. Power sometimes produces harsh disregard of the fundamental rights of others and recklessness in the exhibition of power. Officers have no right, except in self-defense, to kill the offender to effect his arrest, such killing would amount to murder.

In the recent case of \textit{Gambino v. United States},\textsuperscript{32} evidence obtained without a search warrant was held an invasion of the constitutional right of defendants. Gambino and Lima were arrested by two New York state troopers, near the Canadian border; their automobile (while occupied by Gambino and therefore within the protection accorded to his person) was searched without a warrant; and intoxicating liquor found therein was seized. They, the liquor and property taken were immediately turned over to a federal deputy collector of customs for prosecution in the federal court for northern New York. There, the de-

\textsuperscript{31} United States v. Kaplan, \textit{supra}, n. 3.

\textsuperscript{32} Gambino v. United States, 275 U. S. —, 72 L. ed. (Adv. 139), 48 S. Ct. 137.
fendants were promptly indicted for conspiracy to import and transport liquor in violation of the National Prohibition Act. They moved seasonably, in advance of the trial and again later, for the suppression of the liquor as evidence and for its return, on the ground that the arrest, the search and the seizure were without a warrant and without probable cause, in violation of the Fourth, Fifth and Sixth Amendments of the Federal Constitution.

It appeared at on August 1, 1924, at one P. M., Gambino and Lima were riding southward toward Massena, N. Y., on the State highway, in a Buick roadster, owned and driven by Gambino. As they came into Massena they stopped in front of the Reno Garage. Lima got out of the car and went into the men's room at said garage. Immediately thereafter New York State Troopers came up in a Ford car. Trooper Carroll asked Gambino for his registration card, and was shown the same. He then demanded of Gambino to open the rear compartment of the car. This he refused to do. The trooper then asked Santamour, the owner of the garage, for keys to open the rear compartment and was told that he did not have keys for same. The trooper then attempted to question Gambino as to what was in the rear compartment of the car and Gambino declined to state. The officer was then asked if he had any search warrant, and replied that he did not have any. Lima came back to the car and was also questioned as to what was in the rear compartment of the car, and replied that he did not know. The officers then took Gambino and Lima and said car to the police station at Massena, opened the rear compartment of the car and claimed to have found fourteen cases of Canadian ale. They also searched the persons and found on each a loaded revolver together with a lawful permit to possess and carry the same. The arrested men and the property seized were turned over to the Federal agent.

The National Prohibition Act, October 28, 1919,3\textsuperscript{33} contemplated some cooperation between the state and the federal governments in the enforcement of the Act. Thus,

3\textsuperscript{33} c. 85, Title II, par. 2, 41 Stat. 305, 308.
Section 2 made applicable the provisions of par. 1014 of the Revised Statutes whereby state magistrates were authorized "agreeably to the usual mode of process against offenders in such State, and at the expense of the United States," to arrest and imprison, or bail, offenders against any law of the United States for trial before the federal court, and to require "recognizances of witnesses for their appearance to testify in the case." Section 2 also gave specific authority to the state magistrates to issue search warrants under the limitations fixed by the federal statutes.\(^{34}\) Evidence obtained through wrongful search and seizure by state officers who are cooperating with federal officials must be excluded.\(^{35}\) Evidence obtained by state officers through search and seizure made without a warrant and without probable cause, but in the presence of a federal official, has been held inadmissible.\(^{36}\) The question here is whether, although the state troopers were not agents of the United States, their relation to the federal prosecution was such as to require the exclusion of the evidence wrongfully obtained.

In this case the Government contended that the evidence was admissible, because there was probable cause,\(^{37}\) and also because it was not shown that the state troopers were, at the time of the arrest, search and seizure, agents of the United States. The defendants contended that there was not probable cause and that the state troopers are to be deemed agents of the United States, because Sec. 26 of the Title II of the National Prohibition Act imposes the duty of arrest and seizure where liquor is being transported, not only upon the Commissioner of Internal Revenue, his assistants and inspectors, but also upon "any officer of the law". It was declared that on the facts there was not probable cause and that the term "any officer of the law" used in Section 26 refers only to Federal officers,

\(^{34}\) Act of June 15, 1917, c. 30, Title XI, 40 Stat. 217, 228.


\(^{36}\) Byars v. United States, \textit{supra}, n. 6.

and that the troopers were not, at the time of the arrest and seizure, agents of the United States.\textsuperscript{38}

There have been many instances where the lower federal courts have admitted evidence obtained by State officers through wrongful search and seizure, but only three reported cases have been found in which it has been seriously contended, in view of the law of the State and the facts appearing in the opinion, that the search and seizure had been made solely for the purpose of aiding in the enforcement of the federal law.\textsuperscript{39}. Conviction of Gambino and Lima rested wholly upon evidence obtained by invasion of their constitutional rights and judgment was therefore reversed.\textsuperscript{40}

Sec. 26 provides that: "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle . . . and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond . . . approved by said officer and . . . conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested, . . . unless good cause to the

\textsuperscript{38} Dodge v. United States, 272 U. S. 530, 531, 71 L. ed. 392, 47 S. Ct. 191.
\textsuperscript{39} Schroeder v. United States, 7 Fed. (2d) 60; Greenberg v. United States, 7 Fed. (2d) 65; Katz v. United States, 7 Fed (2d) 67.
contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts."

This section of the Act has been troublesome and frequently declared to be impracticable in operation. The law required that the person having charge of the vehicle in which liquor was transported must first be convicted before the vehicle can be forfeited. Liquor illegally transported frequently was untaxed, in which instances the government adopted the generous policy of forfeiting seized vehicles under the Internal Revenue statute enacted in 1866, which provides for the forfeiture of vehicles used in the removal, deposit or concealment of taxable articles with intent to defraud the Government of taxes. Proceedings under section 3450 were instituted and encouraged whenever the evidence clearly showed some tax evasion. These proceedings brought forth a diversity of opinion as to whether or not Section 3450 had been repealed and superseded by Section 26 of the National Prohibition Act. This question came to the Supreme Court of the United States in the form of a libel by the United States to forfeit a Ford coupe upon the ground that it had been used in the removal, deposit and concealment of intoxicating liquor,

"Section 3450 of the Revised Statutes, U. S. C. title 26, §1181. This section provides: "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, . . . every vessel, boat, cart, carriage, or other conveyance whatsoever . . . used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."
with intent to defraud the government of tax thereon. The Commercial Credit Company intervened as claimant, asserting title to the car and alleging that it had no knowledge that the car was used or intended to be used in violation of the law. This petition for the writ of certiorari was based solely on the ground that under Section 26 of the Prohibition Act the Government was barred from proceeding to forfeit the car under Section 3450.42

In this case 43 the evidence showed that the customs inspector discovered one Campbell, who had purchased the car under a conditional sale, in the act of backing the car out of an alley, stopped the car and found that it contained thirteen quarts of whiskey and gin, arrested Campbell, and seized the car. The liquor bore labels indicating that it was of foreign manufacture, and there were no stamps on the bottles showing the payment of duty or Internal Revenue taxes. Proceedings were instituted against the driver for possession and transportation in violation of the National Prohibition Act. Campbell, the purchaser of the automobile, was prosecuted both for the unlawful possession and the unlawful transportation of intoxicating liquors. These were made criminal offenses by Section 3, Title II of the Prohibition Act, and are punishable under Section 29 of that Title. Section 26 provides that when an officer discovers a person in the act of unlawfully transporting intoxicating liquor in a vehicle he shall seize both the vehicle and the liquors, arrest the person, and proceed against him under the Prohibition Act; and if such person is convicted the vehicle shall be forfeited. Since the driver was not prosecuted "with effect" under the transportation charge the car should be forfeited under Section 3450 of the Internal Revenue law.

Mr. Justice Sanford delivered the opinion of the Supreme Court of the United States holding, in Commercial Credit Company v. United States, that conviction of the unlawful


possession of intoxicating liquor incidental to transportation, under Section 26 of the National Prohibition Act, precludes any resort under Section 3450 of the Revised Statutes to the forfeiture of an automobile in which liquor is transported. This decision of the Supreme Court is of great interest to searches and seizures of automobiles where the interests of innocent persons and lienors are concerned.

Under Section 29, Title II of the Prohibition Act, an offender might be punished by not more than $500 fine for the first offense, not more than $1000 fine and ninety days in imprisonment for the second offense, and by a fine of $500 or more and by not more than two years' imprisonment for the third offense. Thus he is to be arrested for a misdemeanor for the first and second offenses, and for a felony if he-offends a third time. The main purpose of the act obviously was to deal with the liquor and its transportation and to destroy it. The enforcement of the Prohibition law has not been vigorous enough to stop everybody engaged in the unlawful sale and transportation of liquor but the searches and seizures by officials have been a great factor. Investigations, searches and seizures under the law should be held strictly within the law as the principles that embody the essence of our constitutional liberty and security forbid all invasions of home and the privacies of life.
VOIR DIRE EXAMINATION OF JURORS:

I. The English Practice

By ROGER D. MOORE

THE institution of the jury* which has contributed mightily to the health of the common law by "constantly bringing the rules of law to the touchstone of con-

* Jury, from jurati, i.e., persons sworn. "Until the modern examination of historical documents proved the contrary, the jury system, like all other institutions was popularly regarded as the work of a single legislator, and in England it has been usually assigned to Alfred the Great. This supposition is without historical foundation. . . . The true answer is that forms of trial resembling the jury system in various particulars are to be found in the primitive institutions of all nations. That which comes nearest in time and character to trial by jury is the system of recognition by sworn inquest, introduced into England by the Normans . . . the Norman rulers of England were obliged more than native rulers would have been, to rely on this system for accurate information. They needed to have a clear and truthful account of disputed points set before them, and such an account was sought for in the oaths of the recognitors. This fact would account for the remarkable development of the system on English ground, as contrasted with its decay and extinction in France. . . . This inquest then was of royal institution and not a survival from Anglo-Saxon law or popular custom under which compurgation and the ordeal were the accepted modes of trying issues of fact."


But contrary to popular conception, Magna Charta (1215) does not secure the right to jury trial as we know it. Taken upon the back-
temporary common sense\textsuperscript{1}, has not always been a cross-section of the community sifted and selected for impartiality and lack of personal knowledge concerning disputed facts. Originally composed of men called together as neighbors of litigant parties, its function changed gradually from that of accusatory witnesses to that of discriminating judges.\textsuperscript{2} Historically speaking, two major causes have brought about this reversal. Obviously one of these has been the evolution of the manner in which facts at issue were secured. The other cause, with which we shall concern ourselves here, has been the growth of the law regarding objections to prospective jurors.\textsuperscript{3}

That spear-head of attack upon prospective jurors deemed objectionable by either party, the challenge, has always been permissible if made for cause based upon sufficient
ground of the juridical state of the times, Holdsworth in his authoritative History of English Law (3rd ed. rewritten 1926) vol. 1, p. 59, asserts that the famous phrase “except by the lawful judgment of his peers or/and by the law of the land” made secure only (1) a tribunal of the old type where the triers were judges both of law and of fact, and (2) protection to the barons, who had forced the signing of the Charter, from being judged by their inferiors.

\textsuperscript{1} Holdsworth, History of English Law (3rd ed. rewritten 1926) i. 349.

\textsuperscript{2} Pollock and Maitland, History of English Law (1895), ii, 646. Forsyth, History of Trial by Jury (1852), pp. 202-208, states that at an indefinite date during the 13th century the accused was allowed to put himself on the country by calling a second jury, except in murder by secret poisoning “because the country can know nothing of the fact”, and where the law conclusively presumed guilt as where the accused was found standing over a dead body, a bloody knife in hand. “If the accused person put himself upon a jury for trial he was not allowed to choose the patria of any hundred he preferred, but the justices assigned for the purpose any set of twelve they pleased from amongst those who represented each hundred.” By the middle of the 14th century trials by jury in criminal cases were clearly if not quite the same as now. 4 Edw. III. 1880. Rot. Parl. ii, 57. Forsyth, op. cit., 207, 8. It was not until 1826 that the requirement that the jurors must come from the immediate neighborhood was abolished. 6 Geo. IV, c. 50, Sec. 13.

\textsuperscript{3} Holdsworth, op cit., p. 332. See: Thayer, A Preliminary Treatise on Evidence (1898).
Evidence. Early writers mention challenges and there are a number of early cases in which they were sustained. A challenge is a formal matter and therefore must be communicated in such a way that it can be put on the record and error assigned thereon following the interposition of a demurrer or counter-plea. For if this be not done it will not, however well-grounded in law, be reviewed on appeal.

Challenges to the array are not within the scope of this article since they have more particularly to do with irregularities in the drawing of panels by the sheriff or other officer corresponding to him. We shall direct our attention to that specie of challenge leveled at jurors individually in the ordinary civil and criminal cases, known as challenge.

* For form of challenge see, Mirror of Justices (1285-1290?) Selden Soc'y Publications (1893), Vol. 37, Ch. 34, p. 116. Blackstone's Commentaries on the Laws of England, (1765-69) Bk. 3, j. 353, puts it that challenges for cause "may be without stint in both criminal and civic trials." Upon a challenge for cause, the person making the challenge must be prepared to prove the cause. The King v. Savage (1824). 1 Moody's Crown Cases 51.


* Mansell v. The Queen (1857) 1 Dearsly & Bell's Crown Cases 375, 7, 8; R. v. Edmonds, 4 Barnewall & Alderson 471 (1821).

* The Mayor, etc., of Carmarthen v. Evans et al. (1842) 10 Meeson & Welsby 274, (Exchequer), which was an action in assumpsit by the officials of a town, challenges being made to the array and to the polls because the sheriff and the jurors were members of the corporation. In withdrawing upon the overruling of the challenges counsel had neglected to put them in the record.

* E.g. The Queen v. Mitchel, (1848) 3 Cox's Criminal Cases 1.

* Lawyers have drawn a broad distinction between two kinds of juries, according to the nature of the duties they perform. On the one hand are juries 'of inquiry or presentment', such as grand juries or 'coroners' juries; on the other are juries 'of issue or assessment', chief of which are the juries in the ordinary civil and criminal courts. Reports, etc. of the Departmental Committee appointed to inquire into and report upon the Law and Practice with regard to
to the polls, and originally classified as follows:11

1. *propter honoris respectum*, on account of honorable rank, as where a lord of Parliament was summoned;

2. *propter defectum*, on account of incompetency, as where the person called was not within the prescribed age limits, had insufficient property, or was an alien of insufficient residence in the country;

3. *propter affectum*, on account of partiality, as where circumstances were such as to warrant suspicion for bias or partiality;

4. *propter delictum*, on account of criminality, as where the talesman had been convicted of an infamous offense and was therefore conceived not to be amenable to oath.

It is the challenge *propter affectum* that has occasioned the notoriously wide variations in the practices prevailing in the United States as contrasted to that which persists in England. From early time this type of challenge was considered in turn as being either principal or to the favour, but this distinction is now practically obsolete in this country.12

The former exists wholly in law and consequently does not


12 For instance, in the Federal courts by Section 819 of the Revised Statutes all challenges are required to be “tried by the court without the aid of triers”. (The spelling in Blackstone is *triors*.) Even in England if upon examination for challenge for one cause another cause appears, it has been decided by the judge. *Trippe v. Hakeney*, supra, (6).
require the disclosure of actual bias. Perhaps the best known basis for such principal challenge is near kinship (within the ninth degree) between the prospective juror and a party to the suit, for experience has taught that bias is generally generated by such relationship. The trier of this kind of challenge has always been the judge, as has been the case in the other "manifest" challenges: propter honoris respectum, propter defectum, and propter delictum.¹³

A challenge to the favor (which falls only in the classification propter affectum and is based upon inconclusive circumstances of suspicion) has been and must be determined in England and other places where the common law prevails other than most jurisdictions in the United States by triers appointed by the court and proceeding under oath to ascertain "whether the juror be favourable or unfavourable," i.e., whether the one challenged stand absolutely indifferent (omni exceptione majores) between the parties.¹⁴ Challenges to the favor propter defectum may not be proved by interrogating the challenged talesman in person but must be shown, if at all, by evidence aliunde—this upon the theory that a challenged talesman is not himself reliably competent to testify as to having a bias or prejudice against a challenging party.¹⁵ Likewise grounds for challenge

¹³ 3 BLACKSTONE, op. cit., pp. 361-364. See also Co. LITT. 156a, 158a, BAC. ABR. tit. Juries, E. 12. And for more complete citations see, 1 CHITTY, op. cit., 549. Recent cases: The Mayor, etc. v. Evans et al. (1842), supra, (8).


¹⁵ ROSCOE, op. cit., p. 180. Peter Cook v. The King, 13 St. Tr. 333. States the headnote to a case decided in 1821: "It is not competent to
propter delictum must be proved in the same manner, for the reason that, the credibility of previously given testimony not being involved, a prospective juror should not be required to answer questions tending "to his own disgrace, discredit, or the injury of his character." 16

The exact procedure in England upon challenge to the favor is not indicated in any of the cases which the present writer has found, but a text writer has set forth with fair precision what it is, as follows: 17

"When the opposite side pleads to the challenge, two triers are appointed by the court; either two coroners, two attorneys, or two of the jury, or indeed any two of the jury, or indeed any two indifferent persons. . . . The truth of the matter alleged as cause of challenge must be made out by witnesses to the satisfaction of the triers. The challenging side first addresses the triers, and calls his witnesses; then the opposite side addresses them, and calls witnesses if he sees fit; in which case the challenger has a reply. The judge then sums up to the triers who give their decision."

The fundamental statutory law relating to jurors and juries in England is the Juries Act of 1825, 18 which has been variously amended and supplemented by other statutes on some five subsequent occasions. 19 But these statutes

ask jurymen . . . if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence." The King v. Edmonds, 4 B. & Ald. 471; 1 St. Tr. N.S. (1785), 106 E.R. 1009.

16 1 CHITTY, op cit., 550. 3 BLACKSTONE, op. cit., p. 363, 4; Anonymous, 1 Salkeld, 153, 1 Lill. 554, Vol. xci, Reprint 1909, p. 140; The Trial of Peter Cook (1696) 4 HARGRAVE'S STATE TRIALS 738, 748; Co. Litt. 158, b.


18 6 Geo. IV, c. 50.

19 Juries Act (1862), 25 & 26 Vict. c. 107. Juries Act (1870), 33 & 34 Vict. c. 77. Juries Act Amended (1871) 34 & 35 Vict. c. 2. Special Juries Act (1898) 61 & 62 Vict. c. 6. The Judicature Act of 1872, 36 & 37 Vict. c. 66, introduced into common law courts trial by judge alone; in 1883 by Order XXXVI of the Supreme Court: "The court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or ac-
have to do mainly with the qualifications of jurors and the procedure by which they are to be summoned,\textsuperscript{20} and are not concerned with conditions on which jurors may be challenged, which are based upon custom but infrequently raised in the English reports,\textsuperscript{21} probably variant in different parts of the country, and hence not clearly defined.\textsuperscript{22}

Two sections of the Juries Act, nevertheless, do refer indirectly to the customary basis of challenge for cause by leaving the determination of those to arise under the specifications of the act, in one instance, to the discretion of the trial judge,\textsuperscript{23} and in the other to "the custom of the court," following an assignment of challenge upon a "cause certain."\textsuperscript{24} And although the Supreme Court of Judicature (Consolidation) Act of 1925 went far in simplifying and making more flexible the English legal system, it was expressly made not to affect the existing law relating to jurors and juries.\textsuperscript{25}

The "arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at counts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury." In force to date, \textit{The Annual Practice} (1928), collection by King & Ball; likewise in effect in the colonies, e.g., \textit{Rules of the Supreme Court of the State of Victoria} (1906) Gov't Printer, Melbourne.

\textsuperscript{20} 6 Geo. IV, c. 50, s. 8, provides for alphabetical lists of qualified jurors to be made by churchwardens and overseers of every parish, indicating residence, title, quality, calling or business and the nature of his qualification, and s. 9 requires the posting of such list upon the principal doors of churches and the like.

\textsuperscript{21} \textit{Report, etc. of the Departmental Committee}, op. cit., Cd. 6817, p. 5. A careful search of digest and text by the present author fails to disclose cases in which the regularity and sufficiency of a challenge was raised other than those treated in this article.

\textsuperscript{22} \textit{Roscoe}, op. cit., p. 178.

\textsuperscript{23} 6 Geo. IV, c. 50, s. 27.

\textsuperscript{24} \textit{Ibid.}, s. 29.

\textsuperscript{25} 15 & 16 Geo. IV c. 49, s. 101, with the exception that the Lord Chancellor with four other judges or named members of the Bar by S.99(h) may make rules of court to determine what trials are to be by jury in the three divisions of the High Court (Chancery; King's Bench; Probate, Divorce, & Admiralty).
known as peremptory challenges has an ancient lineage in felony prosecutions from the time of the settled common law, but has never been allowed by either force of practice or statute, in English civil procedure. Unlike the situation existing in most jurisdictions of this country, where it is held that parties may extend *voir dire* examinations to the elicitation of such facts as will enable them intelligently to exercise their right of peremptory challenge, the English courts have never conceived this right as generating a correlative right to question talesmen to any extent whatever. Manifestly, as regards challenges for cause, a party desiring to exercise his peremptory challenges intelligently must confine himself to his personal acquaintance with the talesmen and to their respective reputations in the communities whence drawn as disclosed by investigation anterior to the trial, or he must fall back upon his impression of them, comparatively superficial, as they appear during the process of being empaneled.

4 BLACKSTONE, *op. cit.*, p. 353; STEPHEN, *op. cit.*, p. 377. In Regina v. Hughes (1842) 2 Craw. & D. 396, Ir. Cir. Rep. 274, 422, it was held that a prisoner may challenge a juror peremptorily after a challenge to the juror *propter affectum* has been found against the prisoner by triers. See also, 1 CHITTY, *op. cit.*, 534-536.

It is to be noted here that even though, according to the early writers peremptory challenges were allowed in capital felonies only, they were, in effect allowable in practically all felonies, since most of them were punishable not only by forfeitures but also by death. THOMPSON ON TRIALS (2nd ed. 1912) Sec. 42, viz., notes 54 and 55.


Cases to this effect are fully collected by states in 35 C. J. 387, notes 33, 34 and 35. It is expected to follow the ramifications of such practice in a subsequent article soon to appear in the *Journal*.

An American authority asserts that in England the names of empaneled jurors “can be obtained by counsel for a shilling in advance of the trial, if there is any desire to investigate them with a
The simplicity of systems and the intimacy of community life prevailing in compact England during the formation of the common law is reflected in the reasons for peremptory challenge as recognized in the following passage from Blackstone:\(^ {31}\)

"In criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner and arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge; a provision full of the tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove

insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

It is to be noted that no account is paid here to complexities, experiences and environment as tending to cloud or clarify attitude of mind. Today, due largely to the rise of scientific psychology, criminology and sociology, we readily concede that these things do exert themselves powerfully upon the standards of fairness in all men, no matter how conscientious they may be.32

Under the common law the number of peremptory challenges allowable to the Crown in capital cases was unlimited whereas the accused could employ thirty-five (one short of three full panels).33 But by early statutes carried into the Juries Act of 1825 the accused was restricted to twenty such challenges while the Crown was denied them altogether.34 There has, however, grown up in apparent derog-

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32 e.g. M. BROWN, LEGAL PSYCHOLOGY (1926), treating psychology applied to the trial of cases, to crime and its treatment and to mental states and processes.

33 HALE'S PLEAS OF THE CROWN (Emlyn's ed., 1736), vol. 1, p. 269. "For the law judged that five-and-thirty were fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenged a greater number, or three full juries, had no intention to be tried at all." STEPHEN, op. cit., 378; 4 BLACKSTONE, op. cit., p. 354, and see 1 CHITTY, op. cit., p. 534. See also: FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE (Amos ed. of the transl. of 1775, 1825), p. 92. In 1342 the rule had been laid down that in a criminal case the prisoner could not challenge more than two jurors without cause. Y.B. 17 Ed. III (Rolls Series) 280.

34 6 Geo. IV, c. 50, s. 29. In 1805 an Act of Parliament restricted the Crown exclusively to challenges for cause, but this act was repealed, later to be re-enacted by the Juries Act of 1825. See: Mansell v. The Queen, (1857) 1 D. & B., Crown Cases, 375, 397, 8. At the time of Blackstone the former act, 33 Ed. I, st. 4, was in effect. 4 BLACKSTONE, op. cit., 353. A statute of 1531, 22 Hen. VIII, c. 14, restricted defendant's peremptory challenges to twenty. 4 BLACKSTONE, op. cit., p. 354. 1 CHITTY, op. cit., 534, notes that this was expanded by 32 Hen. VIII, c. 3 (1541) and 33 Hen. VIII, c. 23, s. 3 (1542) and by 1 & 2 Ph. & M. the common law number of 35 was restored in treason.
ation to the statute a practice whereby the Crown may cause the whole panel to be gone through once, therewith challenging without assignment of cause and thus securing what are in effect peremptory challenges, even as defendant is allowed to object to jurors as they are called, without showing any cause, till the panel is exhausted. And by interpretation it has been well established that the twenty peremptory challenges are allowable whether the felony be capital or not, but are not allowable in misdemeanors.

Although the few cases which the writer has been able to find pertinent in the English reports do little more than confirm the restricted practice already indicated the more important of them are chronologically treated below as tending to throw direct light upon our study.

A first clear step toward the jury as now constituted was made in 1179 by legislative enactment creating the Grand Assize, a special jury called to determine which of two parties had the better right to lands held in free tenure, “without the risk of the doubtful issue of battle.” It was provided that four knights selected by the parties in turn elect “twelve legal knights from the same neighborhood to say upon oath which of the two parties to the action has the better right.” This type of jury trial differed mainly from common jury trial as it now exists in that in it the jury was called to answer a specific question formulated in the writ whereas in the latter no order for a jury could

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35 Blakeman v. The Queen, 3 C. & K. 97 (1850); Roscoe’s Criminal Evidence, op. cit., p. 180; Mansell v. The Queen, supra, n. (7).
36 Foster’s Crown Cases (1776), p. 7 on “Mr. Townly’s Case,” 18 St. Tr. 330 (1746), 9 C. & P. 135, 4 St. Tr. N.S. 105, 110 (1839) as cited in Roscoe, op. cit., p. 178. “If the panel is thus exhausted the list must be gone through again, and then no challenge allowed except for cause.” Roscoe, op. cit., p. 180. See also: The Queen v. Gееch, 9 Car. & P. add (1841).
37 Gray v. The Queen, H.L., 11 Cl. & Fin. 427 (1844); 1 Chitty, op. cit., p. 535; Blakeman v. The Queen, supra, n.(35).
38 HolDSWORTH, op. cit., p. 327, 328. In a case reported in the Eyre of Kent (Selden Society) ii, 83, the four knights chose sixteen of themselves and others; then the parties and their attorneys chose twelve. And in substance this seems to have been the procedure in 1406, Y.B. 7 Hy. IV Trin. pl. 28.
be made until the parties by their pleadings had come to an issue of fact and put themselves on the country. 39

In the early cases it was not uncommon for the judge to examine jurors as to their qualifications, even in the absence of challenge, where he had reason to doubt their impartiality, 40 and in a comparatively recent case protested "against being understood to say that a judge has not that power (to set aside a juryman without waiting for challenge) in certain cases." 41 Three-quarters of a century before the publication of Blackstone's *Commentaries on the Laws of England* there seems to have been no rigid restriction against *voir dire* questions being put before challenge by the clerk, the court, the accused or his counsel, or counsel for the Crown; for in the *Trial of Peter Cook,* 42 (1696), which was a prosecution for high treason, preliminary questions were asked of each juror by each of these whether he was a freeholder in London (where the trial was being had), whether he was a member of the jury in a previous treason trial, and whether he was one of the grand jury which had returned the indictment. In this case it was held, furthermore during the *voir dire* examination that service as a juror in a certain previous treason trial was not good ground of challenge. 42a

In an anonymous case decided in 1795 43 the trial question was whether a certain fair should be kept at one of two places. A prospective juror lived at one of these and triers

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39 *Pollock and Maitland*, op. cit., i, 119-128; ii, 601, 615, 621. But the effort of selection at this early time was to secure men conversant with the facts. Says Forsyth, op. cit., p. 129: "So entirely did they proceed upon their own previously formed view of the facts in dispute that they seemed to have considered themselves at liberty to pay no attention to evidence offered in court, however clearly it might disprove the case which they were prepared to support."

40 *Bracton*, op. cit. f. 143 (Twiss' transl. op. cit., ii, 453); Anonymous (1339) Y.B. 13 Edw. III (Pike's transl. 286).

41 Mansell v. The Queen, *supra*, n. (7).

42 See *supra*, n. (16).

42a It is not a ground of challenge that a juror on other trials has not found a verdict for the Crown. The Queen v. Sawdor, 2 Lewin's Crown Cases 117 (1838).

were appointed and put under oath to determine whether he "stands indifferent between the parties to this issue." The brief report of this case does not set forth the result of the triers' action nor the method of attaining it. In another case of about the same time it was held good cause of challenge that the juror had stated the prisoner was guilty or would be hanged.44

And yet in a later case (1821) there is the following quotation:45

"The language of Mr. Sergeant Hawkins upon this subject, Lib. 2. c. 43. §. 28, is that if the juryman 'hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, it is no cause of challenge.' So that in the opinion of this learned writer, the declaration of a juror will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention toward the challenging party."

Still later (1857) it was said:46

"If conscientious scruples entertained by a juror would not prevent his giving in an honest verdict, they would be no ground for objecting to him; but if it was proved on a challenge that they were such as to affect his verdict he ought to be set aside: . . ."

A case decided in 1832 illustrates a marked indisposition to allow challenges.47 It was ruled not to have sufficient ground for challenge that a juror had, with reference to a similar case against defendant tried just before the present selection strongly expressed himself as favoring heavy damages for plaintiff. The challenge was made in an unusual manner by obtaining a rule to show cause, supported by an affidavit asserting that the juror had made up his mind about the verdict he would give. The court consid-

44 Ibid supra, (43); 1 Salkeld 153.
45 King v. Edmonds, supra, n. (15).
46 Mansell v. The Queen, supra, n. (7).
VOIR DIRE EXAMINATION OF JURORS

It is argued that "the whole sting of the charge is answered" by a counter-affidavit, saying in part:

"... though the expressions which the juror admits himself were impudent, yet his entertaining a strong opinion on a former verdict is not incompatible with his giving a correct verdict on the case which was to come before him."

Although the securing of reliable information concerning jurors in the complexities of modern life may be considered increasingly difficult and likely to be prejudicial to poor and obscure litigants without an extensive acquaintance in the neighborhood whence the jurors are drawn or without the means of conducting a preliminary investigation, all efforts in English courts to lessen the rigors of ancient practice by getting information through questions put in court prior to challenge have been blocked.

In The Queen v. Stewart et al., which was a prosecution for larceny by giving a bad check for goods delivered, a juror was asked as he came into the box and without challenge whether he was a member of a certain association for the prosecution of parties committing frauds upon tradesmen. The trial judge refused to permit this type of questioning despite challenging counsel's clear assertion that the information was necessary to enable him effectively to assert his right of challenge. The court, although telling counsel he might "challenge absolutely," even refused to intimate to the jury that such of them as were members of such association had better retire from the box. Not having actual information as to such connection on the part of the juror, it does not seem to have entered counsel's mind to challenge absolutely and then rely upon questioning to substantiate the challenge.

In Regina v. Dowling, which was a prosecution for levying war, a request by defense counsel that a prospective juror be sworn "that he might examine him with a view to a challenge, if necessary," was refused, the trial judge stating it to be "a very unreasonable thing that a juryman

48 (1845) 1 Cox's Criminal Cases 174.

49 (1848) 3 Cox's Criminal Cases 509, 510.
should be cross-examined without your having received any information respecting him."

In Regina v. Lacey et al.,\textsuperscript{50} which was a prosecution for treasonable felony, the specific ground of challenge required was that the juror "does not stand indifferent between the Crown and the prisoner." Counsel was not permitted to ask a talesman if he was not a special constable during the disturbance in which the alleged crime was committed.\textsuperscript{50a} The general nature of this challenge as one \textit{propter affectum} should be noted as compared to a stricter requirement as to challenges \textit{propter defectum}. With regard to the latter, it is laid down:\textsuperscript{51}

"The court may be satisfied of the fact which constitutes the disqualification of the juror, and therefore it may be expressly alleged in the challenge, so that it may be traversed and put in issue by a counter-plea. No indictment or presumption is admissible."

The paucity of English and colonial cases, over a period of centuries, dealing with the requisites of \textit{voir dire} examination of jurors, and the absence of statutes and standing rules of court in England and the colonies as well, modifying established custom in the matter,\textsuperscript{52} indicate satisfac-

\textsuperscript{50} (1848) 3 Cox's Criminal Cases 517.

\textsuperscript{50a} It had previously been held on the trial of an indictment for a riot, it is ground for the prosecutor's challenging a juror, that he is an inhabitant of the town where the riot occurred, and that he has taken an active part in the matter which led to it. The Queen v. Swain, (1838) 2 M. & Rob. 112; 2 Lewin's Crown Cases 116.

\textsuperscript{51} Mulcahy v. The Queen, (Q.B. Ireland, 1867) 15 W.R. 446; L.R. 3 H.L. 306; Jr. R. 1 C.L. 13. As has been noted (see (11) supra) at common law all challenges except those \textit{propter affectum to the favour} were decided by the trial judge without the intervention of triers.

\textsuperscript{52} The Courts of Ontario, 62 PENNSYLVANIA LAW REVIEW, 32, by Mr. Justice Riddell of the Supreme Court of Ontario. Criminal Procedure in England, (12) supra. The Code of Civil Procedure of the Province of Quebec, Sec. V "Formation of the Jury and Challenges" makes no provision for peremptory challenges but provides that "either of the parties may challenge for cause any person called to form part of the jury before such person is sworn" (1) under disqualification or disability, (2) related within degree of cousin-german, (3) interested in suit or not indifferent as between the parties.
tion with extra-curiae investigations coupled with fundamental confidence in the English juror's fairmindedness vitalized by his oath. With regard to our own procedure it suggests that American trial courts may assert a close control over such examinations without thereby denying fundamental rights, embedded in due process while undertaking or permitting within reasonable limits the easier, fairer, more reliable and less costly examination in court immediately preliminary to trial.

On account of existing differences in our social conditions growing largely out of the heterogeneity of our population and the variety and extent of our territories and because of the established traditions of our practice which has been moulded by these conditions, the methods pursued in England would be impossible here. On the other hand, to discountenance the investigation of jurors outside court by fostering an examination of them within court, is to negative a practice liable to inequalities and abuse and at the same time to heighten the prestige and authority of the court itself by consolidating with it for the trial of causes impartial jurors, without which trial by jury is "a delusion, a mockery, and a snare." 

"The empanelling of an English jury is a dignified and impressive performance. They have already been selected for character and intelligence like the judges themselves ... " "Modern English Legal Practice", supra, n. (28) "In selecting the jury in the English courts the challenge of a juror is almost as rare as the challenge of a judge in the United States." "Criminal Procedure in England," supra, n. (12).


"Words used in The Queen v. Mitchell, supra, n. (7). Said the keen French observer Alexis Tecqueville in his Democra\"que (1835) ii, p. 192: "The jury which seems to diminish the power of the judge really gives it its pre-eminent authority".

Note.—Subsequent installments of Mr. Moore's article will cover the practice of the federal and of the state courts.
This writer has stated elsewhere that the final determination of controversies with the administrative branch of the United States Government is with the judicial branch thereof. The significance of this fact is not appreciated unless it be realized that a large number of controversies with the administrative branch involve either directly or indirectly questions of policy; that there are no specialized courts to hear and determine all of them; and that the procedure is almost as diverse as the controversies brought under review.

Money Claims For Service Or Supplies.—Prior to 1855, there was no provision of general law for suit against the United States for services rendered or supplies furnished the United States notwithstanding certain members of Congress had urged for many years the establishment of a court for that purpose.

The Court of Claims.—Finally in 1855 there was created the Court of Claims but it was not authorized to render judgments against the United States. Its prime duty was to hear certain classes of claims and make reports thereon to Congress for its consideration.

1 McGuire, Federal Administration Law, 13 Virginia Law Review, 461. An extremely learned discussion of the substantial law of judicial determination of controversies with the United States may be found in Watkins, The State As A Party Litigant, The Johns Hopkins Press (1927); especially pertinent are Chapters V to VIII, inclusive.


3 Act February 24, 1855, 10 Stat. 612.
jurisdiction of this court was later amended to authorize it to render judgments against the United States. Until the act of February 13, 1925, the United States could appeal to the Supreme Court of the United States from any judgment of the Court of Claims while the claimant could appeal only when the amount in controversy exceeded $3000 or when the claim was forfeited to the United States for fraud practised or attempted to be practised against the United States, but said act of 1925, provided that all reviews of judgments of the Court of Claims should be by certiorari.

The proceedings in the Court of Claims are by direct suit against the United States on the causes of action defined in the statutes. It is not the purpose of this work to define with particularity the jurisdiction of the Courts to determine claims against the United States but to indicate, generally, the procedure of review of controversies with the administrative branch of the United States. However, it may be said, generally, that the Court of Claims has jurisdiction to hear and determine any money claim against the United States not sounding in tort and includes claims arising under the Constitution or statutes of the United States or regulations issued in conformity with law by the

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5 43 Stat. 40.
7 See Louisville Bedding Co. and Hudson Bay Knitting Co. v. United States, 269 U. S. 533, 70 U. S. Law ed. 398, where the court said in a per curiam opinion: “These two appeals allowed before the going into effect of the act of February 13, 1925, revising the jurisdiction of this Court, abolishing appeals from the Court of Claims and requiring that review may be had of its judgments only by certiorari, abundantly show the wisdom of the changes. They invoke no substantial question of law, they did not merit and did not elicit a formal opinion from the Court of Claims, and they do not call for one here.”
administrative services or under contracts, express or implied.\(^9\) This court also has jurisdiction of any counter-claims on behalf of the United States and these counter-claims must be pleaded and proven in the same manner as the plaintiff’s claim.\(^{10}\) A suit in the Court of Claims may be dismissed on motion of the plaintiff at any time prior to the filing of a counterclaim by the Government.\(^{11}\) Of minor importance is the jurisdiction conferred on the court by the Judicial code to determine cases referred to it by the head of the various administrative services or by Committees of Congress.

No suit may be brought in the Court of Claims more than six years after the cause of action accrued,\(^{12}\) unless the claimant was under a disability at the time the cause of action accrued in which event the suit must be brought within three years after the removal of the disability.\(^{13}\) All claims arising under the Transportation act of 1920, must be brought within three years after the cause of action accrued,\(^{14}\) while all suits to recover internal revenue taxes alleged to have been erroneously or illegally collected must be brought within two years after the cause of action accrued.\(^{15}\) However, the statute of limitations with respect to the recovery of taxes is changed from time to time, as in the Sage case, and it is well to consult the latest statute should the question of time within which suit may be filed become material.

The jurisdiction of the Court of Claims is strictly one

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\(^9\) STULL, A CASE IN THE COURT OF CLAIMS (1924) is a handy little volume on the jurisdiction of, and procedure before, the Court of Claims.

\(^{10}\) Hurley-Mason Company v. United States, 60 Ct. Cls. 62, id. 105.


\(^{12}\) Section 156, Judicial Code; Rice’s Case, 122 U. S. 611, 7 Sup. Ct. R. 1377, 30 U. S. Law ed. 793.


of statute; it does not have jurisdiction to review all money claims against the United States, excluding tort claims. Generally speaking, not suit may be brought against the United States to enforce a right given by statute if the statute shows an intention in clear terms that the administrative remedy shall be exclusive. Where suit may be brought against the United States in the Court of Claims, it is not required that the claim shall have been first determined by the administrative branch of the Government except in internal revenue claims.

The rules of the court provide in a general manner as to the procedure of preparation and filing of petitions against the United States and as to the taking of testimony in support thereof. All testimony is taken under oath before a notary public or, within recent years, before one of the Commissioners of the Court. This testimony may be taken in Washington or elsewhere. The Commissioners function in substantially the same manner for the court as the examiners of the Interstate Commerce Commission and the Federal Trade Commissions function for their respective commissions except that the Commissioners of the Court of Claims do not prepare tentative opinions or judgments in the case. The cases are submitted to the court for judgment on the report of the Commissioner as to the facts, the exceptions if any, of both the attorneys for the United States and for the plaintiff thereto, and on briefs and oral arguments as to the law applicable. The Court makes separate findings of fact and conclusions of law thereon and the findings of fact have all the force of a verdict of a jury as to the facts. There are no jury trials in the Court of Claims and along with tort claims, it has

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17 Section 3226, Revised Statutes; Christie Commission Company v. United States, 126 Fed. 991, affirmed 129 Fed. 506.

17a For the history of the Court of Claims, see richardson, HTSTORY, JURISDICTION AND PRACTICE OF THE COURT OF CLAIMS. This paper may be found in Volume 17 of the Court of Claims Report.

no jurisdiction of pension claims, claims for insurance and compensation under the World War statutes or under the Tariff statutes.

District Courts and Money Claims.—The District Courts of the United States, have had since the Tucker Act jurisdiction concurrent with the Court of Claims of all suits against the United States where the amount in controversy does not exceed $10,000 except claims of officers or employees of the United States to recover salary, fees or emoluments. In suits to recover internal revenue taxes erroneously or illegally collected, the District Courts have jurisdiction in suits against the United States “even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office.” Such suits in the District Courts are commenced and tried in the same manner as in the Court of Claims except that unless the United States attorney representing the United States and the attorney for the claimant agree to a stipulation of facts, the evidence is heard by the court. Reviews of decisions of the District Courts in suits against the United States on Money claims are by writ of error of the appropriate circuit court of appeals.

Payment Of Judgments Against The United States.—All judgments of either the Court of Claims or of the District Courts against the United States except for refund of taxes erroneously collected must be specifically reported to Congress for an appropriation with which to pay same. Judgments for refund of taxes erroneously or illegally collected are paid from the appropriations currently made for refund of taxes. The payment is effected in either case on a certificate of settlement by the General Accounting Office and it requires powers of attorneys if some one

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20 Section 24, act March 3, 1911, 26 Stat. 1091-1094.
22 Section 47 of the act of February 13, 1925, 43 Stat. 940.
23 Act September 30, 1890, 26 Stat. 537.
25 Section 1 of the act of February 18, 1904, 33 Stat. 41.
other than the judgment creditor is to receive the check in payment. Also, there must be a showing that the judgment has become final which showing is effected by a certificate of the proper appellate court that the case is not pending therein after the period for writ of error or appeal has expired.

Review of Customs Duty Controversies.—All controversies arising out of the tariff acts which cannot be settled between the collector and the importer, are taken before the Customs Court and from thence on appeal by either party to the Court of Customs Appeals and a decision of the latter court may be reviewed on certiorari by the Supreme Court of the United States.

If an importer is dissatisfied with the duty assessed by the collector, he may pay same under protest and upon payment of a fee of $1, the collector is required to “transmit the invoice and all of the papers and exhibits connected therewith to the board of nine general appraisers,” now the Customs Court, “for due assignment and determination as provided by law.” If the protest is not filed at the time of payment of the duties, it must be filed within fifteen days thereafter and the fee of $1 must be paid within thirty days after the filing of the protest. The Customs Court is required in such appeals to “proceed by all reasonable ways and means in their power to ascertain, estimate, and determine the dutiable value of the imports and merchandise, and in so doing may exercise both judicial and inquisitional functions.” These appeals are heard by one

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member of the Customs Court but a rehearing may be had before three members of the court.

All final decisions of the Customs Court may be exclusively reviewed on appeal by the Court of Customs Appeals in Washington. This court consists of a presiding judge and four associate judges, any three of whom constitute a quorum. The appeals must be taken within sixty days after the entry of the decree of the Customs Court and may be taken either by the administrative officer of the Treasury or by the importer. In event of such an appeal, the Court of Customs Appeals, while confined to the record made below from the documents and testimony of witnesses, is authorized to review both questions of law and fact entering into the administrative decision of the Treasury Department official and into the decision, or judgment of the Customs Court. No other Federal court has jurisdiction to review the assessment of customs except the Supreme Court of the United States, in event of allowance of certiorari to revise a judgment of the Court of Customs Appeals either because the Constitution or a treaty is involved or when a certificate of the United States Attorney General is filed with the Court of Customs Appeals prior to judgment as to the great importance of the question. The judgments of the courts for refund of customs

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33 United States v. Riebe, 1 U. S. Cus. App. 19; Sheldon v. United States, 2 id. 51.
34 Historically, it is interesting to note that the courts first acquired jurisdiction to review administrative controversies over customs matters by the allowance of suit at common law against the collector and his classifications of imports were reviewed by a jury. Elliott v. Swartwont, 10 Peters, 137, 9 U. S. Law ed. 373; Schneider v. Barney, 13 Blatchford, 42; Bend v. Hoyt, 13 Peters, 263, 10 U. S. Law ed. 154. The act of March 3, 1839, 5 Stat. 348, was held to have deprived the courts of such jurisdiction, Carey v. Curtis, 3 How. 236, 11 U. S. Law ed. 576, but restored by the act of February 26, 1845, 5 Stat. 727; Barney v. Watson, 92 U. S. 449, 23 U. S. Law ed. 730. This general procedure obtained until the Customs Administrative Act of 1890, 26 Stat. 131 as amended by the act of September 21,
duties erroneously or illegally collected are not reported to Congress for a specific appropriation but are paid in a manner similar to the judgments for refund of taxes erroneously or illegally collected, that is, "from the appropriation for the refund to importers of excess of deposits."

Review Of Internal Revenue Controversies.—There has been heretofore observed in connection with the jurisdiction of the Court of Claims to review administrative controversies, the fact that the United States might be sued in said court for refund of internal revenue alleged to have been erroneously or illegally collected and in the United States District Courts under its concurrent jurisdiction with the Court of Claims in any amount where the Collector of Internal Revenue is dead or out of office or in any case where the amount of recovery sought does not exceed $10,000. Suit may also be maintained in the United States District Courts against a Collector of Internal Revenue to recover taxes in any amount in event there has been a prior decision of the Commissioner of Internal Revenue in the case or it has been presented to him for more than six months without securing such decision, and provided the proceedings were instituted within two years after the cause of action accrued. The cause of action accrues at the time the Commissioner of Internal Revenue rejects the claim.

These suits against Collectors of Internal Revenue are tried before a jury and it must consider all of the problems of bookkeeping, depreciation of plant, and the many other

1922, 42 Stat. 972, established the Board of Appraisers to exclusively review administrative controversies concerning custom duties. At first the decisions of this board were reviewable on direct appeal to the Circuit Courts of Appeal. United States v. Klingenberg, 153 U. S. 93, 14 Sup. Ct. R. 790, 38 U. S. Law ed. 647. However, such decisions are now exclusively reviewable by the Court of Customs Appeal and on certiorari of the Supreme Court of the United States.


Section 3226, Revised Statutes.


intricate questions which arise in the ordinary controversy between the administrative officers of the Bureau of Internal Revenue and the taxpayer. In this respect, such suits are similar to the suits formerly maintained in the District Courts against collectors of customs to secure judicial review of the classification of imports. The judgments of the District Courts against Collectors of Internal Revenue for refund of taxes may be reviewed by the appropriate circuit court of appeals, and, on certiorari, by the Supreme Court of the United States.

No court has jurisdiction to review the action of the administrative officers in the collection of taxes until the tax has been actually collected.39 Not even to prevent the seizure and sale of the property of the taxpayer under a warrant of distraint issued by the Commissioner of Internal Revenue to satisfy the unpaid taxes.40 The taxes must be paid before resort to judicial proceedings to have reviewed the action of the administrative officer in collecting same.41

In addition to suit against the United States in the Court of Claims or in the District Courts or against Collectors of Internal Revenue in the District Courts to secure judgment for refund of taxes where the law and the facts of an assessment and collection of taxes may be reviewed, the statutes provide an additional method of review of an administrative act in assessing or collecting taxes and a method which may be resorted to in order to prevent the collection of an additional assessment of taxes.42 The proceeding is against the Commissioner of Internal Revenue before the Board of Tax Appeals, whose decision may be reviewed by the Circuit Court of Appeals for the district in which the taxpayer resides or by the Court of Appeals of the District

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of Columbia, being similar in this respect to the judicial reviews which formerly obtained of the decisions of the Board of General Appraisers. If the assessment should be upheld, the taxpayer may pay same and then bring suit against either the United States or the collector as hereinbefore outlined. This Board may also entertain appeals from the decisions of the Commissioner of Internal Revenue refusing to pay a claim for refund of taxes and the decisions of the Board may be reviewed by the appropriate Circuit Court of Appeals or the Court of Appeals of the District of Columbia.42a

Review of Regulatory Orders Of The Federal Trade And Interstate Commerce Commission.—Judicial reviews of a cease and desist order of the Federal Trade Commission may be had by the Circuit Court of Appeals of the district in which the business concern is located against which the order is issued.43 Such a review may be secured on petition by the person or corporation against whom the order is issued to have it set aside or on petition of the Federal Trade Commission for an order requiring the person or corporation to comply with the cease and desist order. Judicial review in such cases is limited to the questions of law arising on the record which the Federal Trade Commission is required to transmit to the Circuit Court of Appeals.44 The Federal Trade Commission may also desire access to the books and papers of a business concern and upon being refused such access, it is authorized to apply to the United States District Court having jurisdiction of the business concern for a writ of mandamus and, in such event, the reasonableness of the request is subject to judicial review.45

42a For the first of such reviews, see Board of Tax Appeals v. Blair, 20 Fed. (2d) 10.
43 Acts September 26, 1914, and October 15, 1914, 38 Stat. 717, 730, respectively.
The history of judicial reviews of the orders of the Interstate Commerce Commission is succinctly stated in a recent decision of the Supreme Court of the United States as follows:

"For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because thus, for the first time, the rate making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 24, 1906, Chap. 3591, sections 2-7, 34 Stat. at L. 584, 586-595. The first suit to set aside an order was brought soon thereafter, Stickney v. Interstate Commerce Commission, (C. C.), 164 Fed. 638, 215 U. S. 98. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, Chap. 309, Sec. 1, 36 Stat. at L., 539; and when that court was abolished, to the district courts, by the Urgent Deficiencies Act [of October 22, 1913, 38 Stat. 219]. The so-called order here assailed differs essentially from all those held by this court to be subject to judicial review under any of those acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of delegated legislative function of rate making and rule making."

Judicial review of an order of the Interstate Commerce Commission concerning rates is ordinarily invoked by the filing of a petition in an United States District Court of the district in which either party resides to restrain the enforcement, operation or execution of the order and same is heard by a court of three judges, one of whom must be a judge of one of the Circuit Courts of Appeal. Final orders in such cases, may be reviewed by the Supreme Court of the United States on appeal when same is filed

44 United States v. Los Angeles and St. L. R. R. Co., 71 U. S. Law ed. 446.
45 Act October 22, 1913, 38 Stat. 220.
within sixty days after the entry of the decree of the District Court. A copy of the petition filed in the District Court must be served on the Attorney General of the United States and all other parties defendant and if the Interstate Commerce Commission is not made a party defendant, the ordinary procedure is for it to ask leave of court to intervene. The defense of the administrative order is conducted by an assistant to the Solicitor General of the Department of Justice and by attorneys of the Interstate Commission, being similar in the latter respect to the conduct of proceedings in the courts concerning controversies arising with the Federal Trade Commission. If the suit does not relate to a transportation matter, it must be brought in the district in which the matter complained of in the petition arose.

The administrative decisions of the Interstate Commission may not only be reviewed on a bill filed to annul or set aside the order, but such decisions awarding reparation for collection of unreasonable rates may be reviewed in the District Courts should the railroad refuse to pay same and the shipper bring suit therefor. The orders of the Commission may be also reviewed when application is made to the District Courts for a writ of mandamus commanding the carrier to comply with any provision of the Interstate Commerce act.

The general rule is clearly observed by the courts that they hesitate to disagree with the Interstate Commerce Commission on questions of fact; ordinarily the courts merely inquire whether there was substantial evidence to support the conclusions of the Commission. So
it is vitally important that all of the facts be presented and fully argued in the hearing before the Interstate Commerce Commission.

Review of Administrative Decisions Under The Packers and Stockyards Act.—The decisions and rules, or regulations of the Secretary of Agriculture under the Packers and Stockyards Act forbidding packers to engage in unfair, discriminatory, or deceptive practices in interstate commerce in connection with the purchase of live stock and forbidding stockyards from charging unjust, unreasonable, and discriminatory rates may be reviewed on appeal by the Circuit Court of Appeals. This provision for judicial review is similar to that for judicial review of the orders of the Federal Trade Commission and of the Board of Tax Appeals. Any bill to set aside or annul an order of the Secretary of Agriculture in the regulations of packers and stockyards may be brought in an United States District Court to be heard by a court of three judges, one of whom must be a judge of a Circuit Court of Appeals. The decree of the District Courts in such cases may be reviewed on appeal direct to the Supreme Court of the United States. In fact, the procedure is the same as that here-inbefore discussed with respect to the review of an order of the Interstate Commerce Commission concerning railroad rates.

Review Of Controversies Under The World War Veterans' Act.—The World War Veterans' Act permits suit in the District Courts of the residence of the Veteran under the procedure established for other suits against the United States “insofar as applicable” in “event of disagreement as to claim under contract insurance” with the Government but no suit may be maintained under the compensation provisions of the statutes administered by the United States

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64 Act August 15, 1921, 42 Stat. 159.
Veterans' Bureau. The suit is against the United States and may be tried before a jury.

Review Of Marine Controversies.—As pointed out in the previous chapter, there are statutes authorizing the Secretary of the Navy to adjust and settle claims arising out of collisions with Navy vessels but in the absence of some specific statute in a specific case which are occasionally enacted, no suit can be maintained against the United States in any court in such a case. However, the Merchant Marine Act of 1920, transferred all of the Merchant ships of the United States Shipping Board Emergency Fleet Corporation to the United States Shipping Board and authorized suits in admiralty against the United States by reason of the operations of said vessels. In event a controversy growing out of a collision with a merchant vessel of the Shipping Board or with its seamen or because of loss or shipment, etc., the same may be reviewed in a suit in admiralty in personam against the United States under the conditions specified in the statutes which prescribes procedure practically the same as that obtaining under the general rules of the admiralty law in a suit because of an injury of a private vessel.

Review By District Courts Of Other Administrative Controversies.—The inability of United States District Courts to issue mandamus except in aid of jurisdiction acquired by other processes, the fact that their jurisdiction is wholly statutory and that the more responsible administrative officers of the Federal Government reside in the District of Columbia, outside of their territorial jurisdiction, serve to limit any general review by said courts of administrative controversies. In all of the cases hereinbefore mentioned the jurisdiction exercised is that conferred by the express terms of statutes. There are, however, a limited number of cases where administrative controversies

60 Emerson v. Baker, 3 Fed. (2d) 830.
are brought under review in District Courts in the absence of an express statute to that effect.

The action of the General Land Office of the Department of the Interior in granting a patent to public land may be reviewed in a suit between the patentee and another claiming title to the land or in a suit to cancel a patent or a contract. Administrative controversies may always be reviewed when the United States invokes the aid of the District Courts to recover money alleged to have been wrongfully paid or to be otherwise due from a debtor. Such Courts also have jurisdiction in suits against officers of the United States alleged to be in wrongful possession of private property or threatening to illegally interfere with the property rights of a private party for:

"By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing thereof in asserted agency for the government." 65

It is upon the same general theory that District Courts have jurisdiction by the writ of habeas corpus to review the administrative decisions of Boards of Inquiries or of the Secretary of Labor in excluding or deporting an alien or the detention of a person convicted by an Army or Navy Courts-Martial. However, the sentence of a Courts-Martial will not be reviewed on the facts but merely to determine whether the Courts-Martial had jurisdiction of the person and the offense and whether the sentence imposed

was within the scope of its lawful powers. The courts appear to be exceedingly unwilling to review the decisions of Boards of Inquiry or the Secretary of Labor in immigration and deportation cases. They take the position that an inquiry to enforce the immigration laws "may properly be devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing may constitutionally be made conclusive." Such writs will be issued where the alien is detained for deportation for a cause not within the immigration law or when the hearing before the administrative branch was unfair. If the hearing before the administrative tribunals in immigration cases is fair and their decisions are supported by evidence reasonably justifying the conclusion reached, the courts will not disturb them on judicial review.

The general procedure of the Federal Courts in habeas corpus proceedings is regulated by statute and in invoking the writ to review an administrative controversy, the statutes should be closely followed in the preparation and service of the petition.

Reviews in the Supreme Court of the District of Columbia of Administrative Controversies.—The Supreme Court and Court of Appeals of the District of Columbia are located at the seat of the Federal Government in ten square miles of territory over which the Constitution authorizes the Con-
gress to “exercise exclusive legislation.” This territory was ceded to the Federal government by the State of Maryland and the statutes applicable thereto have provided since the cession that “The Common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one” as well as the general statute of Congress and the statutes specifically applicable thereto “shall remain in force” except where inconsistent with subsequent acts of Congress. The Supreme Court of the District of Columbia, is a court of first instance and it is provided that it shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised under the act of March 3, 1863, and at the date of the enactment of the code. This court may issue writs of mandamus and injunction when “necessary to the effective exercise of its jurisdiction.”

The Supreme Court of the United States has said that:

Congress in its constitutional exercise of exclusive legislation over the District may clothe the courts of the District not only with the jurisdiction and the powers of the Federal Courts in the several states, but also with such authority as a state might confer on her courts, and so may vest courts of the District with administrative or legislative functions which are not properly judicial.

In other words, the courts of the District are both Federal courts and courts exercising the jurisdiction of the Maryland courts in 1801 and such other jurisdiction made particularly applicable by statutes of Congress thereto. They have jurisdiction to issue extraordinary writs not only where a District Court may issue same but where a com-

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72 Article I, Section 8.
73 Section 1, District of Columbia Code (1911) hereinafter cited as Code.
74 Section 61, Code.
75 Section 68, Code.
76 Postum Cereal Company v. California Fig Nut Company, 71 U. S. Law ed. 354.
mon law or equity court may do so and even if the Courts of said District did not originally have jurisdiction to issue such writs to review administrative acts of Federal administration, as contrasted with District of Columbia officials, their assumption of such jurisdiction has been affirmed by both the Supreme Court of the United States and impliedly by Federal Statutes which provide that they shall possess the jurisdiction "exercised at the date of the passage of this code." 77 One of the earliest cases where such jurisdiction was involved arose in 1837. 78 The question was very thoroughly considered there and the court held that in a proper case, the courts of the District could review an administrative controversy with a cabinet officer and where the duty imposed upon him was merely ministerial, it could require him to comply with the terms of the statute. Subsequently, the questions involved in such cases have been whether the act demanded of the administrative officer was ministerial or discretionary and whether there was an adequate remedy in a suit against the United States. 79

Even as the Lord Chancellor's foot may have been short, long or indifferent, so may be the views of the courts of the District of Columbia with respect to whether a particular controversy with the administrative branch of the Government involves the performance of a ministerial or discretionary duty and whether there exists an adequate remedy at law in a suit against the United States. No general rule can be formulated to determine the probable view of these courts as to either of these questions. The best that can be done is to examine the prior decisions of these courts in similar cases while bearing in mind that what the courts may have determined years ago to be a discretionary duty they may now determine to be ministerial duty. In fact, the courts are on record as having

77 Section 61, Code.
78 Kendall v. Stokes, 12 Peters, 532, 9 U. S. Law ed. 1181.
79 See Wark v. Rives, 267 U. S. 175, 45 Sup. Ct. R. 252, 69 U. S. Law ed. 561, where are collected some of the many cases where the Court has held that some particular acts were ministerial while others were discretionary. The border line between the two seems to be enveloped in mist, Crozier v. Krupp, 224 U. S. 290, 32 Sup. Ct. R. 488, 56 U. S. Law ed. 771.
determined in one case that the duty demanded was ministerial and when the same facts come up again, they were held to involve the exercise of judgment and discretion.80

In addition to the jurisdiction of the Supreme Court of the District of Columbia with right of appeal to the Court of Appeals of said District and with further review by certiorari in the Supreme Court of the United States81 to review administrative controversies by means of the extraordinary writs of mandamus and injunction, the Court of Appeals has statutory jurisdiction to review the decisions of the Commissioner of Patents in Patent and Trade Mark Cases.82 However, there is no right of review of such cases in the Supreme Court of the United States.83

Personal Liability Of Administrative Officers For Acts Done In Their Official Capacity.—The question arose early in the history of our Government whether an administrative officer was personally liable in damages to an aggrieved party even though the act causing the damage was in accordance with the orders of his superior officer and the court answered the question in the affirmative.84 This rule is now well settled.85 Whether an administrative officer


81 Section 240, act February 13, 1925, 43 Stat. 940.


83 Postum Cereal Company v. California Fig Nut Company, 71 U. S. Law 354.


85 See Dowling Bros. v. Andrews, 19 Fed. (2) 961, where the court assumed without question that in a proper case such liability existed.
is liable in damages for failure to perform a ministerial duty is a question which appears not to have been decided. It was presented in an early case but the court escaped decision thereof by holding that the duty demanded was discretionary, reaching a conclusion exactly opposite to that reached on the same state of facts when the case was before the court at an earlier date. It is probable that this question will become of increasing importance and the procedure of suit is substantially that obtaining in a suit against a private individual for damages.

It has long been the rule that costs were recoverable as a part of the judgment against administrative officers, though such costs may not be recovered in a suit against the United States unless the United States puts in issue the plaintiff's right to recover on a money claim within the concurrent jurisdiction of the District courts when the court may allow for sums actually expended for witnesses and for fees paid for clerk.

Conclusion.—The writer has stated elsewhere that the final determination of the more important administrative controversies not involving either broad questions of executive policy or questions essentially political in their nature is with the judicial branch of the Federal Government through suits either in law or equity against the administrative officer concerned or through suits against the United States. It is believed that the foregoing inadequate discussion demonstrates the correctness of that statement and, incidentally, that the procedure for judicial review of controversies with the administrative branch is

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86 Kendall v. Stokes, 3 Howard, 86, supra.
87 Kendall v. Stokes, 12 Peters, 522, supra.
91 McGuire, Federal Administrative Law, 13 VIRGINIA LAW REVIEW, 461.
badly in need of reorganization and simplification. The writer has ventured the opinion that the more satisfactory solution lies in the establishment of a special tribunal with jurisdiction superseding that of all the present courts to review all administrative controversies and with a sufficient number of judges to enable different sections to be hearing cases at the same time, either at the cost of Government or in the nine Circuit Courts of Appeal circuits, as the condition of the docket may justify. Such a court would not only become expert in the complicated matters arising in the conduct of the administrative branch but the present day, diversity of decisions, etc., would be avoided. Furthermore, the hearing of such controversies on the records made in the administrative branch, as, for instance, the present procedure in Federal Trade Commission controversies, would serve to decrease the expense of litigation with the United States.92

LEGISLATIVE DETERMINATION OF ADMINISTRATIVE CONTROVERSIES

THE authority and jurisdiction of Federal administrative officers are limited; they have only such authority and jurisdiction as is expressly conferred on them by statute or such as may be reasonably implied therefrom.1 The administrative officer may not only be without authority and jurisdiction to grant the relief requested but the need for such relief may have resulted from acts of such officer in excess of his authority and jurisdiction. In such event neither the administrative nor the judicial branch of the Government may grant relief.2 Nevertheless, the adminis-

92 See Watkins, The State as a Party Litigant, Chapter X, for a description of the French System.

1 Floyd's Acceptances, 7 Wall. 666, 19 U. S. Law ed. 169. Chief Justice Marshall, when on circuit said in Dixon v. United States, 1 Brockenbrough, 177, at page 185, that: "It would certainly be mischievous, to allow officers to insert in the bonds they are empowered to require, conditions not warranted by law . . . and if the officer be at liberty, under the color of office, to introduce such conditions as his own judgment may approve, then his judgment and not the statute, becomes the director of his conduct."

2 See Davis v. United States, 59 Ct. Cls. 197, when the Court said in denying relief: "When a statute in express language circum-
trative officer may have obtained services or supplies for the use of the United States or his unauthorized acts may have resulted in damaging the individual. A good illustration of the latter class of cases occurred shortly after the close of the World War when the War Department sold a purchaser a quantity of meat and after delivery, the Department of Justice prosecuted him for hoarding the meat and not only prevented him from disposing of it in the market but the delay incident to the court proceedings caused the meat to deteriorate to the extent that it had to be destroyed in accordance with the Pure Food and Drug Act. In such instances, the claim is an equitable one of such a character that relief must come if at all from the Congress either in the appropriation of a sum of money to pay the claims or the enactment of a special statute, as it did in the meat case, authorizing some one of the various courts to hear and determine the claim.

The Constitution confers on Congress all legislative power, and, as heretofore pointed out, all power to appropriate money; Congress may either validate an unauthorized act of an administrative officer of the Government or it may authorize some administrative officer or the judicial branch of the Government to allow the claim if otherwise proper, notwithstanding that it was not incurred in accordance with statute. If it validates the claim, it may by statute authorize the General Accounting Office to credit the payment therefore in the accounts of the disbursing officer.

or if payment has not been made, it may either appropriate a specific sum of money to pay the claim or it may authorize the administrative branch of the Government to settle and pay the claim or class of claims. There is no general rule in the matter, the practice not only differing as between different Congresses but differing as to particular claims in the same Congress. Where there is no right of judicial review, as in pension claims, there is enacted from time to time omnibus pension claim statutes authorizing and directing the pension officials to place the names of certain persons on the pension rolls of the Government and to pay them a pension of specified sums each month.

The legislative branch of the Government has found it impracticable, for instance, to exercise all legislative power in the fixing of railroad rates and has indicated in the statute the broad, general rules to be followed and has delegated to the Interstate Commerce Commission the legislative power necessary to determine the details, that is, to actually fix the rates and, this power has been sustained. Similar delegation of power to a cabinet officer of making criminal the violation of certain of his rules and

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7 Such specific appropriations are made at nearly every session of Congress, as shown by the various private relief acts.

8 See, for instance, the act of March 2, 1919, 40 Stat. 1272. It may be noted in this connection that it is unwise to empower the administrative officers who brought about the situation to adjust it. As early as December 5, 1834, (republished in 26 CONGRESSIONAL RECORD 4305) it was said:

"It seems to be required, by a due regard to System uniformity, and proper accountability, that neither those empowered by law to decide on the necessity for certain services and purchases for those who make the purchases and contracts should also adjust the accounts rendered for them."

regulations has been upheld as also delegation of legislative power to another such officer to determine whether a bridge across a navigable stream is an obstruction to navigation and to require such changes as to remove the obstruction. However, it has not delegated to any subdivision of the administrative branch of the Government nor to any court the settlement and adjustment of controversies with the administrative branch on principles of equity and justice when there is no provision of law which would authorize their settlement. An adequate safeguard against the perpetration of administrative practices giving rise to such controversies could be had by the requirement that all of the facts be submitted to Congress for consideration in connection with any legislation deemed necessary to correct the situation or to so inform the leaders in Congress that it would be either necessary to discipline or remove the offending administrative officer.

The failure to designate some such machinery for the adjustment of controversies with the administrative branch of the Government, excluding those arising out of the activities of the regulatory services has resulted in a situation where it is necessary to enlist the active support of Congressmen and Senators to secure the introduction and enactment of private bills to secure relief from a situation brought about through the failure of some administrative officer to observe the delimitations on his jurisdiction and authority. This consumes the time and energy of the legislators and not infrequently they are required to resort to log-rolling in order to secure the enactment of their

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private bills. There have been raised in Congress, from time to time, since the early days, protesting voices against the necessity for such practices.

For instance, a Senator said in advocating the enactment of a bill which finally became the statute establishing the court of claims that:

"He had been so deeply impressed with the necessity of some such system as this which would get rid of what he considered a disreputable jurisdiction on the part of Congress; he was so perfectly satisfied of the necessity of some remedy for this evil; that he was willing to accommodate the bill to the ideas of other gentlemen on the subject." 11

After Congressmen and Senators have become sufficiently interested in either the claimant or the merits of his claim or both to prepare bills and introduce them in their respective houses of Congress, the bills are referred to the appropriate committees for consideration and report. The clerks of the respective committees refer the bills to the appropriate administrative service for reports and recommendations as to the action that should be taken by Congress. There may be an oral hearing of the claimant or witnesses produced by him and representatives of the particular administrative service concerned may be called upon to testify with respect thereto. It is ordinarily necessary for the Congressman or Senator who introduced the bill to follow it up in the Committee and insist upon a report. If the report of the Committee is unfavorable, the chances of the bill becoming law are exceedingly limited. If the report is favorable, the bill must take its place on the calendar where it may or may not be reached for consideration. If the bill is reached, particularly in the Senate, some Senator who has not read the report or who has read it

11 41 ANNALS OF CONGRESS, 478. For a conspicuous example of the settlement of claims by Congress, see 32 ANNALS OF CONGRESS for its action on a bill for the relief of the heirs of Caron de Beaumarchais concerning the famous "lost million" of livres. For a historical account of this claim which was the subject of diplomatic and congressional consideration for approximately half a century, see KITE, CARON DE BEAUMARCHAIS.
and disagrees therewith may object to its enactment with
the result that the bill may be passed over or if brought to
a vote, may fail to secure the necessary majority to secure
its passage.

This procedure may be repeated for years before the
bills are either finally enacted or the claimants and their
heirs die. In any event, the task of securing legislative re­
view of an administrative controversy is one not to be
lightly undertaken, especially if the administrative service
is opposed to the enactment of the legislation.

It is probable that with the increasing complexity of ad­
ministrative activities and resulting number of controver­
sies, the need of some central organization to relieve Con­
gress of the details of settlement of such controversies when
relief is not afforded by either the administrative or ju­
dicial branches of the Government, will become more evi­
dent and will be established. In the meantime, the pro­
cedure outlined herein must be followed by those who must
go to Congress for legislative relief in a controversy with
the administrative branch, a controversy which, for lack of
jurisdiction and authority, cannot be adjusted by either
the administrative or the judicial branches even though
they may be inclined to grant relief because of the equity
and justice of the claim.
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CONFLICT OF LAWS — Legitimacy of Issue of Polygamous Marriages Which Are Valid at the Marital Domicile.

It has often been said that a marriage valid by the law of the place where contracted is valid everywhere unless it is polygamous or incestuous. The statement of this exception has given rise to decisions that a child born of a polygamous marriage is illegitimate and nullius filius even though the marriage is perfectly valid at the marital domicile and the child of the marriage is legitimate there.¹ Such a view is due to a failure to differentiate between the creation or sanctioning of a status, the enforcement of its incidents, and the mere recognition of it.

The rule set forth is invoked where a marriage is celebrated elsewhere than in the state where the parties are domiciled. Then it is true that an exception is made in the case of incestuous and polygamous marriages. A better way of stating the proposition is to say that a marriage will be created, even though violative of some laws of the domicile, if the requirements of the state of celebration have been complied with, unless the creation of the status would be repugnant to the morals of the domicile. Even though the marriage is celebrated abroad the domicile creates the status of marriage.² Public policy favors marriage and is opposed to promiscuity. Therefore, the state of domicile will create a status of marriage on a foreign celebration unless the creation will result in sanctioning a violation of principles which the state considers vital to its well being.³ For this reason, where the relationship of the parties to the

¹ In re Look Wong, 4 Haw. 568 (1915), see adverse comment in (1918) 31 HARV. L. REV. 892; Ng. Suey Hi v. Weedin, 21 F (2d) 801 (1927). In this case an American of Chinese descent became domiciled in China. There he married two women and had a child by the second one. The court held that the child was illegitimate because there could be no marriage between the child's parents, since polygamous unions could not be called marriages. For a further discussion of this decision, see Recent Cases, page —.

² See Cleveland, Status at Common Law (1925) 38 HARV. L. REV. 1074, 1077; Vol. 5, PROCEEDINGS AMERICAN LAW INSTITUTE (1927), 170, 171.

³ Sec. 137 of the American Law Institute's CONFLICT OF LAWS Restatement No. 3 provides, "A marriage which is against the law of the state of domicil of each party, though the requirements of the law of the state of celebration have been complied with, will be invalid in the following cases: (a) Polygamous marriages. (b) Incestuous marriages between persons as closely related as brother and sister. (c) Marriages between persons of different races, where such marriages are at the domicil regarded as odious." This statement seems to be unfortunate in that it expresses some applications of the rule
marriage is not too close, the state of domicile will predicate a marital status on a foreign celebration; but if the relationship is of such a degree that to allow the parties to cohabit would greatly endanger the welfare of the state, the status will not be created. Likewise the state of domicile, if Christian, will not give effect to a foreign celebration if in so doing it would allow a polygamous union. But if the domicile were one where polygamy is a recognized institution, the state will create the status.

Sometimes, however, other states than that of the original marital domicile will be called upon to deal with the status. For example, should the parties move away from the state which created the status and seek to reside together in another state, this other state might find it impossible to sanction all the marriage incidents. It is as much concerned as the state of original marital domicile in the protection of its morals. It probably would have grave objections to allowing an incestuous or polygamous cohabitation within its borders. It undoubtedly has the right to refuse to allow such cohabitation and to deny enforcement of any marital incident when this is necessary for its own protection. This is in accord with the general rule that the enforcement of a right will be denied where the enforcement itself would be illegal. rather than the rule itself. For example, a state might find a marriage by an idiot extremely odious. Would it not, therefore, refuse to impose a status of marriage upon an idiot’s celebration abroad of a marriage? There seems to be no cogent reason for limiting the rule to the three instances of polygamy, close incest and miscegenation.


Brook v. Brook, 9 H.L. Cas. 193 (1861); See Stevenson v. Gray, supra, note 4, at 208.

This would be an application of the rule that unless cohabitation within the state would be particularly odious the status of marriage would be imposed. For example, in cases of inter-racial marriages, the question of whether a marriage between blacks and whites will be allowed when celebrated abroad depends on how grave a violation of the public policy a cohabitation between blacks and whites would be. Thus in Massachusetts such a marriage is recognized, Medway v. Needham, 16 Mass. 157 (1819), but in Virginia, where the race question is of greater importance, the marriage status will not be given. Kinney v. Commonwealth, 30 Grat. 858 (1878).

U.S. v. Rodgers, supra, note (5); Hyde v. Hyde, 1 P. & D. 130 (1866); Sec. 139 Conflict of Laws Restatement No. 3.

See Beale, SUMMARY OF CONFLICT OF LAWS, Sec. 49.
It may be that the state of domicile has created a family status which, although in some respects similar to an Occidental marriage, will not be considered as a marriage by that name, in the state of forum. Thus in *Hyde v. Hyde* the court held that such a union was not a marriage within the matrimonial law of England. Its reason was that the English marriage laws are adapted only to unions of one man and one woman and that, necessarily, they were unsuited to deal with polygamous relations. Also it was held in *Esop v. Union Government* that the term “wife” does not include a woman married by a custom which recognizes polygamy. These decisions are not refusals of recognition of polygamous unions, but are determinations that they are not “marriages” within the meaning of the *lex fori*.

Neither the refusal to enforce all the incidents of a status acquired abroad, nor the classification of the status other than as a marriage by the state of forum, is a failure to recognize the existence of the status. To fail to recognize a validly created marital status would be a willful blindness to the existence of a legal fact. The courts, therefore, do not vainly deny the existence of the status but merely give effect to those of its incidents which are not deleterious to the welfare of the state of forum. The enforcing of some of these incidents requires

10 *Supra*, Note (8).
11 4 C.P.D. 133 (S. Af. 1913).
12 Professor Beale takes the view that *Hyde v. Hyde*, supra, note 8, recognizes the status as a marriage but refuses to give to it all of its incidents. It is submitted that it does not do so. The words of the decision are unequivocally to the effect that a polygamous union is not a marriage. That does not mean the court refused to recognize the family status given abroad. In *Chang Thy Phin v. Tan Ah Loy*, 1920 A.C. 369 (1919), the court recognized, for purposes of inheritance, the status of a t'ap, which seems to be a station midway between that of a concubine and of a wife. To hold that a man can not live with his concubine or t'sip in England does not mean that the status of marriage is recognized but the sanctioning of its incidents is refused. It means merely that a court will recognize a status of polygamy or concubinage but refuses all the incidents of such a status, and denies that such a status is marriage.

13 Sometimes these unions are considered as “marriages” within the meaning of the *lex fori*. Thus a Hindu “marriage” (which allows polygamy) will be deemed a marriage should the Hindu turn Christian and attempt a Christian marriage with another Christian. *Re. Millard*, (1887 I.L.R., 10 Mad. 218 (India)). In *Rex. v. Maguib*, (1917) 1 K.B. 350 (1916) the court refused to answer whether a Mohammedan “marriage” is a marriage within the English law, saying it is an open question.

14 See *Beale, Summary of the Conflict of Laws*, Sec. 47.
little more than the mere recognition of a status and in no way affects the morals of the state of forum. Thus if several persons are validly married under the laws of a state, have issue and die there, the forum of another state would not be doing violence to its morals in determining the issue of the marriage to be legitimate. American courts recognize polygamous marriages among tribal Indians provided they are valid by the laws of the tribe, and upon an Indian's death all his wives, also his children by these wives, are recognized as his heirs if the tribal law so designated them. The English courts take the same view of polygamous unions if valid by the lex domicilii, but their decisions have not been uniform. There is another reason for holding the issue of a polygamous union to be legitimate. The status of legitimacy once created is recognized and enforced everywhere. This seems to be true even when it is not predicated upon a marriage valid anywhere.

To cite the rule that a marriage valid by the lex loci contractus is valid everywhere unless it is polygamous or incestuous as the reason for bastardizing the issue of a polygamous union, validly created, is plainly erroneous.

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15 Whittington v. McCaskill, 65 Fla. 162, 61 So. 236 (1913) where the court held that even though the Florida statute and constitution prohibited marriages and cohabitation between blacks and whites a marriage between them would be recognized when the parties to it lived outside of the state and the celebration was had in a state allowing such marriages.

16 Hallowell v. Commons, 210 Fed. 793 (1914); Oklahoma Land Co. v. Thomas, 34 Okla. 681, 127 P. 8 (1912).

17 Chang Thye Phin v. Tan Ah Loy, supra, note (12). In re Bethell, 38 Ch. D. 220 (1888), has been cited by Professor Beale as refusing to recognize polygamous marriages. SUMMARY OF CONFLICT OF LAWS, Sec. 47. It is submitted that the case is not squarely in point, however, because the "husband" was domiciled in England.

18 There is an apparent exception to this latter rule in England. There even if a child of foreign domicile is legitimate by the law of his domicile he will not inherit land from an intestate unless he was born after the marriage of his parents. Doe d. Birtwhistle v. Vardill, 7 Cl. & Fin. 895 (1840). This is not because the child is considered illegitimate but because, by the Statute of Merton, the requirement for inheriting land is not mere legitimacy but birth after marriage of the parents. Grey v. Earl of Stamford, (1892) 3 Ch. 88; See (1893) 6 HARV. L. REV. 379.

19 See Re. Ulee, etc., 53 L.T. 711, 713 (1886) where it was said that even if a polygamous marriage celebrated in England was invalid that did not mean the issue were illegitimate if they were legitimate by the Mohammedan law (the law of their domicile).

20 See (1928) 14 VA. L. REV. 311, where the view is taken that this
rule applicable only to its creation. It is also a failure to distinguish between the enforcement of the incidents of a status and the mere recognition of its existence.\(^2\)

**SURETYSHIP—Subrogation and Indemnity.**

Of the remedies afforded a surety who has become liable or who has paid on account of his principal, those of indemnity from the principal and subrogation to the creditor’s rights are most often confused. These two rights are entirely distinct and separate; one is legal\(^1\) and the other equitable.\(^2\)

Whenever a contract of suretyship is made, the law implies a contract between the surety and his principal whereby the principal shall indemnify his surety if the surety be injured.\(^3\) The remedy for breach of this contract is by way of an action at law. If the surety make an express contract for indemnity with his principal, there is, of course, no implied contract, for it is presumed that the parties have embodied all of their rights in their expression. These express contracts may provide for indemnity against liability, in which case a right of action arises when the liability is incurred by the surety and before payment,\(^4\) or against damages in which case the right of action does not mature until payment is made by the surety.

The surety has a right to be subrogated to securities which the creditor may hold for the payment of the debt. This right is based on the theory that the securities are given for the better payment of the debt, and if the surety pay, it is only equitable that he should have the securities. This rule has been long recognized and applied both in the United States and in England.\(^5\) It would appear that this is a right cumulative to any others which the surety may have.

The right of subrogation as just outlined, marks the extent of equitable relief which a surety may have in some jurisdictions. How-

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\(^1\) Hall v. Smith, 5 How. 96 (1847).

\(^2\) As an illustration of the difficulties arising from holding the issue of a valid polygamous marriage to be illegitimate, the court in Ng Suey Hi v. Weedon, *supra*, note (1), could find no way under the Chinese law, the law of the father’s domicile, by which the child could be legitimated because the child already was legitimate there.

\(^3\) Rice v. Southgate, 16 Gray, 142 (Mass. 1860); Griffin v. Long, 96 Ark. 268, 131 S. W. 672 (1910); Byers v. Franklin Coal Co., 106 Mass. 131 (1870).


ever, the general rule in this country and a statute in England,\(^a\) give the surety the right to be subrogated to any and all of the rights of the creditor, provided, the surety has paid and the creditor's demand has been fully satisfied. In the jurisdictions applying this rule, it is said that equity makes an assignment of the debt with all of its accompanying priorities, to the surety on his paying the creditor.\(^7\) Where this rule is not followed, it is said that when the debt is paid by the surety, the obligation is destroyed; hence, if the surety do not take an actual assignment, there is nothing left to which he may be subrogated.\(^8\)

In most cases an enforcement of either the right of indemnity or subrogation will make the surety whole, but where one or the other, for some practical reason does not afford reimbursement in full, the question arises as to whether or not the surety may have both. On this point the law is in some confusion.

There are a number of cases holding that where the surety takes an express contract of indemnity, he thereby expresses an intention to look to his indemnity.\(^9\) This is not a satisfactory rule, for in hard cases it has been held that the surety did not, under the circumstances, intend to look to his indemnity alone, and he has been allowed subrogation.\(^10\) Moreover, if the surety do not make an express contract for indemnity, he will have the implied right, but it cannot be said in this case that he has expressed an intention to look to either, and so may have both.

Next are the cases which hold that the two rights exist concurrently, but that if one be enforced, then the other is waived.\(^11\) Cooper v. Jenkins,\(^12\) decided by Sir John Romilly, Master of the Rolls, is often cited to sustain this rule, but that case would seem to be based on other grounds according to interpretation by excellent authority.\(^13\) On the statement of facts in that case, it is virtually impossible to determine what was decided, at least so far as the law is concerned.

Lastly, there are cases which hold that the enforcing of one of such rights is no waiver of the other.\(^14\) The two rights are not inconsistent so that the enforcement of one would estop the surety from enforcing the other. Of course, the limitation on the rights of surety is that

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\(^a\) Mercantile Law Amendment Act, St. 19 & 20 Vict. c. 97, par. 5.
\(^7\) Litterdale v. Robinson, 12 Wheat. (U. S.) 594 (1827).
\(^8\) Story, Equity Jurisprudence (14th Ed.), Vol. II, c. IX, sec. 711 et seq.
\(^9\) The Advance, 72 Fed. 793 (1896).
\(^12\) Cooper v. Jenkins, 32 Beav. 337 (1863).
\(^13\) Williston, Contracts, Vol. II, 2306, sec. 1269, n. 16.
\(^14\) Crawford v. Richeson, 101 Ill. 351 (1882).
he can recover only the amount of his damage. This class of cases
seems to follow the better rule, for the surety is afforded greater
relief; and yet subrogation need not be allowed in any given case,
if an injustice would result. In such a case the surety would be
relegated to his action on the indemnity contract.

A. M. H.

WITNESSES—Cross-Examination as to Previous Prosecution for,
and Conviction of Crime, for Purpose of Affecting Credibility.

The principle is now well established that when a defendant in
a criminal case testifies in his own behalf, he thereby waives any
privilege and becomes subject to the rules which govern all other
witnesses. He is subject to cross-examination on any matters per-
tinent to the issue and may be contradicted and impeached like any
other witness and is subject to the same tests as other witnesses.¹

The courts recognize the right to introduce on cross-examination
facts which pertain to the credibility of the witness, but they are
divided into three groups with respect to what the facts are which
may be admitted. In Texas, it is proper to prove that a complaint
has been filed against the witness which charges him with the com-
mission of a felony or an offense involving moral turpitude. The
burden then rests upon the other party to show that the grand jury
has met since the filing of the complaint and that no indictment was
returned.² On the other hand, Maryland not only does not permit
mere complaints, arrests or indictments to be admitted to affect the
credibility of the witness on cross-examination, but does not allow
even convictions of past offenses unless they tend to impeach the
credibility of the witness. If the offense bears no relation to the
truth and veracity of the person, it is inadmissible for the purpose.³

The authorities are divided into three groups with respect to the
admissibility of prior convictions for the purpose of affecting the
credibility of the witness; and are divided into three groups with
respect to the admissibility of prior indictments, arrests and com-
plaints.⁴

A previous conviction for a crime may be shown on the cross-exami-
nation of a witness, or an accused, for the purpose of affecting his
credibility as a witness. This is known as the majority rule. Stat-
utes have been enacted in many states for this purpose, and they
have been held to apply to an accused in a criminal case, even when
not so mentioned in the statute. Over one-third of the states have

¹ Reagan v. U.S., 157 U.S. 301 (1895). See WIGMORE, EVIDENCE
(2d Ed.) Secs. 889-891; JONES, EVID. (2d Rev.) Sec. 2127.
⁴ See WIGMORE, EVID. (2d Ed.) Sec. 983.
Even in the absence of such statutes, such matter generally is held admissible. Under the minority rule, such prior convictions are not admissible to affect the credibility of the witness or the accused, when on the witness stand. Some states follow this minority rule because they hold that the proper method to prove previous convictions is by the production of the record and not by questions.

The Texas rule differs from both of these views. With respect to this entire subject, Texas requires that the conviction, indictment, arrest or complaint must be for crimes which involve moral turpitude. Hence on cross-examination the person can only be asked about a prior conviction of crimes involving moral turpitude. A prior conviction for a crime involving moral turpitude cannot be admitted if it is too remote, but the courts in Texas have not determined what is meant by remoteness. Remote crimes are excluded because the courts realize that a person may in his youth commit some crime but has in later years, since becoming mature, developed into a good and reliable citizen. This gives the person a chance to begin anew, without fear that his one slip will be brought into public in later years.

The witness, or the accused on cross-examination, cannot be asked questions concerning prior arrests, indictments and complaints, for the purpose of affecting his credibility as a witness. This is the majority rule and is based upon the reason that an arrest, indictment or complaint is only a charge, of which the accused is presumed to be innocent, hence is not proof of the guilt of the person.

A minority of the courts allow such questions, holding that the imputation thus cast upon the witness, or upon an accused on cross-examination has a real bearing upon his credibility as a witness and should be considered by the jury.

Texas differs from the above views, the reason being the same as

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* People v. Newman, 261 Ill. 12, 103 N.E. 559 (1913); Burdette v. Commonwealth, 93 Ky. 76, 18 S.W. 1011 (1892); Duffy v. State, 151 Md. 456, 135 Atl. 189 (1926. See Jones, Evid. (2d Rev.), p. 388.
* Vancleave v. State, 150 Ind. 273, 49 N.E. 1060 (1898); Hanoff v. State, 37 Ohio St. 173 (1881).
that given with regard to the admissibility of prior convictions. Only those arrests, indictments and complaints, which involve moral turpitude can be admitted to affect the credibility of the person.\(^{13}\) Texas does not extend this doctrine without limit. They do not admit every incident which points to the guilt of a person. A question not based upon an indictment, complaint or arrest, but based only on hearsay is not admissible.\(^{14}\)

In most jurisdictions, the admissibility of prior convictions, arrests, complaints and indictments is left largely to the discretion of the trial judge.\(^{15}\) The fact that a person has been convicted of driving over a stop signal, failed to turn properly, or of many other traffic violations, should not be admitted. To do so would be unreasonable because there is no real relation between these offenses and the credibility of the witness. Again, such questions should not be limited to offenses and crimes which involve moral turpitude (Texas rule) because other acts may involve the truth and veracity of the person on the witness stand. The best practice is to leave such questions to the discretion of the trial judge.

J. H. W.


“A mere rumor of accusation is not a basis for impeachment.”

\(^{15}\) Nelson v. Seiler, supra, n. 3; Third Great Western Turnpike Co. v. Loomis, 32 N.Y. 127 (1865).
RECENT DECISIONS

ALIENS—Legitimacy as Condition to Citizenship of Person Born Abroad.

An American citizen of Chinese descent became domiciled in China. There he had born to him a child who was considered illegitimate. The child applied for entrance into the United States, claiming to be a citizen under Sec. 1993 R.S., by which all children born abroad, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens. Held, that act applies only to legitimate children and, therefore, the applicant was not an American citizen. *Ng. Suey Hi. v. Weedin,* 21 F. (2d) 801 (1927).

Although the statute, with modifications, has been part of our law since 1802, this is the first time a Federal court has decided whether or not it applied to illegitimate children. The Attorney General and one state court have interpreted the act in the same way as the instant case. *32 Op. ATTY. GEN. 162 (1920); Guyer v. Smith,* 22 Md. 239 (1854). To the same effect is *Shedden v. Patrick,* 1 Macq. 535 (1854) interpreting a similar English statute (4 Geo. 2nd). All these decisions are based on the fiction that a bastard is *nullius filius.* It is true that common law he is *nullius filius* for purposes of inheritance. However, there has always been, even in times when the law regarding illegitimates was much more rigorous than at present, much secondary authority to the effect that he is *nullius filius* for that purpose only. See *King v. Inhabitants of Hodnutt,* 1 T.R. 96, 101; *Garland v. Harrison,* 8 Leigh, 368, 372 (Va. 1837); 2 COMYNS DIG. (Rose's Ed.) *117, 1 BL. COM. *459, Co. LITT. *123, 2 Kent COMM. *214. There may be some historical reason underlying the decision in *Shedden v. Patrick,* supra. The first English laws dealing with rights of persons born abroad were primarily to determine who could inherit English lands. Thus 25 Edw. III, Stat. 2 (1350), after reciting the doubts theretofore existing as to whether or not children of Englishmen born across the sea could inherit, provided that all children inheritors born out of the liegeance of the king, whose fathers and mothers were of the same faith and allegiance as the king should inherit within the same liegeance as other inheritors. The same statute also provided that the handling of a charge of bastardy against one born across the sea should be treated in the same way as if alleged against one born in England. However, the reasons prompting the early English statutes were not those which caused ours to be enacted. Then liegeance to the lord and king was the basis of feudal tenure. In our country, since the revolution, allegiance, in the feudal sense, has been non-existent, and citizenship implies rather a status of membership in a body politic. The status is not inherited
nor is it transmitted by inheritance. See United States v. Wong Kim Ark, 169 U.S. 649, 665 et seq. (1898). Since it is not acquired by inheritance it is difficult to see why the rules applying only to inheritance should determine the status.

The State Department holds that an illegitimate child born abroad of an American father, legitimated by the laws of its father's domicile, is an American citizen. It is submitted that this rule is proper merely in case there is uncertainty as to whom the father is until there has been a legitimation. If the father be ascertained legitimation should not be necessary. If the legitimation confers citizenship then that status can be acquired by an alien without naturalization. Also a confusion would follow from the fact that there can be no uniform rule as to what would legitimate the child. The father may be domiciled in any foreign country. Even if he were domiciled in the United States he might perform acts which would legitimate the child were his domicile in any one of forty-seven states but which would not be effective in his own.

F. C. B.

CONSTITUTIONAL LAW—Due Process—Notice Necessary to Give a State Court Jurisdiction over a Non-resident Defendant in a Civil Suit.

In this day of the "hit and run" automobile driver and the transient motorist, a recent case of the United States Supreme Court should excite much interest. Plaintiff, a resident of New Jersey, brought an action in the courts of that state for injuries to his person and property from an automobile, owned and driven by the defendant, a resident of Pennsylvania, crashing into the rear of the plaintiff's wagon on a New Jersey highway. Service of process on the defendant was made under a New Jersey Statute (Chap. 232, P.L. 1924, p. 517), by leaving the process with the Secretary of State. Although there was no provision of the statute requiring notice to be sent to the defendant, he was in fact notified of the proceedings but failed to appear; whereupon judgment was entered against him by default. He appealed on the ground that the New Jersey statute was invalid under the due process clause of the Fourteenth Amendment to the Federal Constitution. Held, a statute prescribing substituted personal service on non-residents by leaving process with a state officer, must contain a provision making it reasonably probable that notice of the service on the officer will be communicated to the non-resident defendant. Wuchter v. Pizzutti, 72 L. ed. (Adv. 313).

At common law process is the means of compelling the defendant to appear in court as there could be no judgment rendered in a personal action against the absent defendant by default; he could if he so chose deprive the plaintiff of his remedy. 2 Pollock and Maitland's Hist. of Eng. Law 589. Hence, as Holmes, J. said:
"The foundation of jurisdiction is physical power, and the foundation should be borne in mind." *McDonald v. Mabie*, 243 U.S. 90 (1917). It is generally held that there must be some service on the defendant, in some mode authorized by law, or the court cannot proceed, and a judgment rendered without such service is a nullity. *Wilson v. Seligman*, 144 U.S. 41 (1891); *Pennoyer v. Neff*, 95 U.S. 714 (1877). No action lies on it either in the state where it is rendered, *Needham v. Thayer*, 147 Mass. 536, 18 N.E. 429 (1888), or in any other state, *Pennoyer v. Neff*, supra; *Rand v. Hammon*, 154 Mass. 87, 28 N.E. 6 (1891). These principles are embodied in and protected by the Federal Constitution in the "full faith and credit" clause of Art. IV, Section 1; and the enforcement of a judgment against one over whom the court rendering it has no jurisdiction involves a violation of the Fourteenth Amendment. *Dewey v. Des Moines*, 173 U.S. 193 (1889); *Simon v. Railway Co.*, 236 U.S. 115 (1915); *Scott, Jurisdiction Over Non-resident Motorists* (1926); 34 HARV. L. REV. 563. The law remained well settled that a state's sovereignty does not authorize the state to make lawful any service against a natural person outside the jurisdiction of the court, *Wilson v. Seligman*, supra; *Fallman v. Anderson*, 119 U.S. 185 (1886); *Pennoyer v. Neff*, supra; but with the advent of the automobile came state enactments designed to secure and later to retain jurisdiction over non-residents who used the highways of the state.

In the first of the "automobile cases" it was held that it is within the police power of a state (and therefore not in violation of the Constitution, *Cohens v. Virginia*, 6 Wheat. [U.S.] 264) in the regulation of its highways to prescribe for their use by non-residents as well as residents, and the court observed that "the movement of motor vehicles over the highways is attended by constant and serious dangers to the public." A later case held that a state may require a non-resident to register and take out a license in the state, as a condition precedent to his operating any vehicle on the highways of that state. The same case held that such non-resident may be required to appoint one of the state officials as his agent upon whom process may be served in suits growing out of accidents in the operation of such vehicle within the state. *Kane v. New Jersey*, 242 U.S. 160 (1917). In *Hess v. Pawloski*, 274 U.S. 352 (1927), it was held that by the very fact that a non-resident uses a state's highway, he will be "deemed" to have appointed a designated state official as his agent to receive service. But in both of the above cases there were provisions in the statutes calculated to notify the defendant; in the Kane case, by mailing notice to the necessarily known registered address of the defendant, in the Hess case, by the defendant actually acknowledging receipt of the notice.

The general principal of the present case seems sound and on that principle the whole Court is in accord. (Brandeis and Holmes J.J., dissent from the judgment of the majority on other grounds). Here-
tofore the “automobile cases” had progressively extended the jurisdiction of the state through which the automobile was driven so as to include non-resident defendants by different modes of service. Until the present case it was doubtful just how far the state could go. By this case the outside limits of the state’s authority is laid down, and this point may now be regarded as settled. “We think”, said Mr. Chief Justice Taft, speaking for the Court in the present case, “that a law with the effect of this one should make a reasonable provision for such probable communication otherwise it will be entirely possible for a person injured to sue any non-resident he chooses, and through service on the state official obtain a judgment against a non-resident, who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state, has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud, Heineman v. Pier, 110 Wis. 185, 85 N.W. 646 (1901), or injustice is not a reasonable provision and in the case supposed would certainly be depriving a defendant of his property.” The fact that defendant actually received notice was held immaterial because the statute did not require it; therefore the statute violated the Fourteenth Amendment. The result of the case seems to be in keeping with natural justice also, when viewed after balancing the interests involved, because as one writer suggested, “the Fourteenth Amendment has placed upon the court the duty of weighing the individual interest comprehended under the very general terms of “life, liberty and property,” and as against the claims of society subsumed under the equally general phrase ‘the police power.’” Brown, Due Process of Law, Police Power, and the Supreme Court (1927) 40 HARV. L. REV. 943. Now applying that test to the present case it would seem that the interest of the non-resident, in being given opportunity to defend his property, outweighs the inconvenience caused by requiring that some notice be sent to him.

J. F. McD.

CONSTITUTIONAL LAW—State Tax on Interstate Carrier.

A Connecticut corporation engaged in the transportation of passengers, exclusively in interstate commerce, brought suit to restrain its State tax officials from levying a tax of one cent for each mile of highway traversed by any motor vehicle of the State used in interstate commerce, the proceeds of which were used for maintaining the State’s highways. It was contended that the tax is an infringement of the power of Congress to regulate interstate commerce, or at least, a discrimination against such commerce, in that the same tax is not imposed on intrastate motor bus transportation. Instead, all companies engaged in intrastate transportation had to pay an excise tax of 3% of their gross receipts, less such taxes as were paid locally on their real and tangible personal estate, and less the 2% income tax
imposed generally on corporations. The proceeds of this tax were likewise devoted to maintenance of the public highways. It was said that this scheme of taxation imposed a tax on interstate carriers, in addition to statutory charges already made for use of the highways in interstate commerce, and that both in purpose and effect it discriminated against interstate carriers, and in favor of intrastate carriers. Held, to gain relief, appellant must show that in actual practice the mileage tax falls with disproportionate economic weight upon it; also that the aggregate charge bears no reasonable relation to the privilege granted. *Interstate Busses Corporation v. Blodgett*, 72 L. ed. (Adv. 243.)

The proposition is fairly established that the absence of federal legislation on the subject of interstate regulation leaves the states free to prescribe uniform regulations reasonably necessary for public safety and order, in respect of operation upon their highways of motor vehicles moving in interstate commerce. *Hendrick v. Maryland*, 235 U.S. 610, 59 L. ed. 385, 35 Sup. Ct. 140 (1914). A carrier contemplating the use of the highways of a state, exclusively in interstate commerce, may even be required to apply for a certificate from the State officials before beginning to operate, and pay a tax not required of persons using automobiles on the highway generally, for maintenance and repair of the highways and the administration and enforcement of the laws governing them. *Clark v. Poor*, 274 U.S. 554, 71 L. ed. 1199, 47 Sup. Ct. 702 (1926). *Buck v. Kuykendall*, 267 U.S. 307, 69 L. ed. (Adv. 301), 45 Sup. Ct. 324 (1924), is a forceful reiteration of the doctrine that within reasonable limitation, the states may regulate the use by common carriers of the public highways, but that they have no right to prohibit it altogether; not even on the ground that such use would be prejudicial to the welfare and convenience of the public. *Geo. W. Bush & Sons v. Maloy*, 267 U.S. 317, 69 L. ed. 627, 45 Sup. Ct. 326, 327 (1925). The holding of the New Jersey Court of Appeals that the charging of an annual sum for the use of its highways by automobiles, instead of a mileage fee, is a matter within the discretion of the State, was approved in *Kane v. New Jersey*, 242 U.S. 160, 61 L. ed. 222, 37 Sup. Ct. 30 (1916).

As it appeared in the instant case that the mileage tax and the gross receipts tax were complementary, the appellant failed to establish discrimination by showing merely that the two statutes were different in form. A mere inspection of the statutes did not reveal a substantially greater burden resulting from the mileage tax as compared with the gross receipts tax. This holding was in harmony with the principles in the above cases. In default of a showing that the aggregate charge on the Interstate Busses Corporation bears no reasonable relation to the privilege of operating on the State's highways, the United States Supreme Court was unwilling to say that the
mileage tax in question is an unconstitutional burden on interstate commerce, and thus affirmed the proposition that in the absence of federal legislation on the subject, the states are free to prescribe uniform regulations reasonably necessary for public safety, order and convenience, as well as for highway maintenance, in respect of operation upon their highways of motor vehicles moving in interstate commerce.

R.C.W.

JUDGMENT NOTE—Notice of Judgment by Confession.

The defendant corporation gave the plaintiff a judgment note signed by the president of the corporation. It was alleged that this note gave the plaintiff power to secure a judgment by confession upon default in payment of a note made by the defendant and held by the plaintiff. Held, plaintiff was not entitled to entry of judgment upon the note on the ground that it did not appear that process had been served upon the defendant, or any notice had been given it of the proceedings; that the only authority of the attorney to confess judgment was that embodied in the note and that it was not shown that the president had power to bind the corporation by such an instrument. Columbia Sand & Gravel Co. v. Stresbilt Tile Co., 56 W. L. R. 82 (1928).

In most jurisdictions a judgment by confession may be entered upon a written authority called a warrant of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated certain sum. Treat v. Tolman, 113 Fed. 892 (1902). A corporation may in a proper case, and by its authorized officers confess a judgment, the same as a natural person, by complying with all the statutory provisions. Manley v. Mayer, 68 Kan. 377, 75 P. 550 (1904). The power to confess judgment by warrant of attorney had its origin in the common law. Las Cruces Bank v. Baker, 25 N. M. 208, 180 P. 291 (1919). It is governed thereby except insofar as it has been changed by statutes and decisions of courts of last resort. Halfhill v. Malick, 145 Wis. 200, 129 N.W. 1086 (1911). Originally the warrant of attorney was intended as a protection to the defendant, to prevent unauthorized persons from entering appearance for him; and as a protection for the attorney as evidence that he had been regularly employed by the party. In some jurisdictions this method of securing judgment is modified or otherwise regulated by statutes and in a few states it is entirely prohibited, where the power is given before the action is instituted. Harper v. Cunningham, 5 App. D.C. 203 (1895); Jamison v. Freed, 161 Ala. 432, 50 So. 52 (1909); Hodges v. Ashhurst, 2 Ala. 301 (1841). These latter jurisdictions refuse to recognize this right on the ground that where a warrant of attorney is given before an action is instituted, the defendant is thereby denied due process of law, for judgment is rendered against him without
notice and he has no opportunity to be heard.

In the instant case the court in refusing to enter judgment based its decision upon two grounds. First, that it was not clearly shown that the president of the corporation had authority to sign the judgment note; and second, that the usual relation of attorney and client did not exist. They found that the corporation had no knowledge of the action and that the attorney in confessing judgment was not in fact acting for the corporation as its legal representative. The court further stated that the judgments already entered in similar cases were not invalid on their faces, for in those cases it was presumed that the court was satisfied that the attorney was acting for his supposed client with due authority, and that the present decision was strictly limited to the specific facts of the case at bar.

F. W. G.

INSURANCE—Aviation—Flying Machine Clauses.

A seaplane in which the insured was riding as a passenger was forced to alight on a rough sea because of engine trouble. After ten minutes the plane capsized and the insured was drowned. Held, there could be no recovery on the accident policy excepting liability for injury or death "while in a mechanical device for aerial navigation or in falling therefrom," and correctly interpreted a seaplane as being a mechanical device for aerial navigation. Wendorff v. Missouri State Life Ins. Co., 1 S. W. (2d) 99 (Mo. 1927).

Where the policies excepted injuries sustained "while participating in or in consequence of having participated in aeronautics," and the insured was killed while riding as a passenger in an aeroplane, the courts held a passenger is participating in aeronautics whether operating the plane or not, and denied recovery. Bew v. Traveler's Ins. Co., 95 N. J. L. 533, 112 Atl. 859, 14 A. L. R. 983 (1921); Traveler's Ins. Co. v. Peake, 82 Fla. 128, 98 So. 418 (1921); 31 Yale L. J. 217 (1921). Where the policy excepted liability where death occurred while "engaged in aviation", the court said, in Masonic Accident Ins. Co. v. Jackson, 147 N. E. 156 (Ind. 1925), "engaged in aviation" meant the act of flying in a machine heavier than air, whether piloting or riding as a passenger at the time. The purpose the insured had in mind in making the flight has no influence in determining whether he was participating in aviation. 98 Cent. L. J. 238. In Meredith v. Business Men's Acc. Ass'n, 213 Mo. App. 688, 252 S. W. 976 (1923), recovery was also denied on a similar provision, it being held that the words would not be narrowly construed because the extraordinary hazards incident to flying were not confined to the mere operation of flying in the air. Thus, in Pittman v. Lamar Life Ins. Co., 17 F. (2d) 370 (C. C. A. 1927), certiorari denied, 71 L. ed. 1391, the court held the insured was "participating in aeronautic activity" and denied recovery when after completing a flight and having gotten out of the plane he was struck by the propeller. The
words will be construed to prevent recovery by those injured who ride in machines designed for aerial navigation whether as passengers or pilots and the "participation" lasts until free from the hazards of the machine. CARL ZOLLMAN, LAW OF THE AIR (1927), Sec. 135; Beu v. Traveler's Ins. Co., supra. However, exceptions to the liability of the insurer must be clearly expressed and will according to ordinary principles of the law of insurance be strictly construed. Where the insured was drafted into the army, assigned to aviation and killed while flying, although the by-laws of the insurance company prohibited from membership those engaged in aviation without additional payment of premiums, it was held that the provision applied only to private enterprises and not to persons in the Army Air Service. Sovereign Camp Woodmen of the World v. Compton, 140 Ark. 313, 215 S. W. 672 (1919). The policy of a brakeman excepting liability while following "any occupation more hazardous than that of brakeman", has no application to prevent recovery where he is killed while making a balloon ascension as an isolated act and not as an occupation. Pac. Mut. Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 P. 1087 (1910). However, in Ridgely v. Aetna Life Ins. Co., 160 App. Div. 719, 145 N. Y. S. 1075, affirmed in 217 N. Y. 720, 112 N. E. 1073 (1914), a newspaper reporter, who was injured when a plane he had built and was testing fell, was not able to recover under a provision granting recovery if injured while in "recreation". The insurer is liable only when the injury results proximately from the act of participation in aviation. If the insured while flying is struck by a stray bullet or sky-rocket or even a collision with another plane which completely destroys it before reaching the ground, as a recent writer on this subject has pointed out, the injury is not proximately due to participating in aeronautics and there can be recovery on the policy. ZOLLMAN, LAW OF THE AIR, supra. Where the policy contained the flying machine clause and also a clause saying recovery could be had if the injury occurred while on "a public conveyance provided by a common carrier for passenger service", the court held no recovery as the aeroplane was not a public conveyance where, it had no schedule, no baggage and could discriminate against races. North Am. Ins. Co. v. Pitts, 104 So. 21, 40 A. L. R. 116 (Ala. 1925); (1926); 20 ILL. L. R. 511. Probably if it had been a common carrier recovery could be had regardless of the flying machine clause. Zollman, Aerial Insurance (1927), 2 MARQUETTE L. R. 937. In Brown v. Pac. Mut. Life Ins. Co., 8 F (2d) 996 (1926), the insured was killed by the falling of a hydroplane, and it was held not within the double indemnity provision applicable to conveyances of a common carrier, because the plane carried only white people and flew only when the owner pleased. If they fly on schedules, at fixed prices without discriminating against races, they become like common carriers as suggested in Anderson v. Fidelity & Casualty Co., 225 N. Y. 475, 127 N. E. 584 (1920). But where they simply circle around and return to their
starting point, they are more like aeroplane swings, their purpose being amusement and not transportation. *Firszt v. Capital Park Realty Co.*, 98 Conn. 627, 120 Atl. 300, 29 A. L. R. 17. See, also, *Chambers v. North Am. Life Ins. Co.*, 118 Kan. 494, 235 P. 859 (1925), where the insured, a parachute jumper and aerial performer took out a policy on representations of the agent that it covered any kind of hurt. The insured did not see the policy before the accident. It contained a clause excepting injury sustained in an aerial machine while handling explosives. The insured set off what he thought a smoke-torch but in fact was a trench-mortar bomb. He was thrown from the plane by the explosion but landed on the wing, succeeded in getting into the plane and brought it to earth safely. The court held the policy would be reformed so as to sustain recovery for his injuries.

C. O'S.

The authors present to the students of law and to the profession generally in this volume a treatment of the historical and statutory background of the law of wills, descent and distribution, probate and administration.

An understanding of the historical background of these subjects is not only exceedingly helpful, but almost absolutely necessary to any proper comprehension, interpretation and assimilation of the law as it has developed to the present time. It is true, as the authors state in their preface, that the text books on the subjects, the reported decisions and even those works more fully devoted to the history of law give more or less disconnected if not fragmentary treatments; too, that it is difficult, if possible at all, to find anywhere in one place the information necessary from which to gain a clear view of the development of the law of succession. They offer this volume with the hope of meeting that need, and somewhat, also, as supplementary to a case book proposed to be offered by them later.

The book covers a great deal of ground. One sometimes wishes that they had furrowed a little deeper and tilled and cultivated some fields a little more thoroughly, but that is not an unusual feeling that possesses a reviewer if the work is really good, and this is good.

A good work sometimes tantalizes because it is good enough for one to want it perfect, and is there any such thing as a perfect legal treatise? In addition to famous names associated with the common law and canon and ecclesiastical law, there are found frequent references to the works of Pollock and Maitland; Holdsworth; Swinburn; Caillemier; Jenks; Jarman; Underhill; Williams; Woerner; Rood. Of course, outstanding cases like Cole v. Mordaunt; Lemayne v. Stanley; Shires v. Glasscock; Marston v. Roe

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d. Fox; Guardhouse v. Blackburn; Holdfast d.Anstey v. Downing; Harrison v. Rowan; Stevens v. Van Cleve; Banks v. Goodfellow; In re Almosino; Christopher v. Christopher, are found with due respect paid to them. Likewise, later cases like In re Fowle's Will; Bryan's Appeal; Lacey v. Dobbs; Wall v. Pfanschmidt are encountered. It makes one wish that the authors had gone a little further along certain lines, such as the interpretation and conflict of statutes in these 48 states of ours; domiciliary and ancillary administration, and that cases like In re Mackay's Will; Throchmorton v. Holt; Blackstone v. Miller; Rackemann v. Taylor; Thornton v. Gates; Ramsay v. Ramsay; Scott v. McNeal; Petition of Hunt, Admr.; Nunn v. Ehlert; Frick v. Commonwealth of Pa., might, also, have found a place.

However, it is to be remembered that this is neither a text book, in the real sense, nor a case book. It is what its authors very modestly claim it to be,—an "Historical and Statutory Background," and it is all of that and more. One of its attractions is the pleasing, running style of treatment, that makes the work understandable and interesting even to the layman, not to mention the general historian. It should distinctly appeal to the legal historian.

Beginning with the Statutes of Merton of 1235 affecting the law of wills and testaments and the law of descent and distribution, and beginning with Ordinance of William I of 1084 affecting the law of probate and administration there may be found the The Wills (Soldiers and Sailors) Act of Geo. V of 1918; The Law of Property Act of Geo. V of 1922; The Administration of Estates Act of Geo. V of 1925 and The Supreme Court of Judicature Act of Geo. V of 1925 and statutory enactments all the way between. These constitute, together with the excellent and unusually detailed table of contents in the front and the index in the back, a compilation and editing, that, in addition to the most worthy body of the book itself, approaches the rank of a vade mecum for at least all teachers of the law of the subjects mentioned.

WM. JENNINGS PRICE.

Mr. Collender is the Professor of Business Law in the Wharton School, and this work seems intended primarily for his students of commercial science. At any rate, he disclaims a purpose to write for lawyers or students of the law, and the volume could hardly answer as a treatise suitable to preparation for practice; though one engaged in study of the law will find here much useful information which probably cannot be found elsewhere within a single pair of covers. Moreover, the book is not of that class which professes to make every man his own lawyer, and there is no danger of leading the reader into the delusion that he is learning how to practice in the courts.

Having regard to the modest purpose and limited scope of the publication, the work is in general well done. Of course, many local diversities of procedure are necessarily ignored or very broadly indicated; though at places it might have been safer to make it distinct that the point is one upon which the local practice should be ascertained, and sometimes the Pennsylvania rule is stated as if it obtained generally or more extensively than it does.

Perhaps the only feature of Mr. Collender's book which one could wish to be remodelled is his chapter entitled "Courts of Equity." To be sure, for the non-professional reader it is not very important to explain the difference between law and equity, and to make such an explanation adequate would require an amount of historical and other statements which might not consist with the scheme of the present project. At the same time, if the subject is to be touched at all, it should be treated with reference to modern conceptions of history. And this, as it seems to one reader, our author has failed to do.

Thus, the origin of equity is attributed to the reign of Edward I.; and the reason for establishing courts of equity is, referring to that period, thus (in part) stated:

"The law, as it was administered in the common law courts, was wholly inadequate to meet the needs of an ad-
vancing civilization. This was true for many reasons, some more important than others, but all contributing to the inevitable breakdown of the then existing common law system.” (p. 133).

To the student of legal history the breakdown, whether actual or only threatened, of the common law courts in the thirteenth century or afterward comes as a startling piece of news and a very sensational latter day discovery. The authorities hitherto accepted represent the law courts of Edward the First’s day as rejoicing in their lusty youth and crescent jurisdiction: in their hundred years of existence these courts had, according to Pollock and Maitland, accumulated several hundred distinguishable forms of writs—indeed the authors mentioned fix the golden age of the writs not long before this time; and the Statute of Westminster Second had lately made possible the formulation of new actions as fast as the substantive law could develop. In the two succeeding centuries we see the common law courts functioning always with increasing vigor, constantly adding to the legal doctrines at their disposal and steadily expanding the scope of their activities, incessantly robbing the preestablished rival courts of their jurisdiction and building up the common law at the expense of ancient institutions until (toward the close of the fifteenth century) the law of the Westminster courts had become virtually the only law of the kingdom. Nothing in the history of institutions—unless it be the romantic career of assump-sit, which is a part of the same story—is more impressive than the course of conquest in which these usurping parvenu courts of the King, operating in opposition to all the great vested interests of the realm and to the prejudice of recognized property rights, grew from little to much or all until they had absorbed the law and the jurisdiction of the older and legitimate judicatures as effectually as Aaron’s rod swallowed the serpents of the courtly magicians.

Of the many reasons given by Mr. Collender for the hypothetical breakdown of the common law courts one is thus stated:

“Legal rules at the hands of the common law judges had
grown to be fixed and rigid. Once a decision was made, subsequent judges regarded it as a binding authority, which could not be ignored and seldom, if ever, extended to new facts or changed conditions. . . . If changing social or economic conditions called for a new or different application of the rules of law, the courts found themselves unable to proceed." (p. 134).

By this is understood that the authority of precedents narrowed and stiffened the common law; which is equivalent to saying that the doctrine of *stare decisis*, which has developed enormously since the Middle Ages, renders our present day law utterly intolerable. If settled principles made the common law incapable of adoption to changing social and economic conditions, one is puzzled to account for the tremendous expansion of the law of torts, contracts, and real property, which has been accomplished since the breakdown of the common law and is wholly the work of the common law courts. No one will suggest that our modern law on these subjects is due to the Court of Chancery: so far indeed were the law judges from being indebted to equity for aid in enlarging the common law that the work of the law courts was done only through divers collisions with the Chancellor. If the judges of the Middle Ages were hemmed in by precedents and always disposed to contract their jurisdiction, it is difficult to explain why the tort and contract law of today are so much larger in compass and richer in content than the meager tort and contract law of the thirteenth century, when there was no remedy for breach of a parol promise, before assumpsit for misfeasance had been invented, when conversion was not a wrong unless done by trespass, when the whole field of defamation and malicious prosecution and other actions on the case was *terra incognita* or ground forbidden to justice. Somewhere in the common law must have been a germinal principle which was capable of growth and which irrepressibly tended to expansion.

Mr. Collender does not say that this development of the common law was engineered by the Court of Chancery. But his context plainly implies that equity was invented to
relieve against the narrow notions and reactionary adjudications of the law courts and that the specific mission of the Chancellor was to redeem the nation from the rigor of the law—or at least to give a fillip to the consciences of the judges and stimulate them to learning their own law. And in his footnotes he cites as authorities Bispham, who wrote in 1884, and Pomeroy, who wrote in 1881, and both of whom come pretty near saying what Mr. Collender seems to imply. Now, such ideas were prevalent in the early eighties; but it is rather late in the day to explain, even for laymen, that our common law was developed by the aid of Chancery and that, but for the beneficent spirit of equity, we should still be without remedy for broken contracts, for negligent injuries, for slander and libel and the like, and should still be trying lawsuits by the ordeal, by battle and by compurgation.

Mr. Collender's concluding chapter is entitled "The Problem of Improving Legal Procedure," which seems strange coming from a practitioner. It is, of course, well understood that many learned men are giving themselves much concern over the difficult ties of the bar, and there is in current legal literature much serious consideration of the deficiencies in procedure and these deficiencies are commonly called problems. But the men who serve in the courts do not find any embarrassments arising from the present institutions; at any rate, in a quarter of a century at the bar, I never heard any lawyer complain of the existing methods, and I am sure that no practitioner of my acquaintance would understand what is meant by the problem of procedure or would recognise such a problem if he met it in Pennsylvania Avenue. Improvements in practice, it is true, are occasionally made in matters of detail; but such minor changes are taken care of by revised rules of court, and nobody, in the District of Columbia at least, is aware that any fundamental reform is need or desirable.

One fact mentioned as illustrating the necessity for such a reform is the delay in the conduct of litigation. Mr. Collender assigns several reasons for that delay, most of which are undoubtedly explanatory and account for the dilatory
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conduct of the courts, if indeed they do not show that tardiness is necessary and incurable. But one of his reasons sounds like an echo from the distant past, namely, "an archaic system of pleading." Now, there may have been a time when the law's delay was the fault of the law itself—though it is hard to discover in legal history any period when the system of pleading postponed trials beyond the time reasonably requisite to prepare for trial. But it may safely be said that no practitioner now living has ever known a scheme of pleading which afforded opportunity for any substantial curtailment. A foreign lawyer cannot, of course, speak definitely or confidently of what is possible in Pennsylvania, but if Mr. Collender should bring an action today in the District of Columbia—where we have what is probably the most archaic pleading in the world—and should get immediate service of process, he could expect a plea within twenty-three or twenty-four days. In forty-nine cases of fifty that plea will be the general issue; or until lately it would have been simply that, and now it is likely to be the equivalent of a general issue in different words. If it should be a special plea, or something else not admitting of a formal joinder in issue, the plaintiff may reply on the day that the plea is filed; and a rejoinder resulting in an immediate issue is due in ten days more. Of course, no case is tried on the day after issue is reached; but so far as the law goes, any usual lawsuit may be brought on for trial within four or five weeks. If it is not tried so soon, the delay is plainly not chargeable to our archaic pleading. If we have any procedural problems, or if anything in our procedural methods makes for delay, we are obtusely ignorant of our misfortune; and I am sure that virtually all my brethren of the bar would resent any substantial reform in the practice.

CHARLES A. KEIGWIN.


It is generally a matter of gratification to a student of constitutional law that opportunity has been afforded him to read extensively opinions of the nation's Supreme Court.
There are, of course, among these opinions many masterpieces of legal literature. For the most part the cases studied elevate the student's mind to a plane of legal thought that for breadth and depth and cogency of reasoning, finds no exact counterpart in any other field of the law.

It may also be said that in the law of the Constitution as presented in the cases, there stands forth conspicuously the conception of the Constitution as a living organism, so to speak, developing through the years with our changing political, social and economic conditions.

Whoever makes a study of our Constitutional Law should enjoy and appreciate these two aspects of the subject to the full. What shall be said then of a set of "Illustrative Cases," "sufficiently numerous and varied to cover the main underlying principles and essentials," but making "no attempt . . . to supply a comprehensive knowledge of the subject from the cases alone?"

The cases are to be used in connection with a textbook which sets forth fully the principles of the subject. Does not such a plan of study lose something of the richness and of the inspirational quality that inheres in the work of the Supreme Court in its relation to the Constitution? Every case book can only partially exhibit that work, but the more comprehensive the selection of the cases, the more nearly it fulfills the ideal objectives of this course of study.

May it be said, however, that Dr. Black, in his 1927 edition of Hall's Illustrative Cases on Constitutional Law (Hornbook Case Series), has effectively forestalled criticism that can ordinarily be levelled at an expurgated edition of cases. From an author of his renown one would expect a scholarly appreciation of his subject, and in this respect, the casebook reflects high character. The book is really not so abbreviated as one would anticipate. It comprises a few pages short of six hundred and presents one hundred and fifty-nine cases. The editor has not hesitated to preserve the text of the cases where necessary. He has not sacrificed either the bones or the meat of the cases to save space.

He has, moreover, skillfully selected many of his cases, apparently, for the sake of the discussion in the opinion of
related cases. In a measure he has thus obviated the necessity of footnotes, the only reference notes in the book being those to the author's textbook. Any individual, out of his own experience as a teacher of this subject, might offer minor criticisms of the organization and selection of the cases. On the whole, however, this work has such limitations only as inhere in the very plan of study here adopted and stated by the publishers in the preface.

ROBERT A. MAURER.


This is the second edition of Professor Walsh's treatise on real property. Several new chapters have been added on matters pertaining to personal property; the treatment of future interests has been materially broadened; and the title has been expanded to "A Treatise on the Law of Property." The author has also annotated the new edition with references to his recent work on the history of English and American law.

The introduction of the Socratic method of teaching law has been marked in the class-room by an increasing emphasis on reasons as well as rules. This tendency finds reflection in several recent texts of which this book is a happy illustration. It may, perhaps, in comparison with the more pretentious works on property be called a handbook, but it is by no means a summary. The author has been condensed in his treatment, but at the expense of prolix ramifications of minute variations of principle rather than ample consideration of these principles themselves.

Professor Walsh has given us a clear, argumentative, analytical discussion of the fundamental principles of property. He is delightfully intelligible in many cloudy parts of that law, especially with regard to the complex subject of future interests. An adequate historical background sets of a very modern and progressive approach to each subject and an interesting treatment of recent decisional and statutory developments. This is an excellent book for
the student,—an arresting and stimulating book for the practitioner and teacher.

CHARLES L. B. LOWNDES.

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