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THE STATUS OF GOVERNMENT OWNED AND GOVERNMENT CONTROLLED CORPORATIONS

ANY interesting legal problems have arisen out of the important activities of various corporations created under sanction of Congress for the purpose of performing functions necessary and incident to participation in the World War. These corporations are the War Finance Corporation, a body corporate created by Act of Congress approved April 5, 1918; the United States Housing Corporation, organized under the laws of the State of New York by authority of Act of Congress approved June 4, 1918; the United States Shipping Board Emergency Fleet Corporation, organized under the laws of the District of Columbia by virtue of the provisions of Section 11 of the "Shipping Act, 1916," and the United States Food Administration Grain Corporation and the United States Sugar Equalization Board, Inc., organized under sanction of Act of Congress approved August 10, 1917.

It is well settled that Congress in the exercise of its constitutional powers, may designate such agents or agencies for the performance of governmental functions as it sees fit, and that a corporation can act as an agent of the Government in the performance of governmental functions and be vested with sovereign powers. Upon the theory therefore that these corporations are merely executive agencies of the Government, it follows that while their officers may enjoy full powers as corporate officers as regards internal management, the powers of the corporations themselves must be measured by the law of public officers; whereas if the Government is regarded merely as a stockholder in these corporations, the powers of the corporations, as well as their officers, would be governed entirely by the law applicable to private corporations, and the law governing public officers would have no application.
The use of corporations for the purpose of conducting operations in their nature inherently governmental, may be said to date from the legislation authorizing the President to develop the Territory of Alaska. Prior to this legislation the use of corporations for the conduct and accomplishment of national purposes was merely incidental to the functions which the corporations were created to perform, and the interest of the Government, as a stockholder in corporations normally private, had been confined to banks and transportation corporations, the best illustrations of which are the Bank of the United States and the Pacific railroads.

The principles of law which would seem applicable to the relationship between the Government and the corporations created during the War Emergency, have been established in a line of decisions beginning with McCulloch v. Maryland, Osborn v. Bank of the United States and Bank of the United States v. Planters' Bank of Georgia and ending with Ballaine v. Alaska Northern Railway Company. In McCulloch v. Maryland the activity of the second Bank of the United States which the State of Maryland attempted to tax was a governmental activity delegated to the bank. A branch of the bank had been established at Baltimore, and the Legislature of Maryland had passed an Act requiring all banks established without authority of the State to issue notes only on stamped paper, or, in lieu thereof, to pay an annual tax. McCulloch, cashier of the bank, was sued for the recovery of the penalties prescribed by the statute, and the question before the Supreme Court was the constitutionality of that statute. It was held that the bank was an agency of the United States and that power to tax the operations of an agency of the Federal Government did not exist. In Osborn v. Bank of the United States this principle was applied to a suit by the Bank of the United States against the auditor of the State of Ohio, in which the latter was enjoined from enforcing a state law intended to harass the bank, and which forbade an appeal to the Federal Supreme Court. That law was held to be unconstitutional, and to be no bar to the suit by the Bank of the United States, the decision being further based upon the operations of the bank as an agency of the Federal Government.

In Bank of the United States v. Planters' Bank of Georgia, the State of Georgia, as a stockholder in the Planters' Bank, contended

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1 4 Wheat. 316.
2 9 Wheat. 738.
3 9 Wheat. 904.
4 259 Fed. 183
that the action against the Planters' Bank should be treated as an action against the sovereign State of Georgia, and therefore within the prohibition of the Eleventh Amendment to the Constitution of the United States. In overruling this contention, Chief Justice Marshall said:

"** A suit against the Planters' Bank of Georgia is no more a suit against the State of Georgia than against any other individual corporator. The State is not a party, that is, an entire party in the cause.

* * * *

"** This suit is not to be sustained because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that Court who is not withdrawn from its jurisdiction by by the constitution or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The States does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.

"It is, we think, a sound principle, that, when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many States of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator and exercises no other powers in the management of the affairs of the corporation than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank, in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought
by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

“We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal courts by the circumstance that the State is a corporator.”

This decision was later followed in Bank of Kentucky v. Wister and in Briscoe v. Bank of Kentucky. The Bank of the Commonwealth of Kentucky has been authorized to issue bills which were made receivable for taxes and other public dues, and the Legislature had thus virtually authorized a state currency and had issued bills of credit expressly forbidden by the Federal Constitution. The doctrine of Bank of the United States v. Planters' Bank was followed in these cases insofar as it dealt with the identity of the State of Kentucky with the Bank of Kentucky, all the stock of which was owned by the State, and the Supreme Court held that the officers and directors of the bank were not agents or officers of the State, and that its notes were not bills of credit of the State, although the State was the sole stockholder in the bank.

The underlying principle of these decisions was also applied to litigation arising out of the ownership and control by the Government of the Panama Railroad Company, a corporation organized under the laws of the State of New York, and the stock of which was acquired by the United States as incident to the construction and operation of the Panama Canal. In Thull, Adm. v. Panama Railroad Company the Supreme Court of the Canal Zone held that the Panama Railroad Company was "a corporation doing business in the Canal Zone, and as such is liable to be sued in the courts for alleged injuries, even though, as a matter of fact, its stock is owned and the road controlled by the United States Government," and in Salas v. United States the Circuit Court of Appeals for the Second Circuit, held that an indictment would not lie under Section 37 of the Penal Code for a conspiracy to defraud the United States arising out of facts which clearly showed fraud against the Panama Railroad Company. In Panama Railroad Company v. Curran the Panama Railroad Company contended that it was an agency of the Federal Government in the construc-

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3 2 Peters 318.
4 11 Peters 257.
5 2 Canal Zone 204.
6 234 Fed. 842.
7 256 Fed. 768.
tion and operation of the Panama Canal, and as such immune from suit in tort. This contention was, however, overruled by the Circuit Court of Appeals for the Fifth Circuit, which concluded that the intent of the legislation by which the United States had acquired the stock of the company was that the railroad should continue to be a private enterprise, as it had been prior to the investment by the Government in its capital stock.

The Pacific Railroad cases arose out of conditions immediately succeeding the Civil War, when the Government, for the purpose of aiding the development of transportation facilities across the territory west of the Mississippi River, had assisted the railroads through grants of land and loans of money, and had reserved to itself a certain control over the operations of those railroads. The Supreme Court upheld the right of various States to tax the property of these railroads, despite the fact that the interest, supervision and control of the Government was claimed to render them immune from taxation. A clear distinction was, however, made between a tax upon the property of a government agent, and a tax upon the operations of such agent when acting for the Government, and the doctrine and distinction laid down in McCulloch v. Maryland was adhered to. Again, in Baltimore Shipbuilding and Dry Dock Company v. Baltimore, the Supreme Court held that a corporation in which the Government has only a contingent interest, but which is engaged in purely private business, is not a federal agency entitled to claim exemption from a state tax imposed upon the real estate of such a corporation.

The relationship of the sovereign to a bank in which it was a stockholder, has been analyzed and summed up in Curran v. State of Arkansas in the following language:

"By the charter of this bank, the State of Arkansas became its sole stockholder. But the bank was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact, that a sovereign State paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once

\[10\] 9 Wallace 579.
\[18\] Wallace 5.
\[11\] 195 U. S. 375.
\[12\] 15 Howard 304.
with the trusts, and subject to the uses declared and fixed by the charter, to the same extent, and for the same reasons, at it would have been if contributed by private persons.

"That a State, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court." * * *

Under these decisions it would seem that the Government of the United States, or a State, as a stockholder in a corporation, has only that interest in the corporation which any individual stockholder has in any private corporation. Persons contracting with such a corporation would have the same remedies against it as persons contracting with any other private corporation, the officers of the corporation would have the same general and implied powers with respect to the property and contracts of the corporation, as have officers of any other private corporation, and the relationship of the sovereign would seem to be clearly affected by the functions to be performed by the corporation. Thus, in Bank of the United States v. Planters' Bank, the question before the Court was whether the Planters' Bank of Georgia, a creature of the State, was within the doctrine applied to the Bank of the United States as laid down in McCulloch v. Maryland and in Osborn v. Bank of the United States, insofar as the operations of the Planters' Bank might be considered operations of the State of Georgia; and whether the Planters' Bank was in law of the State of Georgia, within the meaning of the Eleventh Amendment to the Constitution of the United States. Immunity from suit arising out of the operations of the bank was denied, and it was held that the investment by the State of Georgia in the capital stock of the Planters' Bank was not essential to the sovereign existence of the State, while in Curran v. State of Arkansas, the various acts of the Legislature of the State of Arkansas affecting the defunct State Bank of Arkansas, were held to be a consent on the part of the State to be sued as trustee for the unpaid creditors of the bank. Ownership of stock in a corporation, by the Federal Government or a State, will not, therefore, of itself, impart the attributes of the sovereign to the corporation, the ownership of stock is a mere circumstance, and the corporation can partake of the attributes of the sovereign only in those trans-
actions in which it performs functions of a sovereign delegated to it, and irrespective of the ownership of its stock.

The acquisition of the Alaska Northern Railway by the Federal Government illustrates the use of a corporation in the performance of a necessary governmental function. Under an Act of Congress (38 Stat. L. 305) the President was authorized to locate, construct and operate railroads in the Territory of Alaska, and was empowered to delegate this authority to such officers, agents or agencies, as might be necessary to enable him to carry out the purposes of the Act. The Secretary of the Interior was designated by the President as his agent, and a contract was entered into with the Alaska Northern Railway Company, a corporation of the State of Washington, for the purchase of its capital stock and first mortgage bonds, the object being to acquire an existing railroad rather than to construct a new one. That contract was submitted to the Attorney General for an opinion as to its legality, and he advised that the purchase of all the certificates of stock and all the first-mortgage bonds of the corporation was in effect, a purchase or acquisition of the railroad line within the meaning of the Act. The contract was accordingly executed and all the real and personal property of the railway company, and all the stock and bonds of the corporation were conveyed to the United States.

The status of the railway company was discussed and decided in the case of Ballaine v. Alaska Northern Railway Company, already referred to, in which the United States had intervened as a party defendant on the ground that it had acquired control of the road on its own behalf, and to which the plaintiff answered that the United States was not exercising any of the rights of sovereignty in the conduct, operation and maintenance of the railway company, but was engaged in a purely commercial business. The trial court dismissed the complaint on the ground that the action was one sounding in tort, that the real party defendant was the United States, and that the Court had no jurisdiction; and this judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, which said:

"* * * plaintiff in error argues that in the operation and maintenance of the railroad the United States is carrying on a commercial business, and in such business has, to an extent, abandoned its sovereign capacity. We cannot uphold that view. Congress, in its power to regulate commerce, could construct, or could authorize a corporation or individuals to construct, a railroad, or to buy a railroad, and clearly in the territories has a plenary
power to grant franchises, to create a railroad system, and to employ the agency of a corporation as a means of accomplishing such object. * * *

" * * * Taking all these provisions together they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute.

" * * * Salas v. United States, * * * cited by plaintiff in error, is to be distinguished. There Burke and Salas were indicted for conspiring to defraud the United States. The United States owned all of the stock of the Panama Railroad Company, and through the Isthmus Canal Commission and its subsistence department food supplies were furnished to the employees on the Isthmus and to the commissary department of the railroad company, which bought and furnished all other supplies. Burke was manager of the commissary department of the railroad. The Court of Appeals was of opinion that the United States had entered into commercial business in the premises and was to be treated like any other corporation, and that the combination proved on the trial was not one intended to defraud the United States. Here, however, the United States holds the railroad and stock for public purposes under clear statutory authority, and it operates the road in the necessary discharge of its duty to the public, and in our judgment, in this, a civil action, can claim the privileges and immunities of a sovereign. * * *

"Our opinion is that the United States has, by the pleadings, shown itself to be the real party in interest, and can claim the immunity set up in the complaint in intervention."

This opinion thus holds that the nature of the business transacted by the Panama Railroad Company under control of the Federal Government, was to be clearly distinguished from the governmental project, as a necessary element of which the Alaska Northern Railway was acquired. The ownership and control of the Panama Railroad Company by the United States was held not to change the private status of that company, while the ownership and operation by the Government of the Alaska Northern Railway Company, as part of a public enterprise, was held to change its status from private undertaking to that of
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governmental activity; and it is to be noted that this opinion was rendered by the judge who had presided upon the trial of the case of Salas v. United States.

An examination of the legislation which sanctioned the organization of the United States Housing Corporation, organized under the Business Corporations Law of the State of New York, makes it evident that Congress intended to provide for a stock corporation as the instrumentality through which the President might exercise the powers delegated to him. It would seem clear that the corporation provided for by Congress was intended to act as a distinct agency of the Federal Government in carrying out the provisions of acts of Congress, and in performing certain powers necessary and incident to a portion of the activities connected with the war. Property acquired by this corporation would therefore clearly seem to be property held for the use and benefit of the United States, and contracts made by the corporation would clearly be contracts of the United States.

The United States Shipping Board Emergency Fleet Corporation was incorporated under the incorporation laws of the District of Columbia by authority of the “Shipping Act, 1916.” It is to be noted that this Act provides that the operation of vessels by any corporation created thereunder would cease and the corporation be dissolved, five years from the date of the conclusion of the European war, whereas, under the “Merchant Marine Act, 1920,” this limitation on the operation of ships by the Emergency Fleet Corporation has been removed, and the life of the corporation has been extended for the purpose of operating vessels. Under the provisions of the “Shipping Act, 1916,” the United States Shipping Board might have created a corporation to engage in the construction of ships and another corporation to engage in the operation of ships, but only one corporation was organized, and to this was delegated from time to time the powers both of construction and operation.

The activities of these corporations have been more extensive than those of the other corporations organized for war purposes, and in addition to the powers granted to them under their charters, various other powers have been conferred upon them from time to time either directly by Congress, or by delegation from the President under sanction of Congress; whereas the activities of the United States Food Administration Grain Corporation and the United States Sugar Equalization Board, Inc., have been more or less limited and were practically terminated upon the signing of
the armistice. The activities of the War Finance Corporation were revived under authority of joint resolution of Congress approved January 4, 1921, and the corporation has since continued to function in carrying out the purposes for which it was organized under the original act of Congress.

In Luxton v. North River Bridge Company it was held that Congress could create a corporation as an appropriate means of executing an implied power under the Constitution. If Congress can create a corporation for such purposes, it follows, as a matter of course, that it can authorize the creation of a corporation by the executive branch of the Government, and these various corporations would therefore seem to be clearly within the doctrine laid down in Ballaine v. Alaska Northern Railway. In "exercising entire control, possession, ownership and management," the United States, acting through Congress, "has merely employed the corporate organization as an agency through which to execute the purposes of the statute."

Under the Constitution (Art. I, Sec. 8; Cl. 1, 12, 18) Congress has the power to "provide for the common defense and general welfare of the United States," "to raise and support armies" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested * * * in the Government of the United States or in any department or officer thereof." Since Congress has this power, it necessarily has all powers incident thereto, if they be direct means of executing that power. In the language of Chief Justice Marshall in McCulloch v. Maryland, " * * * the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

A clear analogy would thus exist between these corporations and the Bank of the United States, and all the activities and operations of the corporations, because of their federal nature, would be exempt from supervision or interference by the States. In view of all the facts and circumstances surrounding the creation

153 U. S. 525.
of these corporations, as well as the functions performed by them, they would appear to be a necessary undertaking by the Federal Government in time of war, for the benefit of all the people. Their creation was the result of an exercise by Congress of implied powers under the Constitution, and insofar as the operations of the corporations were necessary for the maintenance of national supremacy, they would be exempt from state regulation and control, and the functions performed by them being purely federal, and duly delegated to them, would not be subject to any restrictions placed upon them by the States. Their creation under the laws of any particular State would be immaterial.

The status of these various government-owned and government-controlled corporations has been considered by the courts in a number of cases, and many divergent opinions have been rendered. A summary of these decisions shows that three entirely distinct views have been held by the federal courts, and that three divergent conclusions have been reached as to whether or not the corporations are suable in state courts. The United States District Courts for the Southern District of New York, the Northern District of Illinois, the Southern District of Florida and the Circuit Court of Appeals for the Second Circuit, have held that these corporations are suable as private corporations and that the doctrine of governmental immunity does not apply; the United States District Courts for the States of Washington and Oregon have held that these corporations are immune from suit and endowed with the attributes of the sovereign because of the legislation under which they function: and the United States District Courts for the Eastern District of Pennsylvania and the Southern District of Mississippi have held that the status of the corporations in any particular transaction is a matter of proof to be decided upon the trial of each case. The courts of Pennsylvania have indicated that these corporations, in all respects, would be amenable to state process; the Supreme Court of the State of

272 Fed. 132.
New York has held that they may not avail themselves of the defense that they were engaged solely in the performance of governmental functions and therefore immune from suit, while the United States District Court for the Southern District of Alabama has decided that no state court has authority to entertain a suit against such corporations.

The Supreme Court in the "Lake Monroe" and United States v. Strang has construed the legislation under which the Emergency Fleet Corporation was organized. In the "Lake Monroe" the question before the court was whether or not the steamship "Lake Monroe" was employed "solely as a merchant vessel" at the time of a collision, for damages arising out of which, a libel has been filed. In its opinion the Court reviewed the legislation, history and executive action in regard to the Emergency Fleet Corporation, declared that it was primarily an agency of the Shipping Board, and held that the "Lake Monroe" at the time of the collision was subject to the ordinary liability of a merchant vessel notwithstanding the indirect interest of the United States in the outcome of her voyage. The following extracts from the opinion are indicative of the legal status of the Emergency Fleet Corporation:

"Soon after the declaration of war the Shipping Board, under authority of Section 11 of the above Act, caused to be organized (April 16, 1917) under the laws of the District of Columbia, a corporation known as the United States Shipping Board Emergency Fleet Corporation, with $50,000,000 of capital stock, all owned by the United States. It was officered by the commissioners of the Shipping Board and their nominees, and was but an operating agency of that board.

"In this state of affairs, Congress embodied in the Urgent Deficiencies Appropriation Act of June 15, 1917, (Ch. 29, 40 Stat. 182) a clause entitled 'Emergency Shipping Fund,' which conferred upon the President broad powers of control over contracts for the building, production or purchase of ships or material, and among others the power 'To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.' Another clause declared: 'The President may exercise the power and..."
authority hereby vested in him * * * through such agency or agencies as he shall determine from time to time: Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.'

"Under this authority the President made an executive order July 11, 1917, directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the purchase or requisitioning of vessels in process of construction, and the completion thereof, and that the Shipping Board should exercise all power and authority vested in him by said provision, so far as applicable to the taking over of title or possession, by purchase or requisition, of constructed vessels or charters therein, and the operation, management and disposition of such vessels, and of all others theretofore or hereafter acquired by the United States, declaring: 'The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose."

* * * * * * *

"But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as his agencies to exercise the new powers, for the Fleet Corporation was mentioned in the Act, and it was known to be but an arm of the Board. It is not necessary to hold that Congress, while entertaining this expectation, went to the extent of restricting the President to those agencies; but it is not to be believed that they intended he should exercise the powers arbitrarily. And when in fact he designated the Fleet Corporation to exercise those powers so far as they pertained to the construction of vessels and the requisitioning of vessels in process of construction, and the Shipping Board so far as they applied to the operation, management, and disposition of vessels, it is to be presumed that he did so because of the
general powers that already had been conferred upon them by law, and because they were subject to the regulatory provisions that Congress had enacted."

As a result of the decision in this case and also the decision in the "Flagg"*, Congress on March 9, 1920, passed the "Suits in Admiralty Act," which authorizes suits in admiralty against the United States and the Emergency Fleet Corporation, and this is the only legislation which in terms has consented to the bringing of an action against the Emergency Fleet Corporation.

In United States v. Strang the question before the court was whether or not an inspector employed by the Emergency Fleet Corporation was an agent of the United States within the meaning of the Criminal Code, the United States District Court for the Southern District of Florida having sustained a demurrer to an indictment charging the defendant with a violation of Section 41. The Court held the demurrer had been properly sustained and uses the following language:

"As authorized by the Act of September 7, 1918, * * * the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under the laws of the District of Columbia, with $50,000,000 capital stock, all owned by the United States, and it became an operating agency of that board. Later, the President directed that the corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917, * * * and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. * * * The corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. Notwithstanding all its stock was owned by the United States, it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officers designated by Congress; they were subject to removal by the corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Section 41.

"Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. * * * The view of Congress is further indicated by the provision in Section 7, Appropriation Act of October 6, 1917,
* * * 'Provided, that the United States Shipping Board Emergency Fleet Corporation shall be considered a government establishment for the purposes of this section.' Also, by the Act of October 23, 1918, * * * which amends Section 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States own stock."

The status of the Emergency Fleet Corporation has been clearly set forth in an able and comprehensive opinion by Holmes, J., in the case of Ingram-Day Lumber Company v. Emergency Fleet Corporation, previously noted. The action had been removed from a state court to the United States District Court, and motions to remand and to dismiss were disposed of in the same opinion which makes the following summary:

"1. The Fleet Corporation, when acting for itself, is capable of suing and being sued as an ordinary corporation.

"2. Any suit against it, regardless of the amount or value in controversy, must be in the federal courts, because it was organized under a law regulating commerce.

"3. When acting as the delegate of the United States, or the appointee of the President, in the purchase of materials or ships, it is not liable in its corporate capacity; but such suit must be against the United States.

"4. Ships purchased or constructed by it for the United States are to be operated by the President, and when operated through the agency of the Shipping Board are liable to arrest under Section 9 of the act establishing such board.

"5. Property acquired by the Fleet Corporation with the funds and as the agent of the United States, even though held in the name of said Fleet Corporation, is the property of the United States, and exempt from state taxation. * * *

"6. The property of such corporation, even though the United States may be interested therein as a stockholder, may be subjected by legal process to the payment of its debts; but property of the United States, which it holds as a government agent, and which simply stands in the name of the Fleet Corporation, is not liable for the debts of such corporation.

"7. If the relation of the Government to the corporation is merely that of stockholder, then the corporation is liable for its acts, because its transactions are those of the corporation, and not of the Government. Panama R. Co. v. Curran, * * * is an illustration of this principle."
"8. But, if the relation is that of principal and agent, then the corporation, when it acts within the scope of its authority, is not liable, because such authorized acts are the acts of the government, and not the corporation. Ballaine v. Alaska N. Ry. Co. * * * is illustrative of this principle.

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"In conclusion, I might say that the law of this case will arise out of the facts. 'Ex facto jus oritur.' Some of the facts, like the existence of the war and the executive order of the President, the court can take judicial knowledge of; but the determinative fact, as to whether in this particular transaction the defendant was acting for itself as a private corporation, or for the United States as a public agent, the court can only know from the evidence, because under the law and its charter it might have been acting in either capacity."

In arriving at a definite determination of the status of these various corporations, it is necessary to consider certain fundamental principles. The first is that the sovereign, in the exercise of the powers of government, necessarily acts through agents or agencies, and that a corporation can act as such agent or agency, and be vested with the exercise of governmental powers. Second, is the principle that the character of a corporation is to a great extent determined by the beneficial purposes to which its property is to be applied. Next is the nature of the transactions and the business done by the corporation, and last is the source from which the funds or property of the corporation is derived, and which may be looked to for the satisfaction of any judgment against it. It is then necessary to consider whether the organization of these corporations was the result of an exercise by Congress of the discretion vested in that body for the fulfilment of a duty to the public arising out of necessary and incidental powers under the Constitution, or whether Congress merely intended to sanction engagements in private enterprises for the purpose of conducting some of the affairs of the Government incident to the war, with a greater degree of facility.

There would seem to be no question that these corporations are agencies of the Government. The sovereign has the right to select that form of agency by which it may perform the functions of government to the greatest advantage, and in selecting a corporate form for an agency, it does nothing more than to give legal and artificial capacity to one or more persons as distinguished from the natural capacity which an individual agent would have.
GOVERNMENT OWNED CORPORATIONS

The means by which national exigencies are to be met and national prosperity promoted, are of such variety and complexity that there must of necessity be allowed to the sovereign the greatest latitude of discretion in the selection of those means. To create a corporation is but to create a legal person, and there would seem to be no valid reasons for surrounding a corporate or artificial agent with greater restrictions than surround a natural agent. The principle distinction between a natural and an artificial agent is that the latter is created by operations of law, authorized to perform its functions in succession and without interruption, and with legal capacity as distinguished from natural capacity, and it would seem clear that while circumstances may affect the expediency of a means, they can never operate to bring into question the right of the sovereign to avail itself of any means which under a given circumstance may seem expedient.

The question, therefore, naturally arises why the courts, in certain cases involving the status of these corporations, have deemed it necessary to construe the law of the States under which the corporations were organized as being paramount, and imposing certain limitations, restrictions and liabilities upon the form of agency thus created; when the real doctrine seems to be that where the law of a State imposes limitations, restrictions and liabilities which are contrary to the settled law of the United States, the law of the United States is supreme. The view of the courts in certain other cases seems to be that the creation of a corporation for the purpose of performing governmental functions, is the creation of an independent entity apart from its relation as agent, when as a matter of fact the corporation should be considered as a quality, or a capacity, or a means to an end, by which the functions delegated to it are performed with greater safety and convenience.

The operations and activities of these corporations were deemed both necessary and incidental to the proper functions to be performed by the Government during the war emergency, and they would, therefore, seem to be clearly distinguished from such corporations as the Panama Railroad Company and the Philippine National Bank. Where the operations and activities of a corporation are purely governmental, the immunity of the sovereign necessarily attaches, the operations of the agency and not the interest of the sovereign in the agency would be the criterion upon which its immunity is based, and those cases in which the sovereign

enters the domain of private business, should be clearly distinguished from cases in which the sovereign enters the domain of business as a matter of self-preservation. If the President, acting under authority of Congress, had himself performed the functions which were delegated to these various corporations, it can not be questioned that he would have been immune from suit arising out of the performance of any of those functions, and it would seem to follow that his delegate or instrumentality, whether an individual or a corporation, would likewise be immune from suit. It would seem that when the Government itself creates its agent, or owns part or all of the stock of an agent, the test as to whether such a corporate agent is suable is the nature of the business done. Suits against the sovereign exist as a matter of privilege conferred by the sovereign, and it would seem that an artificial entity, upon which certain attributes are conferred by law, would have no greater incapacities as an agent, than an individual agent with similar attributes.26

While it has been suggested that the particular functions performed by those corporations must be examined into in order that it may be ascertained whether or not they are subject to suit, and whether or not a suit against them arising out of the performance of a particular function would be a suit against the United States, it would seem clear that the only operations in which the corporations could engage would be those under their charters, irrespective of the capacity conferred upon them by the situs of their incorporation. Their charters each provide that the objects of the corporation are to perform functions authorized by Acts of Congress, or to engage in the performance of such functions as may be delegated to them by the President, and it would therefore seem that the only functions in which the corporations could engage, would be functions to carry out legislation by Congress, or executive orders of the President based upon such legislation. Congress and the President can only engage in activities of a national character and permitted under the Constitution, and it would therefore follow, that the activities and operations of these corporations would be purely governmental in their nature.

Proof as to the governmental nature of the transactions of the corporations can undoubtedly always be produced, and ultimately litigation conducted along the lines laid down by certain of these decisions will have the same result as though the courts had so construed the legislation under which the corporations were

created, as to hold as a matter of law, that a suit against them is, in fact and effect, a suit against the United States. While, therefore, it would appear to be fundamentally sound to hold that these corporations must respond to process, and that a judgment can be entered against them, it should be borne in mind that only in cases in which the corporations exceed their authority as agents of the Government, and in which the action is to obtain redress for a wrong thus committed, can the action be maintained, as such actions are clearly not actions against the Government.\(^b\)

The conflicting views of the courts in regard to the status of these corporations, would seem to arise from differing application of principles which have been firmly established, and which only need adaptation to modern conditions and to the various problems presented.

ELDRED E. JACOBSEN.

New York, N. Y.
THE DISTRICT OF COLUMBIA
IN THE
CONSTITUTIONAL CONVENTION OF 1787

FRANK SPRIGG PERRY,
Assistant Professor of Constitutional Law.

The question has frequently been asked whether the framers of the Constitution intended that the District of Columbia should be composed of voteless inhabitants or whether the failure to provide for the suffrage of its citizens was an oversight. The solution of this problem involves a consideration of the circumstances under which the Federal city was organized and the reasons for the granting of exclusive jurisdiction over it to Congress.

Article I, Section 8, Clause 17, of the Constitution provides that Congress shall have power:

“To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings.”

It will be the purpose of this article to trace briefly the origin of the Federal city and to determine, as far as possible, the nature and character of the district so set aside to be the “seat of the Government of the United States.” The result of this survey, it is believed, will establish the fact that there was an explicit promise of local suffrage by the framers of the Constitution, but that no consideration was given to the national political rights of the inhabitants of the ceded districts. Under these circumstances no argument can be advanced today that the citizens of the District of Columbia should be left without the right to vote because “our forefathers so provided.”

At the beginning it will be wise to cite an eminent writer on Constitutional law, one of the earliest of the commentators and one whose words are still cited as authority.1 William Rawle

1 Fort Leavenworth R. R. v. Iowa, 114 U. S. 529.
published his work, "A View of the Constitution," about 1825 and
the second edition in about 1829. Not only was this author near
enough to the Constitutional Convention of 1787 to have remem-
bered its great events, but he was prominent in politics
in Pennsylvania and had a personal acquaintance with many of the
distinguished statesmen who sat in that Convention. This period
of thirty-eight years had been sufficient time to bring out certain
inequalities which were not apparent when the instrument was
drafted. On page 113 of the second edition and with reference to
the District of Columbia, the author states:

"It (i. e. the establishment of a Federal district) has
been carried into effect by the cession and acceptance of
a tract of land on the River Potowmack, partly from the
State of Virginia, and partly from the State of Maryland.
The inhabitants generally are satisfied. But some conse-
quences, that perhaps were not fully foreseen, have
followed from it. The inhabitants of the District of
Columbia are no longer, in all respects, citizens of a
State, although they are unquestionably, to a certain
extent, citizens of the United States. As such, they are
entitled to the benefit of all commercial or political treat-
ies with foreign powers, and to the protection of the union
at home. But they have no representatives in the Sen-
ate; they cannot partake in the election of members of
the House of Representatives, or of electors of President
and Vice-President. The judiciary power between citi-
zens of different States does not extend to them, in which
respect they are more unfavorably situate than aliens;
but suitable courts of justice, and certain adequate provi-
sions for its local government, have been made by
Congress. The immediate residence of government has
greatly contributed to its prosperity, and its political
anomaly has produced no general inconvenience."

Indeed, the anomalous situation of the inhabitants of the Dis-
trict, if considered at all, was probably thought unimportant in
view of the fact that the power to remedy this defect was vested
in Congress. Congress was given power of exclusive legislation
over this District, just as it already possessed like authority over
the territory or other property of the United States. The evils of
territorial government have been banished from Continental
United States with the exception of the area occupied as the
seat of the Federal Government. This "back-water" of American
political life—the District of Columbia—should be eliminated so
that no political eddy may savor of oligarchy or despotism at the
heart of the Nation. The District of Columbia has sufficient
population and is otherwise fully qualified for statehood. No amendment to the Constitution is required, as Congress can by a simple act, with the consent of the Legislature of the State of Maryland, erect out of the District of Columbia, the State of Columbia.¹

THE CONTINENTAL CONGRESS

The "Capital City" of Revolutionary days was Philadelphia, Pa. On September 5, 1774, the first Continental Congress assembled in that city, and Philadelphia continued to be the capital until 1783. After meeting in several other places, the Continental Congress met in New York city in 1785, and this city remained the seat of the Federal Government until 1790 when Congress, under the Constitution, again took up its temporary residence in Philadelphia. The permanent seat of the Government was transferred to the city of Washington in December, 1800, and has so remained since that date.

The Continental Congress was at first composed of delegates from the various colonies, and contented itself with preparing "addresses" to King George III and to the people of Great Britain urging a redress of grievances. Chief among these grievances was the infringement of "the undoubted right of Englishmen that no taxes be imposed on them but with their own consent, given personally or by their representatives." It was not until hostilities had actually commenced that the question of separation began to be discussed, and which resulted in the formal establishment of the United States of America by the Declaration of Independence on July 4, 1776. The articles of confederation were adopted by the Continental Congress on November 15, 1777, although they did not finally go into effect by the ratification of the colonies until March, 1781, about six months before the surrender of Cornwallis at Yorktown. These Articles of Confederation remained in force until the new Government under the Constitution commenced proceedings on March 4, 1789. Article IX, paragraph 7, of these Articles of Confederation provided:

"The congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states."

One of the earliest official records of a reference to a "permanent residence" for the Federal Government appears in a resolu-

tion of the Continental Congress on June 4, 1783. In this resolution there was “assigned the first Monday in October next” to take into consideration the offers of the legislatures of the States of Maryland and New York to cede the cities of Annapolis and Kingston for the permanent Federal residence. 

On June 21, 1783, in Philadelphia, occurred the unfortunate incident of an insult to the Continental Congress by a band of mutinous soldiers demanding their pay arrears. The Continental Congress appealed for protection to the authorities of the State of Pennsylvania. Owing to the disorganized state of public affairs in Pennsylvania, these authorities either could not or would not afford the assistance desired. The Continental Congress thereupon adjourned to the city of Princeton, N. J., and occupied a part of the buildings of Princeton University. On this occasion the authorities of the State of New Jersey assured the Continental Congress of their support in case of further disturbances.

It is needless to remind the student of Constitutional history that the Continental Congress was composed of representatives of a federation of individual States. The several States, each acting independently, levied taxes and enlisted soldiers within their own boundaries and the Continental Congress had no separate authority to levy taxes or to raise or support an army. These militia troopers of the several States were relied on to protect the interests of the “Confederation,” as well as to preserve order at home. The Continental Congress exercised no jurisdictional rights over the place where it held its sessions.

The general assembly of Pennsylvania on August 29, 1783, adopted a resolution, which was presented to the Continental Congress, urging them to return to that city and promising adequate protection. This resolution further requested “that Congress will be pleased to define what jurisdiction they deem necessary to be vested in them in the place where they shall permanently preside.” This seems to have been the first inquiry about the proposed status of the district to be ceded. A committee was appointed to consider this question of the necessary jurisdiction to be granted to Congress, and a report was made on September 22, 1783. No copy of this report is set out in the Journal, but it is important to observe that James Madison, of Virginia, was one of the members of this committee.

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4 IV Journals, p. 259, of Monday, September 1, 1783.
5 IV Journals, pp. 275, 279.
Early in October, 1783, the Continental Congress entered into a discussion of the location of the permanent seat of Government. Mr. Gerry, of Massachusetts, on October 7 introduced a resolution, which was seconded by Mr. Howell, of Rhode Island:*

“That buildings for the use of Congress be erected on the banks of the Delaware, near Trenton, or of Potomac, near Georgetown, provided a suitable district can be procured on one of the rivers as aforesaid for a Federal town, and that the right of soil and an exclusive or such other jurisdiction as Congress may direct, shall be vested in the United States.”

The resolution, as finally adopted, provided for the selection of the site on the banks of the Delaware. Subsequently, dissatisfaction arose at this selection of the permanent residence, and a modification was proposed. This modification provided for the erection of other and additional buildings “at or near the lower falls of Potomac, or Georgetown.” Had this proposition of two sites for the “Federal town” been adopted, the question of a “summer capital” for Congress might have been settled.

During the remainder of 1783 and in 1784 the question of the permanent residence was brought up at intervals. On Thursday, December 23, 1784, an “ordinance” was passed by the Continental Congress appointing three commissioners to select the site on the Delaware River and authorizing them “to purchase the soil, or such part of it as they may judge necessary,” and to build on it a “Federal house” for Congress, a house for the President and houses for the Secretaries of Foreign Affairs, War, Marine, Treasury and for the Secretary of Congress. Early in 1785 there was some discussion of this matter, and commissioners were elected to carry into effect the terms of this ordinance.† The Journal does not show that any further proceedings were had under this ordinance, or that any action was taken by the commissioners.

On May 10, 1787, a motion was made that the Continental Congress adjourn to meet at Philadelphia, and it was held to be out of order, as being contrary to the ordinance of December 23, 1784. On this day, May 10, 1787, a motion was made by Mr. Lee, of Virginia, that the necessary public buildings for the accommodation of Congress be erected at Georgetown, on the Potomac

* IV Journals, pp. 286, 288.
† IV Journals, p. 297.
‡ IV Journals, p. 468, of February 10, 1785.
River, "so soon as the soil and jurisdiction of the said town are obtained." This motion failed of passage."

In the meantime, the weakness of the Confederation and of the Continental Congress had become apparent. In January, 1786, the Legislature of Virginia appointed commissioners and invited the other States to appoint representatives to confer on the subjects of trade and the adoption of a uniform system of commercial relations. Commissioners from the States of New York, New Jersey, Pennsylvania, Delaware and Virginia met at Annapolis, Md., in December, 1786. A report drawn by Alexander Hamilton was unanimously adopted, which declared that it was necessary to call a general convention of delegates from all of the States to consider such plans as might render "the Constitution of the Federal Government adequate to the exigencies of the Union." Copies of this report were forwarded to the several States and to the Continental Congress. The Continental Congress on February 21, 1787, passed a resolution providing for the calling of the Constitutional Convention on the second Monday in May, 1787, in the city of Philadelphia, "to revise the Articles of Confederation." The Constitutional Convention assembled in May in Philadelphia, and on September 17, 1787, the Constitution was adopted and signed and sent to the several States for ratification by the people. The ratification of New Hampshire on June 21, 1788, the ninth State, completed the number necessary for the establishment of the Federal Government under that instrument. On March 4, 1789, the new Government of the "more perfect union" went into operation.

**PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION**

When the Constitutional Convention was first organized several plans of a constitution for a federal government were proposed. The delegation from Virginia, through Edmund Randolph, Governor of Virginia and a delegate, presented the Virginia plan, which had been drawn up by James Madison. This Virginia plan was used by the convention as the basis for their subsequent discussions, and out of it the completed instrument was evolved. It was on account of his authorship of this plan that James Madison has been called "The Father of the Constitution." 10 The Virginia plan contained no reference to a place for the seat of Government.

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The Diary of the Debates in the Constitutional Convention kept by James Madison shows that on July 18, 1787, a reference was made by George Mason to the location of the seat of Government "in some one State." A more extended reference to a permanent seat for the Federal Government appears in the proceedings of the session of July 26th:"

"Col. Mason observed that it would be proper, as he thought, that some provision should be made in the Constitution agst. choosing for the seat of the Genl. Govt. the City or place at which the seat of any State Govt. might be fixt. There were 2 objections agst. having them at the same place, which without mentioning others, required some precaution on the subject. The 1st was that it tended to produce disputes concerning jurisdiction. The 2d & principal one was that the intermixture of the two Legislatures tended to give a provincial tincture to ye Natl. deliberations. He moved that the Comm. be instructed to receive a clause to prevent the seat of the Natl. Govt. being in the same City or town with the Seat of the Govt. of any State longer than untill the necessary public buildings could be erected.

"Mr. Alex. Martin 2ded the motion.

"Mr. Govr. Morris did not dislike the idea, but was apprehensive that such a clause might make enemies of Philda. & N. York which had expectations of becoming the Seat of the Genl. Govt."

The motion was subsequently withdrawn, apparently for the reason given.

On July 26, 1787, the Convention adjourned after having elected a Committee of Detail to draw up and report a constitution embodying the principal features of what had already been agreed. The Committee of Detail reported on August 6 a draft of a constitution and this draft, as subsequently modified, grew into the "Constitution of the United States of America."

No clause on the "seat of Government" was contained in the draft of August 6 as presented by the Committee of Detail. A reference, however, to the "seat of Government" arose in the discussion of one of the clauses of this draft dealing with the right of Congress to adjourn to a place other than that in which they were then sitting. This clause was brought forward into the Constitution. (Art. I, Sec. 5, Cl. 4.) In making up this clause on August 11, 1787."

32 Debates, etc., p. 332.
33 Debates, etc., p. 381.
"Mr. King remarked that the section authorized the 2 Houses to adjourn to a new place. He thought this inconvenient. The mutability of place had dishonored the federal Govt. and would require as strong a cure as we could devise. He thought a law at least should be made necessary to a removal of the Seat of Govt.

* * * * *

"Mr. Madison supposed that a central place for the seat of Govt. was so just and wd. be so must insisted on by the H. of Representatives, that though a law should be made requisite for the purpose, it could and would be obtained. The necessity of a central residence of the Govt. wd. be much greater under the new than old Govt. The members of the new Govt. wd. be more numerous. They would be taken more from the interior parts of the States; they wd. not like members of ye. present Congs. come so often from the distant States by water. As the powers & objects of the new Govt. would be far greater yn. heretofore, more private individuals wd. have business calling them to the seat of it, and it was more necessary that the Govt. should be in that position from which it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation. These considerations he supposed would extort a removal even if a law were made necessary. But in order to quiet suspicions both within & without doors, it might not be amiss to authorize the 2 Houses by a concurrent vote to adjourn at their first meeting to the most proper place, and to require thereafter, the sanction of a law to their removal.

The formal resolution providing for a permanent seat of Government was offered by James Madison on August 18, 1787. This resolution was one of a series and the clause relative to the power of Congress over the seat of Government was separate and distinct from that authorizing the securing of property for forts."

"To exercise exclusively legislative authority at the seat of the general Government, and over a district around the same, not exceeding square miles; the consent of the Legislature of the State or States comprizing the same, being first obtained."

* * * * *

"To authorize the Executive to procure and hold for the United States landed property for the erection of forts, magazines and other necessary buildings."

14 Debates, etc., p. 420.
The resolution containing these clauses was referred to the Committee of Detail together with a resolution of Mr. Pinckney on the same subject:

"To fix, and permanently establish, the seat of Government of the United States, in which they shall possess the exclusive right of soil and jurisdiction."

The Committee of Detail apparently made no report on these resolutions of Madison or Pinckney. However, on September 5, 1787, the Committee of Eleven, consisting of one member from each of the eleven States then present in the Convention, reported relative to this matter:

"(4) Immediately before the last clause of Section 1, Article 7, insert: 'To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of the Legislature become the seat of the Government of the United States and to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings.'

This report was immediately taken up by the Convention. So much of this fourth clause as related to the seat of Government was agreed to without objection. The latter part of the clause was modified:"

"Mr. Gerry contended that this power might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the general Government.

"Mr. King thought himself the provision unnecessary, the power being already involved, but would move to insert after the word 'purchased' the words 'by the consent of the Legislature of the State.' This would certainly make the power safe."

This portion of the clause relative to the purchase of land for forts was thereupon amended in accordance with this suggestion.

A Committee of Style was appointed by the Convention and was charged with the duty of casting the Constitution into its final form. This committee made its report to the Convention on September 12, 1787, and Clause 18 of Section 8 of Article 1 provides in identical terms with the present Constitution for the seat

18 Debates, etc., p. 512.
19 Debates, etc., p. 513.
of Government and for the purchase of land for forts. One of the previous clauses of this article was subsequently dropped by the Convention, and Clause 18 became our present Clause 17, Section 8, Article 1.

The Pinckney Draft

Charles Pinckney, a delegate to the Constitutional Convention from South Carolina, presented to the Convention on May 29, 1787, a draft of a federal government, and it was referred to the Committee of the Whole on the same date with the Virginia plan.17 No copy of the Pinckney plan was made at the time, nor was it debated or used in the Convention. On December 30, 1818, Charles Pinckney, in a letter to John Quincy Adams, then Secretary of State, and in response to a request from him, forwarded what purported to be a copy of his original draft of the Federal Government.18 In Article VI of this draft, so contained in this letter, there were two clauses of interest in the present discussion. One of these clauses provided that the "Legislature of the United States" should have power to provide necessary dockyards and arsenals, and the other clause provided for the establishment of a seat of Government and to exercise exclusive jurisdiction over these places.19 Apparently through mistake Charles Pinckney forwarded to the Secretary of State a copy of notes on the report of the Committee of Detail of August 6, 1787, and not a copy of his original draft of a Federal Government. A reconstructed draft of the Pinckney plan would indicate that neither of these clauses relative to dockyards and arsenals or to the seat of Government were included in the original plan.20

Proceedings in State Conventions

The Constitution as adopted by the Convention was sent to the various States for ratification. In the five volumes of Elliott's Debates are collected various documents relative to the Constitutional Convention and extracts from the discussions in the ratifying conventions of the States. In many of the State conventions there was serious opposition to the adoption of the Constitution, based on the fear that too great and unrestricted powers had been granted to the Federal Government. Among

17 Debates, etc., p. 26 and footnotes.
18 Debates, etc., pp. 596-607 and footnotes.
20 Debates, etc., p. 596 and footnotes.
the powers so criticised was that of exclusive legislation over the "federal town."

Mr. G. Livingston, of New York, is quoted at length in Volume II of the Debates (page 287):

"What will be their (i.e. Congress) situation in a Federal town? Hallowed ground! Nothing so unclean as State laws to enter there, surrounded, as they will be, by an impenetrable wall of adamant and gold, the wealth of the whole country flowing into it. * * * Their attention to their various business will probably require their constant attendance. In this Eden will they reside with their families, distant from the observation of the people. In such a situation, men are apt to forget their dependence, lose their sympathy and contract selfish habits."

One of the criticisms was that Congress might be tempted to make of the Federal district a "City of Refuge" and shelter for offenders from State laws. Arguments similar to these made a deep impression on the New York convention. Attached to their ratification of the Constitution are a series of amendments which they enjoined their representatives in Congress to exert their influence to have adopted. One of these amendments provided that the right of Congress over the seat of Government

"Shall not be so exercised as to exempt the inhabitants of such district from paying like taxes, duties, imposts and excises as shall be imposed on the other inhabitants of the State in which such district may be; and that no person shall be privileged within the said district from arrest for crimes committed or debts contracted out of the said district."

In the Virginia convention this question of the exclusive jurisdiction of Congress over the seat of Government was warmly debated. It was urged that Congress might give exclusive rights of foreign trade to merchants in this district.2 Patricia Henry and others "entertained strong suspicions that great dangers must result" from the grant of this power.3 James Madison, who had introduced this resolution in the convention, could not apprehend any great danger from the grant of exclusive legislation over such a small area, whereas, he thought that this power was necessary to protect Congress from insults and undue influence of a particular State.4 Edmund Pendleton, the president of the Virginia con-

1 II Elliot's Debates, p. 330.
2 III Elliot's Debates, p. 291.
3 Id. p. 436.
4 Id. p. 433.
CONSTITUTIONAL CONVENTION OF 1787

vention, thought that this clause gave Congress power only over the local police." When the Virginia convention ratified the Constitution they proposed a number of amendments, one of which provided that the exclusive power of Congress over the Federal town "shall extend only to such regulations as respect the police and good Government thereof." 

Apparently no thought was given to the national political situation of the inhabitants of the ceded district or districts. A reference, however, to this matter, is found in the address of Mr. Iredell in the North Carolina convention:

"They (i. e. Congress) are to have exclusive power of legislation—but how? Wherever they may have this district, they must possess it from the authority of the State within which it lies, and that State may stipulate the conditions of the cession. Will not such State take care of the liberties of its own people?"

The State of North Carolina did not ratify the Constitution until November 21, 1789, over a year after it went into effect.

It may be observed that neither of the Legislatures of the States of Maryland or Virginia in ceding the District of Columbia to the United States made any reservations covering the political rights of the inhabitants."

THE FEDERALIST

During the campaign for ratification of the Constitution there appeared the series of articles now collected in "The Federalist," which discussed the more important clauses of this instrument. The clause relative to the permanent seat of Government was considered of sufficient importance to warrant comment. In "The Federalist," Article No. 43, James Madison set out the reasons for this grant of power to Congress:

"The indispensable necessity of complete authority at the seat of Government carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general Government on the State comprehending the seat of the Govern-

* Id. p. 439.
* Id. p. 660.
* IV Elliot's Debates, p. 219.
ment, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government and dissatisfactory to the other members of the confedency. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the Government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the Government, as still further to abridge its necessary independence. The extent of this Federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use, with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have their voice in the election of the Government, which is to exercise authority over them; as a municipal Legislature for local purposes, derived from their own suffrages, will, of course, be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated."

Apart from the wording of the Constitution itself, this article is the most important document dealing with the character and extent of the jurisdiction exercised by Congress over the District of Columbia. The author, James Madison, was a member of a committee of the Continental Congress, which considered this question as early as 1783. As a deputy from Virginia, James Madison proposed this very clause and took part in the debates of the Constitutional Convention and of the Virginia State convention. He was also one of the signers of the Constitution in 1787, and later became the fourth President of the United States.

The first part of the article deals with the national interests involved in the selection of a permanent seat for the Federal Government. Of course, the "indispensable necessity of complete authority" of a Legislature at its seat of Government, had reference to the authority of the States under the Confederation, as contrasted with that exercised by the Continental Congress. *No Legislature of any State of the Union, nor that of any modern nation, has ever exercised the power of exclusive legislation over its seat of Government in the absolute manner in which Congress legislates over the District of Columbia. Nor was it ever in-
tended by our forefathers that Congress should forever keep these inhabitants in perpetual political servitude.

The national reasons for the erection of a Federal district were the principal ones urged in support of this clause. There were two of these reasons—a necessity of Congress for protection and a desire that Congress should be free from any imputation of undue influence on the part of a State.

The tremendous growth of Federal power and authority has completely eliminated both of these original reasons. The Federal Government no longer calls upon the militia of a State for protection in ordinary times. The situation is now reversed. It is the State that calls for Federal troops when a serious outbreak has occurred. The Federal Government has become sufficiently strong to protect its deliberations, officers and property wherever held or located—whether it be on a Government reservation, in a Federal courthouse or on ground owned by a State."

Equally groundless at the present time is the fear that a State might unduly influence the deliberations of Congress if the Federal city were located on land owned by such State. The States are no longer supreme, even in matters of local concern. Modern means of rapid communication and transportation, together with amendments to and constructions of the Constitution, have swept away State boundaries and have knit firmly together the ever-growing nerves and sinews of Federal authority. The Federal Government has grown beyond the influence of any particular State and the deliberations of Congress sitting in a State would be as free and untrammelled as in the present District of Columbia.

The serious opposition to the adoption of the Constitution came "entirely through fear of what might result from the exercise of the powers granted to the Central Government." No other or further powers were intended to be granted to Congress except such as were necessary for the proper functioning of national life—only those powers necessary for the preservation of the Union. The Constitution created the "Federal town" to protect the newly formed Government. The necessity for this protection having passed away, there exists no valid reason why the people of the District of Columbia should be deprived of their right of representation, simply because it is more "convenient" for Congress to rule as if in a sanctuary all their own.

\(^{29}\) Re Neagle, 135 U. S. 1.
\(^{30}\) Mr. Justice Brewer in opinion of Court in South Carolina v. U. S., 199 U. S. 437.
The latter part of the article in "The Federalist" is directed to the individual needs of the inhabitants. The original owners of property in the district to be ceded were expected to find "sufficient inducements of interest" of a financial character to obviate any objections to the cession. Local suffrage would be granted them as a matter of course, and their other rights would probably be protected by the compact of cession of the State.

It has been often said that democracies are ungrateful. The "sufficient inducements of interest" turned out to be vain illusions. The final plans of the city of Washington embraced about 6,111 acres of land out of the total acreage of the District of Columbia. All of this was ceded free of charge to the United States, and of it the United States took for streets, avenues and reservations about 4,147 acres. The remaining 1,964 acres were laid out into building lots and these lots were equally divided between the original proprietors and the United States. These proprietors, therefore, had returned to them only some 982 acres, which constituted about one-sixth and one-seventh of the land originally surrendered. The lots taken by the United States were subsequently sold to individual purchasers, the proceeds being used for the erection of public buildings and little, if any, for the improvement of streets. This conveyance of land was made by the proprietors to the United States in consideration of the great benefits they expected to derive, as it was thought that the location of the Federal city would more than compensate for the reduction in their holdings of property.

Instead of affluence from the location of the "Capital City" in their midst, many of the original proprietors, through no fault of their own, were brought to financial ruin. Daniel Carroll was one of the original proprietors and owned the land on which the White House and Washington Monument now stand. In a letter to the Mayor of Washington dated July 24, 1837, he said:

"In answer to yours, I fear the deeds will fully express the relinquishments of rights in the streets to the Government. I nevertheless perfectly remember that the general opinion was that so great was the gift that the citizens would never be subject to taxation for the improvement of the streets—having relinquished every alternate lot to the Government. * * * After nearly half a century the result is now fully known; the unfortunate

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31 Report of Judiciary Committee, June 1, 1874. H. R. 627. 43d Congress, 1st Session.
CONSTITUTIONAL CONVENTION OF 1787

Proprietors are generally brought to ruin, and some with scarcely enough to buy daily food for their families. The subject is so truly frightful to me that I hate to think of it, much less to write of it."

Local suffrage was held out to the inhabitants to silence objection on that score. From 1800 to 1874 the local affairs of Washington city and of the remainder of the District were, in general, managed by local officials elected by the people of the city and District. Since 1878 the city and District have been governed by a board of three commissioners appointed by the President and the inhabitants have no voice or vote in their choice nor in local or national affairs.

Truly, it is a remarkable situation! The property of the original proprietors is coaxed away from them by vain illusions which ruin them financially. The later inhabitants are deprived of all political rights, and one of the grounds urged is that the gift of land by the original proprietors forever carried with it the right to govern the District without regard to the wishes or votes of the inhabitants, just as if the District were "conquered territory."

Porto Rico, conquered from Spain and composed in large measure of an alien population, is accorded territorial rights and a delegate in Congress. In fact, a strong party in the island is urging admission to the Union as a State. The District of Columbia, freely given to the Nation and composed of American citizenry of the highest type, is denied all participation in national politics or in the management of its local affairs.

Local Self-Government

It has sometimes been stated that the object for which the District of Columbia was created was to put the local Government under the control of Congress. It is apparent, however, that the purpose of the creation of a "Federal town" was solely to protect and preserve national interests. The local rights of the inhabitants would not be affected, "as a municipal legislature for local purposes, derived from their own suffrages, will, of course, be allowed them." These words in "The Federalist," supra, coming from James Madison, the author of the clause in the Constitution and one of the great expounders of its terms, must be considered of binding force. Local self-government was promised to the inhabitants as a condition of the cession, and there was no intention to deprive them of that right.

It is evident that Congress has no interest in the "local affairs" of the District of Columbia. Congress is not peculiarly concerned with the laws of the District relating to contracts, nor to negotiable instruments, nor to the descent and distribution of decedent's estates, nor to the organization and control of corporations, nor to any local matters. The interest of Congress relates principally, if not exclusively, to the protection of Federal deliberations and property and to the proper expenditure of public funds.

It is not necessary that 437,571 people be kept in a position of political slavery to further either of these objects. A Federal marshal can protect a Federal official even in a State.33 United States troops can surround and protect any Government property endangered by disorder, whether it be located in a State or on a United States reservation. Public funds can be distributed through a Federal disbursing officer. All of these matters can be provided for without conflict with local or national suffrage in the State of Columbia. Through reservations in the enabling act admitting the State of Columbia to the Union, all essential national interests can be preserved. Indeed, Congress can retain jurisdiction over the public buildings and grounds in the city of Washington just as it does over the Government reservations in the States.

The District of Columbia has today a larger population than each of the seven States of Arizona, Delaware, Idaho, Nevada, New Mexico, Vermont and Wyoming and possesses all of the other qualifications of statehood. The national interests no longer require that the "Federal town" should be entirely dependent upon the will of Congress, without voice or vote of its own. The inestimable right of every American community is self-government, both State and Federal. No amendment to the Constitution is necessary to bring about this result in the District of Columbia. The State of Columbia can be formed by a simple act of Congress, with the consent of the Legislature of the State of Maryland.

**The Cession By Maryland**

The District of Columbia was originally formed out of land ceded to the Federal Government by the States of Maryland and Virginia, to "become the seat of Government of the United States." The land so ceded by Virginia was returned to that State by an act of Congress of July 9, 1846. (9 Stats. 35, 1000.) The remaining

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33 Re Ncagle. 135 U. S. 1.
area of about seventy square miles and constituting the present District of Columbia consists entirely of the land ceded by the State of Maryland. This land was offered to the Federal Government by Maryland under date of December 23, 1788, and its cession was confirmed by the act of the General Assembly of that State on December 19, 1791. It was provided in clause 2 of the later act:

"That all that part of the said territory called Columbia, which lies within the limits of this State, shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eight section of the first article of the Constitution of Government of the United States."

Of course, the reference to the "eight section of the first article" of the Constitution was to clause 17, by which Congress exercises the power of exclusive legislation over the District for the seat of Government.

In one sense the grant of this "full and absolute right and exclusive jurisdiction" may be considered as being so complete as to give Congress authority to do with the District of Columbia as it sees fit, even to the erection of the State of Columbia. If this construction of the terms of the grant is the proper one, Congress can erect the State of Columbia by its own act alone and without reference to the consent of the Maryland Legislature. The better opinion would probably hold, however, that where land was ceded to Congress for the seat of Government, such land could not be used for another purpose or conveyed to another State without the consent of the parent State.

The United States Supreme Court has distinctly held this proposition to be true in regard to land taken for a military reservation.\footnote{Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 541.}

"It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general Government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those pur-
poses; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant for the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State."

It should be noted that Congress exercises "like" jurisdiction and authority both over the District of Columbia and over places purchased by the consent of a State for forts or military reservations. These several grants of authority are contained in the same clause in the Constitution (Art. I, Sec. 8, Cl. 17).

It can, therefore, be said that the weight of reason and authority is in favor of the proposition that the consent of the Maryland Legislature is necessary for the erection of the State of Columbia. And, of course, the District of Columbia could only be returned to the State of Maryland, that is retro-ceded, upon the formal consent of the Legislature of that State.

In Constitutional days it was suggested that the State ceding the land for the "seat of Government" would insist upon proper provision being made for the rights, political as well as civil, of its citizens in the ceded territory. Had the citizens of Maryland realized that they were consigning to perpetual political impotence a growing city within their boundaries of over 430,000 inhabitants, there would unquestionably have been some stipulation made for national suffrage. Unfortunately, the number of inhabitants in the ceded districts was comparatively small, so that no consideration was taken of the political rights of these citizens of Maryland.

Justice Demands Statehood

These extracts from the proceedings of the Constitutional Convention, of the State conventions and from the "Federalist" show that there was no design to create a separate and independent political area forever under the jurisdiction of Congress. The Continental Congress, it is true, had no fixed place of abode and possessed no right of jurisdiction over the place where it held its sessions. It was, however, the weakness of the Continental Congress and not its location that made it liable to insults and
outside influence. This clause in the Constitution was designed to erect a wall around the newly formed Government until it could stand alone. The days of infancy are over and Congress no longer needs to rely upon its isolation as a protection.

The population of the District of Columbia by the census of 1920 is 437,531. In 1790 this number exceeded the population of any State in the Union, except the State of Virginia. The State of Virginia in 1790 had a population of 747,610, while the next State in size, Pennsylvania, had a population of only 434,373. New York State had a population of 340,120.

It is inconceivable that our Revolutionary fathers, those passionate lovers of liberty, intended permanently to disfranchise by this clause in the Constitution and by inference only an approximately larger number of free-born, native American citizens than were then living in each of the great States of New York and Pennsylvania.

The great builders of our framework of Government did not provide that the citizens of the District of Columbia should be forever without the right of national suffrage. This deprivation of political rights was a consequence which was not foreseen by them at the time and was not the result of deliberate consideration. As long as the population of the District of Columbia was small, there was no great necessity for national representation or local self-government. Now, the size and importance of the District of Columbia make it imperative to grant the right of representation to the citizens—to erect the State of Columbia.
INTERNATIONAL LAW AS LAW

The idea underlying this volume is that international law is part of the English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic. Municipal law it was in England; municipal law it remained and is in the United States. No opinion is expressed on the vexed question whether it is law in the abstract; our courts, State and Federal, take judicial cognizance of its existence, and in appropriate cases enforce it, so that for the American student or practitioner it is domestic or municipal law.

If English and American courts of justice enforce international law, and have repeatedly done so in the past two centuries, there must be, and, in fact, there is, a mass of judicial decision on this subject. There should be the same reason for respecting precedent in this as in other branches of the law; and beyond doubt in suits involving a question of international law a case in point is cited and followed, unless overruled or distinguished from the case under consideration. Judicial decisions, then, are an important and indispensable source of authority in international law.

It is the judgment that is authoritative, although the obiter dictum of a distinguished judge is entitled to respect. The opinion of a textbook writer is valuable; but, like the dictum, it is not in itself law. It is at best a statement of the underlying principle of the law or a digest or summary of cases on the subject with which the textbook deals. The opinions of diplomats likewise carry great weight; but the diplomatist does and can not consider the question at issue with the impartiality of a judge, for he is influenced by the interests of his country. * * *

The statement that international law formed a part of the common law of England, and that as such it passed to the United States with that law of which it formed a part, can be based upon

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1 Preface to a forthcoming collection of cases on international law, to be issued by the West Publishing Co., St. Paul, Minn.

The first three paragraphs are retained from an introduction contributed to a new edition of Freeman Snow's Cases and Opinions on International Law, published in 1903.
judicial decision before the separation of the American colonies from the mother country, upon the authority of the accredited commentator upon the Laws of England, the seventh edition of whose work, containing this statement, appeared in the fateful year of 1775, and upon the authority of Alexander Hamilton, whose opinion as to the law of his country would seem to be conclusive. Thus, Lord Chancellor Talbot was reported by Lord Mansfield to have "declared" in Barbuit's case, "a clear opinion 'that the law of nations, in its full extent, was part of the Law of England.'"

There can be no doubt about Lord Talbot's opinion, as Lord Mansfield added that he was "counsel in this case" and that he had "a full note of it."—Triquet v. Bath, 3 Burrow, 1478, 1482 (1764).

Lord Mansfield himself held, in his own person, in the case of Heathfield v. Chilton, that "the privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England."—Heathfield v. Chilton, 4 Burrow, 2016 (1767).

His Lordship was familiar with the law of nations at an early period of his career, for the Barbuit case, in which he appeared as counsel, was decided in 1737. As Solicitor General he put his name, some sixteen years later, to the declaration that the law of nations is "founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage"—a definition quoted with approval by Mr. Elihu Root, as leading counsel for the United States in the North Atlantic Fisheries dispute, decided by a tribunal of The Hague in 1910.

Sir William Blackstone stated, as a matter of course, in the fourth book of his Commentaries, published in 1765, that "the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."

Sir William Blackstone was also familiar with the law of nations, because the year before this part of his Commentaries was published he had appeared as leading counsel for the plaintiff in the case of Triquet v. Bath. Indeed, in the course of his opinion Lord Mansfield took occasion to say that "Mr. Blackstone's principles are right."

In the letters of Camillus, published in 1795, Mr. Hamilton maintained that an affirmative answer should be given to the
question which he himself put: "Does this customary law of nations, as established in Europe, bind the United States?"

In behalf of the affirmative answer he advanced the following reasons, which he himself called conclusive:

"1. The United States, when a member of the British Empire, were in this capacity a party to that law, and not having dissented from it, when they became independent, they are to be considered as having continued a party to it.

"2. The common law of England, which was and is in force in each of these states, adopts the law of nations, the positive equally with the natural, as a part of itself."

The fact that later judges may be inclined to consider Lord Mansfield's statement as too sweeping can not detract from the binding effect at the time of its delivery of the unanimous decision of the court over which he presided. But, however Lord Mansfield may have fared at the hands of his successors, Hamilton's authority is unshaken. For did not Mr. Justice Gray say, only a few years ago, in delivering the opinion of the court in the case of The Paquette Habana, decided in 1899, and in language which is a paraphrase, if it can not be considered as a direct quotation from Sir William Blackstone, that "international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."—175 U. S. 677, 700, 20 Sup. Ct. 290, 44 L. Ed. 320 (1899).

The late Sir Henry Maine spoke as an historian, as well as a man of affairs, when he said, in his lectures on International Law, delivered in 1887, before the University of Cambridge: "The statesmen and jurists of the United States do not regard International Law as having become binding on their country through the intervention of any Legislature. They do not believe it to be of the nature of immemorial usage, 'of which the memory of man runneth not to the contrary.' They look upon its rules as a main part of the conditions on which a State is originally received into the family of civilized nations. This view, though not quite explicitly set forth, does not really differ from that entertained by the founders of International Law, and it is practically that submitted to, and assumed to be a sufficiently solid basis for further inferences, by governments and lawyers of the civilized sovereign communities of our day. If they put it in another way it would probably be that the State which disclaims the authority
of International Law places itself outside the circle of civilized nations."—International Law, London, 1888, pp. 37, 38.

It is to be hoped that the views attributed to the statesmen and jurists of the United States may ultimately prevail in all parts of the world. In the editor's opinion they will because they should. If he is mistaken in this, he nevertheless prefers to be generously wrong than to be niggardly right.

International law seems to have stood fairly well the strain of war. It is no doubt true that the belligerent practices of nations have not squared with their peaceful professions. Nevertheless the law of nations emerges from the World War as a system with foundations unimpaired, although the structure bears outward marks of violence and unsightly scars, which only time can cover. The prediction, however, of the late William Edward Hall, set out at length in the preface to the third edition of his Treatise on International Law, dated August 1, 1889, exactly twenty-five years to the day before the outbreak of the World War, has stood the test of what is commonly called the greatest of all wars.

"Probably in the next great war," he said, "the questions which have accumulated during the last half century and more will all be given their answers at once. Some hates, moreover, will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existence will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that, if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law. In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscience. On the whole, the collective seems to exert itself in this way more surely than the individual conscience; and in things within the scope of international law, conscience, if it works less impulsively, can at least work more freely than in home affairs. Continuing temptation ceases with the war. At any rate it is a matter of experience that times in which international law has been seriously disregarded have been followed by periods in which the European conscience has done penance by putting itself under straiter obli-
gations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist."

Whether we admit it with open eyes, or ostrich-like bury our heads in the sand, there is such a thing as justice, independent of the State, above it and beyond it, although the formulation of its principles may change according to time, place and circumstances. This is not the language of mere theory, or of idle speculation. It is apparently the view of the Supreme Court of the United States. As late as 1880, that august tribunal, "speaking of the universal law of reason, justice and conscience, of which the law of nations is necessarily a part," quoted with approval, the language of Cicero: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all time will be, eternally and immutably the same."

From this opinion, delivered by Mr. Justice Swayne, on behalf of the court, in the case of Wilson v. McNamee, 102 U. S. 572, 574, 26 L. Ed. 234, there was no expression of dissent on the part of the members of that august tribunal.

From this justice nations must derive their rules of law. And this is so, although they may affect to consider themselves the source instead of the agent whereby the principles of justice, expressed and made visible in rules of law, enter the minds and the thoughts of men before they pervade the practice of nations.

The topics here selected are, in the editor's opinion, calculated to give the student a knowledge of the fundamental principles of international law, and the cases will, it is hoped, furnish him training in the discovery of those principles and in their application to the concrete problems of international life as they present themselves to courts of justice and to tribunals of arbitration.

The facts of the case may be new, the rule of law may seem to be new, and the decision is necessarily so; but the principle of justice which the rule of law announces is old. "For out of the old fields must come the new corn," as Sir Edward Coke says in his report of Calvin's Case, 7 Reports, 3 B. (1608).

To the same effect is the language of Sir William Scott, later Lord Stowell, which is sufficiently broad and comprehensive to
include future agencies, whether they operate under sea or in the air:

"I am warranted to hold, that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this court, that it is guilty of interpolations in the law of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances."—The Atlanta, 6 C. Rob. 440, 458 (1808).

And also from the bench a Chief Justice has more recently said:

"It was contended on behalf of the owners of the Prometheus that the term 'law,' as applied to this recognized system of principles and rules known as international law, is an inexact expression; that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations, inasmuch as there is no sanction for such law; that is to say, that there is no means by which obedience to such law can be imposed upon any given nation refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international—that is to say, binding upon all nations—by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law, because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that, because any given person or body of persons possessed for the time being power to resist an established municipal law, such law had no existence? The answer to such a contention would be that the law still existed, though it
might not for the time being be possible to enforce obedience to it."—Sir Henry Berkeley in The S. S. Prometheus, Supreme Court of Hongkong, 2 Hongkong Law Reports, 207, 225 (1906).

The knowledge thus acquired is the knowledge of law and the training obtained is the training in law. * * *

It is devoutly to be wished that members of the profession in foreign countries examine the decisions of their own courts, the awards of mixed commissions and sentences of arbitral tribunals in whose cases their respective countries have special interest, and produce collections of cases, not only for the benefit of the profession to which they belong, but also for the purpose of instruction in the law schools, universities, and other seats of learning in their respective states.

The many cases of foreign courts involving international law which have come to the editor's attention convince him that this can be done, and he had chosen not a few foreign cases for this collection. It seemed, however, better on the whole to confine the present work to the English-thinking world and to leave the selection of foreign cases to more competent hands.

If our friends in other parts of the world take kindly to the suggestion that they prepare collections of cases of an international character, the causes decided by courts which are foreign to them might in some instances predominate; but the collections would, nevertheless, be made up of adjudged cases. International law could then be taught quite generally from cases, and those selected would be the ones which appealed most strongly to the profession in each nation accepting and applying the law of nations, and which, in the judgment of competent persons, were best fitted for purposes of instruction in their various countries.

It needs but a slight familiarity with foreign cases to see how they are conditioned in form by local procedure and in substance by local law. The stream is indeed everywhere colored by the soil through which it reaches the sea, but the sea itself is international.

James Brown Scott.
BOOK REVIEWS

HAS THE UNITED STATES VIOLATED THE LAW OF NATIONS IN ITS RELATIONS WITH MEXICO, CUBA, SANTO DOMINGO AND HAITI?


INTERVENTION IN INTERNATIONAL LAW—By Ellery C. Stowell, author of the "Diplomacy of the War of 1914"; Washington, D. C., John Byrne & Co., 1921; pp. 458; Bibliography; Index.

HAS the United States violated the Law of Nations in its relations with Mexico, Cuba, Santo Domingo and Haiti? Dr. E. J. Dillon answers this question in the affirmative in his latest book. The 22 chapters of "Mexico on the Verge" are 22 counts in an indictment against the United States, covering 296 pages. The prosecutor is a journalist, an Irishman, educated at several European universities, who has been Professor of Comparative Philology, Sanskrit and Oriental History. He has traveled far, seen much and written copiously. He spent sufficient time in Mexico under the Carranza regime and later under Obregon's Administration to familiarize himself with conditions in the two periods. He has presented the contrast between the two with vividness, though not always accurately. The London Spectator says that he "might have stated his case at once more definitely and more discreetly. The evidence that he cites of alleged misdeeds in Haiti is taken from the most tainted sources in the American Press." Of Mexico's President, Dr. Dillon says:

"General Obregon is confronted with perplexing problems drawn from every conceivable sphere: from the domains of foreign policy, internal legislation, constitutional law, national economy, railways and waterways, labor, finance and the army. And some of these are uncommonly delicate. True, the new President is gifted with an unusual stock of common, or rather uncommon, sense, with the rare quality of leadership; and, although still young, has vast stores of experience to draw upon."

The problems confronting the new President are staggering:

"Of all the tasks awaiting General Obregon, that which will most severely strain his ingenuity and resourceful-
ness, is the transformation of the revolutionary republic with which the world has so long been acquainted into a pacific and well-ordered community. And it is by far the most urgent and momentous. Mexico must become an elective, law-abiding commonwealth on pain of extinction as a sovereign State. The alternatives are as certainly these as if fate had embodied them in a formal decree promulgated urbi et orbi."

"No Mexican whom I have met or heard of has discerned so clearly or defined so precisely the only helpful course of action open to his country. One of the aids to this discernment is the accurate perspective in which the new President visualizes the history of his native land and foreshadows its potential future. He is wont as we saw to contemplate Mexico as a part of the great human family which, although still in process of formation, may be looked upon already as a reality for all the purposes of a farsighted national and international policy. His mental picture of the country is not marred by the slightest tinge of that chauvinism, which inspires the writings and discourses of some of his countrymen. There is neither mistiness in his perception nor vacillation in his action."

"In a word, General Obregon keeps a death grip on a political faith calculated to awaken a response from spiritual depths never reached by any of his predecessors. His destestation of war as a satisfactory method of settling disputes is worthy of the most enthusiastic pacifist, and comes with immense force from the successful military leader, who put down anarchy and is thoroughly conversant with the generous selfishness and lofty altruism, which so often characterize the soldier in the field. Force, bloodshed and every kind of destructiveness are abominations to him. He sees in them the fetters that have kept his country from moving forward with the progressive races, and these from reaching still distant goals. And the lessons from his own experience, which he yearns to impress upon his fellow countrymen, is that respect for law, a certain degree of self-abnegation for the common good and the substitution of moral relationship in the dealings of man with man and nation with nation for the savage state of nature, constitute the only solid basis for that process of renovation, which is Mexico's last hope. On this foundation President Obregon is minded to build up his policy."

According to Dr. Dillon, conditions in Mexico under Obregon have so changed for the better, since the days of Carranza, that Obregon's Administration is now entitled, under International Law, to recognition by the United States, without conditions, but
“foreign relations really mean intercourse with the United States Government, and that connotes compliance with the principal demands of the American oil companies.”

In discussing the important question of the recognition of General Obregon’s Government by the United States, Dr. Dillon says:

“Two movements are at present afoot in the United States, which are carefully kept sundered there, but are merged together in the minds of Mexicans apprehensive of what the morrow may bring. The object of one is the re-establishment of official and friendly intercourse between the two republics, Mexico redressing her neighbor’s grievances and the State Department in Washington recognizing President Obregon’s Government. The ultimate goal of the other is much more comprehensive; it includes a complete rearrangement of the two countries reciprocal relations along the lines traced by the United States Senate for Cuba. And in the proposed treaty of commerce and amity Mexican statesmen discern the tell-tale nexus between the two. They apprehend that the condition officially put forward, which is essentially irrelevant to the question of recognition, is but the prelude to the unofficial scheme of which it vaguely sounds the keynote. The function of the one is to furnish the framework, that of the other to complete the fabric. Form plays an appreciable role in the first, substance monopolizes the second. International law should supply the motive power for recognition; public opinion, or what passes muster for that, will provide the stimulus for Cubanization. The United States Government confines itself to the actual in time and to the Mexican in space, whereas, the creators of public sentiment looking further ahead in both are formulating a modus vivendi for the future and for Latin-America generally. State sovereignty and its correlate duties toward the unhappy family of nations are the only postulates of the diplomatists.

“A specific politico-economic object, commonly known as the Cuban standard, floats before the imagination of an influential group of American business men and politicians. They maintain that for the United States Government to protect the rights of its citizens is a duty. With the oil companies, however, the rearrangement of reciprocal intercourse is an appetite and a somewhat voracious one. And against appetites as against passions, there are no arguments that carry. To fall in with the legitimate claims of the United States Government is President Obregon’s fixed resolve. To help, however indirectly, build up by a punitive treaty a bridge between
those claims and Cubanization is repugnant to him personally and beyond his powers constitutionally."

"The recognition of one government by another is hardly more than an implicit admission that the administration recognized does really represent the country, is authorized to act in its name and can be approached and dealt with as its trustees and mouthpiece. The theory, accepted and acted upon by other nations, is confirmed by international precedent."

"President Obregón's objections to a preliminary treaty are many and convincing. One of them is that it is a slightly disguised form of purchase money paid for recognition. Insistence upon it by the United States would be evidence that the Government, which the Mexican people regard as the repository of the sovereign rights of the republic, cannot be trusted even for a brief span of time. And true or false, nothing could well be more humiliating. Those manifestly are also the views taken by a number of sovereign States—among them Italy, Japan, Spain, Germany, Switzerland and the Argentine—which have already given recognition to the Obregón Administration in accordance with international usage. They implicitly hold that Mexico's difference with foreign countries can best be adjusted by diplomatic methods after recognition. And it is hardly too much to assert that Britain and France would likewise have recognized President Obregón if considerations of political expediency had not impelled them to refrain from weakening Washington's influence in Mexico by countering or checking her policy there, even when that policy is a flat negation of their economic interests."

"The insistence of the United States Government on a preliminary treaty means that recognition on the American Continent is become something wholly different from what it has been hitherto, and still is in the remainder of the world today. In international law it is no more than an implicit acknowledgment by one State that another State has a Government which duly represents it and exercises legal and valid authority within its frontiers. That and nothing more."

"What it amounts to is the one-sided promulgation of a principle new to international custom and tradition, which shall be applicable on the American Continent to Latin-American States and shall fit in with that new and comprehensive interpretation of the Monroe Doctrine, which has been advocated by Mr. Fall in his public utterances."

"With the praiseworthy intention of helping Mexico out of her difficulties Mr. Hughes, who seems to operate
with abstract principles in vacuo, has provided a lever for all those Mexicans and Americans who are working openly or covertly for the overthrow of the present Mexican Government. In his zeal for the defense of the rights of property, he is sapping the power of the only defenders of property in the republic. In the name of righteousness, he is unwittingly aiding and abetting the conspirators who are plotting to plunge the country in confusion and urging President Obregon to break his plighted word. On behalf of a great democracy he is forcing Mexico, by means of a financial and political boycott, to acquiesce in a treaty which it considers detrimental to its sovereignty. In these ways he has established a strong claim to be judged, not by what he is doing, but by what he would do.”

“What the American State Department, doubtless with the best intentions, asks is that General Obregon shall consent to a transaction which would brand himself and his administration as disingenuous or weak-willed, self-seeking men who inherited together with the liabilities of their predecessors their defects and vices. As the State Department was unable to trust Carranza’s pledged word, it argues that it can have just as little faith in Obregon’s emphatic assurances and it implicitly calls upon him constructively to admit that it is right by signing a document which would be superfluous on any other supposition and is humiliating and illegal on this. To contend that a treaty brought about under such conditions is not a humiliation of the entire Mexican people is to ignore the meaning of national dignity. Mexicans go further and assert that it is an attempt to goad the President into trampling on the laws of his country, which he has sworn to observe and enforce. That this would be the direct effect of compliance with the demand of the State Department is evident. It is a noteworthy phenomenon, we are further told, that an instigation of this demoralizing character should have found a place in the program of a republic to which is ascribed the future role of ethical guardian of the backward Latin-American peoples. If you want to shape a people’s conduct for the general good, you must appeal to it through creditable motives and key it up to commendable, not to blameworthy, acts. A President, who would openly qualify for his certificate as a good moral ruler by lawless deeds and downright perjury, would be a poor reformer for the ill-starred Mexican republic.”

“The fundamental law which the President has sworn to observe contains an article expressly withholding from him the right to conclude any such treaty as that proposed. If, therefore, he sets his hand to the
covenant on which the State Department insists, he is violating both the Constitution and his oath to observe it. There are doubtless ambitious men devoid of scruples who would pay even that price for power—the names of some of them have recently become public property—but President Obregon is not a member of the group. The inevitable effect of compliance with the State Department's demand would be to lower him to their level and his fellow-citizens naturally join him in resenting the attempt."

Dr. Dillon quotes with approval an article in the Mexican newspaper *Excelsior* of June 18, 1921.

"A Mexican press organ contributes data for an answer. 'In the United States,' it writes, 'there is much talk about a treaty, but seemingly no recollection of the circumstances that there is one actually in force today. It was signed by the two governments at the close of an unjust war in which the weaker was forced to surrender to the stronger one-half of its territory—a much harsher condition than any that was imposed by the victors on the vanquished after the four years' World War waged on the other shore of the Atlantic.'

"And it may not be amiss to recall to mind Article XXI of that treaty, which runs: 'If unhappily at some future time any disagreement should arise between the governments of the two republics respecting the meaning of any stipulation of this treaty, or any other aspect of the political or commercial relations of the two nations, the aforesaid governments in their name undertake to endeavor in the most sincere and strenuous manner to settle the differences and to preserve the state of peace and amity hereby established between the two countries, and to employ for this purpose reciprocal representations and pacific negotiations. And should they not succeed in coming to an agreement by these means, recourse will not on that account be had to reprisals, aggression or hostilities of any kind by one republic against the other until the Government of the country which deems itself aggrieved has considered ripely and in a spirit of peace and good neighborliness whether it would not be better to compose the disaccord by arbitration of commissioners appointed by both parties or by a friendly nation.'

"'And we might point out that this treaty was in force at the time when the military invaders landed at Vera Cruz and trod our territory on their so-called punitive excursions.

"And with all our blood transmuted into eloquence, we might exclaim: 'How is it possible for us to conclude a
treaty with a State which does not know how to respect a treaty?"

"'In what thrilling tones might we say: "The United States have taken part in a war against a people whose Government treated as mere scraps of paper the covenants which it had signed with various States. To Belgium, the mutilated nation, went out the sympathy of the whole civilized world, which unanimously condemned the conduct of the German Empire towards a weak neighbor, who took it for granted that the promise registered in a scrap of paper was binding on its honor. And for what purpose? In order that the republic of the North, which stood forth as the ally of right and justice, should treat its signature exactly as the German Empire had treated the scrap of paper which guaranteed Belgium's neutrality.'"

"'We might well say this and more.'" * * *

**Quod licet Jovi, non licet Bovi**

In his chapter entitled "The Fall From Grace in Haiti," the author makes copious extracts from the memoir presented on the part of the republic of Haiti to the State Department and to the Senate Foreign Relations Committee on May 5, 1921. In commenting on the charges made against the United States in this memoir, Dr. Dillon says:

"Seldom has such a tremendous indictment been framed against the official representatives of any great people in modern times." * * *

"And throughout the lugubrious document, which fair-minded American hope will bring about a thorough investigation, one is confronted with the ominous refrain: 'The American Government has never lived up to any of the agreements which it has solemnly entered into with regard to the Haitian people.'"

"It is easy to realize the effect which the warning note sounded by this historic memoir must have had on Mexicans who fancied they saw their own turn coming next. And all the Latin-American republics look with deep concern on the outcome of the Mexican situation, much as Ulysses regarded his plight in the cave of Polyphemus when his comrades were being devoured by the Cyclops one by one."

In his concluding chapter the author writes:

"While hoping to further American interests which he appears to have partly identified with those of the oil corporations, Mr. Hughes has failed to take due account
of those of humanity at large which occupy such a prominent place in his public utterances. This aspect of the American secretary's statecraft reminds one of what Turgot said of those who become the dupes of general ideas which are true because drawn from nature, 'but which people embrace with a narrow stiffness that makes them false, because they no longer combine them with circumstances, taking for absolute what is only the expression of a relation.' Their minds operate in vacuo."

"The North American statesman declares that he will recognize the Mexican Government only after it has given proof that it wields the power and possesses the will to fulfil its international obligations. Now, the only proof conceivable is the experiment, and Mexico is eager to make it. Mr. Hughes, however, declines to accept that and insists upon Obregon imitating President Wilson in Paris and signing a treaty which the nation will repudiate and which will have no more intrinsic worth in Mexico than that signed by the United States has had in Haiti."

"The scrap of paper doctrine is gall and wormwood to Mexicans, and if the Haitian memoir signifies anything, it cannot have a particular relish for the United States. Nor does Haiti offer the only example of the kind. The treaty of amity still in force between Mexico and her northern neighbor as we saw obliges the two contracting parties to refrain from having recourse to arms and to submit their differences to arbitration. Yet that solemn obligation did not prevent Mr. Wilson from despatching an army under General Pershing to the northern provinces of Mexico, nor Mr. Harding from sending recently two warships to Tampico, congruously with Senator Fall's recommenda-
tions to the Senate. The binding power of treaties was seldom less effectual than it is today." * * *

"Lastly, President Harding, through his chief secretary, Mr. Hughes, denies official recognition to President Obregon unless he first demonstrates that his word as President is indeed worthy of trust, and the only demonstration that will satisfy him consists in Obregon deliberately violating his oath as President and publicly violating the law which he solemnly swore to observe."

From the foregoing extracts it will appear that Dr. Dillon's book is a formidable indictment against the Government of the United States. He is careful to exonerate the people of this country. Every count, however, is obnoxious to demurrer. The author of the indictment is not a lawyer, least of all is he one familiar with the accepted principles of international law. Naturally, therefore, he is vague and uncertain in his charges. Apparently he
believes that there is no such thing in international law as a right of intervention; that every intervention is a hostile act, and therefore may be considered by the intervenee a just cause for war. This belief is founded on the assumption that one of a State's fundamental rights is the right of independence, and that, as intervention impairs or abridges independence, intervention in any form and at all times must be an international wrong. This assumption without limitations loses sight of the fact that, in international law, as in municipal law, every rule may have its exceptions and "exceptio firmat regulam in contrarium." A rule of municipal law is that all persons are free and have equal legal rights; but the exceptions that becomes the rule is that minors, spendthrifts, criminals and lunatics may be deprived of their freedom of action and contract in various degrees. So the rule of international law is that all States are independent, but the exception that becomes the rule is that a State that violates the law of nations may be restrained or coerced by intervention on the part of another State or by concerted action on the part of several States. As there are no tribunals to declare and enforce international law, each State must decide for itself what its general rules are and what are the exceptions to those rules. For example, there may be a right of intervention by one State in the affairs of another State to terminate or prevent another intervention, but the State making the second intervention has to determine the delicate question whether all the circumstances in each individual case establish the right. Most of the interventions of the United States in the affairs of the republics on this hemisphere have been for the purpose of preventing interventions by European powers, interventions that would have been disastrous to the intervenees and would have jeopardized the peace of the world. So long as we adhere to the Monroe Doctrine as our national policy, we must intervene to prevent interventions. And this is what we have done in the case of Cuba, Santo Domingo, Haiti and Mexico. In these and similar instances the United States has not violated the law of nations. On the contrary it has simply interpreted as a right what those writers who deny a right of intervention concede to be justifiable as a matter of policy. As Oppenheim tersely puts it, "the so-called doctrine of non-intervention, as defended by some writers who deny that intervention is ever justifiable, is a political doctrine without any legal basis whatever."

Opponents of the doctrine of intervention and antagonists of the Monroe Doctrine freely charge that these doctrines not only
have no legal basis, but that they are founded solely on the theory that might makes right; or that as W. G. Sumner alleges, they are but "a glib and convenient means of giving an appearance of rationality to an exercise of superior force." This statement of Mr. Sumner's, Dr. Dillon says, cannot be gainsaid. Unfortunately the supporters of these doctrines have not had always a ready and convincing reply to the charges so freely made against them.

A careful analysis of the fundamental character of international law will suggest a convincing answer. International law is the body of rules which States in the Society of Nations agree to observe in their relations with each other, and so far as practicable in their dealings with States that have not been recognized as members of that society. If a State that is a member of this international community fails to observe the law of nations, how shall it be dealt with? As there is no international force to compel obedience to the law, punish infringements thereof and enforce rights, each State may consider itself justified in maintaining its own rights, and furthermore must consider itself bound to aid in securing compliance with the law. The condition in international society today, so far as enforcing rights is concerned, is much the same as that which prevailed in early civil communities when the enforcement of customary laws was left largely to the individual. The strong man was able to assert and secure his rights. The weak man often failed. That is the defect in all primitive legal systems. That is the great defect in international law today. The enlightened sense of humanity demands that the strong States that are able to enforce the law shall so enforce it as not to impair the legal rights of the weaker States. It is clear, therefore, that the doctrine of intervention and the Monroe Doctrine are not based on the claim that might makes right, but on the only principle that gives to international law a living force, that might makes possible the enforcement of right.

In this strictly limited and just sense, intervention is a doctrine of superior force, for intervention, however clear the right to intervene may be, should never be undertaken without the power to make it a success. Intervention without such power is the madest act of which a State can be guilty. On the other hand intervention, in many cases for securing ultimate justice, is not a violation of international law, but is often the only method of enforcing that law.
Dr. Dillon seems to confuse the law relating to the recognition of a new State and the law relating to the recognition of a new Government in a State that is already a member of the international society. The recognition of a new Government is entirely within the discretion of the recognizor, and it is quite consonant with the principles of international law for the recognizor to insist on the fulfilment by the recognizee of specified conditions before recognition shall be accorded. Furthermore, each recognizing State, according to its relations, geographical, commercial and financial, with the recognizee, may make conditions precedent to recognition that differ from the conditions insisted upon by other recognizing States. In specifying its own conditions that must be fulfilled by the Obregon Government before recognition is accorded, the United States is acting within the accepted principles of international law.

Professor Stowell, in his latest book, sets forth the doctrine of dictatorial intervention as a legal right with admirable clearness and convincing logic. He bases the doctrine upon reason and effectively answers the arguments of the advocates of non-intervention. In the Society of Nations there is no organized constabulary, therefore "international law must depend mainly upon interposition, that is, the action of the separate States to secure redress for their own injuries. Whenever a separate State acts for this purpose, it will also vindicate international law, and help to secure for it the respect it deserves." * * * "Under present conditions the obligation to intervene for the vindication of the law cannot be made absolute, but must be left to the discretion of each State. Reasonable action by way of remonstrance and discrimination will generally be taken in support of the innocent, as opposed to the transgressor. Occasionally a Government will go further and intervene by force of arms for the vindication of the law. Such intervention is legal."

In 1904 President Roosevelt wrote: "Brutal wrong-doing or impotence, which results in the general loosening of the ties of civilized society, may finally require intervention by some civilized nation, and in the Western Hemisphere the United States cannot ignore its duty."

Why, under any circumstances, does intervention become the duty of the United States? Because the United States has the power to intervene successfully. Professor Stowell quotes a fine answer from Captain Mahan: "That the possession of power is a talent committed in trust, for which account will be exacted; and
that, under some circumstances, an obligation to repress evil external to its borders rest upon a nation, as surely as responsibility for the slums rests upon the rich quarters of a city." Such a responsibility rested upon the United States when it intervened in Cuba in 1898.

Professor Stowell's book covers, in five chapters, the subject of intervention in all its aspects. It is brief without being obscure, ambiguous or dry, and is rich in citations from writers of authority. His bibliography, covering 80 pages, is the most complete reference index to works on intervention now accessible. It contains a list of over 300 works, with descriptive notes to the more important ones. Professor Stowell's work is a most valuable and timely contribution to an exceedingly important branch of the science of international law. If Dr. Dillon would read, mark, learn and inwardly digest this book, he would change his views expressed in "Mexico on the Verge," unless he wrote not as a historian, but as an advocate.

The closing words of Professor Stowell's book deserve the widest possible circulation:

"For generations it has been the custom of governments to justify their recourse to force before their nationals, and it will be no small guarantee of the observance of the law when governments understand that their explanations and excuses must stand the test of reason—by which is meant unprejudiced examination of the alleged grounds of action in all the States of the world. Today, when the nations are so dependent one upon the other, and when all recognize the importance of insisting upon the respect for the law of nations, States will be quicker to intervene in vindications of their law than formerly they were. The motive-spring of this salutary action will ever remain enlightened public opinion in each State. As long as public opinion has this directing influence, the citizen himself must assume his part of the responsibility for the faithful observance of international law. To meet this responsibility fully he must be ready to commend his Government for its just action, to condemn it for its violations of international law and to lend his support for the adoption of a policy of enlightened self-interest which neither sacrifices essential interests to quixotic and ill-balanced impulses, nor yet is unmindful of the common interest of all the States to maintain peace and to preserve the health and rightful independence of each of the States separately, so that all humanity may continue uninterruptedly its march toward the goal anticipated by the poet:
Till the war-drum throbb'd no longer, and the battle-flags were furl'd
In the Parliament of man, the Federation of the world.
There the common sense of most shall hold a fretful
realm in awe,
And the kindly earth shall slumber, lapt in universal law.

Henry Sherman Boutell.

Georgetown Law School, Dec. 24, 1921.

The World War and International Law


The World War wrought havoc in the domain of international law, notably in the department of the law of war and neutrality. During the conflict there were many departures by the belligerents from the rules of warfare that had been considered by the Society of Nations as settled principles of international law at the opening of hostilities. To what extent are these departures from the accepted canons to be regarded as violations of law, and to what extent may they be held to have established new law? After every war since the Peace of Westphalia that ended the Thirty Years War in 1648, the quickened conscience of international society expressing itself in treaties, diplomatic correspondence, declarations of national policy, municipal law and the writings of international jurists, has condemned as infractions of the law the deviation by belligerents and neutrals from the rules of warfare expressly or tacitly agreed to before the outbreak of hostilities, and has sought to secure the acceptance of more humane, just and enlightened rules of warfare, and to establish international law upon a firmer and more enduring foundation.

From the Peace of Utrecht to the commencement of the War of 1914 there were two centuries of steady improvement in the character of international law. The international law of the Napoleonic wars was a more enlightened code than the one prevailing during the War of the Spanish Succession; while the one prevailing at the opening of the World War was far in advance of the accepted rules of a century earlier. The Declaration of Paris, the Geneva
Conferences, the Declaration of St. Petersburg and the Hague Conventions all reflected a determination on the part of the Society of Nations to lay down fixed and definite rules for the conduct of wars in accordance with the enlightened civilization of the age. Then came the World War, and the Central Powers—through the scrapping of treaties, the invasion of Belgium and violation of her guaranteed neutrality; the devastation of Northern France; the wanton destruction of architectural monuments, and literary and artistic treasures; the maltreatment of prisoners; their ruthless submarine warfare; the bombing of defenseless villages and countrysides and the murder of innocent women and children—went far toward the destruction of the very pillars on which international law rests.

Will Germany's attempt to condone her crimes prevail? Will her plea that in warfare *necessitas non habet legem* and that this maxim is the true and right guide of national policy and action be accepted by the civilized nations today and receive the calm approval of posterity? Assuredly not. Germany in the World War has been a breaker, not a maker of law. International law still lives and will continue to regulate the conduct of civilized nations in their dealings with each other in war as in peace. And there is hope that the German people, choosing their own government and rejecting the maxims and policies of autocracy, will bring the German State into harmonious relations with the other States that compose the family of nations under international law. It is encouraging to recall that it was a native of Germany who prepared for the United States the *Instructions for the Government of Armies of the United States in the Field* and embodied therein these sentiments, "The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers. * * * Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God." It was also a native of Germany who prepared for the British Government the body of enlightened rules of warfare, known as the Manual of Land Warfare, for the guidance of officers of his Majesty's army.

In August, 1917, Dr. A. Pearce Higgins wrote his preface to the seventh edition of W. E. Hall's Treatise on International Law. Writing in the midst of the World War he said: "The very
structure of the law of nations has been shaken to its foundations in this civil war among the Society of Nations, and there are those who would have us believe that international law has ceased to exist. I do not share this opinion, though I think that in many respects the future will reveal that important changes have taken place in certain departments."

For the past three years international society has been engaged in weighing the events of the late war and endeavoring to formulate anew the rules of war and neutrality to comport with changed conditions. In this work textbook writers have a two-fold task, to chronicle the events of the war, the employment of new agencies of destruction, the adoption of new methods of warfare and the departures by the belligerents from the established rules; and in the second place, to suggest and urge improvements in international law. So we find writers of authority bringing out new editions of their works that were published before the war. Of the treatises designed to cover the entire field of international law two of prime importance have just appeared. The seventh edition of the Manual of International Law, by M. Henry Bonfils, appeared in 1914 and covered 1,200 pages. The eighth edition of this exhaustive work has now been issued in two volumes of over 2,000 pages. The editor, M. Paul Fauchille, may, on account of the large amount of new matter introduced, be considered the author of this treatise. In England Dr. Lassa Oppenheim’s great work has appeared in a new edition greatly enlarged by the discussion of the complicated problems raised by the late war.

Some valuable books have been published since the war dealing with special departments of international law. Among the most important of these works must be placed the second edition of Hall’s “Law of Naval Warfare.” The first edition, published six months before the outbreak of the late war was, the author tells us, intended primarily to furnish in as concise a form as possible a summary of the rules of international law and British prize procedure, so far as they concerned naval officers in time of war. The present edition is similar in scope, but the new problems discussed have doubled its size. Like the earlier editions, this one divides the material into eleven chapters dealing respectively with Introductory Considerations, Outbreak of War, Mutual Rights and Duties of Belligerents, Treatment of Enemy Subjects, Rights and Duties of Neutral States, Restrictions on Neutral Commerce, Blockade, Contraband, Unneutral Service, Enemy Character, Visit and Capture, Prize Courts and Prize Proceedings.
The six appendices contain: British proclamation of neutrality, 1912, declaration of London and British orders in Council relating thereto, final British contraband list in the great war, maritime rights and reprisals in the great war, convention between the United Kingdom and France relating to prizes captured during the great war and orders in Council relating to naval prize.

In discussing the rules of warfare, the author says:

"Although international law cannot prevent war, it endeavors to regulate its conduct as much as possible by the provision of rules which have the general approval of civilization and so should have a reasonable prospect of being obeyed. The outbreak of war, therefore, sets up an entirely new condition of affairs, and brings into force an entirely different set of rules known as the rules of warfare. These rules are divisible into two main classes, namely, those governing the relations of the belligerents toward each other, and those called the laws of neutrality, governing the rights and duties of the belligerents with regard to the rest of the world."

"Only such modes of fighting should be prohibited as would meet with the overwhelming disapproval of civilization, or whose use could contribute nothing, or practically nothing, to the success of the campaign. A prohibition of the former class is that which forbids the slaughter of unresisting prisoners, even though their presence causes serious embarrassment to the captor. As an example of the latter class may be cited that forbidding the use of projectiles, such as explosive or poisonous bullets which cause unnecessary suffering without increasing the number of casualties; or again, that forbidding the bombardment of undefended coast town merely ad terrorem populi. If the prohibitions contained in the rules of war are governed by these principles, there remains no room for the doctrine of 'necessity knows no law.'"

Germany's violations of international law are clearly stated by Mr. Hall:

"In the war at sea the two main subjects of interest and controversy were the so-called blockade of the Central Powers by the Allies and the German submarine warfare. The former, as I hope the following pages will make clear, was a lawful and reasonable application of the historical principles of international law to modern conditions; it affected neutrals only in their pockets and their opportunities for making abnormal profits out of trading with our enemies. The latter was illegal and inhuman, inflicting upon neutrals cruel loss of life as well as property. At the beginning indeed, apart from mine-
laying, Germany conducted her war at sea with humanity and consideration for the lives of non-combatants and with some show of regard for the rights of neutrals. It was only later, and with obvious misgivings on political grounds, that she attempted to snatch victory from coming disaster by a deliberate crime against international law, perpetrated against the whole world."

"Submarine warships are normally to be regarded as having the same status in international law as that of any other type of warship, but their peculiar qualities and the use to which they were put by the Central Powers during the great war demand special consideration. The advantage of the submarine is its capacity to work in secret, a quality which will require to be considered again later in regard to the use which belligerent ships of war may make of neutral ports and territorial waters; its disadvantage is its weakness in comparison with other vessels of war and the difficulties which consequently beset its attempts to carry on war upon the enemy's commerce in accordance with the recognized rules of international law. It was these two qualities in the submarine which tempted the Central Powers to employ these craft in unrestricted warfare on Allied and neutral merchant ships. Their unsuitability for this warfare by lawful means was indeed put forward as an excuse for adopting unlawful means or for changing the law to suit the new type of vessel. There seems no reason whatever to admit this plea."

"However, even a restricted form of submarine warfare of this nature is clearly contrary to the universally accepted rules of international law and was incapable of achieving an effective blockade of the British Isles or compensating for Germany's lack of command of the sea. On the old pleas, therefore, that 'necessity knows no law,' the principle of prohibited zones was applied in a manner never hitherto contemplated, and all vessels therein were liable to ruthless destruction without regard to nationality and in defiance of the well-established rights of neutrals. If the theories put forward by the German Government are to be accepted, the whole law relating to contraband and blockade and visit and capture gradually built up for the protection of neutral commerce in time of war will be swept away. To go to the other extreme, as was suggested in some quarters after the armistice, and prohibit submarines altogether, is an equally unacceptable proposal. It is clear that, as in the case of mines, the weaker naval States would never consent to forego the right to employ such a useful defensive weapon as the submarine. Moreover, the idea of submersible warships is still comparatively new, and future developments may entirely change the aspect of this question. The only
reasonable attitude to adopt is to insist that such vessels shall be subject to the same rules of warfare as any other type of warship."

"In order to justify a bombardment the place attacked must be in some way actively hindering the attackers in the prosecution of the war, and it is clear that air raids conducted merely for the purpose of spreading panic and undermining the morale of the civil population have no sanction in international law."

"Firing on Paris with a long range gun, which could by no possibility be aimed with any degree of accuracy, and wandering at large over England at night dropping bombs on any large centre of population which came into view cannot possibly be justified merely on the ground that there was a hope and a chance of destroying something militarily useful. The military damage inflicted by the German raids was in fact infinitesimal, and could surely have been greater if the raiders had seriously confined themselves to an objective of that nature, and conducted their aerial operations in accordance with the principles of international law."

It is refreshing to find a writer of authority who condemns, without extenuation, the seizure by the United States and the Allies of the Dutch vessels in their ports during the World War. The extension by them of the Jus Angariae beyond the true principles of international law is dealt with by the author with independence of judgment and a high regard for international law as a scientific system of rules.

"In the case of the Dutch ships requisitioned by the Allies and the United States, there was no urgency for immediate defense against hostile attack, although one of the reasons for the requisition was to enable the vessels to be defensively armed against submarines, nor was there any sudden necessity requiring their employment for any purpose closely connected with operations of war; and, in spite of the arguments put forward in the memorandum sent to the Dutch Ambassador by the British Foreign Office, it does not seem to be in accordance with a reasonable interpretation of international law in this matter to admit that a general policy of requisition of neutral ships, which have come into belligerent ports in good faith and in the ordinary course of trade, can be justified on the mere ground of their general utility to a belligerent owing to a general shortage of tonnage consequent upon hostile activities against merchant shipping. If requisition is to be permitted on grounds as general as this, there does not appear to be any limit to the extent to which neutral ships may be appropriated, and it will
naturally follow that neutral governments will claim the
right to make corresponding requisitions of belligerent
ships in their territory as in the case of railway rolling
stock. Such a right has already been advocated by a
Chilean writer, not on this ground, but on the ground of
the general necessity with which a neutral State may be
confronted to provide in time of war for its sea-borne
commerce hitherto carried on in merchant ships belong-
ing to the nations at war and no longer able to operate for
fear of hostile capture or other reasons arising out of the
war. The right of angary is not to be regarded as an
absolute right, but as exercisable only under certain con-
ditions and with certain limitations, which should not be
only a 'very high degree of convenience to the belliger-
ent', but may perhaps be defined as follows:

"1. An immediate and urgent need must exist for the
property requisitioned, requiring its utilization forthwith
for defense against the enemy's forces or for the prosecu-
tion of some definite operation of war.

"2. Compensation must be paid in all cases, and such
property as is not destroyed must be restored as soon as
the need passed.

"3. No requisition of neutral property can take place
unless the property of the belligerent's own subjects is
equally subjected to appropriation so far as available and
of service."

While the Germans were the chief violators of the law in the
late war, we must admit that the United States and the Allies
neglected many opportunities to raise international law to a higher
level by declarations of principles and by practice; and not the
least of these was the opportunity to consign the Jus Angariae to
the same limbo with the Droit d'Aubaine and privateering.

In the earlier editions of his work, issued before the World War,
Dr. Oppenheim felt justified in asserting that this right of angary
"is now probably obsolete."
It would have been more in harmony
with the lofty pretentions of the Government of the United States
if they had assisted at the obsequies, instead of at the revival, of
this moribund rule of doubtful repute, under cover of which neutral
rights were violated with an assumed consciousness of exalted
rectitude. Prior to the entry of the United States into the war
the seizure of American vessels by Germany or by the Allies
would have been as strongly resented by the people of this
country as the appropriation of their ships was resented by the
Dutch, and the plea of the Jus Angariae as justification would
have been treated with contempt.
We are privileged today in witnessing the various forces that make international law actively engaged in formulating the international law of the future. In view of the sentiments expressed and the action taken by the Disarmament Conference, it is interesting to note that Fauchille, Oppenheim and Hall, among the leading writers, all agree that submarines should be subject to the same rules as other vessels of war. In the next war such acts as the sinking of the Lusitania, the seizure of the Dutch ships and the bombing of defenseless towns will be considered as illegal as the murder of the wounded and prisoners, and the poisoning of bullets and wells.

Henry Sherman Boutell.
RECENT LEGISLATION

THE REVENUE ACT OF 1921

The admittedly temporary solution of our national tax problem, submitted by the Sixty-seventh Congress, cited as the Revenue Act of 1921, was approved by the President on November 23, 1921, and became law as of that time except where effective dates were otherwise provided in the various titles and sections of the act. In the preparation of this legislation the proposed measure was entitled: "An Act to reduce and equalize taxation, to amend and simplify the Revenue Act of 1918, and for other purposes." This contemplated title epitomizes three popular conceptions of an ideal system.

1 The purpose of this note is merely to outline the more important modifications and innovations effected by this Act in the Federal internal revenue system. The theoretical principles and practical considerations underlying some of the changes made over the previous law (Revenue Act of 1918) are discussed, and probable interpretations ventured in a few instances. No pretense is made to an adequate or comprehensive treatment of a Federal measure of such proportions and complexity.


3 The Act as finally passed bears the title, "An Act to reduce and equalize taxation, to provide revenue, and for other purposes."
of taxation: *Reduction and equalization* of the burden and *simplicity* of comprehension or administration. Yet, strangely enough, the demand for relief from taxation and the desire for a simpler taxing statute are in a certain sense mutually destructive. This seems to be a paradox of income taxation. For instance, the simplest form of income tax would probably be a uniform percentage levy upon all gross income; however, such a tax would be intolerable. Therefore, in order to effect a more equitable distribution of the burden (consonant with the generally accepted principle of ability to pay) it is necessary to impose surtaxes, to create a taxable statutory net income arrived at by allowing certain deductions from gross income, and, in general, to meet peculiar conditions by specific exceptions. It is just such provisions, calculated as relief measures, which complicate any revenue system and increase the attendant administrative difficulties.

It is not believed that the Revenue Act of 1921 works any appreciable simplification of Federal taxation, for it is permeated with provisions of the character above-described. In one material respect, however, the act holds out prospects of some progress in the way of administrative simplicity. There is established in the Department of the Treasury a Tax Simplification Board, to be composed of six members: Three representatives of the public, to be appointed by the President, and three representatives of the Bureau of Internal Revenue, who shall be officers or employees of the United States serving in the Bureau, to be appointed by the Secretary of the Treasury. The prescribed duty of the Board is "to investigate the procedure of and the forms used by the Bureau in the administration of the internal revenue laws, and to make recommendations in respect to the simplification thereof." The members are to serve without compensation and the Board will cease to exist December 31, 1924.

Probably the most important single feature of the Revenue Act of 1921 is the repeal, as of January 1, 1921, of the excess-profits tax imposed upon corporations by the Act of 1918, and the substitution in lieu therefor of a war-profits and excess-profits tax upon corporations for the calendar year 1921. The effect of this legislation is to repeal all excess-profits taxes as of January 1, 1922. Section 304 (c) carries forward the pre-existing exemption to corporations engaged in the mining of gold, and in addition grants to such corporations an unusual retroactive exemption from the tax imposed by Title II of the Revenue Act of 1917.

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*No attempt is here made to discuss the pretended advantages over the Income Tax of the various forms of the so-called "sales" or "manufacturers' tax."

*For instance, see discussion of the "capital gain" provision, infra.

*Sec. 1327. Cf. Sec. 1301 (d) (1), Revenue Act of 1918.

*This relief has been supplemented by the imposition of a uniform percentage income tax upon corporations (except those specifically exempted) of 10 per centum for the calendar year 1921, to be increased to 12½ per centum for each calendar year thereafter. Secs. 230, 231. Tax legislation of such uniform character invariably works hardship upon taxpayers peculiarly situated. For example, the tax liability of public utilities and other low-return enterprises has probably been increased after the year 1921, whereas that of prosperous concerns, better able to pay, has been reduced.

*It is noted that although retroactive exemption from excess-profits tax under the 1917 Act is granted to corporations engaged in the mining of gold, no provision is made for the refunding of the taxes so paid. Such taxes already paid were not erroneously or illegally assessed or collected within the language of Sec. 3220, Rev. Stat., and Sec. 252 pertains to the credit and refund of excess-profits tax "paid in excess of that properly due." A special relief enactment may be necessary to authorize the refunding of such taxes.
RECENT LEGISLATION

The new act imposes the same normal tax upon individuals as the previous revenue law. There is a slight reduction of surtaxes for the calendar year 1922 and thereafter, the maximum rate being decreased from 65 per centum to 50 per centum and the principal relief accorded to taxpayers with incomes exceeding $100,000.

Several of the so-called "nuisance" taxes are repealed, as of January 1, 1922 (Sec. 1400), to wit: The transportation tax upon freight, express, persons, and Pullman accommodations; the soda-fountain and ice-cream parlor tax; the sales tax on wearing apparel; and the stamp tax on toilet preparations and patent medicines. The manufacturer's excise taxes, under Sec. 900, are retained on fewer articles and at generally reduced rates. The tax on admissions under Title VIII is amended so as to base the same upon the amount actually paid for admission to any place, omitting the artificial provisions in Sec. 800 (a) (2) of the 1918 Act regarding free or reduced-rate admissions, which presented unduly difficult administrative problems. The exemption from the admission tax is extended to include (among others) admissions, all the proceeds of which inure exclusively to any post of the American Legion, to needy ex-service men, to municipal improvement societies and organizations maintaining a co-operative or community center moving-picture theatre.

DIVIDENDS. Sec. 201. A distribution from earnings or profits accumulated prior to March 1, 1913, was excluded from the meaning of "dividend" by Sec. 201 (a) of the Revenue Act of 1918. However, the increment to capital assets accrued prior to March 1, 1913, when realized by sale or other disposition subsequent to February 28, 1913, was held by the Treasury Department to constitute "earnings or profits accumulated since February 28, 1913," and, therefore, when distributed as a dividend, was taxable to the stockholder under Sec. 201 (a) of the 1918 Act, in accordance with the principles of Lynch v. Hornby.10

Sec. 201 (b) of the Revenue Act of 1921 changes this result by specifically excluding "increase in value of property accrued prior to March 1, 1913," along with earnings or profits accumulated prior to that date, from taxable distributions, after the earnings and profits accumulated since February 28, 1913, have all been distributed. However, where any such tax-free distributions are made, the allowable deduction upon a subsequent disposition of the stock at a loss is only the amount by which the cost or March 1, 1913 value thereof exceeds the sum of the selling price and the aggregate of such distributions.

The liquidation provision of the 1918 Act, Sec. 201 (c), has been omitted and an entirely new subdivision (c) added, providing that any distribution (whether in cash or property) made by a corporation otherwise than (1) out of earnings accumulated since February 28, 1913, or (2) earnings accumulated or capital appreciation accrued prior to March 1, 1913, shall be applied to reduce the basis prescribed by Sec. 202 for determining gain or loss on the sale of the stock by the distributee. It would appear that the distributions therein referred to are tax-free as not falling within the statutory conception of a "dividend." The provision also apparently contemplates both partial and complete liquidations, and necessitates a due regard for the source from which a liquidating distribution is made. For example, where a partial liquidation is made by a distribution from depreciation or depletion reserves

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10 See Treasury Decision No. 3237.
(all earnings or profits having already been distributed), such liquidating distribution is exempt from taxation, but is applied to reduce the basis for determining gain or loss on a subsequent sale of the stock. Sec. 201 (c) of the new law, taken in conjunction with subdivisions (2) and (3) of Sec. 202 (c), infra, constitutes a flagrant tax cushion as to capital accretions subsequent to March 1, 1913.

Specific exemption is provided for stock dividends in accordance with the Supreme Court decision in Eisner v. Macomber.11 However, where after any such dividend the corporation proceeds to cancel or redeem the stock, in such manner as to make the entire transaction equivalent to the distribution of a taxable dividend, then the amount received in redemption or cancellation of the stock is taxable to the extent of the earnings therein accumulated after February 28, 1913.

**BASIS FOR DETERMINING GAIN OR LOSS.** Sec. 202 (b). It is now expressly stated that the cost of property acquired either after February 28, 1913, or before March 1, 1913, shall ordinarily be the basis for ascertaining the gain derived or the loss sustained from a sale or other disposition thereof. The general effect of subdivision (b), Sec. 202, of the new act is not only to

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11 (1920) 252 U. S. 189, 40 Sup. Ct. 189. Cf. (1918) 31 Ops. Atty. Gen. 213. The decision in Eisner v. Macomber is discussed by Mr. Eustace Seligman in an able article entitled "Implications and Effects of the Stock Dividend Decision," 21 Columbia Law Rev. 313. The distribution by a corporation of stock held by it in another corporation has been recently held to constitute income taxable to the recipients. United States v. Phellis (1921) 42 Sup. Ct. 63; John D. Rockefeller v. United States (1921) 42 Sup. Ct. 68. A dividend paid in debenture bonds of the corporation held income to the stockholders. Doerschuck v. United States (1921) 274 Fed. 739.

The stock dividend decision has occasioned considerable adverse comment and an intimation might be gathered from the opinion in the Phellis case, supra, that the Macomber decision is sui generis and will not be logically extended. "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder. In a number of cases besides those just cited (referring to Eisner v. Macomber) we have under varying conditions followed the rule. Lynch v._Turriff, 247 U. S. 221; Southern Pacific Co v. Lowe, 247 U. S. 330; Gulf Oil Corporation v. Lewellyn, 248 U. S. 71." P. 65. (Italics ours.)

12 The corresponding section of the Revenue Act of 1918 (40 Stat. 1057) provided that the basis for ascertaining gain or loss from the disposition of property should be: "In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date," Sec. 202 (a) (1). See also Sec. 2 (c), Act of Sept. 8, 1916 (39 Stat. 756). It is generally conceded that the actual intent of the framers of the prior acts was "to freeze", for administrative purposes, the value of capital assets as of March 1, 1913, the effective date of the Sixteenth Amendment and of the first income tax enacted thereunder (Act of Oct. 3, 1913). The merits of this economic theory of "frozen assets" were not adequately argued before the Supreme Court inasmuch as the Government (by the Solicitor General) confessed error on that point in Goodrich v. Edwards (1921) 255 U. S. 527, 534, 41 Sup. Ct. 390, which presented the question under the Act of Sept. 8, 1916. However, the court adopted the Solicitor General's "concession," saying: "It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived therefrom by the vendor, and we therefore agree with the Solicitor General that since no gain was realized on this investment by the plaintiff in error no tax should have been assessed against him.

"Section 2 (c) is applicable only where a gain over the original capital investment has been realized after March 1, 1913, from a sale or other disposition of property." (Page 535.) See also Walsh v. Brewster (1921) 255 U. S. 536, 41 Sup. Ct. 392.
write into the law the decision of the United States Supreme Court in the case of Goodrich v. Edwards as to the effect of March 1, 1913 values on the determination of income, but also to incorporate what the Treasury Department has conceived to be the logical consequences of that decision on the basis for determining loss. In other words, just as no taxable gain arises where the selling price is more than the March 1 value, but less than the cost price of the property sold, so, it is reasoned, there is no deductible loss where the selling price is less than the March 1 value, but greater than or equal to the cost price of the property. See Sec. 202 (b) (3). Otherwise taxpayers would be permitted to take a loss on a transaction in which they had actually realized a gain or broken even, whereas the amount of any such gain would have been exempt from tax having accrued prior to the Sixteenth Amendment. Furthermore, where the March 1, 1913 value is less than the cost, no deductible loss occurs when the property is sold for an amount less than cost, but equal to or greater than such value, said loss having accrued prior to the adoption of the Sixteenth Amendment. See Sec. 202 (b) (2). It is the gains over the original capital investment realized after March 1, 1913, that are taxable, and losses sustained below such investment after March 1, 1913 that are deductible.

REORGANIZATIONS. Sec. 202 (c). It has been a general complaint that Sec. 202 (b) of the Revenue Act of 1918 worked as a prohibitive deterrent to necessary corporate readjustments. As a result there are several outstanding modifications of the 1918 Act regarding the exchange of properties, especially in connection with exchanges incident to the organization and reorganization of corporations.

Sec. 202 (c) of the 1921 Act provides that no gain or loss shall be recognized on an exchange of property, real, personal or mixed, for any other such property, unless the property received in exchange has a readily realizable market value. But even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized:

18 Shortly after the Goodrich decision the Treasury Department amended Regulations 45 (1920 Edition) to conform therewith, as to the basis for determining both taxable gain and deductible loss with respect to property acquired prior to March 1, 1913, and disposed of subsequent thereto. Treasury Decisions, Internal Revenue, Vol. 23 (1921), Nos. 3206 and 3209. It is thus seen that the provisions of the new law are in general accord with the existing regulations under the 1918 Act.

19 Sec. 202 (b) (3) of the Revenue Act of 1921 appears to consider each individual capital transaction and to forbid the deduction of a loss sustained thereby under March 1, 1913 value, where the selling price is greater than or equal to the cost of the property. However, the Revenue Acts of 1916 and 1918 were not framed on that theory but explicitly provided for deductible losses arising from such transactions, to be based upon March 1, 1913 value. Regarding the value of the taxpayer's property as of March 1, 1913 as his capital (see footnote 34, infra), it is believed by the writer that a conversion thereof for an amount below such value results in a deductible loss under the Revenue Acts of 1916 and 1918 equal to the excess of such value over the amount received.

20 Sec. 202 (b) of the 1918 Act provided: "When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any." Under this statute it was only necessary that the property received in exchange (a) be essentially different from that disposed of, and (b) have a market value. Article 1563. Regulations 45. In effect, this worked a presumption in favor of taxability, whereas, under the new law the property received in exchange must be readily marketable (a question of fact) at substantially its fair value in order that a gain or loss be recognized. In case of subsequent disposition of the exchanged property, see Sec. 202 (d) and (e).
(1) When property held for investment, or for productive use in trade or business (not including stock-in-trade or other property held primarily for sale), is exchanged for property of a like kind or use.14

(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization.17 (See this subdivision for definition of the term "reorganization.")

(3) When a person or persons transfer any property to a corporation and immediately thereafter are in control of such corporation, and the amounts of stock or securities received by such persons are in substantially the same proportion as their interests in the property before such transfer. By "control" is meant at least 80 per centum of both the voting stock and the total number of all other classes of stock in the corporation.

GIFTS. Sec. 202 (a) (2). An essential change has been made in the matter of property acquired by gift. No explicit provision existed in the prior acts for determining gain or loss resulting from the sale of property so acquired, but the departmental regulations prescribe that the "cost" of such property to the donee is its fair market value at the date of acquisition, and gain or loss is then computed as in the ordinary case.18 Under the 1921 Act, however, in the case of gifts after December 31, 1920, the basis for determining gain or loss on a subsequent disposition by the donee is that which would have applied had the property remained in the hands of the donor or the last preceding owner by whom it was not acquired by gift.19 The old basis, above described, still prevails as to gifts inter vivos prior to January 1, 1921.

In the case of property acquired by bequest, devise or inheritance, as well as to transfers made in contemplation of death or intended to take effect in possession or enjoyment at or after death, and property passing under a general power of appointment exercised by a decedent—the basis continues to be the fair market value thereof at the time of such acquisition. Sec. 202 (a) (3). The revenue acts in this particular give sanction and financial incentive to a practice that is economically unsound and squarely opposed to the general policy of the common law. That is, a premium is placed upon holding fast to property during life, thereby removing it from the market for that period, and then devising the same or directing a sale

14 Under the prior act and regulations, the property received in exchange would be treated as the equivalent of cash to the amount of its fair market value and tax computed in accordance with the basis for determining gain or loss in a closed transaction.

17 Heretofore, upon a reorganization, merger or consolidation of a corporation, where the aggregate par or face value of the new stock received was in excess of that relinquished, the recipients of the new stock were taxed in accordance with Article 1569, Regulations 45, as amended by Treasury Decision No. 3206. Note, the securities exchanged may be of different classes and kind, but no gain or loss is recognized under the new law.

18 Article 1562, Regulations 45, as amended by Treasury Decision No. 3206.

19 This change will prevent the evasion of tax on capital accretions since February 28, 1913, by simply donating the property to wives or other relatives.
thereof and distribution of the proceeds by will or other testamentary disposition.

NET LOSSES. Sec. 204. An important change is effected in the "net loss" provisions. Prior to the Revenue Act of 1918 the fiscal or calendar year was regarded as the absolute unit for purposes of income taxation, and no net loss within such a period could be applied for purposes of reducing the net income in any other taxable year. Under the 1918 Act, however, a deduction was authorized for net losses sustained in a taxable year beginning after October 31, 1918, and ending prior to January 1, 1920, but not to extend past the latter date.

Under the new revenue law, if for any taxable year beginning after December 31, 1920, a net loss as defined by the act is established to the satisfaction of the Commissioner of Internal Revenue, it may be used to wipe out the net income of the taxpayer for the next two succeeding taxable years.

CAPITAL GAIN AND CAPITAL LOSS. Sec. 206. One of the most important of the many relief provisions in the new act relates to the taxation of gains derived from the disposition of capital assets. In Great Britain capital gain or loss has been generally ignored or eliminated in computing net income. In America the Federal revenue laws were designed to reach that important source of income taxation, and such legislative intent has been recognized and upheld by the United States Supreme Court. This policy has, however, operated as a strong deterrent to the conversion of capital assets, as gains and profits accumulated over a series of years would have been taxed as a lump sum in the year in which realized, the surtaxes being thereby excessively enhanced. In order to permit capital transactions to take place without fear of prohibitive tax, Sec. 206 of the 1921 Act provides that any taxpayer (other than a corporation) may elect to be taxed on the basis of the regular normal and surtax on his ordinary net income, plus 12½ per centum of the capital net gain resulting from the sale or exchange of capital assets consummated after December 31, 1921; but, so electing, the total tax is never to be less than 12½ per centum of the total net income. Corporations are denied the benefit of the capital gain provisions, apparently for the reason that for the calendar year 1921 they are subject to a flat 10 per centum income tax, which is increased to 12½ per centum for succeeding years. It is noted that although the effect of this relief provision

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20 An amendment adopted by the Senate, but stricken out in Conference, imposed an excise tax on the transfer of property by gift inter vivos. It seems that a tax of this nature forms an essential supplement to the the Estate Tax owing to the extreme difficulties encountered in establishing a transfer "in contemplation of death." Cf. Vaughan et al v. Riordan (D. C. West. Dist. of N. Y.), unreported.

21 Sec. 204 (b). It should be noted that before the deduction could be taken under this provision against the succeeding taxable year, the net loss must completely exhaust the net income for the preceding taxable year.

22 See Goodrich v. Edwards, supra, at p. 529.

23 "Income may be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." Eisner v. Macomber, supra, p. 207. Applied in Merchants' Loan & Trust Co. v. Smietanka (1921) 255 U. S. 509, 41 Sup. Ct. 386; 34 Harvard Law Rev. 781, 806.

24 Sec. 230, Revenue Act of 1921.
is not to tax considerable portions of realized income, yet a deduction of the entire loss sustained in such transactions is permitted. It is submitted that this works an undue concession to taxpayers, and certainly is not in harmony with the plan of counterbalancing deductible losses with taxable gains pursued in Sec. 202 (b) of the statute.26

INCOME TAX—INDIVIDUALS

GROSS INCOME DEFINED.27 Sec. 213. (a) Gross income is again defined to include the salaries of Federal judges and of the President,28 apparently in order to cover the salaries of such persons only as are elected or appointed subsequent to the passage of the 1918 revenue law.29

(b) Gross income under the new act does not include: (1) proceeds of life insurance policies paid on death of insured; (2) return of premiums under life insurance, endowment or annuity contracts; (3) interest on postal savings certificates of deposit; (4) compensation, family allotments and allowances under the War Risk Insurance and Vocational Rehabilitation Acts, or pensions from the United States, received by anyone and paid because of war-time service in the military or naval forces. The special exemption of $3,500, granted by the 1918 act, Sec. 213 (b) (8), to persons in the military or naval forces, was not carried forward, and, therefore, will not be available to such persons for the taxable year 1921. Another new item of exempt income is dividends or interest not exceeding $300 received by an individual after December 31, 1921, and before January 1, 1927, from domestic building and loan associations, operated exclusively for the purpose of making loans to members.

The term "gross income" is further amended so as not to include: "The income of a non-resident alien or foreign corporation, which consists exclusively of earnings derived from the operation of a ship or ships docu-

26 Note, this relief provision will further complicate the income tax forms by necessitating a separation or segregation of "capital net gain" from "ordinary net income." Sec. 206 (c), Ibid.

27 The residents of States having community property law enjoy a marked advantage over the residents of other States. Income which in other States is taxed as a unit to the husband is divided between husband and wife, the surtaxes being correspondingly reduced. An amendment was proposed to Section 213, designed to restore uniformity of treatment, by providing that income received by any martial community shall be included in the gross income of the spouse having the management and control of the community property, and taxed as the income of such spouse. See (1920) 32 Ops. Atty. Gen. 298; (1921) 32 Ops. Atty. Gen. 435. This proposed amendment was stricken out on the floor of the Senate, but is here mentioned because of the manifest justice of its provisions.

28 Cf. Sec. 213 (a), Revenue Act of 1918.

29 The Supreme Court held in Evans v. Gore (1919) 253 U. S. 245, 40 Sup. Ct. 550, that the Federal Constitution (Art. III, Sec. 1) "expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise." (P. 264.) The Attorney General thereforer ruled that there was nothing in that opinion "which relieves a judge appointed since the enactment of the income-tax law from paying the tax imposed by law." (1920) 32 Ops. Atty. Gen. 248, 249. There is no constitutional objection to increasing a judge's salary by reduction of taxes, but the Constitution specifically provides that the President's compensation "shall neither be increased nor diminished" during his term of office (Art. II, Sec. 1, Cl. 6). Quaere: Shall the salary of the President, who assumed office March 4, 1921, be taxed under the Revenue Act of 1918 or the Revenue Act of 1921?
mented under the laws of a foreign country, which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States." Sec. 213 (b) (8).

DEDUCTIONS ALLOWED INDIVIDUALS. Sec. 214 (a). The 1921 Act allows substantially the same deductions in computing the net income of individuals as are authorized under the prior act, but adding several relief and interpretative provisions, among which are the following:

(1) The deduction for business expenses is extended to include all traveling expenses incurred while away from home in the pursuit of a trade or business.20

(2) Interest accrued or paid after January 1, 1922, upon money borrowed to purchase or carry tax-free Liberty bonds or Victory notes is not deductible.21

(5) No deduction is allowed for losses sustained in the sale of shares of stock or securities made after the passage of this act, where it appears that within thirty days before or after the date of such sale the taxpayer has acquired (otherwise than by bequest or inheritance) substantially identical property, which is held by him for any period after such sale.22

(7) Two important extensions are made to the "bad debt" provision, authorizing the Commissioner, when satisfied that a debt is recoverable only in part, to allow such debt to be charged off in part; and, within his discretion, to permit the deduction of a reasonable addition to a reserve for bad debts.23

(8) The effect of this subsection is to remove any doubt of the legislative intent under this and prior acts to base the depreciation allowance upon March 1, 1913 value in the case of property acquired prior to such date. The Congress apparently regarded the cases of Goodrich v. Edwards and Walsh v. Brewster as indicating that the correct basis for the depreciation deduction under the then existing law was cost as regards property acquired before March 1, 1913. Where the March 1st value is greater than cost, a depreciation allowance based only upon cost would indirectly subject to income tax an appreciated value that had accrued prior to the effective date of the Sixteenth Amendment. For that reason, it is believed that by analogy with the Goodrich authority, the Supreme Court would hold March 1st value the basis under prior acts for depreciation in the above example.24 Suppose, however, that the March 1st value of property acquired prior thereto is less than cost. On these facts a depreciation allowance, based upon March 1st value, may, in effect, result in tax upon an accumulated loss of part of the original investment as though it was so much gain. It is believed that in the latter

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20 The motive of this new provision was, "to encourage the international adoption of uniform tax laws affecting shipping companies for the purpose of eliminating double taxation."


22 Cf. Sec. 214 (a) (2), Revenue Act of 1918; Art. 121, Regulations 45 (1920 Ed.).

23 Enacted to prevent evasion of income taxes through the medium of "wash sales."


25 "In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." Doyle v. Mitchell Bros. Co. (1918) 247 U. S. 179, 185, 38 Sup. Ct. 467; Southern Pacific Co. v. Lowe (1918) 247 U. S. 330, 335, 38 Sup Ct. 540; City of Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1, 13, 29 Sup Ct. 148.
case the Supreme Court will either find cost to be the correct basis for de-
preciation under the 1921 Act or declare the new taxing provision invalid under
the Sixteenth Amendment.\textsuperscript{26}

(9) This provision is apparently interpretative of the 1918 Act, and
limits the depletion allowance in cases of discovery to the net income, com-
puted without allowance for depletion, from the property upon which the
discovery is made, except where such net income so computed is less than
the depletion allowance based upon the March 1, 1913 value.

ITEMS NOT DEDUCTIBLE. Sec. 215 (b) is a new subsection, precau-
tionary or interpretative in character. Persons receiving by gift, bequest or
inheritance, a life or other terminable interest in property have sought to
capitalize the expected future income therefrom, by reference to mortality
tables, then set up this capitalized expectancy as corpus or principal, and
claim a deduction for depreciation on the ground that with the passage of
time it is gradually being exhausted. The new provision explicitly forbidding
such a deduction will probably be regarded by the government as merely
declaratory of the pre-existing law.\textsuperscript{36}

CREDITS ALLOWED INDIVIDUALS. Sec. 216 specifies the credits al-
lowed to individuals in computing the normal tax only. The allowance for
each dependent (other than husband or wife) is raised to $400. Each head
of a family or a married person living with husband or wife receives a per-
sonal exemption of $2,500 (an increase of $500), unless the net income is in
excess of $5,000 (aggregate income of husband and wife in case of married
persons living together), in which case the personal exemption is $2,000 (to
be taken by either or divided between them if each make separate returns);
but in no case shall the reduction of the personal exemption from $2,500 to
$2,000 operate to increase the tax, which would be payable if the exemption
were $2,500, by more than the amount of the net income in excess of $5,000.
The personal exemption of a single person remains $1,000. Non-resident
aliens are only allowed the single personal exemption of $1,000.

INCORPORATION OF INDIVIDUAL OR PARTNERSHIP BUSINESS.
Sec. 229. Owing to the uniform and comparatively low income tax rates
granted to corporations by the 1921 Act, it will be highly advantageous to
profitable unincorporated businesses to change their form of organization to
that of a corporation. This privilege is afforded to some concerns by Sec.
229, even under the taxable year 1921. It provides that in the case of the
organization as a corporation within four months after the passage of
this act of any trade or business in which capital is a material income-
producing factor, and which was previously owned by a partnership or
individual, the net income of such concern from January 1, 1921, to the date
of such organization may, at the option of the individual or partnership, be
taxed as that of a corporation under Titles II and III. However, there are
two safeguards surrounding this privilege: (1) It shall not apply to any
trade or business, the net income of which for the taxable year 1921 was
less than 20 per centum of its invested capital for such year; and (2) any
\textsuperscript{26}It is observed, however, that where the March 1, 1913, value is less than cost and
the enterprise operate at a loss, a depreciation allowance based upon cost would
permit a taxpayer to recoup from profits of other sources an economic loss
accrued prior to such date, which is expressly declared on-deductible by Sec. 202
(b) (2) of the Revenue Act of 1921.
\textsuperscript{36}Cf. Gavit v. Irwin (1921) 275 Fed. 643.
taxpayer who takes advantage thereof must pay the capital stock tax imposed by Sec. 1,000 of the 1918 Act as though a corporation on and after January 1, 1921.

Sec. 229 illustrates a practical phase in the drafting of tax legislation. A revenue measure should be so framed as to reduce evasion of the taxes imposed to a minimum. One method of accomplishing this result is to impose a number of different types of taxes, which, in practice, operate as mutual checks and balances. The capital stock and the excess-profits taxes are imperfect examples of this theory. A taxpayer, claiming a high invested capital for purposes of reducing his excess-profits tax, would thereby lay himself open to a higher capital stock tax. Business trusts, when they are not classified as associations, enjoy exemption from certain stamp taxes and the capital stock tax.37 But in order to secure relief under the new law from high income taxation they must incorporate and thereby render themselves liable to all such taxes imposed upon corporations.

**INCOME TAX—CORPORATIONS**

The most important changes respecting corporations have been previously mentioned and need not be restated. The deductions allowed corporations are, with some exceptions, of the same nature as those provided for individuals. A new deduction appears in Sec. 234 (a) (3) respecting taxes imposed upon stockholders paid by the corporation without reimbursement from such stockholders, but in those cases no deduction is allowable to the stockholders for the amount of such taxes.38

**ESTATE TAX**

Title IV. There has been no alteration of the estate tax rates. By reason of an opinion of the Attorney General holding that “real estate as such located outside of the United States, belonging to a decedent resident within the United States, should not be included in determining the value of the gross estate of such decedent for the purposes of the tax imposed by Title II of the Revenue Act of September 8, 1916,”39 no deduction is allowed for mortgages upon or indebtedness with respect to such property. Sec. 403 (a) (1). The word “gifts” has been omitted from the deduction authorized by Sec. 403 (a) (3) and (b) (3) of the Revenue Act of 1918 and the expression, "transfer,... in contemplation of or intended to take effect in possession or enjoyment at or after the decedent’s death," has been substituted in lieu thereof. It frequently happens that the charitable, educational and religious donations inter vivos of philanthropists if deductible, would be sufficient to wipe out their entire gross estate for Federal estate tax purposes. This change will set at rest the mooted question of whether such gifts inter vivos, and not in contemplation of death, etc., are deductible from the decedent's gross estate. The amount receivable as insurance upon the life of a non-resident decedent; and bank deposits by or for a non-resident decedent, not engaged in business

38 Cf. Art. 566, Regulations 45; National Bank of Jackson v. McNeel (1917) 238 Fed. 559. See also Sec. 214 (a) (3); Massey v. Lederer (1921) U. S. D. C. for East Dist. of Penna., unreported to date.
in the United States at the time of his death, are not to be deemed property within the United States for estate tax purposes. Sec. 403 (b) (3).

The exemption accorded by the prior act to decedents, who have died or may die as a result of serving in the military or naval forces of the United States in the late war, has been restricted to those whose injuries were received or disease contracted "in line of duty." However, the exemption is extended to include all citizens of this country who have died or may die from injuries received or disease contracted in line of duty while serving in the military or naval forces of any country while associated with the United States in the prosecution of such war, or prior to the entrance therein of this country; provision is made for the refund of the tax already collected under such circumstances. Sec. 401. There is created by the new law a rule of presumption as to the domicile of missionaries commissioned and serving under the foreign missions board of any religious denomination in the United States. It is provided that such missionaries dying abroad are not to be deemed non-residents merely because of their intention to remain permanently in foreign service, but shall be presumed to be residents of the State or Territory wherein they resided at the time of their commission and departure for such foreign service. Sec. 403 (b) (3).

The deduction accorded to the gross estate of persons dying within five years of a prior decedent from whom property was received by gift, bequest, devise or inheritance, is enlarged to include property upon which an estate tax was paid by the estate of such prior decedent "under this or any prior act of Congress." The amount of this deduction is specifically limited to the value placed by the Commissioner upon the property so received in determining the estate tax thereon, and then only to the extent that such property or that received in exchange therefor is included in the latter decedent's gross estate and the value thereof is not otherwise deductible. Sec. 403 (a) (2) and (b) (2).

Sec. 406 of the Revenue Act of 1918 provided that the estate tax "shall be due one year after the decedent's death," and if not paid within 180 days thereafter "interest at the rate of 6 per centum per annum, from the expiration of one year after the decedent's death shall be added as part of the tax." The new law expressly states that "the tax shall be due and payable one year after the decedent's death," and changes the 180-day period above-mentioned to one of "six months." These alterations remove the pre-existing doubt as to whether the date on which the tax was payable was or was not postponed until 180 days after the due date; and will also avoid any technical delinquency in payment owing to the taxpayer misconstruing 180 days to mean six months, thereby causing interest to attach as of one year after the decedent's death.

Sec. 407 works a simplification of procedure where the exact amount of tax cannot be determined, and also prescribes a method by which executors may obtain a discharge from personal liability therefor. The new provisions of Sec. 411 relating to the United States Court for China will in all probability be rendered null by reason of the proposed abolition by the present Disarmament Conference of extra-territorial spheres in China.
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STAMP TAXES

There are at least three extremely important changes in Title XI: (1). Schedule A (3) of the Revenue Act of 1918 imposed a stamp tax upon the original issue of certificates of no-par-value stock of five cents per share, unless the actual value thereof exceeds $100 per share, in which case the tax was five cents on each $100 of actual value or fraction thereof. The new act, by Schedule A (2), substantially re-enacts the foregoing, but with the proviso that where the actual value is less than $100, the tax shall be one cent on each $20 of actual value, or fraction thereof. (2). The stamp transfer tax upon shares of stock without par or face value has likewise been reduced to two cents on each such share transferred, regardless of its actual value.46 These further concessions by the Federal taxing power to the peculiar demands of the modern corporate practice41 of issuing shares of stock and analogous certificates without par or face value, are of especial interest to persons engaged in the organization and reorganization of corporations.42 (3). A new exemption is enacted in the present law which provides that the stock transfer tax imposed by Schedule A (3) shall not attach "upon mere loans of stock nor upon the return of stock so loaned."43 This amendment was occasioned by reason of the government's application of the corresponding section in the prior act, to transfers of legal title to stock involved in the so-called practice of intraoffice borrowing and loaning of stock among brokers.44

GENERAL ADMINISTRATIVE PROVISIONS

ADMINISTRATIVE REVIEW. Sec. 1313. This is an entirely new provision to the effect that the decision by the Commissioner (or the Secretary) upon the merits of any internal revenue claim shall not, in the absence of fraud or mathematical miscalculation, be subject to review by any other administrative official of the United States.45

40 The 1918 law imposed a transfer tax on no-par stock determined by the actual value where such value exceeded $100 per share. The criticism was made that the tax was hard to administer owing to the difficulty of checking the valuation of such stock, which in many cases is not sold regularly on the market. This criticism would seem to apply with equal if not greater force to the new basis for the original issue tax which calls for much finer gradations in actual value.

41 Fletcher Cyclopedia Corporations, Vol. 4, § 3456.

42 See the discussion of Sec. 202 (c), supra.

43 The tax on Transfers of Stock imposed by the State of New York embodies a similar exemption: "nor upon mere loans of stock or the return thereof." Birdseye's Consol. Laws of N. Y. (2nd Ed.) Vol. 8, p. 8608.


45 The provision was in all probability necessitated by reason of certain sweeping language in "The Budget and Accounting Act, 1921." Sec. 305 of said Act amends Sec. 236 of the Revised Statutes to read as follows: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the general accounting office." Prior to this amendment R. S. 236 provided that all such claims or accounts "shall be settled and adjusted in the Department of the Treasury." Section 301 of said Act provides: "There is created an establishment of the Government to be known as the general accounting office, which shall be independent of the executive departments and under the control and direction of the comptroller general of the United States."
FINAL DETERMINATIONS AND ASSESSMENTS. Sec. 1312 is a distinct administrative innovation in our Federal Internal Revenue System. It authorizes the Commissioner, with the approval of the Secretary, and under conditions therein specified, to enter into a written agreement with a taxpayer which shall be a final and conclusive settlement of the latter's tax liability. Furthermore, such settlement shall not be reopened or modified by the government, or annulled by any United States Court. One of the primary functions of law is to impose the element of "certainty" upon human relationships, particularly in the field of commerce. The tax laws have been notoriously defective in this respect, and the provision under discussion, if wisely administered, is a decided step forward.

RETROACTIVE REGULATIONS. Sec. 1314. "That in case a regulation or Treasury decision relating to the internal-revenue laws made by the Commissioner or the Secretary, or by the Commissioner with the approval of the Secretary, is reversed by a subsequent regulation or Treasury decision, and such reversal is not immediately occasioned or required by a decision of a court of competent jurisdiction, such subsequent regulation or Treasury decision may, in the discretion of the Commissioner, with the approval of the Secretary, be applied without retroactive effect." This new provision meets a long felt administrative need. It might be classed with the two preceding sections in that it will aid taxpayers to conduct their business operations with reasonable security and certainty as to their tax liability.

There are serious doubts as to the constitutionality of this delegated discretionary power, although it is difficult to see how that point will ever be presented for judicial determination.

REFUNDS. Sec. 3228 of the Revised Statutes is amended, extending the

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60 "Under the present method of procedure a taxpayer never knows when he is through, as a tax case may be opened at any time because of a change in ruling by the Treasury Department. It is believed that this provision will tend to promote expedition in the handling of tax cases and certainty in tax adjustment." (Italics ours.) Report No. 275 of the (Senate) Committee on Finance, pp. 31, 32. The statement is even more accurate than appears on its face, for prior to the passage of this Act (Sec. 1320) there was no general limitation upon the time within which the Government could bring suit for a tax, whereas taxpayers were limited to two years within which to file claims for refund. U. S. v. Chamberlin (1911) 219 U. S. 250, 31 Sup. Ct. 155; United States v. Minneapolis Threshing Machine Co. (1915) 229 Fed. 1019. But see Sec. 250 (d), Revenue Act of 1918.

87 This section is unfortunately worded in that regulations and Treasury decisions, as commonly known, are made by the Commissioner with the approval of the Secretary, and not by either individually. In order to effectuate the manifest spirit and intent of the provision, however, it should be construed to apply to the volume of Bureau decisions which of necessity cannot receive the dignity of a regulation or Treasury Decision. Note that the section applies only to subsequent regulations or Treasury decisions and then only in the discretion of the Commissioner, with the approval of the Secretary.

80 The Treasury Department has hitherto taken the position, and correctly so, it seems, that a regulation correctly interpreting the law speaks from the effective date of the law, and a taxpayer relying upon a prior misinterpretation of the law may claim no benefit thereunder. (Cf. Black v. Bolen (1921) 268 Fed. 427.) The law has often resulted in severe hardship to taxpayers, for instance, in cases involving manufacturer's excise taxes where the vendor has parted with the property sold and collected no tax, relying on erroneous advice from the Department.
period for filing claims for refund from two years to four years,\(^{19}\) accompanied by a statement that such section (except as modified by Sec. 252) shall apply retroactively to claims for refund under the Revenue Acts of 1916, 1917 and 1918.\(^{20}\)

**LIMITATIONS UPON SUITS AND PROSECUTIONS.** Sec. 3226, Revised Statutes, is amended to provide that no suit will lie to the taxpayer before the expiration of six months from the filing of the refund claim, unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of payment of the tax or penalty.\(^{21}\) Sec. 1320 of the Revenue Act of 1921 imposes upon the sovereign apparently the first general statute of limitations (five years) upon instituting suit for the recovery of any internal revenue tax,\(^{22}\) subject, however, to the usual exception in case of fraud or willful attempt to defeat the tax. This unusual provision constitutes merely another phase of the policy frequently manifested in the new act of affording taxpayers a reasonable degree of finality and certainly with respect to their tax obligations. (See discussion, *supra*, of Secs. 1312 and 1314.)

**ASSESSMENTS.** Sec. 1322. The period for making assessments (except as provided in Sec. 250) has been extended to four years, notwithstanding Sec. 3182, Rev. Stat., or any other provision of law; but in case of fraud or willful attempt to defeat the tax, assessment may be made at any time.\(^{23}\)

**INTEREST ON REFUNDS AND JUDGMENTS.** Sec. 1324 effects a drastic change of policy on the part of the taxing power. Sec. 177 of the Judicial Code\(^{24}\) is amended, authorizing the allowance of interest in any *judgment* of any court rendered *after* the passage of the Revenue Act of 1921 against the United States for any internal revenue tax or penalty erroneously or illegally assessed or collected.\(^{25}\) Not only that, but interest is granted at the rate of one-half of one per cent per month upon the allowance of a claim for refund or credit, to be computed and subject to the conditions as prescribed by the statute.

The principal reason for suing collectors of internal revenue, and not the United States, for the recovery of taxes erroneously or illegally collected, has thus been abolished. In the future, the majority of such suits will probably be brought against the United States in the Court of Claims, from which the case may be carried direct to the Supreme Court for final adjudication.

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19 The language of Sec. 3228, R. S., is further changed to base the computation of the limitation period upon the time of *payment* of the tax, penalty, or other sum for which refund is sought. However, this modification appears to be merely declaratory of the pre-existing law. Savings Institution v. Blair (1886) 116 U. S. 200, 204; N. Y. Mail and Transportation Co. v. Anderson (1916) 234 Fed. 590.

20 The retroactive application of the amendment saves the necessity of a special refunding or limitations enactment, e. g., Act of July 27, 1912, concerning legacy taxes erroneously collected under the War Revenue Act of 1898.

21 This provision virtually consolidates the old Sections 3226 and 3227, R. S., the latter being repealed by Sec. 1319 of the new Act. However, these changes are not to affect any suit or proceeding instituted prior to the passage of the Act.

22 By its terms Section 1320 is not retroactive and is inapplicable to suits under Section 250.

23 Administrative provisions of this character are generally applied retroactively


BRIEF SUMMARY OF LEGISLATIVE MATTERS CONSIDERED BY THE FIRST SESSION OF THE SIXTY-SEVENTH CONGRESS, APRIL 11, 1921, TO NOVEMBER 23, 1921.

The Sixty-seventh Congress convened for its first session on April 11, 1921, having been called together in extra session by President Harding to consider urgently needed legislation, particularly the establishing of peace with Germany, Austria and Hungary, and the revision of the tax and tariff laws. Much legislation of a reconstructive nature was considered. Over 12,000 bills and hundreds of resolutions were introduced during the session, and a number of them were enacted.

The Knox Peace Resolution was adopted by the Senate April 30 and by the House in amended form June 13, the final draft being enacted July 1. This was followed by the formulation of peace treaties with Germany, Austria and Hungary, which were ratified October 18. The Senate also ratified the long-delayed treaty with Columbia on April 20.

The Tax Revision bill was passed by the House August 20 and by the Senate, amended, November 7. It then went to conference. The conference report was agreed to in the House November 21, in the Senate November 23, and the measure was approved by the President November 23. The chief features of the new law are the repeal of war profits and excess-profits taxes, transportation and insurance taxes and most of the so-called nuisance and luxury taxes, retention of present rates on normal income taxes, reduction in individual taxes, the extension of exemption in income tax for heads of families from the $2,000 at present to $2,500 and from $200 to $400 for each dependent, the substitution of a 12 1/2 per cent flat corporation tax for the present normal tax of 10 per cent, and the decrease in maximum surtax rates from 65 per cent to 50 per cent. This law, the most important enacted during the session, is in the form of a compromise, the majority of the members of the House declining to concur in the action of the conference or the recommendation of the President insofar as the reduction of the surtax is concerned.

During the framing of the Tax Revision bill the so-called "sales tax" was given much consideration, and despite the fact that it was defeated in both the House and Senate, it is expected that the subject of a sales tax will be brought up again in the near future.

The Emergency Tariff bill, passed in the last session of the Sixty-sixth Congress and vetoed by President Wilson, imposing temporary duties on certain agricultural products and intended for relief of the farmers, was reintroduced at the first of the special session, passed by Congress, and on May 27 was approved by the President. It becoming apparent that the bill for a permanent tariff would not become law within the time limit of the Emergency Tariff Law (November 27, 1921), H. R. 9643, extending the Emergency Law until February 1, 1922, unless otherwise provided by law, was passed by Congress, and on November 16 was approved by the President. After months of labor in framing a permanent tariff bill, H. R. 7456 was reported in the House from the Ways and Means Committee on July 6. On July 21 it was passed by the House and sent to the Senate, where it was referred to the Committee on Finance.

The Immigration Restriction bill, passed in the last session of the Sixty-sixth Congress and pocket-vetoed by President Wilson, was reintro-
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duced at the beginning of the special session of the Sixty-seventh Congress, passed both Houses and was approved by the President May 19. It provides for the limitation, until June 30, 1922, of admissions of aliens into the United States to three per cent of the citizens of any foreign country resident in the United States according to the census of 1910, with certain exceptions. This emergency measure was necessary to prevent a flood of immigration following the war, which would have aggravated conditions of unemployment.

A number of bills were introduced seeking to amend the Transportation Act of 1920. The so-called Railroad Funding bill, amending Sec. 207 of the act and intended to provide for the financing of the railroads, was passed by the House and referred to the Senate Committee on Interstate Commerce. This Committee amended the bill and reported it to the Senate, but no further action was taken before the close of this session. Other pending bills involve the question of the powers of the Interstate Commerce Commission over intrastate rates, which has been the subject of endless confusion, dispute and litigation.

Senate Resolution No. 23, providing for a general investigation of the railroads, including finances and labor conditions for the years 1912 to 1920, inclusive, was passed by the Senate April 19, 1921. Hearings were commenced on May 10, and will be continued from time to time until the Committee has completed its investigation.

The bill providing for a National Budget System and an independent audit of government accounts was reintroduced early in the special session, passed by both Houses and was approved June 10. For years this reform has been advocated in and out of Congress, and the inaugural of a budget system, it is claimed, will result in great saving to the United States Treasury.

The Packers Control bill, designed to curb the power of the meat-packing combine in maintaining exorbitant prices for meat products to the consumer, while at the same time setting their own prices to the farmer and stock raiser, was passed during this session and was approved August 15.

The Capper-Tincher bill, passed during this session, places all grain exchanges under the supervision of the Secretary of Agriculture, and is intended to put an end to the evils of market manipulation by big traders, dissemination of false crop information and gambling in indemnities, or "puts and calls."

The agricultural credits measure enacted provides a $1,000,000 revolving credit fund for the War Finance Corporation. Legislation was also enacted providing for the exportation of agricultural products. The Federal Good Roads bill was passed, appropriating $75,000,000 for state aid in road building.

Much consideration was given to soldier relief. The Sweet bill was passed, establishing the Veterans' Bureau, consolidating and decentralizing soldier relief agencies and liberalizing compensation awards. The bill providing for a soldier bonus, which failed of passage in the Sixty-sixth Congress, was reintroduced and received strong support, but action on the measure was postponed, the majority responding to the recommendation of the President for temporary delay until the financial condition of the government will permit the passage of the bill.
A number of bills were introduced and are pending, designed to stabilize
the coal industry, prevent profiteering and secure lower prices of coal to
consumers.

Among other important measures passed are the Sheppard-Towner bill,
providing Federal aid to mothers and infants, the Army and Navy Appropriations
bills and deficiency appropriation bills. A number of investigations
were conducted during the special session in addition to the general railroad
inquiry above referred to, among them being the general inquiry into agri-
cultural conditions by a joint commission, the Senate investigation of dis-
abled veterans, the Senate investigation of West Virginia coal field disorders
and the Senate investigation of the Ford-Newberry Senatorial contest.

The first session of the Sixty-seventh Congress, as covered by the above
brief summary of the more important legislative matters considered, came
to an end November 23, 1921.

J. C. G.
NOTES AND COMMENTS

IS THE CONTRACT OF INSURANCE DIVISIBLE OR ENTIRE?

Insurance policies often are valued property under separate heads, and the question arises where there is a breach of condition as to some item or property separately enumerated and valued, does a breach of a condition as to these items make the contract voidable in toto, or is it a divisible contract and merely void as to the particular property separately valued? 1

Upon this question there is much conflict and contrariety of opinion, many courts adhering to the doctrine of the entirety of the contract; 2 also we find opinions of equal weight leaning towards the doctrine of the divisibility of the contract. 3

In Merill v. Insurance Company, 73 N. Y. 452, the court in discussing the severability or entirety of a contract, other than an insurance contract, says: Whether or not a contract is severable is dependent upon whether the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed.

In Miner v. Bradley, 22 Pick 457, there is a distinction made between a severable and an entire contract where there is a purchase of several items for a gross sum, and a contract for several articles with a separate valuation as to each; in the first case the contract is entire, and in the latter case the contract is a divisible one.

The reason for this rule is this: That in contracts thus held to be entire, no means are afforded by the terms by which the value at which any portion was estimated by either party can be ascertained, and also that their terms do not indicate that either party ever contemplated taking the whole. The entirety, therefore, may be, and in fact legally is, the only express consideration. Story on Sales, paragraph 240.—Merill v. Insurance Company, 73 N. Y. 452.

But these rules, applicable to the interpretation of whether a contract is severable or entire, should be laid aside as to the insurance contract, for it is a peculiar one and the rules of equity and reasonableness applied in its stead, bearing in mind that the law is adverse to forfeitures, and where a forfeiture is claimed, the party so claiming must show a clear right; since the language in the policy is prepared by the company and with the aid of the best legal

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2 McGowen v. Insurance Co., 54 Vt. 211.
5 Hinman v. Insurance Co., 36 Wisc. 159.
6 Bowman v. Insurance Co., 40 Md. 620.
7 Lovejoy v. Insurance Co., 45 Me. 472.
8 Merill v. Insurance Co., 73 N. Y. 452.
10 Koontz v. Insurance Co., 42 Mo. 126.
12 Insurance Co. v. Spankneble, 52 Ill. 53.
13 Insurance Co. v. Walsh, 54 Ill. 164.
minds, where there is room for a difference of opinion as to the construction
to be placed on the language, the courts should favor the insured.

It would seem that there are three rules as deduced from the cases:

Of that where the consideration is paid in a gross sum, even though there
is an apportionment of insurance on the different items or they are separately
valued, the contract is entire.\(^1\) Plath v. Insurance Company, 23 Minn. 479,
23 Am. Rep. 697, established the rule in that State that, where the insurance
is for a gross sum and single consideration although the amount of insurance
is distributed over several distinct items of property, the contract is entire.

A mutual benefit insurance contract, providing for benefits upon the death
or disability of the insured upon the same consideration, was not a severable
contract.\(^2\)

Where one premium note was taken for several insurances on different
buildings or other property contained in the policy and by the policy this
premium note was a lien on the several buildings or other property named
in the policy, where there was a misrepresentation of the amount of liens
on any one of the buildings, or other property, declared by the policy to be
a forfeiture, it was held that this was an entire contract, and a forfeiture
as to one piece of property would be a forfeiture as to the whole, though
there was separate valuation on each of the buildings.\(^3\)

But as the court said in Quarrier v. Insurance Company, 10 W. Va. 533:

These decisions are clearly right, not as I think merely because
the consideration recited was entire, but because the entire consideration
as represented by the premium notes was a lien, on all the
property named in the policy, and a misrepresentation of the in-
cumbrances upon any one piece of property diminished the companies' secu-
ity for the premium due on the separate insurance of the prop-
erty included in the policy, but the title of which was not mis-
represented. * * *

The second rule seems to be that where there is an apportionment
of insurance as to different items of property, even though the consideration
is paid in a gross sum, the contract is a severable one.\(^4\)

In Miller v. Gibbs, 95 N. Y. S. 385, 108 App. Div. 103, the rule was laid
down that where insurance is taken out on different kinds of property, each

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\(^1\) Miller v. Insurance Co., 106 N. W. 485, 97 Minn. 98.
Kelly v. Insurance Co., 6 A. T. L. 740, but I think the reason for holding this an
entire contract was due rather to the doctrine of indivisible risk, than the pay-
ment of the consideration in a gross sum.


\(^3\) Insurance Co. v. Miller, 39 Ill. App. 633.
Insurance Co. v. Pickel, 119 Ind. 155, 21 N. E. 546.
Wright v. Insurance Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211.
But in Day v. Insurance Co., 51 Me. 91, a policy of insurance on several different
parcels of property, valued separately, was held to be indivisible.
separately valued, the contract is severable, though only one premium is paid and the amount insured is the sum total of the valuations.

The third rule which has been applied in some cases where this question has arisen, which seems reasonable, and wherein is gaining support, is where there is a separate valuation as to the various items of property insured, the entirety or severability of the contract is dependent on whether the property is so situated that the risk on one item affects the risk on the others, and if the risk on the remaining items is so affected, it is an entire contract, but the contract is divisible if the risk on one item separately enumerated and valued does not affect the risk as to the remaining of the items so insured.\(^7\)

Where there is neither illegality, fraud, nor increase of risk, a recovery is permitted as to all the property not thereby directly affected.\(^8\)

A large number of decisions support the rule that the contract of insurance on a building and the contents therein is entire, and that a forfeiture as to the buildings will forfeit also as to the contents.\(^9\)

In the cases cited as to the building and the contents therein, there are assigned various grounds of forfeiture, but in no case does the court make any distinction as to the different grounds of forfeiture in its affect upon the insurance on the personality therein.

In other states there are cases in direct conflict with those cited. In New York the decisions are varying, but the leading case in that state, Merill v. Insurance Company, 73 N. Y. 452, lays down the rule that a forfeiture as to the building does not forfeit the policy as to the personality therein.

Where a fire insurance policy covered both the buildings and personality therein, and the policy was conditioned against any change in interest of the assured, and the assured sold the real estate just prior to a fire and still had his personality in the buildings, the contract was held to be so indivisible that there could be no recovery on the policy for loss of the personality.\(^10\)

In Mott v. Insurance Company, 69 Hun 501, the court in this case makes a distinction between the language of the policy in that case, where a recovery was allowed on the personality, and that of the language in the policy in the case of Smith v. Insurance Company, 118 N. Y. 526, where the contract was decided to be so indivisible that there could be no recovery. In the first case the language of the policy provided that the "entire policy shall be void," * * * but the policy does not say that if there is a breach of

\(^7\) Insurance Co. v. Pickel, 119 Ind. 155.
\(^8\) Insurance Co. v. Pickel, 119 Ind. 291.
\(^9\) Insurance Co. v. Pickel, 119 Ind. 155.
Miller v. Insurance Co., 14 Okla. 81, 65 L. R. A. 173, 75 Pac. 1121 and other cases which might be cited.

\(^10\) Insurance Co. v. Stoddard, 88 Ala. 606.
Pickel v. Insurance Co., 119 Ind. 291.
Lovejoy v. Insurance Co., 45 Me. 472.
Richardson v. Insurance Co., 46 Me. 394.
Bowman v. Insurance Co., 40 Md. 620; and other cases which might be cited.

\(^11\) Farmers (etc.) Co. v. Olson, 127 N. E. 848.
stipulation as to any part of the insured property the entire contract shall be void as does the language in the policy of Smith v. Insurance Company, supra, which was as follows: "It is expressly stipulated in this policy that, if the property, either real or personal or any part thereof, shall be encumbered by mortgage * * * this policy and every part thereof shall be void."

That an insurance company may waive the indivisibility of one of its policies is decided in the case of Manchester Fire Assurance Company v. Glenn, 13 Ind. App. 365, 41 N. E. 847.

Testimony as to Prior Discovery of Another Still Than That Charged in Indictment Admissible to Show Intent

In the case of State v. Crouse1 the Supreme Court of North Carolina ruled that in a prosecution for manufacturing and possessing spirituous liquors for sale, the admission of testimony as to prior discovery near the defendant's house of another still than that alleged was no error. At the trial Newsome, a witness for the state, was permitted to testify over the defendant's objection, that about 90 days before the trial, or possibly in the preceding September, he found a still at night about 800 yards from the defendant's house, and that it had been in operation during the night. It will be borne in mind, said the court, that the defendant was convicted of the manufacture of liquor and of having it in possession for the purpose of sale. If he owned or controlled or had in possession the still or liquor, the question of his purpose or intent at once became both relevant and material. Evidence of circumstances and proof of other like offenses to show the scienter, intent or motive are generally competent when the circumstances and offenses are so connected or associated that such evidence will throw light upon that question.

The rule that evidence must tend to prove the issue excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact in dispute. The reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party is not prepared to rebut it.2 In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it. These cases will be found to be actions in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral and foreign to the main subject, had a direct bearing.3 The general rule undoubtedly is, said the court in Shaffner v. Com.,4 that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely that the defendant would commit another. In all criminal cases, however, where the felonious intent or guilty knowledge is a material part of the crime, and, therefore, it becomes necessary to show a particular intent in order to establish

1 108 S. E. 911 (Nov. 2, 1921).
2 Greenleaf on Evidence. Pages 77-78.
3 Greenleaf on Evidence. Pages 79-80.
4 72 Pa. St. 60.
the offense charged, proof of previous acts of the same kind are admissible for
this purpose. Thus, in the leading case of Regina v. Francis, where the
prisoner was indicted for obtaining money from pawnbrokers by false
pretences, evidence that he had offered other false jewelry shortly before to
other pawnbrokers was admissible to show guilty knowledge. Upon this
same point in Com. v. Robinson, the court said that the rule excluding
evidence of other independent crimes does not extend so far as to exclude
evidence of acts and crimes which are shown to be connected as part of the
same purpose.

In Com. v. Jackson, however, it was held that, where one was indicted for
falsely pretending a certain horse was sound, with knowledge that such
assertion was false, evidence of circumstances of three other sales of horses
made by the same person, with false representations, was inadmissible. In
the leading case of Regina v. Oddy, where the defendant was indicted on the
third count of receiving stolen property, the Crown wished to show that three
months before this theft the accused was found with other cloth in his
possession which had been stolen from other mills, in order to show guilty
knowledge on his part. The court said that this was not direct evidence of
the particular fact in issue; that the defendant knew that his cloth had been
stolen. In its opinion the court distinguished this type of case from cases
of fraud and forgery and uttering. Representative cases following Regina v.
Oddy are Cable v. State, where another assault with robbery about the
same time by the accused was held incompetent as evidence that this was an
assault with intent to rob. In the case of State v. Johnson the court refused
to allow evidence of another burglar to show intent of the accused in the
case on trial. In the case of Bismarck v. State, also where the prosecution
was for receiving stolen goods, the court refused to admit evidence that the
defendant had subsequently on two different occasions received stolen goods.
The court said that these thefts were separate transactions from different
persons and inadmissible as being too removed, although all these transactions
occurred within a month. On the other hand, in Harwell v. State, the Texas
court admitted as competent evidence the prior receiving of stolen animals
to show the intent of the defendant in the case at bar. This ruling was
followed by the Texas courts and the Vermont Supreme Court in the following
cases:

6 U. S. Snyder, 14 Fed. 554.
8 People v. Hopson, 1 Denio 573 (N. Y., 1861).
9 People v. Lyon, 1 N. Y. Cr. R. 400.
11 State v. Murphy, 84 N. C. 742.
12 Wiley v. State, 43 Tenn. (3 Cold.) 362.
13 12 Cox. C. C. 612.
14 146 Mass. 571.
15 132 Mass. 16.
17 31 Ohio 60.
19 73 S. W. 965; 45 Tex. Crl. R. 54 (1903).
20 22 Tex. App. 251 (1886).
21 Gilbraith v. State, 41 Tex. 567 (1874).
23 State v. Dalwell, 66 Vt. 558; 29 Atl. 1018 (1894).
In cases of fraud,16 which occur in prosecutions for fraudulent use of the mails, there is a general agreement that evidence of similar acts can be introduced by the prosecution to show intent. In prosecutions involving embezzlement15 and counterfeiting there is also the same agreement.17

In prosecutions under the various liquor laws the cases, because of the wording of the prohibition statutes, fall into that class in which it is necessary to show a particular intent in order to establish the offense charged. The admissibility of proof of previous acts of a similar kind by the accused is, therefore, highly necessary. In the case of Rock v. State,19 however, the Indiana court said that the rule that other offenses may be shown to prove intent or motive did not apply to the charge of unlawfully keeping a place where intoxicating liquors were sold or given away. This ruling has not, however, been followed by other courts. The liquor prosecutions usually fall into four classes depending upon the intent which the state has to establish. In the first class are the cases in which the state must show that the defendant manufactured or purchased the liquor in question with intent of unlawfully selling the same. In these cases the state is allowed to introduce evidence of prior sales18 to show the intent with which the accused acquired the liquor seized. The prior sales, evidence of which is introduced by the state, need not be made by the defendant himself. Evidence of liquor sales, made by the servant of the accused in Rash v. State,20 was admitted as competent. Even where the state has been unable to show prior, sales evidence of large importations of spirituous liquors has been allowed to show intent of sale on the part of the defendant.21 In the second group of cases the state has to prove that the defendant sold the beverage in question knowing that it was intoxicating. Here evidence that other sales were made by the defendant of this beverage to persons, and the fact that they became intoxicated, was held admissible.22 In the third class fall those cases in which the state must prove that the transaction in question was not a gift or a "treat," and that it was really so intended by the parties. In the case

17 People v. Gray, 66 Cal. 271; 5 Pac. 240 (1884).
19 110 N. E. 212 (Ind. 1915).
20 Hill v. State, 165 P. 326 (Ariz.).
   Dentler v. State, 112 Ala. 70; 20 So. 572.
   State v. Plunkett, 64 Me. 534.
   State v. Naegle, 65 Me. 468.
   Cliff v. State, 142 P. 644; 14 Ariz. 179.
   State v. Johns, 118 N. W. 295; 140 Iowa 125 (1908).
   State v. Hessel, 191 P. 637 (Wash.).
   Lane v. City of Tuscaloosa, 67 So. 778; 12 Ala. App. 599.
   Tagert v. City of Tuscaloosa, 67 So. 783; 12 Ala. App. 617.
21 69 So. 239; 13 Ala. App. 266 (1915).
22 State v. McKone, 154 N. W. 256; 31 S. D. 547 (1915).
   Fugan v. State, 165 P. 311 (Ariz.).
   Pearce v. State, 40 Ala. 720.
of Archer v. State, where the accused sold cigarettes at ten cents apiece and gave the purchaser a drink, the state was allowed to introduce evidence of other such transactions to show that this was really a sale and was so intended by the parties. Also in the Michigan Case of People v. Giddings, where a party of berry pickers obtained whisky from a tent of the accused by helping themselves and leaving money on the table, the state was allowed to show that this was the customary method of selling the liquor by evidence of other sales. In similar cases the courts of North Dakota, Texas, Alabama, Oklahoma and Kansas have admitted evidence of prior sales. In the fourth group of cases fall the prosecutions of doctors and drug-store proprietors for prescribing liquor when they know, or have good reason to know, that it is not to be used for medicinal purposes. Here the state must prove that the doctor had good reason to know that the liquor would be used as a beverage, and with that intent issued the prescription. The courts of Washington and Kansas have allowed the state to introduce evidence concerning the circumstances under which other prescriptions were issued about the same time, and also evidence as to the number of prescriptions the defendant was issuing per week. In Missouri this offense is prosecuted under the Rev. St. 1909 Section 5784. In two similar cases for the unlawful issuing of prescriptions for liquor the Appellate Court of Missouri has reversed itself. In State v. Patterson it allowed evidence as to the number of prescriptions issued by the defendant to show intent and lack of good faith. In State v. White, however, it ruled that to allow the state to introduce in evidence other prescriptions than those stated in the indictment was an error.

The next question which naturally arises is, how far can the state go in its introduction of evidence to show guilty intent? In State v. Van Vleet the Supreme Court of Minnesota said that the admission of evidence of prior sales, properly limited, to show the intent of the accused was no error. In Ryan v. People the court held that the introduction of evidence to show that the defendant kept a disorderly house when the indictment was drawn to prosecute a violation of the state prohibition laws was error on the part of the trial court. In State v. Benson the Supreme Court of Iowa held that in a prosecution for maintaining a liquor nuisance during a specific period, evidence of prior sales was inadmissible. In the case of State v. Gustament, the Texas court held that in a prosecution for having liquor

Reed v. State, 200 S. W. 843 (Tex. Civ. App.).
Sweat v. State, 45 So. 588; 153 Ala. 70 (1908).
State v. Coulter, 40 Kan. 87; 19 Pac. 368.
26 State v. Raub, 173 P. 1094 (Wash.).
City of Seattle v. Hewetson, 164 P. 234; 95 Wash. 612.
City of Everett v. Cowles, 166 P. 786; 97 Wash. 396.
27 State v. Elliott, 45 Kan. 528; 26 P. 55.
28 222 S. W. 882 (Mo. App.).
29 223 S. W. 683 (Mo. App.).
30 165 N. W. 962 (Minn.).
31 180 P. 84 (Colo.)
32 134 N. W. 851; 154 Iowa 313 (1912).
33 197 S. W. 998.
with intent to sell in October, the state could not show that sales had been made in December and January. Also in the case of State v. Bartly11 the Supreme Court of Maine said: "In a prosecution for maintaining a liquor nuisance, prior convictions of the accused for selling intoxicating liquor and maintaining a liquor nuisance in another place, is not admissible to show intent for keeping liquors at the place described in the indictment."

There is another group of cases which apparently disagree with the rule of admitting evidence of collateral facts to show the intent of the defendant. The case of Protor v. State12 is a representative case of this group. The accused was indicted for the unlawful transporting of beer. During the trial the state tried to introduce evidence that the accused had, on other occasions, violated other provisions of the prohibitory liquor laws, but the court refused to admit the evidence. The point of evidence in these cases is, that the statutes under which the offense is prosecuted is so worded as to dispense with the necessity of proving a specific intent in order to establish the offense charged. Without the necessity of the state proving a certain intent the introduction of evidence of collateral transactions to prove the intent of the accused in the action at bar becomes, of course, incompetent.

It is, however, in regard to the period of time within which the collateral transactions occurred, or should have occurred, in order that these actions should be competent to show the intent of the accused in this action that most of the cases are appealed. Upon this subject the United States Supreme Court said, in United States v. Spurr,13 the period of time within which collateral transactions offered to show intent must have occurred is largely discretionary with the trial court. In Com. v. Sinclair and Com. v. Cotten the Massachusetts court and the Federal court, in Malcolm v. United States,14 admitted evidence of similar sales, trips into prohibition states, etc., which occurred within a few days of the alleged offense laid in the indictment. In a prosecution for the importing of liquor the North Dakota court allowed evidence of an earlier shipment which the defendant received two months before.15 The New Hampshire court, in a prosecution for the illegal sale of cider, admitted evidence of prior sales occurring within a year;16 and in a similar case the Main court allowed evidence of collateral transactions occurring within a period of three to eighteen months before the occurrence of the offense charged to show the intent of the accused.17 On the other side the court of Kentucky refused to permit the entering of a prior conviction for selling whiskey some four or five years before to show the intent of the accused in having liquor in his possession in the case on trial;18 and in a similar case the Supreme Court of North Carolina held that evidence of sales of liquor to several persons occurring a year earlier was incompetent. The transactions were not connected, and the earlier sales, said the court,

11 74 Atl. 129; 105 Me. 50 (1909).
12 129 P. 77; 8 Okla. Cr. 537 (1913).
13 174 U. S. 728.
15 138 Mass. 500.
16 256 Fed. 363.
17 State v. Miller, 128 N. W. 1034; 20 N. D. 509 (1910).
18 State v. Welch, 64 N. H. 625; 15 Atl. 146.
19 State v. O'Toole, 108 Atl. 99 (Me.).
20 Combs v. Com., 188 S. W. 326; 171 Ky. 231.
were too remote to show the intent of the defendant in having liquor in his possession at this time.\textsuperscript{6}

In this case, State v. Crouse, therefore, from the opinions given above, it would seem that the court did not wrongly exercise its discretion in admitting the evidence in question, either in regard to the time of the collateral transactions or to the type of the actions. The cases of State v. Stancill and State v. Simmons,\textsuperscript{5} upon which the Supreme Court of the state based its opinion, exactly cover the latter point. The collateral evidence admitted in the latter case, to show the intent of the accused, was of the same nature as that offered in this case, namely, the finding of a still on his premises. The evidence admitted, therefore, was of circumstances sufficiently connected with the main charge to be competent to show the purpose or intent of the defendant.

D. F. J. L.

**MASTER'S LIABILITY—TO THIRD PERSONS, FOR THE NEGLIGENCE OF A STRANGER WHILE ASSISTING HIS SERVANT**

One may not become the servant of another without the latter's consent, express or implied, or by his ratification.\textsuperscript{1} As a rule, a master cannot be held liable for the negligence of another who is not his servant or agent.\textsuperscript{2} And yet, nearly a century ago an English court decided that a master may be held responsible for the damage or injury caused to a third person by the negligence of one whose employment he has in no way authorized, and of whom he had no knowledge, if his servant has requested or permitted such other to do something in the master's business which it was the servant's duty to perform, and the injury resulted in the course of the employment. Booth v. Mister, (1835) 7 C. & P. 66. That decision was followed in 1860 in Althorf v. Wolfe,\textsuperscript{8} a New York case. Since then the doctrine has been considered in a number of cases with rather general assent.\textsuperscript{7} This doctrine is said by one compiler to be untenable in theory.\textsuperscript{8} Another writer justifies it merely upon the requirement of "supposed public policy that a pecuniarily responsible defendant be found."\textsuperscript{9} Surely, the doctrine does increase greatly the extent of the master's liability.\textsuperscript{7} And a recent English case\textsuperscript{10} contains a dictum that Gwilliam v. Twist\textsuperscript{10} (1895) precludes the further use of Booth v.

\textsuperscript{1} State v. Beam, 103 S. E. 370.

\textsuperscript{2} 178 N. C. 686; 100 S. E. 242.

\textsuperscript{3} 178 N. C. 679; 100 S. E. 239.

\textsuperscript{1} 18 R. C. L. 578, and cases there cited.

\textsuperscript{2} City of Indianapolis v. Lee, 132 N. E. (Ind.) 605.

\textsuperscript{3} Althorf v. Wolfe (1860), 22 N. Y. 355.

\textsuperscript{4} Cyc. v. 26; P. 1521. Note in 13 L. R. A. (N. S.) 572.

\textsuperscript{5} Note in 45 L. R. A. (N.S.) 382; 18 R. C. L. 785.

\textsuperscript{6} Article by Prof. Floyd R. Mechem in 3 Mich. Law Review, 1905.

\textsuperscript{7} 18 R. C. L. 785.


\textsuperscript{9} And yet, the master is denied the defense of the fellow servant doctrine if his servants suffer injury through the negligence of the assistant. Ellinghouse v. Ajax (1915) 152 Pac. (Mont.) 481. Fiesel v. N. Y. Edison Co., 123 App. Div. (N. Y.) 1908.

\textsuperscript{10} Harris v. Flat Moors (1906) 22 Times L. R. (K. B. Div.) 556; reference found in Labatt, Master & Servant v. 7. P. 7737.

\textsuperscript{11} 2 Q. B. (C. A.) 84. Considered in Note 9, below.
Mister as authority for the proposition stated; which, Mr. Labatt says,\textsuperscript{10} weakens pro tanto Althor v. Wolfe, and the American cases in point, which generally rely on Booth v. Mister for authority. Furthermore, there is sufficient conflict in this country to constitute a noteworthy dissent.\textsuperscript{11} Still, the tendency of recent cases here seems to favor the extension of the application of the doctrine.

\textsuperscript{10} Labatt, Master & Servant, v. 7, p. 7737.

\textsuperscript{11} The courts which deny responsibility in the master, emphasis the servant's lack of authority to employ assistance, or they place the procuring of assistance as an act without the scope of the servant's employment. Cooper v. Lowery (1908) 60 S. E. (Ga. App.) 1015, is squarely contra to Althor v. Wolfe, so far as the latter rests upon vicarious responsibility. A manufacturer's servant whose duty it was to deliver goods to customers, obtained the assistance of a boy who injured a customer while loading some goods into the latter's wagon. The court said that where a servant employed to do certain work employs another to assist him, the master is liable for the negligence of the assistance only when the servant had authority to employ him, or when the employment was ratified by the master.

Practically the same language was used in Levin v. City of Omaha (1918) 167 N. W. (Neb.) 214. And that is the sense, also, of an earlier Minnesota case, where, however, the court applied the oft repeated statement that authority in employe to use gratuitous assistance may be implied from a course of conducting the business for such time that employer's knowledge and consent to the use of such help may be inferred. On that ground the court allowed recovery, under the evidence, saying, "It is enough to render the master liable if the person guilty of the negligence was at the time in fact rendering service for him by his consent, express or implied." Haluptzok v. Great Northern R. Co., 57 N. W. (Minn.) 144. See also Bellar v. Levy, 124 N. Y. Supp. 411.

Though there are cases contra on the same facts (Hill v. Sheehan, considered below) it has been held more than once that where a servant having charge of his master's vehicle, turns it over to the complete control of another, while the servant pursues purposes of his own, the master will not be held liable for results of the negligence of such assistant. Mangan v. Foley (1888) 33 Mo. App. 250, was such a case, the court saying that the driver had acted outside the scope of his employment when he confided the team to his friend. The same decision was reached under similar facts on the same reasoning in White v. J. E. Levi & Co. (1911) 73 S. E. (Ga.) 376.

In Gwilliam v. Twist (1895) 2 Q. B. 84, the driver was forced to leave his omnibus by an officer who believed him intoxicated. And yet, because he could easily have communicated with his master, the court held that no "necessity" existed which would specially warrant him to accept assistance. Therefore, in permitting a volunteer to drive the bus, the servant acted without the scope of his employment, and the master was not liable for the accident that followed.

The master was declared not liable, also, in Hills v. Strong, 132 Ill. App. 174, supporting the generalization that the master is not liable where servant delegates a particular duty in its entirety to a stranger, and is not present and does not co-operate in the performance.

And in Weatherhead v. Handy (1917) 198 S. W. (Mo. App.) 459, where a servant entrusted an animal left to his care to another, by whose negligence damage resulted, it was held that if the servant delegates his duties to another, the master is not liable, unless negligence of the servant concurs with the negligence of the third party in contributing to the injury. In these cases the abandonment of duty by the servant is not treated as being, in itself, negligence for which the master could be made liable.

Of course, where the servant co-operated with the helper in the act from which injury results, the master is responsible in that the act of his servant contributed to the injury, and joint tort-feasors are separately liable for the entire damage." Obviously, too, the master is liable, if, from the nature of the employment or from the circumstances of the case, authority in the servant to employ an assistant may be implied, or where the time the employment has been continued warrants an inference of knowledge and consent thereto by the master. And, on the contrary, it is uniformly held that claim for responsibility on the part of the master cannot be established if the injury resulted from negligence by the helper outside the scope of the employment of the servant who countenanced his aid.

In a few cases the master has been held liable for the negligence of one whom a servant engaged, because the delegation by the servant of his own duties was, of itself, considered negligence on the part of the servant, and was taken to be the proximate cause of the injury which resulted from the acts of the sub-servant. In one instance, the sub-servant used defendant company's wires to send a fraudulent telegram whereby he benefited, having

15 "The one safe and logical ground on which to rest the liability of a master for the negligence of a volunteer assistant of his servant is the negligence of the servant in inviting or permitting a stranger to perform or assist in the performance of the work which was entrusted to his own hand." Thyssen v. Davenport Ice Co. (1907) 112 N. W. (1a.) 177.
To this Mr. Labatt objects, "if it be assumed that the servant's act is one which necessarily imports negligence, that negligence is incidental to a matter which, ex hypothesi, lies outside the scope of his authority." Master & Servant 1:7, p. 7744. For support see Mangan v. Foley, and cases subsequent, in Note 9, above. Contra. P. C. C. & St. L. Ry. Co. v. Kirk, 1 N. E. (Ind.) 849; Ellingham v. Ajax Live Stock Co. (1915) 152 Pac. (Mont.) 481; Slothower v. Clark (1915) 179 S. W. (Mo, App.) 55. Jewell v. Grand Trunk R. Co. (1874) 55 N. H. 74, is in point. There the negligence of the servant in procuring help was considered not to be proximate cause of the damage occasioned by the helper; hence, no recovery from master.
The same might well have been the ruling in Leavenworth Elect. Ry. Co. v. Cusick, above, where the conductor asked another to give the signal to stop when plaintiff's destination was reached. He did so, and left the car simultaneously. An in termeddler prematurely pulled the bell rope, giving the signal to start. Injury resulted; and recovery was allowed against the company.
Employing another in disregard of express instructions was held to be an act outside the scope of employment, in Long v. Richmond, 73 N. Y. Supp. 912; Aff. 67 N. E. 1084. While, under a quite similar state of facts, such disregard of express instructions was held to be negligence on the part of the servant for the consequences of which the master was responsible. Hill v. Sheehan, 20 N. Y. Supp. 529.
gained access to the office as gratuitous helper to the company's servant. There this doctrine favoring the responsibility of the master for injury to third persons by an unauthorized sub-servant was entirely unnecessary; for the case goes on the broad ground that the agent was negligent in not preventing any unauthorized person from using the wires—not vicarious responsibility, but responsibility for a proper use and care of business instrumentalities potentially harmful, was the point in issue. Other instances in this category involve the negligence of helpers to servants of common carriers; these, seemingly, might have gone on the responsibility of the carriers, as such, "to use a high degree of care to protect passengers from injury by the negligence or wilful misconduct of third persons."

In other cases which consider, and rely more or less upon this liability of a master for the acts of a "sub-servant," while undoubtedly a correct result has been reached under the particular facts, the master's responsibility might better have been based entirely, as usually it is in part, on the liability of a property owner abutting a highway to use due diligence and care to save pedestrians from being endangered thereby.

A group of decisions, which involve more precisely the proposition under consideration, comprises what may conveniently be termed the "longer arm" cases, in which the proximity of the servant and his participation, through direction and control, impute to him the negligence of his sub-servant. These, most frequently, are instances where driver or chauffeur permits or induces another to handle the reins or the wheel, but remains in the vehicle himself. Such was the leading case of Booth v. Mister, in which Lord Abinger said: "As the defendant's servant was in the cart I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself." In Simons v. Monier a servant directed his child to ignite a brush heap belonging to the master, and the fire spread. Lighting the fire was found to be negligence and the master was held liable. The court said: "It was the father's will and volition exclusively." In James v. Muehlebach the helper negligently injured another while arranging the load on the wagon. The court held that he was not a servant, but instructed the jury that the defendant would be liable if they found that the keg was thrown by the direction or with the assent of the driver; which they did

Bank of Calif. v. Western U. Telegraph Co. (1877) 52 Cal. 280.

The court said, "It certainly would be a strange thing if, while the defendant would be responsible had C. committed the fraud by reason of a want of proper care on the part of W. to prevent his getting within reach of the telegraph machine, the defendant is not responsible because W. actually delivered over the conduct of the business of telegraphing to C." Citation preceding note.

Lakin v. Oregon Pac. R. Co. (1887) 15 Pac. (Ore.) 641.


Altorfer v. Wolfe, above. And particularly Elleison v. Singer (1909) 116 N. Y. Supp. 453; 132 App. Div. 89; where janitor engaged helper to clean roof, and helper negligently struck a neighbor with a plank which he threw from the roof, the janitor not being present.


29 Barb. 419 (1859).

34 Mo. App. 512
find. In Hollidge v. Duncan injury was suffered by a pedestrian from the negligence of "bystander" while helping the driver repair his cart. The court said: "We think that the act of the bystander must be regarded as the act of the driver; * * * he used the assistance of the bystander as he would have used a tool or an appliance." In this case, however, the condition of the cart "was a contributing cause of the accident." Recovery was allowed against the master in Geiss v. Twin City Taxicab Company (1913), where the damaging negligence of the assisting stranger occurred "in the presence of the servant and with his consent." In Slothower v. Clark (1915) the chauffeur let another person, invited to ride with him, take the wheel; and this other person's acts were held to be the acts of the servant, for which the defendant master was responsible.

Some courts go beyond this "long-arm" type of case. Using the same language, citing the same authorities, treating as entirely analogous cases wherein the facts present situations which might reasonably be distinguished as different, they have found wider scope for this principle of vicarious responsibility, and thereby have extended perceptibly the liability of the master. In Wellman v. Miner (1897) the master is said to be "liable for the negligent act of an individual whom the servant had invited to aid him in the task imposed by the master, the negligence having occurred in the course of the work." Though the helper is said, here, to "aid" the servant, there is nothing whatever required as to the presence or the supervision of the servant. In Gleason v. Amsdell (1880) a drayman requested another person to unload the goods, and he watched the performance from a window as he ate his dinner. According to the court, the act, under the circumstances, must be regarded as the act of the defendant's driver. In another early case a liveryman sent his servant with a patron's horse, with express instructions to entrust the horse to no other. The servant turned the horse over to one Kreger, a friend, and damage resulted. It is said in the opinion that an instrument "i. e. Kreger was used for the prosecution of the master's business, and that such instrument inflicted the injury. It is not essential, under such circumstances, that the relation of master and servant should exist, in order to fasten responsibility. It is sufficient when it appears that the master's business is being prosecuted by the instrument used."

A similarly broad interpretation of the principle is found in an Indiana case decided last October. A chauffeur employed by the city of Indianapolis,

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24 (1908) 85 N. E. (Mass.) 186.
25 139 N. W. (Minn.) 611.
26 179 S. W. Mo. App. 55.
Indiana U. Traction Co. v. Benadum (1908) 83 N. E. (Ind.) 261
29 19 Miss. 644 (1897).
30 9 Daly 393 (188).
31 Hill v. Sheehan, 20 N. Y. Supp. 529. See also:
Campbell v. Trimble, 12 S. W. (Tex.) 863.
Bucki v. Cone, 6 So. (Fla.) 160.
Indiana U. Traction Co. v. Benadum, above.
Ellefson v. Singer, above.
32 City of Indianapolis v. Lee (1921) 132 N. E. (Ind.) 605.
in violation of express orders, allowed a friend to drive the truck; and the city was held liable for an injury to a pedestrian resulting from the negligence of his friend. The facts are interesting. Neff was the employee. While out in the course of his employment he met a friend, Merrill, who was having trouble with his automobile. Neff obligingly stopped and offered to assist. After some adjustments by him he took Merrill's car and "told Merrill to drive the city truck and to follow him; * * * the two proceeded northward, Merrill following Neff. As they thus moved along, Neff looked back at least twice to see how Merrill was coming."22 One of the truck wheels ran into a depression in the street, the truck was turned, and a woman was injured. The opinion says: "Merrill operated the truck under the express permission, in accordance with the direction and under the immediate supervision and control of Neff. * * * The city is liable—not for the negligence of Merrill, but for the negligence of Neff; for Merrill was in fact merely an instrument in the hands of Neff."23 Here again is the familiar language. The sub-servant is but the "instrument" of the servant; he is a longer arm. He is said to act "under the immediate supervision and control of Neff." It is noteworthy, however, that he was an instrument—not primarily to further the master's business, but to enable the servant to leave his master's work for the purpose of doing a favor for the tort-feasor. And the servant's supervision and control were not so immediate as to make at all likely (if, indeed, possible) the prevention by him of just the thing which did occur. In the leading case of Booth v. Mister24 we had two men on the same seat in a cart; here we have the men operating separate machines. This Indiana court gave one of the broadest statements of our principle yet made by a judicial tribunal, when it held that "generally * * * where a servant, without express or implied authority from the master, suffers or permits a stranger to do, or to assist in doing, the work which the master intrusted to the servant, the master is liable under the rule of respondeat superior for an injury to a third person inflicted through the tortious act of the stranger."

Thus the courts disagree as to whether to hold the master liable to third persons for the negligence of a stranger while acting in his business under the countenance of his servant. There is lack of unison, too, both among those which assert and those which deny such liability, as to the precise

22 From the opinion, ibid.
23 Ibid.
24 The courts generally dwell upon the stress which emphasized, in Booth v. Mister, the close relationship of the servant and his helper due to their physical nearness. Mr. Labatt objects (v. 7, p. 7737) that it was not intended, in Booth v. Mister, thus to insist upon the actual proximity of the two men. And this Indiana case, among others, seems to bear out his interpretation that, "The rationale of Lord Abinger's ruling is simply that the negligence of the tort-feasor was imputable to the servant on the ground of those two persons being constructively identified as regards any defaults committed by the tort-feasor while he was engaged in the driving."

This Indiana court says, "The acts of the two men are so interrelated that it is impossible to form a rational conception of the conduct of either uninfluenced by the conduct of the other."

Obviously, such reasoning can be used to attach responsibility in a great variety of circumstances which, it seems reasonable to suppose, were not immediately contemplated by the courts which relied upon the theory of the assistant being—in a much more restricted sense—only a "longer arm."
NOTES AND COMMENTS

grounds for their respective decisions. Yet it seems that in a majority of the cases, and in the majority of jurisdictions, the doctrine of Booth v. Mister has, in greater or less degree, been yielded assent. And, among these cases, the principle sustained, is often stated in terms susceptible of wide application. Though there is, still, considerable opposition, the principle seems to be established and capable of extention.

V. S. M.

THE THEORY OF SUNDAY LAWS

The Supreme Court of Minnesota has held that the prohibition of motion-picture shows on Sunday is not in conflict with the general law or public policy of that state, and that under a grant of police power of the state to license and regulate such shows, municipal authorities have power to determine where and within what limits they may be conducted, saying that in the exercise of such police power all manner of labor and business on Sundays, except works of necessity and charity, may be prohibited. The theory upon which the court upheld the Sunday law in question was that there should be one day of rest in each week to promote the moral and physical well-being of society (citing authorities). Those attacking the law claimed it simply camouflaged Sunday legislation, and illegal for the further reason that the general laws of the State did not prohibit motion pictures on Sunday. There was a dissenting opinion by Justice Hallam, who thought the law in so far as it related to the exhibition of motion pictures on Sunday was Sunday legislation, and not regulation, and that it was repugnant to the statutes of the State (citing authorities). Fower v. Nordstrom et al., 134 N. W. 967.

The prohibition of work, shows and recreation on Sunday by law is not new either in this country or the Old World. Constantine the Great (A. D. 321) issued his famous "Edict of the Sun," saying: "On the venerable day of the Sun let the magistrates and people residing in the cities rest, and let all workshops be closed ** *" tillers of the soil in the country exempted. In A. D. 326 an edict was published forbidding the transaction of any business or the arbitration of causes on that day. Nowhere, however, in the edict of Constantine was the "Lord's day" or the "Christian Sabbath" mentioned. It was not until 386 A. D. (Theodosius) that we find any reference in civil law to the "Lord's day," and the term "Christian Sabbath" had no place in history, ecclesiastical or civil, until the time of the Reformation. Constantine forbade desecration of Sunday, not under the name of Sabbath or Dies Domini, but under its old astronomical and heathen title, Dies Solis, and there was no reference in his edict to the Fourth Commandment or to the Resurrection of Christ. The law was not asked for by Christians. Constantine called no council to seek advice, nor did he act in response to any appeal from Christians. The sacredness of the day, so far as his edict was concerned, was predicated on the fact that it was the "Day of the Sun," and many historians hold that it was the result of the growing importance of "Sun Worship" as a religion in Rome. However, throughout the years following, many of the laws of Rome "adopted" the "Day of the Sun" as the "Lord's day" in the injunction of work, labors, circuses and amusements, and in exhorting the people to religious activities of the Christians. Through the laws of the various councils, after the fall of Rome, the day—Sunday—came
to be the recognized day of the Christians. The Saxon laws on the subject were the product of middle age legislation relative to Sunday. The first law of the Saxons, of which there is record, was about A. D. 694, during the reign of Ina, King of Wessex, when all work on the Sabbath was forbidden. Succeeding laws of the Saxons followed, in the main, those of ancient Rome, although possibly more severe. Reference in all, these laws was to the "Lord's day" and "Sunday." The early Sunday laws of England were but the expansion of the Saxon laws, continuing in rigidity until the time of Elizabeth, when there was a slight respite, then again assuming their old-time strictness.

The Statute of 29, Charles II, has been said to form the foundation of the Sunday laws of this country.

But, in none of the laws of ancient Rome, the middle ages or the laws of England were Sunday laws upheld simply on the grounds of public policy. There was always connected with their observance the religious duties of the people.

The laws of the colonies (Virginia was the first to enact such a law) were, in the main, borrowed from those of the Puritan period of England. The non-observance of Sunday was severely punished, sometimes by death, and often by imprisonment and fines. Apparently the legal element of "separation of church and state" never entered the minds of the early colonials, and punishments were meted out paramountly because of the desecration of the day as the "Christian Sabbath." So to, after our entrance upon independent government under the Constitution, for years our states, which had adopted generally the Sunday laws of the colonies, upheld them because of the religious aspect, and not because men were of right entitled to a weekly day of rest. Many decisions have been rendered in the various states of the country and also by the Supreme Court of the United States, wherein Christianity has been characterized as a part of our common law, and the observance of Sunday, therefore, a Christian as well as a legal duty. Washington, however, in the treaty with Tripoli thought that this government was in no sense founded on the Christian religion.

In modern times our courts have gradually drawn away from the doctrine that Christianity is a part of the common law of our country, and have sought to found the validity of Sunday laws on the valid exercise of the police power and not on any religious ground. Since it is conceded by all that no Sunday law can now be upheld on a religious basis, it is unnecessary to discuss that phase of the question further, except to say that history shows that such laws grew out of Christianity, and that the setting aside of Sunday as the day of rest has been mainly because the people of this country are essentially Christian, and that the morals and teachings and principles of Christianity must of necessity permeate everything we do.

In the exercise of its police power a state can either regulate or prohibit certain things. Those things are all laws necessary for the promotion and preservation of the safety, health, morals and general welfare of society. This power is coextensive with self-preservation, and may properly be termed the law of "overruling necessity." Even the privilege of citizenship and the rights inhering in personal liberty are subject to it. The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of practically every state in the union, as well
as the United States Supreme Court. It is universally conceded to include public safety, health and morals. But the states may interfere only where the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public may require, but what measures are necessary for the protection of such interests. Most of our courts now say that in the interest of the public welfare the state may declare a day of rest, and that whether it chooses a day set aside for religious activities is immaterial. But, on this day it can prohibit nothing that will not endanger the health, morals or general welfare of the public. And it is well settled that the police power of a state extends only to such measures as are reasonable, and all regulations must be reasonable under all circumstances, it being required that it appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. "Is the law really designed to accomplish a purpose properly falling within the scope of the police power?"—That is the question. With this in mind, can it be shown that by the prohibition of innocent amusements and recreation, the public morals, safety and health of the state is enhanced? A picture show does not tend to interfere with the public health. They are instructive, and furnish an inexpensive form of recreation to those whose weekly toils may not permit their enjoyment at other times. It is not labor to go to a picture show. It is not a nuisance to either attend or operate one, properly. And the religious phase has nothing to do with it. I injure no one if I prefer to attend an instructive show, rather than to spend my time in idleness. "An idle man is the devil's workshop." The safety and general welfare of the public cannot in any way be endangered by my attendance, nor by one operating a picture show on Sunday any more than on Monday. It is not "immoral" to attend a picture show any more than it is to read a newspaper, and one probably learns more from the former. It is well settled that the police power is confined to regulating such occupations or acts as are in themselves indecent and immoral, or tend to encourage or promote immorality or indecency in others. It is a harmless recreation, and tends to no disorder or extra police supervision or regulation. It has never been known, under proper censorship, to affect in any injurious way the public health, order, safety or morals. The fact that a picture show has attractions which induce people to attend it, does not call for an exercise of the police power to the extent that a state may prohibit it altogether on Sunday.

The law of preservation is the strongest law of nature. Before Constantine ever thought of an "Edict of the Sun" men periodically rested from their labors. It is as impossible for an employer to compel a man to work continuously as it is for a servant to labor always without rest. The railroads of this country run without cessation, yet every workman has a weekly day of rest. Cafes stay open continuously in many cities, yet the employees unquestionably have periods of rest, else they would not work for the hire. The wheels of government roll on without rest. Nowhere in the workings of nature itself is their any cessation.

Let the State say that every man shall have a weekly day of rest, but leave it to his discretion when he takes it, and so long as he spends it in the exercise of his personal liberties, without hurting or harming others, let
him alone. Idleness breeds more crimes than work ever thought of, and if I prefer to spend my weekly day of rest in harmless amusement, out-door recreation, or where I find it "necessary" or "charitable"—in doing extra labor, it were better that I do so than that I become a public charge upon the State. I see nothing in the law save a fit promoter of idleness, and to my mind it is a usurpation of "police power"—that all-pervading cloak for more encroachments on the personal liberty of the citizen than the founding fathers ever dreamed could be accomplished. We need more people in schools, more people on the farms, in the workshops, more producers and less laws and restrictions on personal liberty. That state is best governed which feels the restraint of laws the least.

It cannot be said that the designation of a particular day as a weekly day of rest is necessary because without such designation there would be no obedience of the law. The eight-hour day law is obeyed, and well enforced. The city of Washington is, with the exception of hangings in the shadow of the national capitol, probably as nearly a model city as we have, from the standpoint of proper government. But there are no Sunday laws under which all forms of recreation and amusement are prohibited. Still there is a marked observance of the Christian Sabbath—not to the extent that all activities cease, but so far as the people themselves think is necessary for the common good. Whatever the people want to do, having due regard for the rights of others, they should be allowed to do, and they do it. If a Jew wants to work on the "Christian Sabbath" that is his business, so long as he takes a weekly day off from his labors. If the Seventh Day Adventist believe that Saturday is Sunday, and that the Lord demanded and commanded that they work on the other six, it seems to me that as long as they keep within the other general laws they have a perfect right to attend to their business in their own way. Either the statement "personal liberty" means something, or else it is a misnomer, and a constant "April's fool" to everybody who invokes the principle. Either there is a real and reasonable limit on the police power of a state, or else this is not a republic, but an autocracy pure and simple.

Let us not be able to say that:

"Now the cock's sharp spurs are clipped,
And the elephant's belly is ripped,
While the Socialist party's skipped,
To the night's Plutonian shore,

That—

"The freeman stands a-hawking,
Chewing and spitting, but done quit talking,
And the National Eagle's squawking—
'Nevermore! Nevermore!'"

C. C. Mc. (P. G.)

COMMON LAW: COPYRIGHTS—RIGHTS OF AUTHOR OR OWNER IN STATE COURTS

Without interposing any opinions of our own as to whether or not the classical critics of good music are correct in their denunciations of the modern rhythmic syncopated strains of sound commonly known as "jazz," as being unworthy of the dignity of being referred to under the term of "music," such renditions certainly have a practical commercial and monetary
value which the courts are quick to recognize and protect when called upon to do so.

In the case of Kortlander v. Bradford,1 recently decided in the Supreme Court of Westchester County, New York, the defendant, Perry Bradford, wrote a composition entitled "Wicked Blues," and without having it copyrighted sold all of his rights therein for value to Kortlander, the plaintiff. Later Bradford, with knowledge of Kortlander's acquired rights, and without his consent, copyrighted the piece as provided for in the Federal Copyright statutes, under the name of "Crazy Blues," and published it. Evidently the strains of this composition were particularly engaging, for practically all of the manufacturers of phonograph records in the country were joined as co-defendants in a suit brought by Kortlander in the State courts to restrain the publication and sale of the song. A demurrer was filed by the defendants, in which it was contended that the case, if sustainable at all, was one for the Federal courts under the Federal Copyright law, and that the State court did not have jurisdiction, and also that the complaint did not state facts sufficient to constitute a cause of action. The Court overruled the demurrer, saying that apart from any apparent rights which Bradford may have had under the Federal statutes, he had certain common-law rights of property in the composition which he had disposed of to Kortlander, namely, the right to its first publication and the right to use it for any other purposes short of publication he might desire, which rights were common-law rights, and could be protected wholly independent of and without the aid of the Federal Copyright statutes.

When a person applies for and obtains a Federal copyright on a composition—musical, literary or otherwise—he exchanges, therefore, his common-law rights for the rights afforded under the Federal statutes.2 At common law he was entitled to exclusive rights in his work until he published it. He was entitled to its first publication, but after the work had once been published with his consent he had no further exclusive rights in the composition whatever. Therefore, even at common law he was entitled to make whatever use he chose to short of publication without relinquishing his exclusive rights. It is, of course, understood that the singing of a song, the playing of a tune by an orchestra, its use in theatrical performances or other public presentations, are not tantamount to a publication.

The leading case on the subject is that of Bobbs-Merrill Company v. Strauss.3 In this case the publishers of a copyrighted book printed a notice following the title page that the book was not to be sold below a certain price, and that such a sale would be treated as an infringement of the copyright. Suit was brought to restrain the defendants from selling the book below the price noted and asking for an accounting. The defense was that such a right was not secured to the plaintiff by the copyright statutes. The Court upheld this defense, saying that where an owner of a common-law copyright elects to substitute the protection of the statute for that of the common law, he, upon publication, abandons or surrenders his common-law rights, including the said right of limited publication, in exchange for the statutory right, namely, the exclusive right to multiply copies. He cannot have at the

1 190 N. Y. S. 311.
3 147 Fed. 15.
same time the benefit of the copyright statute and also retain his common-
law rights. The statute does not permit the owner of a copyright by at-
tempts restrictions upon the use of copies to retain in himself the common-
law rights. When an author applies for and receives a copyright he re-
linquishes his common-law rights in exchange for the exclusive right to
multiply copies. He no longer has the right to restrict the manner in
which copies of the composition may be used or, the price for which they
may be sold, for the right to multiply copies is the sole and only right
he now has, and it is the only right secured under the Federal statute.

In some instances it may be more profitable to a composer not to secure
a Federal copyright, but to stand on his common-law rights, for his com-
mon-law rights are such that before its publication he may restrict its use
as he pleases.

"The property of an author in his intellectual production is abso-
lute until he voluntarily parts with all or some of his rights. There
is no principle of law by which he can be compelled to publish it
or to permit others to enjoy it. He has a right to exclude all persons
from its enjoyment; and, when he chooses to do so, any use of the
property without his consent is a violation of his rights. He may
admit one or more persons to its use, to the exclusion of all others;
and, in doing so, he may restrict the uses which shall be made of it.
He may give a copy of his manuscript to another person without
parting with his literary property in it. He may circulate copies
among his friends, for their own personal enjoyment, without giving
them or others the right to publish such copies."*

At common law, when an author did make the first publication, it was
considered that the composition was dedicated to the public and the author's
exclusive rights were forever gone. Until published, the work is the private
property of the author wherever the common-law rights of authors are re-
garded. When once published, with the assent of the author, it becomes
the property of the world, subject only to such rights as the author may have
secured under copyright laws, and they can have no force or give any rights
beyond the territorial limits of the government by which they are enacted.
The assignment of a copyright before publication is entirely permissible. The
right of sale and transfer is one of the inseparable incidents of property, and
the property in a manuscript may be transferred, and upon the death of
the owner goes to the personal representatives or next of kin of the owner as
other personal property. The right to the first publication is lost by parting
with the ownership of the composition.

In the case of Palmer v. DeWitt5 it appeared that one Robertson composed
a drama called "Play," and that he sold and assigned to the plaintiff the exclusive
right and privilege of printing, producing and acting, etc., in the
United States. The drama was publicly performed, and represented many
times in the city of London, with the author's sanction, in the presence of
large audiences, with no notice of prohibition against the carrying of the
same away and making such use of it as any of the audience might see fit.
Later the defendant, a resident of New York city and a citizen of the
United States, printed and sold copies of the drama in New York, having
received it from parties or persons who had seen and heard it represented
and performed in London, and the action was brought to restrain the de-

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* Drone on Copyrights, 102, 103.
5 47 N. Y. 532.
fendant from printing and selling the drama. The Court held that the bringing out and a representation upon the stage of a dramatic composition is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission.

To the same effect is the case of Ferris v. Frohman,4 where an unprinted play, which had been neither published nor copyrighted, had been copied substantially, only a few minor details having been changed, and then copyrighted by the plagiarists. In this case the Supreme Court of the United States held that a State court could restrain the publication of a composition that had been granted a Federal copyright when it could be shown that the party securing the Federal copyright was not the original author or an assignee, the Court saying:

"Our conclusion is that the complainants were the owners of the original play and exclusively entitled to produce it. Their common-law right with respect to its representation in this country had not been lost. This being so, the play of the plaintiff in error, which was substantially identical with that of the complainants', was simply a piratical composition. It was not the purpose or effect of the copyright law to render secure the fruits of piracy, and the plaintiff in error is not entitled to the protection of the statute. In other words, the claim of federal right upon which he relies is without merit."

The common-law property in intellectual productions is not limited to the exact form in which the author has expressed his ideas; the property is in the intellectual conception, and the author may claim it as his own in whatever form it can be identified as his production. It is generally laid down that literary intellectual productions, in order to be the subject of property, must be original with the author, but by this is meant nothing more than that it must represent independent mental labor on the part of the author. Entire originality is not required. A translation from a foreign language or a new arrangement or adaptation of existing materials is sufficiently original to come within the rule. Of course, a mere copyist of another's work acquires no property in his piracy. A dramatization of a novel is an original work entitled to protection, because dramatization requires the skill and experience of the playwright, and the success of the work on the stage depends in large part upon his dramatic knowledge and genius. The rules as to publication of musical compositions follow closely the rules of dramatic works. Public performance is not a publication in the United States nor in England. The authorized sale of copies of a musical composition constitutes a publication. Literary matter must be innocent, however, in order to be the subject of property. No protection will be accorded by the courts to what is illegal, immoral or against public policy. But no literary or artistic merit in the work is essential to entitle one to protection for the result of his mental labors.

The author or owner of a composition does not have any property in its name of itself, but under the rules of the law of unfair competition regarding

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4 223 U. S. 424.
7 Universal Film Co. v. Copperman et al, 218 Fed. 577.
8 13 C. J. 952.
9 Fleron v. Lackaye, 14 N. Y. S. 292, 293.
10 13 C. J. 953.
the use of trade names an unauthorized appropriation of a name which an
author has conferred upon his work by another for a work in the same
class will be enjoined. Likewise an imitating author is not entitled to use
the name of another author on his works, for everyone is entitled to the
exclusive use of his own name wholly independent of the copyright, trade-
mark or any other statutes.

Therefore, the author of a literary, musical or dramatic composition may
make his election of a number of things he may do with it. He can sell it
outright in its uncopyrighted form, or he can license others to use it under
certain restrictions imposed by him, or he may distribute copies under the
condition that they are not to be copied or published, or he may have it
copyrighted. Any publication without the owner's consent may be enjoined.
If he has it copyrighted no one but he, or those whom he permits to do so,
may make copies of it, but all other rights are then gone. This is the only
right he now has. He has sacrificed all his other rights for the one right to
multiply copies after the first publication, a right which he did not have under
the common law.

It may frequently be a matter of large moment in the exercise of judgment
to an author or composer to decide whether to stand on his common-law
rights or to exchange them for the benefits that may be derived under the
copyright statutes. As a matter of business strategy it may be desirable
not to obtain a copyright at first, but to restrict its use under a license basis
for exhibition and other purposes, and then later, after a demand has been
created for copies of the composition, to relinquish these exclusive rights,
secure a copyright and obtain the benefits afforded by the statute law.

C. L. C. (P. G.)

DETENTION OF NEUTRAL VESSELS—REASONABLE DOUBT WHICH
WILL JUSTIFY A BELLIGERENT IN EXERCISING RIGHT OF—
(The Elve and the Bernisse, 37 Times L. R. 193)

It is not every reasonable doubt as to whether or not a vessel is a lawful
prize which will justify its detention by belligerents so as to relieve them from
the payment of damages resulting therefrom. Such a doubt must arise from
"some circumstance connected with the ship or cargo affording reason-
able ground for belief that the ship or cargo might prove a lawful prize.
The Oostzee, 9 Moore, P. C. 150. A bona fide doubt as to the true con-
struction of an Order in Council issued by the belligerent power is not such
a doubt as will relieve the captors from the obligation to compensate for
any loss proximately resulting from detention of neutral or allied merchant
vessel. This is so held in the present case. The case of The Luna
(Edwards, 190) contra is now overruled, and the case of the Actoen (2
Dodson, 48), approved.

In the case of The Luna, supra, Lord Stowell used the following language:

"It is impossible for the court to throw out of its consideration that
when these Orders in Council are issued, it is the duty of the
officers of His Majesty's Navy to carry them into effect, and although
they may be of a nature to require a great deal of attentive considera-
tion, gentlemen of the navy are called upon to act with promptitude
and to construe them as well as they can under the circumstances of
cases suddenly arising. With every wish, therefore, to make the
greatest allowance for the difficulties which are at present imposed
on the commerce of the world, I cannot, in this instance, refuse the
captors their expenses, but in no future case arising on the same state
of facts will the court grant that indulgence.”

In a subsequent case, The Actoen, supra, he laid what seems to be a
different and more equitable rule. He says (p. 52):

“Neither does it make any difference whether the party inflicting
the injury has acted from improper motives or otherwise. If the
captor has been guilty of no wilful misconduct, but has acted from
error and mistake only, the suffering party is still entitled to full
compensation, provided, as I have before observed, he has not by
any conduct of his own contributed to the loss. The destruction of
the property by the captors may have been a meritorious act towards
his own government, but still the person to whom the property be-
longs must not be a sufferer.”

This latter rule is substantially followed by Sir Arthur Channel in de-
delivering their Lordships’ judgment in the case under consideration:

“It is not necessary to say that in order to relieve the captors
from paying damages the neutral owner must be in some way in
fault; it may be only his misfortune; but there must be something
‘connected with the ship or cargo’ in order to give rise to the suspicion
which will relieve. Here the doubt, which certainly was honestly
entertained, was not a doubt as to anything so connected, but merely
a doubt as to the meaning of an Order in Council issued by the
British government.”

L. V. R. (P. G.)

SEARCHES AND SEIZURES—LEGALITY OF WARRANT

There seems never before in the legal history of this country to have
been the need for search authority that has been experienced since the adoption
of the Eighteenth Amendment.

The Fourth Amendment to the Constitution of the United States provides
that 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 and things to be seized”; while the Fifth Amendment requires that
“No person * * * shall be compelled in any criminal case to be a witness
against himself.”

In the many raids and seizures, which are made under the Volstead Act,
application of the Constitutional Amendments cited becomes a matter of the
greatest import, and the question of law enforcement here touches very
closely upon the most sacred rights of American freedom. It has been stated
the instances are numerous where searches and seizures have been made
without the authority of a search warrant conforming to the requirements
of the Fourth Amendment. This is the point considered in the case of the
United States v. Kelih.1

In this case the defendant was indicted by a grand jury in June, 1920, for
violation of the National Prohibition Act (41 Stat. 305). The defendant
pleaded not guilty and made his motion for the restoration of property,
charging it was illegally and unlawfully seized by officers of the govern-
ment, for the reason that the search warrant under which the search and
seizure were made was void, as being in violation of the Fourth and Fifth

1 Dist. Court, S. D. Ill., S. D., No. 16469.
Amendments to the Constitution of the United States, and that it was issued to search a private dwelling in violation of the provision of Title 2, Section 25, of the National Prohibition Act, and that the evidence upon which the government procured the indictment and seeks a conviction was gained by reason of the unlawful and illegal search. The government denies the facts upon the motion was based. The evidence disclosed that a number of officers went to the private dwelling of the defendant, searched his premises and took therefrom one milk can, 12 gallons of distilled whisky, one copper coil and three gallons of raisin mash. Defendant averred the search and seizure were made without his consent and against his will, and was firm in his testimony that no search warrant was produced, and denies that he was told by anybody that the officers had a search warrant or a warrant for his arrest.

After hearing by the court, the defendant's motion was allowed and the material seized ordered returned.

The search warrant was issued by a justice of the peace. The affidavit, upon which the warrant was based, of one of the prohibition officers, who afterwards made the search and seizure, read as follows:

"A violation of the National Prohibition Act has been committed, and affiant further states that he has reason to believe that there are illegally manufactured liquors and an illicit still are now concealed in or on the premises at 1735 Walnut street in C--nite City, and now occupied by Joe Kelih. This affidavit is made to obtain a search for said stolen goods."

The evidence in the case left uncertainty as to whether the warrant was actually based upon oath or affirmation, as required by the Constitution. Necessarily, if such was the case, the warrant is void and legally no search could be made or property seized under it.

It is held in the United States v. Kelih to be a requirement of law that the affidavit upon which a warrant is based must state facts and not conclusions, and will not suffice to support the issuance of a search warrant if vague or uncertain in its allegations.

The case above cited also lays down as law that the finding of probable cause for the issuance of a warrant is a judicial function and cannot be delegated. This is supported by the decision in the case, United States v. Borkowski et al., decided May 24, 1920. The Court ruled that, under the Fourth Amendment, a Federal search warrant may be issued only on an application on oath showing probable cause and particularly describing the place to be searched and the things to be seized, and whether facts are shown sufficient to constitute probable cause must be determined by the magistrate, who is not authorized to issue a warrant pro forma merely because an affidavit is filed.

Nor does a search warrant issued for seizure of one article authorize the seizure of another. 3

The action of the Court in ordering the return of the goods in the case under consideration is supported in the case of the United States v. Kraus, 4 decided February 1, 1921, where the Court ordered the return of papers which had been illegally seized in connection with the enforcement of the

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8 268 Fed. 408.
9 263 Fed. 812.
4 270 Fed. 578.
Volstead Act; and liquor obtained by unlawful search was likewise ordered returned in the case of United States v. Slusser,2 decided only ten days later.

The cases cited are not revolutionary; but are interesting and reassuring in their application of the principle that "A man's home is his castle"; and establish that even in the enforcement of the Volstead Act the safeguards of the American Constitution must be respected.

C. H.

MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACCIDENTAL OR IMPROBABLE INJURIES

It is well settled that the master's liability for injuries to his servant depends entirely on his neglect to fulfill certain duties which he owes to those in his employ. These duties are summarized by Judge Cooley as follows: (1) To provide a reasonably safe place for the servant to work. (2) To provide reasonably safe, suitable and sufficient tools, appliances and materials for the servant to work with. (3) To provide reasonably careful and competent fellow-servants and in sufficient number. (4) And generally so to conduct and manage his business as not to expose the servant to dangers which may be avoided by the exercise of reasonable care and diligence on the part of the master.1

These duties, however, even when unaffected by the question of the assumption of the risk by the servant, are not absolute. The master is not necessarily liable for a failure to provide a reasonably safe place, or reasonably safe tools and appliances; for he fully performs his duty if he exercises ordinary care and diligence to do so. It is a well-settled principle that he is not an insurer of his servant's safety.2 So a charge to the jury, that to find for the employer, it must appear that he used all due and necessary care to insure the safety of his employees, has been held erroneous.3 Within the limits of ordinary prudence a man may conduct his business in his own way4—he is not bound to use extraordinary care, but will be liable only for culpable negligence. He is not bound to furnish the newest, safest and most suitable appliances, and is not liable for defects which are not known and cannot be known to him by due care and inspection.5 But he must use care and skill in the selection of machinery and appliances and in the inspection of the same, and must keep them in suitable repair. Among the tests which have been suggested by various courts to determine the degree of care which is required are the following: He should provide such facilities as are generally accepted in other similar factories to guard against injuries;6 he should use that degree of care which he would if making the provisions for his own personal...

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1 Cooley on Torts, Section 266.
3 Dean v. Terry & Tench Co., 127 N. Y. S. 305.
4 Chandler v. St. Joseph Lead Co., 178 S. W. 217 (Mo.).
5 Garman Co. v. Gamage, 147 S. W. 721 (Texas).
use; he owes no greater duty to his servants than he owes to himself; he should use such care as is commensurate with the demands of the situation, having due regard to the hazards of the work; or that care which a person of ordinary prudence would exercise under the same circumstances.10

Another test has been frequently mentioned, and this formed the basis for the decision in an interesting Michigan case, Horn v. Parke, Davis & Co., 184 N. W. 416, decided by the Supreme Court of Michigan on October 3, 1921. It seems that the defendant is a manufacturer of drugs and chemicals, and maintains in connection with its business biological laboratories. It also has stables in which animals, large and small, are kept; these animals are inoculated, with the germs of the particular diseases under study at the laboratories at the time and the progress of the disease observed. If the animal dies a post-mortem examination is held. To dispose of the carcasses, after the post-mortem, the company maintains in one of its rooms a vat, the top of which is even with the floor and is covered with heavy planking. When the vat is not in use, the room in which it is located is used as a passage way, and a permanent barrier around the vat would not only interfere with the passageway, but would make it hazardous. When a carcass is to be reduced it is put in an iron basket and lowered into the vat. The vat is then filled with water, in which is placed a disinfectant, the steam is turned on and left on over night. In the morning the steam is turned off and the carcass is removed and disposed of. By morning the floor about the vat is generally wet and slippery as a result of the steam. The plaintiff was employed by the company and placed in charge of the reduction of the carcasses. The evening before the injury, for which the suit was brought, the plaintiff had placed the carcass of a horse in the vat, turned on the steam and left it over night. In the morning he removed the cover, slipped on the wet floor, fell into the vat and was severely scalded.

It appeared from the evidence that the appliance had been operated for over fifteen years without an accident of any kind.

The trial court awarded the plaintiff substantial damages, because of the failure of the defendant to furnish a safe place to work; but the appellate court reversed the decision, on the ground that a master is not an insurer of his servant's safety, his duty being merely to exercise due care; and stated that the injury in this case was purely accidental, and not such as a prudent man would anticipate as probable.

So here we have set out an additional test to determine the master's liability for injuries to his servant. Was the injury one which a prudent man would anticipate as probable?

The Court, in its opinion, referred to an earlier case in the same State, Sjogren v. Hall.11 In the latter case the plaintiff's legs had been crushed between the arms of a revolving wheel. It was said in that case that the proprietors of mills, or places where machinery is used, are not bound to provide against every possible accident that can happen, the probability of

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10 Consumers Lignite Co. v. Grant, 181 S. W. 202.
which is not suspected by either the proprietors or the employees until it occurs. In the course of the opinion Cooley, J., said:

"A similar accident, attended by equally serious consequences, might happen almost anywhere, in any machine shop or on a farm as well as in a mill, and after it happened it could readily be seen how it might have been avoided. But the fact that it was avoidable does not prove that there was fault in not anticipating and providing against it. If a farm laborer falls from the haymow, the fall does not demonstrate that the farmer was culpable for not railing the mow in. A man stumbling in a blacksmith shop might have his hand or even his head thrown under the trip hammer, but it would not follow that there had been any neglect of duty on the part of the blacksmith in leaving the hammer exposed. So far as there is a duty resting upon the proprietor in any of these cases it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible. * * * If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of those in his service in express terms; for to all intents and purposes he would, in law, be insurer, whether nominally so or not. But this would work a radical change in the law of negligence, in its application to the relation in which these parties stood to each other."

There are many cases supporting this doctrine. For example, in a Virginia case it was held that where the cause of the turning of a rail, by which the plaintiff's foot was caught and injured as he was assisting in unloading a car, was not shown, the accident being such as could not be expected to happen, negligence was not shown. And in New York, where the plaintiff was caught by a belt which had become entangled and was loosened by a foreman and was injured in a manner not within the experience of any of the operatives of the factory where the accident occurred, it was held that the master was not liable, because the accident was one which could not have been anticipated.

In Creswell v. United Shirt and Collar Company the facts were that, for the first time in nine years' use of a printing press, a lever flew back and startled an employee, who was operating it, so that he involuntarily thrust his hand into some of the machinery of the press and received an injury; and it was held that the employer was not liable, because the injury could not have been anticipated in the exercise of ordinary care and prudence.

Other interesting cases to the same effect are cited in the note.

On the other hand, the fact that no previous accident has happened is not necessarily an excuse if the injury could have been anticipated; as was held in Latorre v. Central Stamping Company, where it was held that the danger of igniting spirits of turpentine from dipping heated metal in it is so probable that its occurrence might reasonably have been foreseen.

13 82 N. E. 725.
A qualification to the principle now under discussion has been pointed out in several cases." That is, that where some injury is likely to occur from the negligent method adopted by the master, the master is liable for injuries to a servant, though he could not anticipate the particular injury; for it is sufficient that he ought to have anticipated that some injury was likely to result as a natural consequence of his plan of operation. Thus, in Hoepper v. Southern Hotel Company, the Court said:

"If the injury follows as a direct consequence of the negligent act or omission, it cannot be said that the actor is not responsible therefor, because the particular injury could not have been anticipated. A neglect to guard against that which no reasonable man would expect to occur may not be negligence. * * * But in case negligence is shown, 'and the injurious consequences are immediate and follow directly from the negligent act, the person guilty of the act will not be excused, for the reason that the particular consequences were unusual and could not ordinarily have been foreseen.' Grancy v. Railway Company, 41 S. W. 248. In Smith v. Railway Company, L. R. 6, C. P. 20, it is said by Channell, B.: 'I quite agree that, where there is no direct evidence of negligence, the question of what a reasonable man might foresee is of importance in considering the question whether there is evidence of negligence for the jury or not; but where it has been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.'"

To sum up it appears that the decision of the court in Horn v. Parke, Davis & Co. is supported by a great weight of authority. But while it is true that, as a general rule, the master is not liable for injuries which he could not have anticipated, the rule must be taken with this qualification: That if the master was in fact negligent with respect to the place and appliances furnished to the servant, so that he should have anticipated that some injury was likely to result, he will not be relieved from liability, because the particular injury which did actually result, could not reasonably have been foreseen by him.

H. C. B.


18 142 Mo. 378, 44 S. W. 257.
RECENT CASES

CORPORATIONS—SLANDER—Slander by president of corporation and its detective, in presence of another detective in its employ, sufficiently published; connection between corporation and its president held such as to make each liable for slander by latter and by detective employed by them.

This is an action for slander by John H. Allen against the Edward Light Company and another. The facts show that defendant corporation conducted, in Kansas City, Mo., a wholesale and retail business in gas and electrical fixtures and the like; that defendant, Lefkovits, was the president, manager and owner of the defendant corporation; that on March 14, 1919, plaintiff was employed by the defendant corporation, being placed in charge of the sales department to "look after the business in general." Plaintiff had power to make small donations to purchasers, and one day, when selling a bill of goods to a church, he donated merchandise to the value of $1.10. Lefkovits was told before the goods went out "that there is more merchandise going out than paid for," and, desiring to "test the matter out," went to a detective agency and employed two detectives to investigate the matter.

When plaintiff was confronted by his employer, Lefkovits, and the two detectives, they accused him of stealing goods from the defendant corporation, one of the detectives saying: "You are a thief." Plaintiff explained that he had authority to make donations, and turning to Lefkovits asked him if he had not such authority, to which Lefkovits replied: "No; you stole that chain hanger" (the merchandise donated). In order to prevent his arrest, it was necessary for plaintiff to reimburse the company $1.10, after which Lefkovits asked him to forget the incident and "work on as if nothing had happened." A few days later plaintiff voluntarily quit his employment and brought this action for slander. There was a verdict and judgment for plaintiff in the sum of $1,000 compensatory and $3,000 punitive damages; defendants appealed, and in Kansas City Court of Appeals, Missouri, May 23, 1921, the judgment was affirmed. (Allen v. Edward Light Company et al, 233 S. W. 953).

1. Petition against corporation and its president for slander held sufficient, because one uttering slander was employed by defendants to confront and accuse plaintiff of stealing goods. In so doing detective acted within the scope of his employment and defendants ratified his acts. Petition stated a cause of action against defendants, although it did not make detective a party. (Davis v. Chi. R. I. & P. R Co., 192 Mo. App. 419, 423, 424). 2. There may be slander by a corporation. (Fensky v. Maryland Casualty Company, 264 Mo. 154). 3. One employed to accuse another of theft cannot be made a defendant in an action against his employer for slander, he being liable only for his own slander. (Newell, Libel and Slander, No. 487 Third Edition). 4. In order to constitute slander the slanderous words must be spoken in the presence of and be understood by some other person than plaintiff and defendant. (Walker v. White, 192 Mo. App. 13). 5. To constitute publication of slander it is enough that the slanderous words were
heard by a single person. (125 Cyc 366). 6. It is no defense to an action for slander that the words were spoken to, and not of plaintiff when other persons were present and heard the words spoken. (25 Cyc 365, 366). 7. There is no question but that the words charged in connection with the facts with which they were used, all of which were alleged, were actionable per se. (Johnson v. Bush, 186 Mo. App. 107). 8. It is not necessary to allege that the persons speaking the slanderous words knew them to be false and untrue. Defendants, in order to defeat an action of this kind, cannot rely upon their honest belief in the truth of the charge. (Morgan v. Rice, 35 Mo. App. 591; 25 Cyc 414). 9. Though in slander publication cannot be the joint act of two or more persons, where there is no agency between them, each being responsible for his own slander only, where the evidence in an action against a corporation and its president showed that the latter owned the former, the jury might find that in uttering his slanderous words he was acting for the corporation, and that a detective employed by him on behalf of the corporation, in likewise accusing plaintiff, was acting as the agent of defendants, both of whom in such case would be liable for his utterances. (Fensky v. Maryland Casualty Company. supra). 10. Malice may be inferred from fact words uttered were false and uttered knowingly and intentionally without justification. (Buckley v. Knapp, 48 Mo. 152). 11. In an action for slander the burden of proving justification or the truth of the words charged is on defendant. (125 Cyc 413). 12. A verdict will not be set aside on appeal as being against the weight of the evidence. (Terry v. K. C. Rys. Co., 228 S. W. 885).

J. C. G.

EVIDENCE—PAROL EVIDENCE ADMISSIBLE TO SHOW CONSTRUCTION

BY PARTIES OF AMBIGUOUS WRITTEN CONTRACT

This rule is clearly enunciated in Rochester & Pittsburgh Coal & Iron Co. v. Makoma Coal Company, 114 A. (Pa.) 261. The right to a set-off for plaintiff’s alleged breach of contract depended upon whether defendant had an interest in the agreement as principal, or whether it acted merely as plaintiff’s agent. The principal contention of defendant was that the contract between the parties was written, and by its terms clearly show defendant was an independant contractor or jobber, and not in any sense the agent of plaintiff company, and that, therefore, parol evidence could not be introduced to modify its terms. The Court held that the parties to a contract in which there exists an ambiguity are entitled to put their own construction upon it, and if it appears that such construction was mutual it may be accepted by the Court and jury, although it might not be the construction the Court would have put upon it by an inspection of the instrument alone. The written contract in this case was held to be sufficiently ambiguous to permit parol evidence that the parties themselves considered defendant to be plaintiff’s agent.

F. S. E. S.

PROHIBITION—WILL NOT BE ISSUED TO PREVENT TRIAL AT CERTAIN TERM OF COURT

A petition for a writ of prohibition against a circuit judge to prohibit him from trying the action at a certain term, it being alleged that the action did not stand for trial at that term, was denied. The circuit judge had
jurisdiction of the action and there was adequate remedy by appeal. Elk Stave Lumber Company v. Lewis, Judge, 233 S. W. (Ky.) 1046.

The office of a writ of prohibition is to arrest proceedings in a tribunal when such proceedings are without or in excess of the jurisdiction of the tribunal (Smith v. Whitney, 116 U. S. 167); and the writ will be issued only in a case where the inferior court has no jurisdiction. (In re Morrison, 147 U. S. 14). Error in the exercise of jurisdiction is not ground for the writ. (U. S. ex rel Deffer v. Kimball, 7 D. C. App. 499.) Merits will not be considered (ex-parte Pennsylvania, 109 U. S. 174); only jurisdictional defects. (In re Fassett, 142 U. S. 479). If the inferior court has jurisdiction, the writ will not be issued to correct errors of law or of fact for which there is an adequate remedy by appeal. (Ex-parte Ohio & Mobile R. R. Co., 63 Ala. 349). Prohibition cannot be made to serve the purpose of an appeal (U. S. ex rel Holmead v. Barnard, 29 D. C. App. 431), and it will not lie where there is an adequate remedy in the proceedings. (Atkins v. Siddons, 66 Ala. 453). An objection to the venue is not ground for the writ (National Bank v. Supreme Court, 83 Cal. 491); unless the objection goes to the jurisdiction. (Ex rel Matthews v. Toomer, Cheves Law (S. C.) 106). Refusal to transfer the action from one court to another (Schoberg v. Manson, 61 S. W. 999), or an erroneous continuance to another term (Moss v. Barham, 94 Va. 12) is not ground for the writ.

J. K. H.

NEGLIGENCE—HUMANITARIAN DOCTRINE—NEGLIGENCE UNDER HUMANITARIAN RULE HELD QUESTION FOR JURY

When driver of a disabled truck was killed by a street car colliding with the rear of his truck, while he was fixing chain leading to towing truck, evidence that motorman, had he been looking, could have seen the truck, though it was after sundown, held sufficient to take question of liability under humanitarian rule to the jury. (Miller v. Kansas City Rys. Co., 233 S. W. 1066, Supreme Court of Missouri, October 24, 1921).

The “humanitarian doctrine,” which appears to be well established, especially in the Southern States and some of the states of the Middle West, is based upon the same fundamental principles as the familiar doctrine of the last clear chance. Its application has been limited principally to actions for injuries caused by negligence where contributory negligence was pleaded as a defense.

Under this rule, if at the time of the accident the person in charge of the vehicle or other object causing the injury was operating the same in a careless manner, or in a manner contrary to some law or municipal ordinance, or by due care and diligence could have avoided the accident, then the party injured can recover notwithstanding his contributory negligence. (Kellny v. Missouri Pac. Ry. Co., 101 Mo. 67, 13 S. W. 806; Hanlon v. Missouri Pac. Ry. Co., 104 Mo. 381, 16 S. W. 233).

The question as to whether defendant, by the exercise of ordinary care, might have avoided the injury is one for the jury. (Richmond & D. R. Co. v. Howard, 79 Ga. 44, 3 S. E. 426; Wheeler v. Gibbons, 126 N. C. 811, 36 S. E. 277).
Allegation of negligence is sufficient to let in evidence of any particular negligence coming within the content of the general statement. (Degonia v. Railroad, 244 Mo. 589, 123 S. W. 807; Bergfeld v. Kansas City Rys. Co., 227 S. W. 108, 109; Fleming v. Louisiana & M. R. R. Co., 172 S. W. 355).

W. C. K.

In the case of Johnson v. Mitchell (Court of Appeals of Kentucky 1921), plaintiff had placed property with defendant, a real estate broker, for sale. Defendant received an offer for the property which he failed to communicate to the plaintiff. He then bought the property in his own name and shortly thereafter sold it at a material profit. The Court held that the relation of principal and agent is one of extreme confidence, requiring the exercise of the utmost good faith, and this doctrine is universally enforced, and applies to a broker in possession of the property of his principal.1

Where a real estate agent is employed to sell land there is created a fiduciary relation between the agent and the owner,2 in which, if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui qui trust.3 The advantage obtained may be by reason of a superior knowledge of the facts involved in a business transaction.4

A case well in point is Cornwall v. Foord, in which it was held that where an agent having charge of the sale of premises fails to communicate offers made for the property to his principal, and then purchases same at a price less than the offers made and sells at an advance, he will be held accountable to his principal.5 6

There is a general rule forbidding a selling agent to buy for himself.7 And a broker employed to sell property cannot become the buyer thereof, either directly or indirectly.8 The mere fact of a purchase by an agent appointed to sell makes the sale prima facie voidable.9 This rule is modified and the sale may be rendered valid when the principal has a full knowledge of all the facts,10 and the broker must act in perfect good faith.11 It is always the duty of a broker to disclose to his principal facts as to the value of the principal's property.12

R. H.

VENDOR AND PURCHASER—DEFECT OF TITLE GOOD DEFENSE TO ACTION ON PURCHASE-MONEY NOTES

In an action brought to recover on notes given for the purchase of land (the holder of the notes being chargeable with the notice of the vendor), it was held that defect in the title of the land conveyed was a good defense. Lott et al v. Dashiell et al, 233 S. W. (Tex.) 1103.

1 9 Corpus Juris 536.

2 Ware v. Ware & Harper, 92 S. E. 961.

3 25 Corpus Juris 1119.

4 25 Corpus Juris 1120.

5 Cornwall v. Foord, 96 Ill. App. 366.


7 Schukmacker v. Lebeck, 173 P. (Kan.) 1072.

8 Snow v. Hazelwood, 179 Fed. 182.

9 2 Corpus Juris 702.

10 2 Corpus Juris 702.


12 Brown v. Mustgrave, 222 S. W. 606.
The general rule is that a purchaser of land under an executed contract will not be relieved against the payment of the purchase money on the ground of failure or defect of title (Thurgood v. Spring, 139 Cal. 569; Abbott v. Allen, 2 Johns. Ch. 519); except in case of eviction by paramount title (Miller v. Lamar, 43 Miss. 483), or in case the vendor be a non-resident. (Atkinson v. Hagar, 121 S. W. 955). If the purchaser holds under a warranty deed, his remedy is by action of the warranty; if he holds without warranty, there is no remedy. (Noonan v. Lee, 67 U. S. 499). The reason for the rule is that warranty of title to realty is never implied, the doctrine of caveat emptor applying. (Lessly v. Bowie, 27 S. C. 193). Where the contract is executory the rule does not apply. (Wamsley v. Hunter, 29 La. Ann. 628). But the Texas rule differs from the general rule—in that State failure or defect of title being a good defense (Tarpley v. Poage's Admir. 2 Tex. 139); provided the purchaser can show clearly that the title has failed in whole or in part (Price v. Blount, 41 Tex. 472), that there is danger of eviction (Blewitt v. Greene, 57 Tex. Civ. App. 588), and that he did not know of the defect at the time of purchase. (Cooper v. Singleton, 19 Tex. 260).

J. K. H.

HIGHWAYS—AUTOMOBILES—LAW REQUIRING MOTORISTS STRIKING A PERSON TO RENDER ASSISTANCE CONSTRUED AND UPHELD

State law requiring the driver of an automobile striking a person to stop and render assistance, must be construed to mean that the party shall render all the aid which would reasonably appear to him as an ordinary person at the time to be necessary, and when so construed is valid. (Scott v. State, Court of Criminal Appeals of Texas, October 5, 1921, 233 S. W. 1097).

Ordinary words used in a statute should be given a common-sense construction, so as to carry out the legislative intent. (Albert v. Gibson, 141 Mich. 698, 105 N. W. 19, Fosburg v. Rogers, 114 Mo. 122).

When so construed the statute should be upheld unless it is clearly in violation of a constitutional right. (Albert v. Gibson, supra. Camp v. Rogers, 44 Conn. 291, Cent. Digest, Vol. 10, Sec. 46). The use of a highway is a privilege and not an absolute right. (State v. Corron, 73 N. H. 434, 445, 62 Atl. 1044, 1045; State v. Sterrin, 78 N. H. 220, 98 Atl. 482). The Legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the State. (State v. Mayo, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502; Commonwealth v. Kingsbury, 199 Mass. 542, 85 N. E. 848). Having the right to prohibit the use of automobiles on the highways, the State also has the right to make whatever laws and regulations are reasonable and necessary regarding their use in order to protect the lives of its citizens and secure to the general public the largest practical benefit from the enjoyment of the easement. State v. Mayo, supra; Twilly v. Perkins, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632; Commonwealth v. Boyd, 188 Mass. 79, 74 N. E. 255; Christy v. Elliott, 216 Ill. 31, 11 L. R. A. (N. S.) 215, 74 N. E. 1035; People v. Schneider, 139 Mich. 673, 69 L. R. A. 345, 103 N. W. 172. See also notes and cases collected thereunder, Ruling Case Law, Vol. 6, page 202, and Vol. 13, page 253).
Writ of Prohibition to Military Court Refused—Clifford and O'Sullivan's Appeal; Judicial Committee of the House of Lords; Amnesty Granted to Appellants Under Sentence of Death

The House of Lords rendered its decision in this case on July 26, 1920, as reported in the last issue of The Journal. A few weeks later the following colloquy took place in the House of Commons, according to the official record:

"Mr. Chamberlain, the leader of the House, replying to Major Cohen, who asked the reasons for the release of two prisoners condemned to death by a military court, said: 'This action was based solely upon the existing situation in Ireland, and the importance at the present time of avoiding a conflict between the civil and military authorities. The releases were not due to any decision given by a civil court in Ireland. Civil courts have no power to overrule the decisions of the military courts in the martial law area in Ireland. The decisions of the military officers administering martial law in Ireland will be upheld.' Major Wood: 'Have not the civil courts in Ireland declared that these military courts are illegal?' Mr. Chamberlain: 'No.' Sir W. Davison: 'Will the right honorable gentleman see that the same amnesty is granted to the police and military that is granted to the other side?' (Hear, Hear!)"

While no names are mentioned in the official reports, a private letter informs us that the prisoners mentioned were Clifford and O'Sullivan and that they have been released.

The statement of the leader of the House that, "Civil courts have no power to overrule the decisions of the military courts in the martial law area in Ireland," has, of course, no judicial weight, and it is to be regretted that the civil courts did not, in a habeas corpus proceeding, decided the question whether a military court could try and pass sentence of death on civilians where and when the civil courts were open and conducting trials without restraint.

H. S. B.

Bankruptcy—Garnishment Lien Obtained Within Four Months of Adjudication Invalid

When plaintiff garnisheed money belonging to defendant, and within four months thereafter defendant was adjudged a bankrupt, the garnishment lien was rendered void and the garnishee released, under Bankruptcy Act, Sec. 67 (f). (Garrett v. Big Bend Plantation Company et al, Supreme Court of Arkansas, October 17, 1921, 233 S. W. 1097).

Sec. 67 (f) of the Bankruptcy Act (U. S. Comp. Stat. Sec. 9651) provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt * * * ."

The rendition of a judgment against the garnishee creates a lien "obtained through legal proceedings," in such sense as to be dissolved by the subsequent

MASTER AND SERVANT—BUSINESS AFFECTED WITH PUBLIC INTEREST

CONSTITUTIONAL LAW—PROHIBITION OF STRIKES BY STATUTE

People of State of Colorado, under State statute prohibiting strikes and lockouts pending an investigation, hearing, or arbitration, of disputes in industries affected with a public interest, sought to enjoin coal miners from striking before or during the consideration of their grievances by the Industrial Commission. Defendant contended that the occupation of coal mining was not an industry “affected with a public interest,” and that the State statute compelled involuntary servitude in violation of the Constitution of the United States.

Held: Coal mining is an industry affected with a public interest. Also, regulation by statute of an industry affected with a public interest is not unconstitutional as compelling involuntary servitude. Injunction granted. (People v. United Mine Workers of America, 201 P. 54).

A business by circumstance and in its nature may rise from a private to a public concern. (German, etc., Company v. Kansas, 233 U. S. 411).

A business which threatens the social stability of several states is one affected with a public interest. (Munn v. Illinois, 94 U. S. 132). One reason for holding a business to be affected with a public interest is that it is a practical monopoly. (Budd v. New York, 143 U. S. 517).

In the principal case, the Court, in passing on the question of involuntary servitude, stated that there was no such condition under the statute. An individual workman had a right to quit at will for any reason or no reason. The only thing forbidden was a strike during the commission’s action.

In the case of In re Morgan, 26 Col. 415, 1899, it was held that the business of operating smelters and working underground mines was a private business. The rapid development of the relations of coal, miners, the coal operators, and the public has produced a situation very much different from that which then existed, and the principle laid down in this early case is no longer applicable.

BILLS AND NOTES—HOLDER IN DUE COURSE—FAILURE TO FILL IN YEAR OF MATURITY

Plaintiff, a holder of two written instruments, called trade acceptances, drawn on August 1, 1919, seeks to recover from the defendant, the acceptor. In attempting to fix the due date in one it is recited: “On December 1st, pay to the order of G. W. Laing.” In the other the recital is the same, except that November 1st is mentioned. In neither is the year specified. Defendant sought to interpose a defense which he would have no right to make against one holding in due course, as was the plaintiff, if the acceptances are in fact negotiable instruments.
Held: That acceptances were non-negotiable instruments, since they were not complete and regular on their faces. (United Ry. & Logging Supply Co. v. Siberian Commercial Company, 201 P. 21).

According to Negotiable Instrument Law, Sec. 3398, Rem. Code 1915: "An instrument is payable on demand in which no time for payment is expressed." The Court held that this section of the act did not apply, and based its decision on a subsequent section of the act; namely, Sec. 3443 Rem. 1915 Code, to the effect that "a holder, in due course, is a holder who takes an instrument complete and regular on its face."

In Collins v. Trotter, 81 Mo. 275, there was an omission of the year on the face of a note, and the Court held the note payable on demand and negotiable, but the decision is based on the law merchant.

**Criminal Law—Dictagraph Testimony**

The defendant, and one accused of complicity with him, were arrested for an attempted robbery of a mail car at night. After arrest the accused were placed in adjacent cells, between which a dictagraph had been installed. Stenographers were stationed at a convenient point to hear, through this instrument, what passed between the two prisoners. One or the other of the accused was several times taken from his cell while the instrument was in use. The stenographers took down the remarks heard through the dictagraph, but they had no knowledge who made the remarks, nor were they familiar with the voices of the prisoners. Subsequently to the reported conversation, the accused accomplice, who had received a shot in the brain at the time of the attempted robbery, and whose mind had been affected by said injury, died. The prosecuting attorney sought to convict the defendant on the testimony reported to have been heard through the dictagraph. Held: Competency of this evidence, at best, is doubtful, and is far from establishing the guilt of the defendant. Conversation with accomplice is of little probative value where he is unable to respond intelligently to questions propounded. (Miller v. People, 201 P. 41).

It is the duty of the prosecuting attorney to see that facts are fully and fairly placed before the jury. (Hilken v. People, 59 Col. 284).