CRIME WITHOUT PUNISHMENT
A Consideration of Penal Jurisdiction over Military Personnel, Particularly Discharged Personnel, Implicated in Criminal Acts Committed Overseas While Still in the Military Service

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The problems resulting from wars of world-wide proportions are always of great import, and present so many ramifications that the period between clashes scarcely has been long enough to permit their solution. World War II was no exception—except perhaps in the extraordinary complication of the problems resulting from the multiplicity of conquerors. The struggles of economists, labor experts, monetary specialists and scientists, as well as of statesmen and politicians, that have been reflected in the public press, are but one indication of the turmoil of things crying to be solved—indeed, on the solution of which the basic hope of the world for a permanent peace may well depend.

Outshadowed by the grave questions of underlying international significance are others, perhaps less urgent, and certainly less spectacular, than those which have made the headlines. In many of them, the "war-is-over" reaction, which has been gaining momentum in respect of our armed forces ever since the shooting stopped and redeployment began, has had its effect, and important questions have been brushed aside with but little consideration. Some of these mundane questions are of vital


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concern to the American people, and may have a definite and direct
effect upon our international reputation.

One of these problems—perhaps it will be concluded that it is not one,
but a series of problems—arises in connection with jurisdiction over an
officer or soldier whose guilt or complicity in crimes committed overseas
is not discovered until the individual has been returned to the United
States and discharged or otherwise separated from the service.\(^1\) The re-
sponsibility of the United States generally, and of the War Department
in particular, for the conduct of its military personnel, wherever they may
be stationed throughout the world, is not merely a pious truism, but
a principle so well established in the minds of nations that it was in-
corporated, as to belligerents, in the 1907 Hague Regulations Respecting
the Laws and Customs of War on Land,\(^2\) and is a basic consideration
for the determination of jurisdiction over the armed forces of a nation
who enter the territory of an ally.\(^3\)

Apart from precedent, common sense supplies the strongest argument
that any government whose troops are overseas must not only insist
upon the good conduct of every individual officer and soldier, but must
see to it that every crime committed by them is swiftly and justly pun-
ished. The army that harbors unpunished criminals within its ranks
while in the territory of a friendly nation would soon outwear its wel-
come, and if it fails to control its personnel in occupied enemy territory
it will retard the furtherance of its occupation mission. The American
occupation forces in Germany, Japan, and in the satellite countries, as
well as those stationed in an allied nation, represent not only the Ameri-
can government, but American ideals, and the control and administration
of these forces must set an example—an object lesson in democratic
procedures.

\(^1\) A court-martial is not the answer. The fact that an officer or soldier who has been
discharged or otherwise separated from the service (with rare exceptions not here material)
cannot thereafter be tried by court-martial for wrongful acts committed while still on
active service will come as a surprise to many lawyers who have not had occasion to rub
elbows with principles of military law. It is, however, amply covered by the authorities.
Infra note 29, and the related text.

\(^2\) See § III, comprising Articles 42-56, entitled “On Military Authority over the Territory
of the Hostile State”, which establish not only the rights, but the duties of the occupant,
many of which are in the interests of the inhabitants of the occupied area.

\(^3\) King, Jurisdiction over Friendly Armed Forces (1942) 36 Am. J. Int. L. 539 and
Further Developments Concerning Jurisdiction over Friendly Armed Forces (1946) 40
Am. J. Int. L. 237.
Proper consideration of the problems connected with jurisdiction over former military personnel for crimes committed while in active service requires a review of the over-all question of jurisdiction over members of the military service. It should be emphasized, too, that we are concerned primarily with the so-called civilian-type crimes—crimes not dependent upon the fact that the perpetrator was a soldier at the time the act was done.4

Speaking generally, the United States Army during World War II was not only a well-oiled fighting machine with magnificent punch, but a fine group of clean-cut and well-disciplined officers and men. It was inevitable, however, in the mushroom growth from a regular army of a few hundred thousand to more than eight million, with the accretions coming about through the application of a uniform system of selective service,6 that the army would and did find within its ranks not only the butcher, the baker and the candlestick maker, but the thief, the racketeer and the ordinary thug. The proclivities of this minority could not be submerged entirely in the rigorous training and discipline imposed upon the new army. There was neither the time nor the inclination to screen out all the undesirables; there was a war to fight, and the prowess of the potential criminal as a soldier was not affected by his strong-arm tendencies or his ingenious, if misdirected, schemes to get rich quickly.

In the peacetime army, crime, particularly crime malum in se, was not a problem. There were, of course, the usual and inevitable breaches of military discipline, "over-the-hill" escapades, and other instances of what might be regarded as purely military offenses. In the occasional instances of serious offenses of a civilian nature—homicide, larceny, assault and the like, particularly if committed against civilians—the concurrent jurisdiction of the civilian authorities, state or federal, was usually adequate to handle not only the necessary investigation (with the

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4See Articles of War 54 through 57, covering enlistment, muster and returns; 58 through 61, covering desertion and AWOL; 62 through 68 covering disrespect, insubordination and mutiny, and many others; 96 under which military personnel may be court-martialed for all crimes and offenses not capital which they may have committed, which includes crimes made such by local law even though not specifically named in the Articles. The civilian-type crimes are covered by Articles of War 92 and 93, which include all of the so-called crimes of violence of which individuals may be guilty, irrespective of whether they are civilians or soldiers. The Articles of War are found in 41 Stat. 787 (1920), 10 U. S. C. §§ 1471 et seq. (1940).

cooperation of the military, as needed) but to carry on the prosecution in the civil courts and to impose the appropriate punishment. 6

During the period of hostilities, the policy of the War Department leaned toward keeping its own house in order and wherever practical, when crime involved military personnel, conducted its own investigations, apprehended the officer or soldier involved, brought him to trial by court-martial and, on conviction, carried out the sentence, largely through its own greatly enlarged facilities. 7

When the offensive stage of the war was reached, and American soldiers landed on foreign soil as an army of liberation, and subsequently of occupation, the wisdom of the policy applied in the United States during the period of preparation became apparent: it was as much a part of the training for the invasions as the infiltration course and the manual of arms. The invading American army was as prepared to conduct its own criminal investigations and to punish its criminals as it was to knock out machine-gun nests and negotiate tank traps—and properly so, since by so doing it would be able to discharge its responsibilities as an army in foreign lands, friendly or belligerent.

The word "responsibilities" in the preceding paragraph was deliber-

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6 See 41 Stat. 803 (1920), 10 U. S. C. § 1546 (1940); Grafton v. United States, 206 U. S. 333 (1907); In re Stubbs, 133 Fed. 1012 (C. C. Wash. 1905); United States v. Matthews, 49 F. Supp. 203 (E. D. Ala. 1943). In United States v. Canella, 63 F. Supp. 377 (S. D. Cal. 1945), the court held, inter alia, that the trial of an army officer by a civil court for an offense punishable both under the Criminal Code and the Articles of War, 10 U. S. C. §§ 1471-1693 (1940), did not constitute denial of due process; civil courts have concurrent jurisdiction with courts-martial and may, with the Army's consent or after taking jurisdiction first, try a member of the armed forces for an offense punishable under both the Criminal Code and the Articles of War.

7 As a practical matter, however, civilian and military authorities extend mutual cooperation on the question of jurisdiction. War Department Field Manual 19-10, January 1945, 10-12, instructs the commanding generals of service commands (now supplanted by commanding generals of the various Zone of Interior armies) to enter into agreements with civil law enforcement agencies of the states included in their respective commands with respect to requests by civil authorities for surrender of military personnel wanted for violations of local law, and requests by the military authorities for the return to military control of members of the military service held in the custody of such civil authorities.

The following federal law enforcement agencies maintain close contact with the military: (1) Federal Bureau of Investigation, Department of Justice, (2) Alcoholic Tax Unit, Bureau of Internal Revenue, Treasury Department, (3) Federal Bureau of Narcotics, Treasury Department, (4) Bureau of Customs, Treasury Department, (5) Immigration and Naturalization Service, Department of Justice, (6) Post Office Inspector, (7) United States District Attorney, and (8) United States Marshal.
ately selected to describe the position of an army on foreign soil. Whether in friendly or enemy territory, the visitors or invaders have definite duties and the obligations to perform them. For the purposes of this paper, it is not necessary to go into these matters, except in so far as they apply to penal jurisdiction over members of the armed forces. For this purpose the subject may be divided conveniently into two parts: the situation in a friendly or allied territory, on the one hand, and in enemy territory, on the other hand.

Plainly, no nation can "occupy" or "control" the territory of a friendly nation in the same sense that there is belligerent occupation and control over an enemy area. In the former case, the troops are present by invitation and consent, express or implied, and with the approval of the sovereign, and there is no pretense of exercising belligerent power over the friendly or allied sovereign state or its population. But whenever two sovereigns are present in one area, the possibility of conflict always exists—on the one hand, there is the obvious necessity for the military authorities of the visiting forces to have full and complete control and jurisdiction over their personnel, and on the other, the equally important viewpoint of the host nation that the members of the visiting army must comply with all of the requirements of the local law. This potential conflict has resulted in varied flights of reasoning, ably collected by Colonel Archibald King, of The Judge Advocate General's Department, in two articles written during the war.

The rules on belligerent occupation have been codified in § III of the Hague Regulations respecting the Laws and Customs of War on Land (1907) entitled "On Military Authority over the Territory of the Hostile State", comprising Articles 42-56 of the Regulations. "... the validity of § III was not denied by any belligerent during the War of 1914-1918. Between 1918 and 1935, the validity and applicability of Articles 42-56 were confirmed in a great number of decisions of international and domestic tribunals; they were never contested by any party to any dispute nor were they questioned by any government. During the period preceding the present war, it was often controversial whether or not an international war existed, but it was never denied that Articles 42-56 applied if the existence of international war was admitted.” FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION, Carnegie Endowment (1942) 5.

This is true even in the case of reconquest of an ally's territory formerly held by a belligerent. The "governments in exile" were still governments.

Colby, Occupation Under The Laws of War (1925) 25 Col. L. Rev. 904 and (1926) 26 Col. L. Rev. 146.

It has been urged that when the host nation consents to the entry of the friendly foreign army, it may specify the terms on which the consent is granted, and can cover the extent of the jurisdiction of the local courts over the visiting personnel. When this line of reasoning refers to a specific consent and a resultant agreement reduced to writing, or embodied in appropriate legislation, there can be no quarrel with either the premise or the conclusion. A sovereign whose consent is necessary to permit the presence of foreign troops of course may attach such conditions as it pleases, and the visitors must abide by them, stay at home, or risk an international incident. The difficulty is that in many instances, the question of jurisdiction arises after the visitors have appeared and the consent can be created only by implication, with equally nebulous conditions relative to the jurisdictional questions. There is no indication, for instance, that any of the Low Countries stopped to ponder the niceties of local jurisdiction over the liberating forces until after

12King, Jurisdiction over Friendly Armed Forces (1942) 36 Am. J. Int'l. L. 549.
13Art. IV of the agreement between the United States and Great Britain, dated March 27, 1941, relating to the leased naval and air bases in Newfoundland, Bermuda, the Bahamas, Jamaica, Antigua, St. Lucia, Trinidad, and British Guiana, confers exclusive jurisdiction in the military commander for military offenses of American personnel wherever committed and for non-military offenses committed on the leased bases. It gave concurrent jurisdiction to the military and to the local courts for non-military offenses committed outside the bases. Id. at 553-555.
14See The United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31, which provides that no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against any member of the military or naval forces of the United States unless the United States Government shall otherwise request. But cf. § 2 (1), Allied Forces Act, 1940, 3 & 4 Geo. VI, c. 51, under which allied soldiers in the United Kingdom who committed crimes against the local law were triable in the local courts; the military jurisdiction was not exclusive. See also Current Notes, The Status of Soviet Forces in British Law (1945) 39 Am. J. Int'l. L. 330; Goodhart, The Legal Aspect of the American Forces in Great Britain (1942) 28 A. B. A. J. 762.

In the latter article, Professor Goodhart notes that the Parliament regarded the provisions as to the American forces as a remarkable constitutional innovation. Perhaps, the disparity in the administration of penal justice as to the American forces and the forces of other allies of Great Britain is accounted for by recognition of "Anglo-American" jurisprudence in which much the same crimes are recognized and similarly punished.

15In World War II, negotiations as to jurisdiction over American forces were begun between Great Britain and the United States when it was contemplated that American troops would be sent to the United Kingdom, and the matter settled well in advance of the actual landing in force on British soil. In World War I, however, negotiations were started after the event and had consumed a period of some one and one-half years, when the question became moot because of the withdrawal of American troops after the Armistice. See King, supra note 12 at 551-3.
the invasion and the reconquest became established facts; and to argue
otherwise and discourse learnedly of fictitious conditions attached to
an implied agreement simply ignores realities. The presence of the lib-
erating troops and their help in winning the war were the primary con-
siderations and occupied the thoughts of the host governments-in-exile,
to the exclusion of all else.

The extent to which the rationalizers have gone in the conception of
the jurisdictional provisions that would have been imposed (had they but
occurred to the host sovereign) as a condition to the consent (had any
one but given it), is illustrated by an argument attempting to reconcile
the potential clash of the two sovereigns by allotting to the commander
of the visiting forces jurisdiction over criminal acts committed while on
duty, and to the local authorities all other criminal jurisdiction.16 Apart
from the objections based upon imaginings and implications, in lieu of
realities, this reasoning leaves open the many twilight-zone cases, and
gives no satisfactory reason for the trial by court-martial of Corporal
Jones for an assault upon a civilian while Jones was delivering an official
message, while Pvt. Smith would answer in a civil court of the com-
munity for an identical assault committed while taking a stroll in the
village before taps.

Another line of reasoning makes the boundaries of the encampment
the line between military and civilian jurisdiction—offenses in the camp
are exclusively for the military commander and those outside of it ex-
clusively for the local authorities.17 This at least has the advantage of
certainty.

None of these arguments recognizes the basic fact that in time of war
the visiting army is in the territory of the host nation on a military
mission, and nothing should be permitted to interfere with its per-
formance. The military commander of the visiting forces cannot be sub-
jected to the risk that his personnel may be picked up by the civil au-
thorities, thrown into the local bastille, and held for trial for the violation
of a law of the community.

16Id. at 545-546.
17Id. at 551-552. During the World War I negotiations, the British admitted the extra-
territoriality of organized bodies of United States troops in Great Britain "within the
limits of the quarters occupied by them" but contended that outside their quarters they
would be liable to be dealt with by the English criminal courts for any offenses against
the English criminal law but could not be apprehended for any purely military offense
(such as desertion, AWOL, etc.) either by their own or the English military police, or
by the civil police. See further, the agreement, made before the United States became a
belligerent, relative to the bases leased from Great Britain, note 13 supra.
This is the practical viewpoint, and that recognized by the Supreme Court of the United States in the leading case of *Coleman v. Tennessee*, where the Court, through Mr. Justice Field, said:

"It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. . . ."\(^{18}\)

It should be observed that most nations have a predilection for their own systems of jurisprudence—their own ideas of crime, of trial, and of appropriate punishment—and a natural feeling of suspicion for the juridical systems of other countries, including allied nations. During the war, American troops were stationed in friendly and allied countries in all parts of the world, from the United Kingdom to the wildernesses tapped by the Lido Road. The American people would have little emotional objection to submitting their soldiers to the criminal procedures of England, so like their own. But the idea of subjecting the "G.I." to the procedures and punishments of China,\(^{19}\) or some other markedly alien—and perhaps, to us, barbarous—processes would not be accepted so readily.

However this may be, the principle enunciated by the Supreme Court of the United States has gained widespread acceptance throughout the civilized world, and it must be regarded as an accepted principle of international law that, in the absence of specific agreement or legislative enactment to the contrary, the courts of the host nation have no jurisdiction, civil or criminal, over the personnel of the visiting army. It follows that if, for any reason, an offense committed by a member of the friendly army is not punished by the military or other authority of the visiting nation, it will not be punished at all; the concurrent jurisdiction of the civilian authorities in "Stateside" crimes which affords an alternate means of punishment\(^{20}\) does not exist.

The situation respecting personnel of the occupying, as distinct from the liberating, army presents no problem in so far as the local civilian courts are concerned.\(^{21}\) During belligerency, the only authority in oc-

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\(^{18}\)97 U. S. 509, 515 (1878). See also Dow v. Johnson, 100 U. S. 158 (1879).

\(^{19}\)Cf. extraterritoriality in China, abolished after many years by treaty of January 11, 1943. See Editorial Comment, The End of Extraterritoriality in China (1943) 37 Am. J. Int. L. 286.

\(^{20}\)See note 6 supra and the related text.

\(^{21}\)Coleman v. Tenn., 97 U. S. 509 (1878), cited supra note 18. Here Coleman was a member of the armed forces of the United States, and on duty in the State of Tennessee.
cupied areas, whether or not hostilities have ceased, is the force of the invader's army. Whatever might be the justification for advocating the trial of personnel of a visiting army in the courts of the host nation, there is no basis for trial in the courts of an enemy nation, even if those courts are returned to operation after the cessation of hostilities. In City of New Orleans v. New York Mail Steamship Co., the Supreme Court of the United States said:

"... the conquering power has a right to displace the preexisting authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. ... There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. ..."

This is the principle on which all military government of enemy territories is based, and is as true when the victory is won by a group of allies as when the conqueror is a single nation. In either case, the policies of the occupation depend largely on the will of the conqueror, the restrictions on his actions imposed by the laws and usages of war being subject always to his interpretation of them in the light of his belief as to the necessities of the case. Even the codified rules on belligerent occupation set forth in the Hague Regulations are so subject and would be reviewable only in the tribunal of public opinion. The multiplicity of conquerors in World War II complicates the situation only in so far as it increases the number of possible interpretations and gives rise to the necessity of the allies attempting to negotiate their differences of opinion as to what the rules and usages of war and the necessities of the case require.

In World War II, the military government imposed by the Big Four included the so-called Allied Military Government courts—courts which had joined the Confederacy. While there, Coleman was tried by military court-martial for the crime of murder, and was convicted. Later, and after the constitutional relations of Tennessee with the Union had been reestablished, Coleman was indicted for the same offense in the courts of Tennessee. The Supreme Court held that Coleman, at the time of the killing, was not subject to the law or amenable to the tribunals of the then hostile state.

22 "The authority for military government is the fact of occupation." The point is too well-established by the authorities to require extended citation. See Winthrop, Military Law and Precedents (2d ed. 1920) 798 et seq. On the distinction between military government and martial law, see Ex parte Milligan, 4 Wall. 2 (U. S. 1866).

23 Winthrop, Military Law and Precedents (2d ed. 1920) 798 et seq. On the distinction between military government and martial law, see Ex parte Milligan, 4 Wall. 2 (U. S. 1866).

24 Winthrop, Military Law and Precedents (2d ed. 1920) 798 et seq. On the distinction between military government and martial law, see Ex parte Milligan, 4 Wall. 2 (U. S. 1866).

25 See note 3 supra.

26 The rights, power and status of the military government in Germany are based upon
undoubtedly possess the power of the conqueror to punish crime in the occupied state, whether committed by a soldier or a civilian, and whether by a citizen of an allied nation or a conquered nation.26 It is to be expected that civilians, including American citizens, will be tried in Allied Military Government courts27—since these courts are based upon the military might of the occupying forces, it can be assumed with confidence that jurisdiction over military personnel will continue to be exercised by the military authorities, but as a matter of policy, and not because of any lack of jurisdiction of the Allied Military Government courts in the area. To this extent, the situation is similar to that which exists within the United States, where both the military and the civilian authorities have concurrent jurisdiction over military personnel who have committed civilian-type crimes.28

The above examination into various practical problems of criminal jurisdiction over military personnel demonstrates the complexities that can result when military operations are conducted upon a world-wide basis, and by several sovereign co-belligerents acting as allies. And yet, as is often the case with complications based on technical considerations, as a practical matter the system permits, by and large, an adequate administration of criminal jurisdiction among military personnel, civilian representatives of the visiting or occupying nation, and the population of the defeated country. There are, of course, loopholes, but technical avenues of escape from just retribution exist, as a matter of common knowledge, in many local American courts, and the effectiveness of penal jurisdiction in overseas areas does not compare unfavorably with its counterpart in the United States.

the unconditional surrender or total defeat of Germany. See 13 DEP'T OF STATE BULL. No. 330, at 596 (1945), which sets forth the directive to the Commander-in-Chief of the United States Forces of Occupation regarding the military government of Germany.


27The following recent Associated Press release from Friedberg, Germany, under date of August 19, 1946, is indicative of the claim to broad and sweeping power made by the military government: "In a decision claiming broad military jurisdiction over thousands of American civilians in Germany, a military government court today overruled a challenge of its constitutional authority to try Ralph K. Betz, of Willoughby, Ohio, on charges of illegally entering Germany. The constitutional issue was raised by Capt. Earl J. Carroll of San Bruno, Calif., attorney for the 26-year-old ex-soldier who came back to Germany . . . in quest of a job . . . " N. Y. Herald Tribune, Aug. 20, 1946, p. 4, col. 5.

28See note 6 supra and the related text.
There is, however, one outstanding problem for which a solution must be found. It is based upon the firmly established rule that once a member of the armed forces has been discharged or otherwise separated from the service he is no longer subject to trial by court-martial, even for offenses committed while he was in the active service. This rule applies to officers as well as soldiers, and is based upon the conception that military jurisdiction over them exists only so long as they remain military persons, and is terminated when, by any recognized legal modes of separation, they cease to be such. On reversion to civilian status, such persons again become entitled to due process of law as applied to civilians, including a trial by jury, and to subject them to trial by court-martial would be to deprive civilians of their right to trial by jury, even though the offense was committed while they were subject to military law.

As to the ordinary methods of separation—discharge, whether honorable, dishonorable, or "for the good of the service"—the rule is readily understandable. However, the procedure adopted by the War Depart-

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29Winthrop, Military Law and Precedents (2d ed. 1920) 89. Generally, court-martial jurisdiction is coexistent and coterminous with military service and ceases upon discharge or other separation from such service and does not extend to offenses committed against military law by those who are subsequently discharged or otherwise separated from such military service. Mosher v. Hunter, 143 F. (2d) 745 (C. C. A. 10th, 1944).

30See Articles of War 94, 10 U. S. C. § 1566 (1940). This article provides that anyone subject to military law under Article 2, 10 U. S. C. § 1473 (1940), who is convicted of perpetrating any of the claims or frauds against the United States recited in the article, may be punished by court-martial sentence. Such frauds are frauds for anyone—civilian or soldier. 18 U. S. C. §§ 80-84 (1940). The section continues: "And if any person being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." (Italics supplied)

As to the constitutionality of the 94th Article of War, see Ex parte Joly, 290 Fed. 858, 860 (S. D. N. Y. 1922), where the court said, "The constitutionality of the statute was doubted (in 1895) by Col. Winthrop, a distinguished writer on military law, but he realized that such authority as there was held otherwise. . . . In the face, therefore, of more than half a century of practical construction and of the reported cases, this court will not hold the act unconstitutional." In the recent case of United States ex rel. Marino v. Hildreth, 61 F. Supp. 667 (E. D. N. Y. 1945), counsel were asked by the court whether there was any contention about the constitutionality of Article of War 94, and counsel answered in the negative. But see Note, The Amenability of the Veteran to Military Law (1946) 46 Col. L. Rev. 977.

31U. S. Const. Amend. V. Trial by jury is not an element of due process for military personnel. See Winthrop, Military Law and Precedents (2d ed. 1920) 48.
ment for the release of officers of the civilian components\textsuperscript{32} has been to revert them to inactive status, but to continue their commissions in full force until six months after the duration of the present emergency unless sooner terminated by action of the President. Thus, these officers are subject to recall to active duty at the pleasure of the Government, even against their will,\textsuperscript{33} and it would seem not only practical, but legally sound, to permit their recall in order to stand trial by court-martial for offenses committed while on active duty. Officers who still hold the same commission under which they were serving at the time a criminal act was committed are still in the army. Control over them, and their subjugation to military orders, has never ceased\textsuperscript{34}—a condition substantially different from that of the former military person who has actually been separated from all military control.

When serious crimes are committed by military personnel while they are in active service in the United States but whose guilt or complicity is not discovered until they have been separated, the problem presented by the fall of the iron curtain between them and the jurisdiction of the military tribunal does not present serious difficulties as a matter of abstract justice, since the concurrent jurisdiction of the civil authorities is completely adequate for the proper application of criminal penalties.\textsuperscript{35} But consider a comparable case overseas, where the soldier-culprit has been returned to the United States and, through the functioning of the well-oiled demobilization machinery, separated before his guilt or complicity has been discovered.

The following three cases, gleaned from the files of the criminal investigation activities of the Office of The Provost Marshal General, will serve as interesting examples of the nature of the problem under discussion:\textsuperscript{36}

During the summer of 1945, and after the establishment of the zones

\textsuperscript{32}Officers' Reserve Corps, National Guard and Army of the United States.

\textsuperscript{33}A reserve officer on inactive status, however, may not be recalled to active duty for the purpose of standing trial by court-martial—See United States ex rel. Viscardi v. MacDonald, 265 Fed. 695 (E. D. N. Y. 1920). But the reserve commission is not the commission under which the officer served in World War II. His was a temporary commission for the duration and six months and that commission continues in effect. On its termination, the reserve commission is again effective.

\textsuperscript{34}Officers have been called back to active service as witnesses in general courts-martial.

\textsuperscript{35}See note 6 supra and related text.

\textsuperscript{36}Names and other identifying features have been changed for obvious reasons; the facts, however, are essentially accurate.
of occupation in Germany, Frau Schmidt of the village of Sitzbaden, in the American zone, was subjected to personal indignities to a degree that a charge of rape could be placed against the perpetrator, then unknown, except for the fact that he was an American soldier. As a result of the efforts of the army criminal investigators, a strong prima facie case was built up against a soldier stationed in that area at the time of the offense. Before the finger of suspicion directed attention to him, his accumulation of discharge points had resulted in his being returned to the States and honorably discharged from the army. The soldier is now living the normal life of a World War II veteran in his home town in a southern state.

A similar crime was perpetrated in a town in the British zone, by an American corporal—more shocking and brutal because it involved the rape-murder of an eleven year old German girl. The crime was committed after the unconditional surrender, but before the establishment of the various zones of occupation. The investigation clearly indicated the guilt of the corporal, but, as in the first case, he had been redeployed and honorably discharged before the evidence implicating him was discovered.

A third case: Shortly after the unconditional surrender of Japan, General MacArthur ordered Chinese military authorities to accept the surrender of the Japanese troops in an area that had been occupied by Japan for many years prior to the outbreak of the "China Incident", but which is regarded as a part of Greater China. An American army colonel, a military government officer, was assigned to the occupying forces. The Japanese commander, understandably enough, had certain qualms concerning the probable treatment he and his troops might ex-

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37 DEPT OF STATE BULL. No. 1051 (1945). See note 41 infra.
39 The first official pronouncement of the central statement of policy concerning the division of Germany into zones of occupation, was contained in the Anglo-Soviet-American Conference, Crimea (Yalta Conference), February 11, 1945. After V-E Day, Germany was divided into four zones of occupation—American, British, Soviet and French—with each zone commander exercising supreme military government authority in his respective zone. The Allied Control Authority was established as the quadripartite group responsible for recasting administration and deciding matters affecting Germany as a whole. See Status Report on Military Government of Germany, U. S. Zone, Office of Military Government for Germany (U. S.), War Department (15 March 1946).
40 On September 2, 1945, the Instrument of Surrender was signed aboard the U.S.S. Missouri in Tokyo Bay.
pect at the hands of the Chinese. Accordingly, he approached the American colonel with the information that he had in his possession, but hidden, a quantity of gold bullion, the property of the Japanese government. Was there any way, he wondered, that this gold could be turned over to the Chinese that would result in better treatment for the "honorable" Japanese soldiers? The colonel promised to arrange things, and with eminent fairness actually did turn one-half the gold over to the Chinese commander—but with what effect on the treatment of the Japanese the facts fail to reveal. The other half of the gold the colonel kept for himself, procuring its transport to Shanghai, where he was able to readily dispose of it for an astronomical amount of dollars in Chinese national currency, which in turn was easily turned into very satisfactory American dollar balances and transferred to his account in the United States. By the time the authorities had discovered the machinations of this financial genius, he had been returned to this country and, after expiration of his terminal leave, placed on inactive status. Today the colonel is understood to be enjoying life immensely in a comfortable, Japanese-paid-for house overlooking the Pacific Ocean.

In each of these three cases, representing three different jurisdictional problems, the solution must be sought on the basis that the individual is no longer under military control, and that he is physically within the United States.

Obviously, the courts in the United States are neither proper nor competent tribunals before which individuals who have committed

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The individual, if still an officer or soldier, could be brought before a general court martial, either in the United States or in the place where the crime was committed, as might be most convenient. See Winthrop, Military Law and Precedents, (2d ed. 1920) 81; A Manual for Courts-Martial, U. S. Army, (G.P.O. 1928) 7. As an alternative, the individual could be ordered back to the overseas station where the crime was committed, and turned over to the civilian courts (if in a friendly or allied country, and if agreement or legislation gave its civilian courts jurisdiction) or to the Allied Government Court (if in occupied enemy country).

If he remained in; or returned to, the country of the crime, as a civilian, the results would be as follows: If a friendly or allied nation, following the rule mentioned in Coleman v. Tenn., 97 U. S. 509 (1878), he would still be exempt from prosecution by the local courts. If a friendly or allied nation with which the United States had entered into an agreement, either in writing or embodied in statute, giving jurisdiction to the local courts in this type of case, he could be apprehended and tried by the civil authorities. If occupied enemy territory, he could be apprehended and tried by the Allied Military Government Courts. In none of these cases may we assume that the culprits will obey the purported impulse of the criminal to return to the scene of his crime.
crimes outside of the United States are to be tried. It is a well-established doctrine in common law that criminal jurisdiction involves power over the offense, as well as the perpetrator, who can be punished only in the forum of the place where the act was committed, which, for crimes committed abroad, effectively closes the door to trial in an American civil court, state or federal.

There has been some speculation among military lawyers as to the possibility, in cases such as those under consideration, of bringing former military personnel before an appropriate tribunal for trial as war criminals for acts of violence or thievery committed while still in the service, against the civilian population of a conquered enemy nation.

That such actions constitute violations of the law of war is readily established. The law of war is that branch of international law which embodies the rules and customs recognized by so-called "civilized" nations as governing the conduct of war and the activities of the belligerents toward the enemy, including the enemy civilian population, during hos-

Some acts committed outside of the territorial limits of the United States constitute crimes against the United States and are triable in a Federal court. For instance: The colonel who appropriated the Japanese gold may have violated a statute, REV. STAT. § 5312 (1875), 50 U. S. C. § 217 (1940), prohibiting dealings with government property; a theft of jewels in Germany may be followed by the transportation of the loot into the United States in violation of the customs laws; the failure to report, for income tax purposes, the "profits" on an overseas criminal transaction, might be a violation of the Internal Revenue Act. It is conceivable, too, that a criminal act abroad may result in a civil suit against the culprit in United States courts—as, for instance, a suit against one who stole government property and disposed of it in the black market for the value of the converted property. See United States v. Bowman, 260 U. S. 94 (1922); American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909). The ancillary offense must be against the United States: 20 ORS. ATT'Y GEN. 590 (1895). In none of these conjectures, however, is punishment administered for the crime actually committed, and while ancillary retribution may be preferable to permitting the criminal to go scot free, there is an inartistic element that offends the straight thinker. And in the majority of cases ancillary retribution either is of doubtful validity, or does not exist at all; rape is ordinarily just that, and any interest of, say, the Bureau of Internal Revenue, would be definitely unofficial melodramaria.

From the viewpoint of the administration of criminal justice within the military establishment, amenability to ancillary retribution is irrelevant and of only academic interest.

Cf. the ability of French courts to punish French nationals for crimes committed abroad. See 2 HACKETT, DIGEST OF INTERNATIONAL LAW (1941) 179-180.

Ibid.

Usually a military commission, for a historical discussion of which see WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920) 831 et seq. But see note 63 infra, on the jurisdiction of a general court-martial over war crimes.
tilities and after, until the formal reestablishment of peace. This common law of war, unlike the Articles of War which have been codified, is largely unwritten, although a few of its principles have been included in the Articles of War. Murder, rape, and thievety, and other acts of violence against the civilians of a conquered nation are clearly "war crimes" and are commonly punished when committed by enemy belligerents, civilian or soldier, by military commission, appointed by the President, or by other appropriate commander. Each of the two outstanding instances of the use of a military commission in World War II passed upon by the Supreme Court of the United States involved enemy personnel, and it is clear that such belligerents are properly tried by a military commission if the charges against them, if proved, will constitute a war crime. Writers seem agreed that such a military tribunal


E.g., Article of War 81 (relieving, corresponding with, or aiding the enemy) and Article of War 82 (spies). It will be noted that in these instances the cited Articles cover anyone, whether or not a person ordinarily subject to military law.

See GLUECK, THE NUREMBERG TRIAL AND AGGRESSIVE WAR (1946) 60-70. Hague Convention of 1907, Annex IV, Article 46, provides: "Family honour and rights, the lives of persons, and private property . . . must be respected." The United States Army's interpretation of this obligation is set forth in Field Manual 27-10, par. 300, as follows: "United States rule. The United States acknowledges and protects, in hostile countries occupied by them, religion and morality; the persons of inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished." In Application of Yamashita, 66 Sup. Ct. 340, 347 (1946), the Court pointed out that acts of violence, cruelty and homicide inflicted upon the civilian population of an occupied country are recognized in international law as violations of the law of war. Cruelty to the civilian population of the conquered Philippines as a violation of the law of war was the basis for the conviction of General Yamashita, the commander of the occupying Japanese forces. It is noted that the dissenting opinion agreed on this point; the dissent was based upon a question of procedure before the military commission. For complete discussion of this case, see Fairman, The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita case, (1946) 59 HARV. L. REV. 833.

Application of Yamashita, supra, involved the commander of the Japanese forces in the Philippines, and Ex parte Quirin, 317 U. S. 1 (1942), involved "enemy belligerents"—the Nazi saboteurs who landed on our shores in July, 1942. One of these, Haupt, claimed American citizenship, as to which the Court said: "Citizens who associate themselves with the military army of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war." Id. at 37-38.
has jurisdiction extending to all violations of the common law of war. While the personal jurisdiction of the military commission conventionally extends to enemy personnel, there are numerous examples of its extending to American citizens, and to members of our own military service, although the latter are more usually tried by court-martial. The wide extent of the jurisdiction of military commissions over any violator of the law of war impelled Cowles, in an exhaustive treatment of the subject, to adopt the thesis that such persons are beyond the pale, and are subject to trial and punishment by whatever power happens to capture them—the only limitation being, seemingly, that the trial take place prior to the declaration of peace.

Bearing in mind that there is no authoritative decision on the subject, it would seem clear that because the jurisdiction of military commissions extends both to civilians and to military personnel, the separation of a soldier from the service would have no effect upon his trial. Since the jurisdiction of a military commission, like that of a court-martial, is personal, rather than territorial, it is no objection to the soldier's trial as a war criminal that the crime was committed either in enemy territory, or, as in the case of one of the rapists, in a place now in the British zone of occupation. To say, however, that the jurisdiction is personal is not to conclude that the jurisdiction can properly be exercised in the United States, since in all cases the trial and procedure must conform with the requirements of the Constitution—specifically, the

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General Order 20, February 19, 1847, quoted in 2 Smith, The War with Mexico (1919) 455, 456, n. 22, provided for such trial of our own forces. There are numerous examples in the files of The Judge Advocate General of the Army. See also Act of March 3, 1863, § 30, 12 Stat. 736.

Cowles, Universality of Jurisdiction over War Crimes (1945) 33 Calif. L. Rev. 177.


24 Ops. Att'y Gen. 570 (1903) semble. Here an officer was guilty of torturing a civilian priest during the Philippine insurrection. After his separation, the Secretary of War requested an opinion as to whether he could be tried by any method. The Attorney General stated that he could not—the Philippine courts had no jurisdiction under Coleman v. Tenn., 97 U. S. 509 (1878); a court-martial had no jurisdiction because of his separation; and a military commission had no jurisdiction since "peace had been proclaimed in the Philippines". It would seem, except for the factor of peace, the Attorney General would have felt that a military commission did have jurisdiction.

Cowles, op. cit. supra note 53, at 217.
right to indictment or presentment to a grand jury\textsuperscript{67} and to trial by jury\textsuperscript{58} within the United States. For this reason, following the principle of the \textit{Milligan} case,\textsuperscript{69} it must be concluded that a civilian citizen of the United States cannot be tried here by a military commission when the civil courts are open and functioning,\textsuperscript{60} although such a trial could be held outside of the United States, provided only that the defendant could legally be brought before it, by extradition or other valid process, or otherwise be found in an appropriate locality where an American military commission could properly sit\textsuperscript{61} and where the constitutional right to a jury trial does not prevail.\textsuperscript{62}

Before concluding the discussion of the jurisdiction of military commissions in these cases, it should be pointed out that the Twelfth Article of War provides that "General courts-martial shall have power to try any person subject to military law . . . and any other person who by the law of war is subject to trial by military tribunals. . . ."\textsuperscript{63} This provision gives general courts-martial and military commission concurrent jurisdiction over the trial of any war criminal\textsuperscript{64} in any case where there is no legal impediment imposed by the Constitution, and to this extent the rule preventing court-martial of former military personnel must be regarded as qualified; such persons may be tried by court-

\textsuperscript{57}U. S. Const. Amend. V.
\textsuperscript{58}U. S. Const. Amend. VI.
\textsuperscript{59}Ex \textit{parte} Milligan, 4 Wall. 2 (U. S. 1866).
\textsuperscript{60}\textit{Sed quaer}, if an emergency were imminent. It is doubtful if during the era of atomic warfare the Supreme Court would insist upon a strict application of this principle of the \textit{Milligan} case. But until modified, this is the law.
\textsuperscript{61}I.e., any place where the military authority of the United States is in sufficient control to permit the American commander to appoint a military commission and to enforce its edicts.
\textsuperscript{62}\textit{See In re} Ross, 140 U. S. 453, 464 (1890), and Neely v. Henkel, 180 U. S. 109, 120-122 (1901).
\textsuperscript{63}Although courts-martial have a concurrent jurisdiction over war crimes, they do not have, in these cases, authority to return a sentence of death. Courts-martial may evoke the death penalty only in cases "expressly made punishable by death". See Article of War 117. War crimes, even if usually punishable by death, must be tried by military commission if the death penalty is to be imposed. See Barber, \textit{Trial of Unlawful Enemy Belligerents} (1943) 29 Corn. L. Q. 53, 84.
\textsuperscript{64}Including a civilian, soldier, officer or other person. Cf. the wording of other Articles of War, such as 75, which applies only to an "officer or soldier", 76, which relates to "any person subject to military law", and 82, covering, as does 12, "any person". There are numerous other examples of wording that creates, definitely, a selectivity of the individuals to which a given Article applies.
martial for violation of the law of war unless the trial is held in a place where the individual may properly assert his constitutional right to trial by jury, and provided that the defendant may legally be brought from the United States to the place of trial.

Finally, it must be noted that, assuming the defendant can properly be brought before the court-martial or military commission, this solution would not take care of those cases of criminal acts that are not war crimes. Violations of the law of war can take place only in connection with personnel or property of the enemy, and therefore would not apply to comparable acts committed in connection with the population of a friendly or allied nation. It is a paradox, perhaps, but nevertheless true, that violence toward the enemy's civilian population is a war crime, but not so if directed toward the civilian population of a friend or ally. The use of the war crime theory as a solution to the problem is, at best, a partial solution, even if the trial, as a practical as well as a legal matter, can be held and the criminal brought before the appropriate tribunals.

It is appropriate, before discussing the legal means, if any, of bringing former military personnel before an appropriate tribunal for crimes committed overseas, to indulge in minor recapitulation. We have seen:

a. That none of the individuals can be brought before a United States civil court, on the basis of lack of territorial jurisdiction.

b. That none of the individuals can be tried by court-martial for violation of the Articles of War, since they have been separated from the military service.

c. That none of the individuals can be tried in the civilian courts of the foreign country, whether friendly, allied, or enemy, since such courts have no jurisdiction over military personnel of the visiting or occupying nation, as the case may be.

d. That the two enlisted rape murderers who committed their criminal acts in Germany are guilty of a violation of the law of war and are war criminals, triable as such before a military commission or a general court-martial that sits outside the scope of the constitutional requirement of trial by jury, provided they can legally be brought before the tribunal.

e. That the light-fingered colonel who stole the Japanese gold in China is not guilty of a war crime, and no military commission or general court-martial sitting in China would have jurisdiction over the act he committed.
That the two rape-murderers are both guilty of criminal acts in Germany over which the Allied Military Government courts in Germany have jurisdiction provided that they could legally be taken to Germany and brought before such tribunal.

That the colonel could not be tried before an Allied Military Government court, since there are no such courts in China where the act was committed and since such courts have no extraterritorial jurisdiction.

The normal method of bringing an individual in the United States to trial before a foreign court, is, of course, extradition as provided in an appropriate treaty. But in the case of individuals, such as the colonel, who are wanted by the Chinese authorities, there is no such treaty, and extradition would be impossible even if it were possible to show (which it is not) that the colonel had committed an act over which the Chinese authorities had jurisdiction. And had the crime been committed in some other friendly or allied nation with which the United States does have an extradition treaty, such as France, it is probable that the treaty would contain the more or less standard provision found in such treaties to which the United States is a signatory, providing that neither country “shall be bound” to deliver up its own citizens to the other. Further, the Supreme Court of the United States in the Neidecker cases has interpreted this clause to mean that not only is our country not “bound” to surrender its own citizens but that it has no legal authority to do so, even if all the elements of an extraditable offense exist. Thus, in such cases, the criminal who is a citizen could not be made to stand trial, even if the foreign court had jurisdiction over the act he committed.

In connection with crimes committed in occupied enemy areas where,
although the local civilian courts have no jurisdiction, trial of a civilian before an Allied Military Government court, a military commission, or a general court-martial is possible, an extradition treaty, if any, formerly in effect between this government and the enemy nation is of no assistance, since it is clear that all such treaties were suspended on the outbreak of hostilities and will remain so until peace has been restored in the technical sense.  

The question of how the United States could fulfill its obligations, as an occupant of conquered territory, to punish its own people for crimes committed by them has presented problems before, as a result of difficulties arising in connection with our occupation of Cuba after the Spanish-American War. In 1900, the Congress enacted legislation setting up a machinery analogous to extradition. It provides, in substance, that whenever any foreign country or territory is occupied or under control of the United States, any person who commits certain *malum in se* crimes, and who flees to the United States may be returned. The procedure to be followed calls for the written request or requisition of the military governor or other chief executive officer in control of the occupied foreign country for the individual’s return “for trial under the laws of the place where such offense was committed”. He is then apprehended by the authorities of the United States, and brought before a judge of a United States court and evidence presented establishing “probable cause that he is guilty of the offense charged”. If the court finds that probable cause exists, the individual is then returned “on the order of the State Department” and surrendered to the authorities in control of the foreign country, who “shall secure to such person a fair and impartial trial”.

The statute in question was subjected to test in the Supreme Court of the United States in *Neely v. Henkel*. In 1900, one Neely, a United States citizen, while employed in Cuba as a finance officer by the Department of Posts, established by the military government, embezzled

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68In 1921, while a state of war still existed between the United States and Germany, an American citizen, charged with a theft in Coblenz, was sought by the German government to be extradited from this country. The Department of State wrote to the American Commissioner in Berlin as follows: “You are instructed to inform Mr. Sauer that since the United States is still technically in a state of War with Germany, extradition proceedings between the two countries are not now being carried on.” See 4 Hackworth, *Digest of International Law* (1942) 38.


70180 U. S. 109 (1901).
postal funds and came to the United States. Subsequently, the Act of June 6, 1900, was passed by the Congress. In due course Neely was arrested, brought before a United States judge and ultimately ordered returned to Cuba under the procedure established by the Act. After his application for a writ of habeas corpus was denied, the case was appealed to the Supreme Court, Neely challenging the constitutionality of the Act on the ground, broadly stated, that the President had no authority under the Constitution for military government, in time of peace, and specifically that there was no authority for the United States to remove one of its own citizens to an occupied foreign area for trial by the local courts. After upholding the military occupation and government of Cuba, the court justified the adoption of the statute on the basis that Cuba, while not included within the political boundaries of the United States, was yet subject to our jurisdiction and under our control either under the power to make war or the power to make treaties. The Act of June 6, 1900, is then simply an extension to our code of criminal procedure—an exercise of the power of the United States to punish crime anywhere within its dominion, and to provide the means and procedure for such punishment.

It would appear, therefore, that the enlisted man, guilty of a crime of violence in the American zone of occupation in Germany, could be returned to Germany by following the procedure established by the Act of June 6, 1900, and could be tried by any appropriate tribunal having jurisdiction to try civilians for the offense—as a war criminal before a military commission or a general court-martial, or as a rapist and murderer before an Allied Military Government court—provided only that he is given, in the words of the statute, "a fair and impartial trial."

In the case, however, of the soldier who selected the British zone as the situs of his crime, the availability of this procedure is not so clear. The United States, while clearly occupying or controlling the American zone of occupation, has no such status in connection with the other zones, and could be said to meet the literal requirements of the statute only on the theory that all of the Big Four have a joint occupation and control of the entire area, and the actual occupation by each in its own zone is constructively an occupation by each of the others. Not only does such a conception ignore the realities in Germany as well as in Ja-

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"The Spanish-American War was terminated by the Treaty of Paris, signed on December 10, 1898, and proclaimed April 11, 1899. By its terms the military occupation of Cuba was authorized. 30 Stat. 1754."
pan, but it probably would not meet a strict interpretation of this statute. And, of course, the statutory procedure would be of no assistance whatever in connection with the trial of the gold gathering colonel in China, since that area is clearly neither occupied nor controlled by the United States, and further, as has been shown earlier, there is no tribunal in China which would have personal jurisdiction over him, even if he were returned to that area.

The foregoing discussion has demonstrated that there are numerous instances of crime overseas perpetrated by personnel who are sponsored by the United States and against whom there is no retribution by any existing constitutional means. Such a criminal enjoys an immunity from legal process based upon the accident of geographical location in his choice of a situs for his criminal act.

From the basic objectives of American policy with respect to occupied areas—Germany, Austria, Japan, and Korea—it is clear that our occupation may be expected to extend over a considerable period of time. The policy of "eventual reconstruction of political life in these countries on a peaceful and democratic basis", to which our Government has committed itself, is no easy task, nor is it one to be achieved within the short space of a few years. It is reasonable to anticipate that crimes, a good many of them serious, will continue to be committed by American members of our occupying forces, and that there will be instances when these criminals will return to the United States, discharged from their military service or employment, before their complicity will have been discovered.

There exists a flagrant gap in the power of the United States Government to administer criminal jurisdiction over members of its armed forces, implicated in crimes overseas, whose separation from the service has terminated military jurisdiction over them. There is an equally flagrant gap respecting civilians who have returned to this country.

Extradition, if an appropriate treaty exists and is in force, is compli-

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Cassidy, American Policy in Occupied Areas, 15 DEP’T OF STATE BULL. NO. 291 (1946).

American civilian employees probably enjoy much the same immunities from military law after their return from the theater as do military personnel. The civilian "accompanying or serving with the armies of the United States in the field", both in and out of the territorial limits, is subject to the Articles of War under Article of War 2(d). He may be court-martialed, tried by a military commission or by an Allied Military Government court, if apprehended in an area and at a time when one of such courts has jurisdiction. In a proper case he could be returned to the theater under the Act of June 6, 1900. Proper trial and punishment are uncertain and at best cumbersome.
icated, uncertain, and, as to military personnel, of no use. "Quasi éx-
tradition", under the Act of June 6, 1900, is equally complicated and
provides a solution, at best unsatisfactory, only in those cases where
the crime takes place in enemy occupied country. Trial in American
civilian courts for incidental violations of law is haphazard and subject
to the objection that only ancillary retribution is possible in exceptional
cases, and that the main crime actually goes unpunished.

The need for a simple, uniform procedure to fill this gap is apparent.
It is submitted that the solution lies in a simple, uniform process and
procedure that will permit speedy trial and punishment and will insure
the equalizing of justice. One remedial method suggests itself: statutory
provision, by act of Congress, providing for continuing court-martial
jurisdiction over former members of the military establishment, or those
individuals formerly subject to military law, for one year from the re-
spective dates of separation from active service, with all of the sim-
plcity as to jurisdiction that such action implies.

The proposed legislation would not controvert any doctrine enunciated
by our Constitution. The war powers of the President and Congress
granted by the Constitution are broad in scope and do not automatically
cease upon the termination of actual fighting.74 The Constitution gives
to Congress the power "to provide for the common Defense", "to raise
and support Armies", "to provide and maintain a Navy", "to make
Rules for the Government and Regulation of the land and naval Forces",
and "to declare War". Congress is further authorized "to define and
punish . . . offenses against the Law of Nations".75 Authority exists for
Congress "to make all laws necessary and proper to carry into effect
the granted powers. The measures to be taken in carrying on war . . .
are not defined. The decision of all such questions rests wholly in the
discretion of those to whom the substantial powers involved are confided
by the Constitution."76 The Supreme Judicial Court of Massachusetts77
put the matter concisely in declaring that the war powers inherently

74"(The war power) . . . is not limited to victories in the field and the dispersion
of the insurgent forces. It carries with it inherently the power to guard against the imme-
diate renewal of the conflict, and to remedy the evils which have arisen from its rise and
progress." (Italics supplied.) Stewart v. Kahn, 11 Wall. 493, 507 (U. S. 1870). See also

75U. S. CONST. Art. I., § 8.

76Stewart v. Kahn, 11 Wall. 403, 507 (U. S. 1870).

77Lajoie v. Milliken, 242 Mass. 508, 136 N. E. 419 (1922); See O'Rourke, War Powers
(1939) 8 Geo. Wash. L. Rev. 157 and Berdahl, War Powers of the Executive in
the United States (1920).
carry with them subsidiary faculties to deal comprehensively with all exigencies created by war or arising from its inception, progress and termination. The Constitution makes the President "The Commander-in-Chief of the Army and Navy of the United States", and charges him with the duty "to take care that the Laws be faithfully executed". As summed up in the Quirin case,

"The Constitution thus invests the President as Commander-in-Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war."79

An alternate solution would be the enactment of legislation giving to the federal courts jurisdiction over all persons formerly subject to the Articles of War for acts, committed while so subject, in violation of the 92d, 93d, and 94th Articles, irrespective of where such acts were committed. Such a statute would be subject to no charge that the Congress was depriving a civilian of trial by jury in this country, or otherwise depriving him of due process of law, since the trial would be by jury and the normal procedures of trial in the federal courts would be observed. The idea of subjecting a person to trial in this country for acts committed abroad is not new, the only difficulty being the practical one of obtaining evidence, including witnesses. This solution has the advantage of being clearly applicable to American civilians who have committed crimes abroad (where subject to court martial) and have returned from overseas before their guilt is suspected.

Either statute would meet all cases, in enemy areas as well as in the territory of friendly or allied nations. The resulting solution would be uniform, relatively simple, and practical of application. The law would revert to its boast that it is no respecter of persons, which would be true irrespective of the accidental geographical location of the criminal act.

"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."82

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79 317 U. S. 1, 26 (1942).
80 Covering respectively, murder and rape, various other civilian crimes and frauds against the government.
81 See United States v. Bowman, 260 U. S. 94 (1922); American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909). Courts-martial may sit anywhere, regardless of where the crime was committed.
82 Mr. Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat. 316, 421 (U. S. 1819).
COMMON LAW CONSPIRACY

Benjamin F. Pollack*

OVER one hundred and fifty years ago a legal scholar delivering a lecture on law is said to have made the observation that "Natural law is the rule of human action prescribed by the Creator, and discovered by the light of reason . . . ", and distinguishable from the arbitrary law which he said "is a rule of action applied to all persons, and is prescribed by the Supreme power in a state"; he further stated that "... one is from God, the other human."

Viewed from the perspective of a violation of natural law, a basis for the validity of the current war trials may be found in the theory of common law conspiracy. There are certain acts that are inherently criminal, and such are certainly those which can be universally recognized as violations of natural laws. Just as the law of criminal conspiracy developed to meet the social demands of a change of times, so may an international law of conspiracy be established, and for the same reasons.

Whether or not the doctrine of an international law of conspiracy has developed sufficiently to afford a legal justification to the Nuremberg trials or that of the Japanese leaders, such a development, if it is to come, may be similar to the development of the common law rule of criminal conspiracy in Anglo-American Jurisprudence. The following examination of the authorities attempts to trace the origin and development of this rule.

It should be stated at the outset that, while the language of the courts and the principles of law expounded in opinions rendered on conspiracy indictments based on statutory law seem similar to those enunciated in instances of indictments on common law conspiracy, there is a substantial difference between these cases. This discussion will be concerned solely with the principles of law pertaining to indictments for criminal conspiracy at common law. In this connection it must be observed that the common law is not the source of jurisdiction in the federal courts, as there are no common law offenses against the United States. Offenses can become the subject of an indictment in the courts of the United States.

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The views here expressed are those of the author and should in no way be considered those of the Department of Justice.

1(1832) 3 Legal Examiner 242.
States only if so created by acts of Congress. This is also true in conspiracy cases.

In speaking of common law conspiracy, the term "common law" is used as defined in the following words of Mr. Chief Justice Chase in his concurring opinion in one of the leading American cases on the subject of criminal conspiracy at common law:

"The common law of England is derived from immemorial usage and custom, originating from Acts of Parliament not recorded, or which are lost, or have been destroyed. It is a system of jurisprudence founded on the immutable principles of justice, and denominated by the great luminary of the law of England, the perfection of reason. The evidences of it are treatises of the sages of the law, the judicial records and adjudications of the Courts of justice of England."4

As can be expected the cases on criminal conspiracy are myriad. In the ensuing discussion, consideration is given to only those cases which state the principles and trace the bounds of the offense, and which are constantly cited as authority. Most of the cases examined were ably argued and carefully considered, and were decided during the formative period of our jurisprudence. In fact, they are the roots from which the law of conspiracy has grown and constitute the base about which most subsequent decisions have crystallized. What variation there has been in the modern and more recent decisions has been in the application of the fundamental principles set forth in those early decisions.

THE COMMON LAW CRIME OF CRIMINAL CONSPIRACY DEFINED5

It can be unequivocally affirmed that the crime of conspiracy at common law is the most difficult to define. In the opinion of learned legal scholars, it is almost impossible to confine the true law of conspiracy within the bounds of a definite statement. Because this crime is so predominately mental, it is very difficult to analyze its elements. The verbalisms of the courts describing and defining conspiracy are, in the words of Professor Harno, "well-nigh terrifying". In the opinion of

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6In the ensuing discussion the term "conspiracy" will connote criminal conspiracy only.
8Id. at 636.
some jurists, no intelligible definition has yet been established.\(^8\)

The fact that it is almost impossible to supply a correct definition of the crime is due entirely to the unsettled state of the law of criminal conspiracy. The law on the subject is as unsettled today as it was one hundred years ago, except that more decisions have been rendered and have made the subject more complicated. As early as 1890, a great English legal scholar wrote:

“No branch of the law of England is more uncertain and ill-defined than the law of Criminal Conspiracy. It is distinctly modern in growth, and its area has from time to time been extended or curtailed by the views divergent or even conflicting of the judges on whom the duty has been cast of directing juries as to the nature of the crime.”\(^9\)

Wright quotes the following from Mr. Sergeant Talfourd:

“The offense of conspiracy is more difficult to be ascertained precisely, than any other for which an indictment lies; and is, indeed, rather to be considered as governed by positive decisions than by consistent and intelligible principles of law.”\(^10\)

Another great authority wrote in 1860, “The law of conspiracy as it stands today is an awkward and unsightly, but in some respects highly convenient, patch upon an old and ragged garment”\(^11\).

The complaints by the courts as to the confused state of the law on the subject are as apt today as they were 125 years ago when the court in one of the leading cases in this country on the subject said:

“The unsettled state of the law of conspiracy has arisen . . . from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances, without reference to any pre-established principle.”\(^12\)

Speaking further in the same case, the court said:

“There is in the books an unusual want of precision in the terms used to describe the distinctive features of guilt or innocence.”\(^13\)

The classical definition generally given by text writers and courts is that a conspiracy consists of a combination of two or more persons to do an act which is unlawful in itself, or doing a lawful act by the use

\(^8\)Wright, Law of Criminal Conspiracy (1887) 11.
\(^10\)Wright, op. cit. supra note 8, at 92.
\(^11\)Purrrington, Tubewomen v. The Brewers of London (1903) 3 Col. L. Rev. 447, 469.
\(^12\)Commonwealth ex rel. Chew v. Carlisle, 36 Bright. 38 (Pa. 1821).
\(^13\)Ibid. See also State v. DeWitt, 2 Hill 282, 284 (S. C. 1831).
of means which are unlawful. Various other definitions have from time to time been suggested. For instance, Mr. Justice Holmes has described a conspiracy as a partnership in criminal purposes. Professor Harno provides a more flexible definition when he states that, basically,

"Conspiracy is an inchoate crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent, and it is with the intent to commit that act that the state is concerned."  

Professor Harno evidently considers the true test of a conspiracy to be the degree with which the state is concerned in the prevention of the act contemplated by the conspirators. That view has been gaining considerable support in many of the dicta of the courts. R. S. Wright, who, according to Professor Sayre, has written a most admirable exposition on the development of the law of criminal conspiracy, has defined the law of conspiracy as follows:

"It would appear that a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal object; or, some object not criminal by criminal means; or, some object not criminal by means which are not criminal, but where mischief to the public is involved; or where neither the object nor the means are criminal, or even unlawful, but where injury and oppression to individuals are the result."

A definition by the court in the leading case of Lambert v. The People which has aroused considerable criticism, but which at the same time has gained many adherents since its pronouncement in 1827, is the following:

"An examination of the cases cited convinces me that a conspiracy may be defined (so far as it is capable of a precise definition) as a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or the public; and that it is not necessary to render the conspiracy indictable that its object should be the commission of a crime."

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16 Harno, supra note 6, at 646.
17 Kennedy, Outlines of Criminal Law (15th ed. 1936) 92.
18 Sayre, Criminal Conspiracy (1922) 35 Harv. L. Rev. 393 n. 1.
19 Wright, op. cit. supra note 8, at 123.
20 9 Cow. 578, 606 (N. Y. 1827). See also the concurring opinion of Mr. Justice Drake in another leading case, State v. Rickey, 4 Halst. 293, 310 (N. J. 1827).
This definition is suggestive of the failure of the courts to distinguish between "confederacy" and "conspiracy".21

The definition, however, which has invoked more universal accord and adherence is that of Mr. Chief Justice Shaw in Commonwealth v. Hunt:

"Without attempting to review and reconcile all the cases, we are of opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful, which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by members to do them would be an unlawful conspiracy, and punishable by indictment."22

From all these definitions it appears that the essential elements of conspiracy are the following:

1. Knowledge of the individual charged of the unlawful design;
2. Intention on his part to associate himself in the promotion of the design;
3. Giving of impression by him to coconspirator, either by words or conduct, of that intent;
4. Acceptance by coconspirators as a coparticipant.23

The gist of the offense is said to be the agreement, or as some courts have stated, the conspiracy. There must be an agreement or understanding between the conspirators that they should act together.24 As was stated by the court in Commonwealth v. Zuern,

"That which gives to the crime of conspiracy its distinctive character is unity of purpose, unity of design, focalization of effort upon a particular project by the persons named in the indictment."25

It is the fact of confederating which is the gist of the offense. The conspiracy itself is the crime—not the actual perpetration, but the

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21See comment on this phase in a very erudite discussion by Blair, Judge Made Law of Conspiracy (1903) 37 Am. L. Rev. 33, 46.
22Metc. 111, 123 (Mass. 1842).
original hatching of the plot. It is not the bare intention that the law punishes, but the act of conspiring which is made the substantive offense. The offense is complete at the moment the undesirable combination is formed.

The most lucid analysis of the nature and import of the agreement in conspiracies has been made by Mr. Justice Holmes in United States v. Kissel & Harned:

"A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, such as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years." Such agreement need not necessarily be formal. It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligible and deliberate agreement. The fact that two or more persons intend to do the same act or a similar act at the same time, or even that one knows the intention of the other to do a particular act, is sufficient to spell out an agreement for conspiracy. There must be a communicated intention to conspire between the defendants.

Manifestly, an agreement can be implied from circumstances. For example, when an individual knows of a conspiracy and then aids in carrying it out, even though he does not communicate with the others, and even though he did not intend to join the agreement, he becomes equally guilty with the rest.

It is not necessary that all conspirators join in the agreement at the same time. All that is required to make a person a party is that he join it prior to the complete consummation of the purpose of the conspiracy.

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26 Carson, The Law of Criminal Conspiracies and Agreements as Found in American Cases in Wright, Criminal Conspiracies and Agreements (Am. ed. 1887) 124.
33 United States v. Manton, 107 F. (2d) 834 (C. C. A. 2d, 1938); Hagen v. United States, 268 Fed. 344 (C. C. A. 9th, 1920); People v. Kauffman, 152 Cal. 331, 92 Pac. 861 (1907); Commonwealth v. Campbell, 7 Allen 541 (Mass. 1863); State v. Gregory, 93 N. J. L. 205,
In the eyes of the law, every person who enters into a conspiracy at any time before final consummation is deemed a party to all acts done by any of the parties before his entry or afterward. As was stated by the court in the leading case of *People v. Mather*,

"... whenever a new party concurs in the plans originally formed, and comes in to aid in the execution of them, he is from that moment a fellow conspirator. He commits the offense whenever he agrees to become a party to the transaction, or does any act in furtherance of the original design. . . ."

Needless to say, there must be at least two persons to give basis to the charge of conspiracy; for the gist of the crime is a combination, and no combination can be committed by less than two persons. Theoretically, there is no upper limit to the number of conspirators.

Any of the conspirators may abandon the crime and thus relieve themselves of the punishment for it, but such abandonment must be beyond doubt and must be conveyed to the co-conspirators. Abandonment is no defense to liability for that which had already been done prior to the abandonment.

Even though there may be no formal abandonment, a defendant is not liable in conspiracy except for the fair import of the concerted purpose of the agreement as he understood it. If others come later and change that import or purpose, he is not liable for such change. His liability is limited to the common purpose while he remains in it and as he understood it.

107 Atl. 459 (1919); People v. Marwig, 227 N. Y. 382, 125 N. E. 535 (1919), (1920) 5 Corn. L. Q. 453; Conrad v. State, 75 Ohio St. 52, 78 N E. 957 (1906); (1926) 40 Harv. L. Rev. 651.


*Miller v. United States, 277 Fed. 721 (C. C. A. 4th, 1921); State v. Allen, 47 Conn. 121 (1879); Pinkard v. State, 30 Ga. 757 (1860).

*United States v. Peoni, 100 F. (2d) 401, 403 (C. C. A. 2d, 1938).
As already stated, it is not necessary in establishing the crime of conspiracy to prove that the purpose of the conspiracy has been effected or accomplished; the agreement of two or more persons to commit an unlawful act is criminal in itself whether or not the unlawful act is eventually committed.\(^{39}\) Neither is it necessary to constitute a conspiracy that the means by which the final act is to be accomplished should be predetermed.\(^{40}\) The details of the conspiracy—that is, all the acts necessary to accomplish the common design—need not be known to each conspirator. All that is necessary is that all conspirators be aware of the purpose to be accomplished. It is not even necessary that every conspirator participate in carrying out every detail, or that he should know the exact part played by his fellow conspirators. It is only essential that there be a common understanding of the end to be achieved and an agreement to do whatever may be or become necessary to achieve that end.\(^{41}\) It is not necessary that there be any communication between each conspirer and every other party.\(^{42}\)

One of the difficulties, as will be shown hereafter in the discussion with respect to the development of the law of criminal conspiracy, is the question whether the determinative test in such a conspiracy is the intent of the parties or the motive of the parties. It is obvious from any perusal of the cases and authorities that it is not the agreement of conspiracy that causes the mischief, but rather what that agreement portends.\(^{43}\) The question is, then, "How can the portent of the agreement be determined?" Can it be determined from the intent of the parties, or from their motives? Kenney asserts that conspiracy is not purely a mental crime consisting in the mere concurrence of the intention of the parties; he considers the announcement and acceptance of the intentions to be the crux of the offense. The mere fact that the parties have come to such an arrangement, in his opinion, suffices to constitute a conspiracy.\(^{44}\) Eminent and respectable authorities have taken an opposite view, however, contending that the crime of conspiracy is

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\(^{40}\)State v. Cardoza, 11 S. C. 195 (1878).

\(^{41}\)United States v. Manton, 107 F. (2d) 834, 848 (C. C. A. 2d, 1938); Miller, *Criminal Law* (1934) 108.


\(^{43}\)Elkin v. People, 28 N. Y. 177, 179 (1863).

purely mental in composition as contrasted with other crimes in which the act is important. As stated by Professor Harno,

"In conspiracy the stress is on the intent element. The danger lurks in the intent. It is present when one person harbors an intent to do an anti-social act, and it is greater when two or more hold it separately. Their behavior becomes criminal when they agree to make a common cause of committing that act. The agreement, it is said, is the act in criminal conspiracy. In truth, it is but a step toward the accomplishment of another act, the commission of which the state wishes to prevent. . . . Criminal conspiracy involves a specific intent to commit a particular act, the perpetration of which the state desires to forestall. As a problem in procedure, to establish a criminal conspiracy the state must prove an agreement on the part of two or more persons, and it must prove that the common intent flowing from that agreement was specific and was criminal."45

These latter authorities assert that the potential danger to the community is heightened through the agreement—that is, through the act of uniting their intentions—but that the full significance of the peril they hold for others can only be understood in terms of their purpose or intent. The intent of each held separately makes each of them potentially dangerous, but not criminal. Their act of agreement, though a factor of but slight added significance, makes them criminals.46 Such intent must be to do knowingly an unlawful act. The question is not merely "Did he intend to do an act which was forbidden by law?"—but rather "Did he intend to do an act which he knew to be unlawful?"47 

The best statement in the cases on the element of intent is the one given in People v. Flack:

"The formation of a common design by two or more persons is never simpliciter a criminal conspiracy. This may be and often is perfectly innocent. The criminal quality resides in the intention of the parties to the agreement, construed in connection with the purpose contemplated. The mere fact that the conspiracy has for its object the doing of an act which may be unlawful, followed by the doing of such act, does not constitute the crime of conspiracy, unless the jury finds that the parties were actuated by a criminal intent."48

It appears, however, that even where the parties to a conspiracy are not aware of the unlawful purpose of their combination, but are under

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45Harno, supra note 6, at 635.
46See also Morrison v. California, 291 U. S. 82 (1934); Crandbouche v. People, 104 Colo. 175, 89 P. (2d) 577 (1939); State v. Glidden, 55 Conn. 46, 8 Atl. 890 (1887); Mulcabry v. Regina, L. R. 3 H. L. 306 (1868).
47State v. Parento, 135 Me. 353, 197 Atl. 156 (1938).
48125 N. Y. 324, 26 N. E. 267, 269 (1891). For further discussion on the element of motive or intent in criminal conspiracy, see Purrington, supra note 11, at 463.
a duty to know it, there is sufficient intent to constitute a conspiracy. Thus in the fairly recent case of *Rex v. Jacobs*49 the court upheld a conviction for common law conspiracy where defendants were charged with selling price-regulated goods at a price exceeding the amount permitted. It was conceded that the defendants actually were ignorant of the permitted price, and it was therefore contended that they could not be charged with conspiracy. The court, however, speaking through Judge Humphreys, dismissed this contention rather curtly, stating:

"It appears to be that they did not know the terms of the orders regulating the price of the goods in which they dealt, but *ignorantia juris nemen excusat*. Mr. Flowers for Jacobs and Carr insisted that his clients were innocent buyers. It would, we think, be more accurate to describe them as buyers ignorant of the matters which it was their bounden duty to know and about which the slightest inquiry would have resulted in their enlightenment."50

Manifestly, there is grave danger where conviction and punishment can be based purely on intent. This has been recognized. The Commissioners on behalf of the Legislature of New York, in revising the conspiracy statutes of New York, in the introduction to the section which called for an overt act before one could be convicted of conspiracy, commented as follows:

"By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offense of conspiracy is made to consist in the intent; in an act of the mind; and to prevent the shock to common sense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of the interchange of agreement. Surely an opportunity for repentance should be allowed to all human beings; and he who has conspired to do a criminal act, should be encouraged to repent and abandon it. Acts and deeds are subjects of human laws; not thoughts and intents, unless accompanied by acts."51

Not infrequently, the language used by the courts would seem to give the impression that it is not the intent which is important, but rather the motive; if the motive is corrupt, then the combination is a conspiracy. Generally speaking, the courts which have adopted this view do so only in instances where the contemplated act, if done by an individual, would have been lawful.52 This view is illustrated in the case

50*Id.* at 420.
51Lambert v. People, 9 Cow. 578, n. 625 (N. Y. 1827).
of *Commonwealth v. Carlisle*, where the court said:

"It will, therefore, be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act is, in this class of cases, the discriminative circumstance. Where the act is lawful for an individual, it can be the object of a conspiracy, when done in concert, only when there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the impression of the individual."{53}

It is difficult to distinguish the true difference between intent and motive, so there is in reality little to choose between the two theories.

It might be parenthetically added that no overt act is necessary to constitute a conspiracy at common law.{54} This is to be contrasted with the federal statutory rule, and a rule which prevails in many states, that in order that a combination of individuals to accomplish a common end may be a conspiracy, it is necessary that some overt act be performed.{55} An examination of the federal cases, however, will disclose that, generally speaking, very little is required to constitute an overt act. The courts somehow discover an overt act in the slightest action on the part of the conspirators.{56} There is really no distinction, in principle, between the common law conspiracy cases and those under the federal statutes; for, while the judges assert that no overt act is necessary in a common law proceeding, they generally speak of the agreement to act as an overt act. Indeed, there is a class of federal cases in which no overt act is necessary beyond the agreement of common design. These are the cases involving conspiracies against the exercise or enjoyment of rights or privileges under the Constitution and laws of the United States.{57}

**The Development of the Law of Criminal Conspiracy in England and in the United States**

The confusion of text writers and courts as to the exact limits and bounds of the law of criminal conspiracy can be best understood in the light of the history of the development of the law of conspiracy.

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{53}Bright, 38, 39 (Pa. 1821).


{55}Horwitz v. United States, 5 F. (2d) 129 (C. C. A. 1st, 1925); People v. Lloyd, 304 Ill. 23, 136 N. E. 505 (1922).


That the effort to guard society from the unsocial acts of many acting in concert should be greater than the effort to safeguard against the unsocial acts of individuals is not a cause for wonder. Conspiracies were made criminal because of the danger from the increased power which results from a combination of many individuals. It is harder to guard against the evil designs of a group of persons than against those of an individual. A combination tends to create fear in the minds of the people. There is a potential danger to the community from a combination to commit an antisocial act. The act, taken by itself, may be insignificant; but when a combination of individuals sets out to commit that act, the potential danger to the community is heightened. Conspiracies are usually, from their very nature, secret; they are entered into in secrecy and are therefore all the more dangerous. Society considers it necessary to make such combinations criminal, under certain circumstances, to deter people from participating in them. As was stated by the court in *Commonwealth v. Carlisle*,

"The effort of an individual to disturb the equilibrium can never be perceptible, nor carry the operation of his interest, or that of any other individual, beyond the limit of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous, that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."  

It is natural, therefore, that the crime of conspiracy should have its origin in a time of social unrest, revolutionary activity, and general insecurity of the powers in control. Such was the case. The development of the law of conspiracy was co-extensive with the measures taken by those in power to maintain themselves in the positions which they held and to thwart any possible assaults on the status quo.

There is some dispute as to when the concept of criminal conspiracy, as we know it now, first crystallized. The weight of authority, however, is that there was no such crime as common law conspiracy until 1611, when the renowned *Poulterers’ Case* was decided by the Court of Star

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60 State v. Glidden, 55 Conn. 46, 8 Atl. 890 (1887).
61 36 Bright. 38, 41 (Pa. 1821).
Chamber. Wright, the most eminent authority on the subject, traces the development of the law through three periods: 1200 to 1600; 1600 to 1800; and 1800 to 1872. This classification accords generally with the view of jurists and legal scholars who have given considerable study and attention to the subject. According to Professor Sayre, the origin of the concept goes back to the early pages of history of the common law and grew out of the efforts of reformers to correct the abuses of ancient criminal procedure. The offense originated, not under the common law or under the Norman institutions, but in a series of statutes dating back to the time of Edward I and enacted to remedy a specific abuse—namely, offenses against the administration of justice. There appears to have been an epidemic of combinations to procure false indictments and maintain vexatious suits against individuals. The only authoritative definition was that set forth in 1305 by the so-called “Ordinance of Conspirators” which was enacted primarily to punish a confederacy or alliance for the false and malicious promotion of indictments, pleas and the like. From 1200 to 1600 there is no mention of criminal conspiracy as a common law crime except as above defined by statute. The courts were strict during this period, and conspiracy was allowed only after the injured party was completely acquitted of the charge preferred against him through the conspiratorial combination. There is a record of a case decided in 1351 in which the judge, in spite of heavy pressure, refused to extend the offense of conspiracy to include an act of generally illegal and oppressive nature which was involved in the alleged improper imprisonment and oppression of many unknown persons by the defendants.

The attitude of the courts showed a somewhat more liberal trend in the latter part of the 16th Century. For example, in 1574, during the reign of James I, C. J. Popham suggested in Sydenham v. Keilaway that common law indictments for conspiracy might be allowed even though no indictment had been returned by the grand jury on the false charge. It was not, however, until the Poulterers’ Case was decided in

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Sayre, supra note 63, at 393; Blair, supra note 63, at 35-38.

33 Edw. I (1305).

The statute of 4 Edw. III, c. 11, enacted in 1330 was supplemental to the Ordinance of Conspirators, 1305, 33 Edw. I.

Anon., Y. B. 24 Edw. III, f. 75, pl. 99 (1351).

1611 that it was definitely settled that there could be an indictment for conspiracy even though there had been no acquittal.\(^69\) Thus, until the Poulterers' Case, the only conspiracy known was that under the Ordinance of Conspirators, which did not precisely confine the crime nor treat it as a substantive crime, but merely provided for a writ, later known as the writ of conspiracy, and thus aided litigants in determining whether their cause was redressable. The Poulterers' Case made the agreement to commit a crime a substantive crime in itself, and it was not necessary that the party aggrieved should be actually indicted and acquitted.\(^70\)

It should be noted, though, that there is respectable judicial authority for the view that criminal conspiracy had long been a common law crime and was such even during this first period. The judges who decided the early American cases, in particular, held this view.\(^71\)

In State v. Buchanan, the court said:

"... much reliance is placed in the statute 33 Edw. I, de conspiratoribus, on the supposition that the offense of conspiracy, was originally created by that statute; or if it was a common law offense, that the statute either contained a definition of all the conspiracies that were before indictable at common law, or annulled by common law, and rendered dispensable all conspiracies but such as it defines. And if either position be correct there is an end to this prosecution, since the matter charged in the indictment is clearly not embraced by the statute.\(^72\)"

\(^69\)Winfield, History of Conspiracy and Abuse of Legal Procedure (1921) 29-37.
\(^70\)Wright, Law of Criminal Conspiracy (1887) 6-12. Blair contends that the Star Chamber decision in the Poulterers' Case "not only overruled Sydenham's case, but it makes a new and dangerous departure from the previous law"; that "it opened the doors of Star Chamber"; and that "soon a crowd of litigants pressed through, with the result that the law of conspiracy began rapidly to enlarge." Blair, Judge Made Law of Conspiracy (1903) 37 Am. L. Rev. 54.
\(^71\)Carson, supra note 26, at 93. But see Rex v. Parnell, 14 Cox C. C. 508, 514 (Ir. 1881).
\(^72\)S Harris & J. 317, 333 (Md. 1821).
193 c. 72, sec. 9, it is said, that the villenous judgment is given by the common law, and not by any statute, against those convicted of a conspiracy. Now this judgment, called the villenous judgment, which was known only to the common law, could never have been given unless conspiracy was an offense punishable at common law."

As will appear hereinafter, this erroneous view of the Maryland court was due to an ambiguous statement of Hawkins, since careful research discloses no authoritative support for it.

The definite development of common law conspiracy, then, took place in the second period, between 1600 and 1800, beginning with the decision of the Court of Star Chamber in the Poulterers' Case. That case marks the origin of the doctrine that a combination to commit a crime is in itself criminal, and that this agreement in itself is the conspiracy. In the Poulterers' Case several poulters combined to charge a man with robbery, and caused him to be apprehended. After the man was apprehended, an examination of the evidence showed that he was absolutely innocent, therefore no indictment was returned by the grand jury. The defendants were then indicted for conspiracy. Admitting the combination, it was urged in behalf of the defendants that there was no action for it because (1) no writ of conspiracy could lie where the party aggrieved was not indicted and (2) that holding the defendants liable would discourage people from prosecuting those who commit crimes. The court disregarded these contentions, found the defendants guilty and punished them by a sentence of a fine and imprisonment. It is not clear, from a reading of the decision, just what the basis for it was. The particular form of action does not appear, and it is therefore doubtful whether the case really constitutes authority for the doctrine based thereon. There is no doubt, however, that the courts thereafter adopted this doctrine, slowly but surely. This case is a landmark in the history of criminal conspiracy, and the development of the law of conspiracy stems entirely from its decision.

The decision was a departure from the doctrine that the conspiracy must actually be carried into effect. After the decision in this case the doctrine that a combination to commit a crime was in itself criminal

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73Id. at 334.

74See 2 Stephen, History of Criminal Law of England (1883) 228. It might also be observed that in IV Bl. Comm. 136, conspiracy is mentioned as a crime where two or more conspire to indict an innocent man of felony, falsely and maliciously, who is accordingly indicted and acquitted. For a refutation of these views of the court in the Buchanan case see Blair, Judge Made Law of Conspiracy (1903) 37 Am. L. Rev. 47-51.

75Harno, Intent in Criminal Conspiracy (1941) 89 U. of Pa. L. Rev. 625.
was extended to other cases, and the agreement or combination itself received the name of conspiracy.

In this connection it should be remembered that the Court of Star Chamber was an unusual judicial body and was established to protect the King from the danger of possible insurrections or any combinations potentially dangerous to the security of the throne. When the Court of Star Chamber was abolished, the Court of King’s Bench claimed and assumed this extrajudicial power.76 The Poulterers’ Case opened up a new field in the criminal law, and the judges were quick to note its potentialities. They saw at once that here was a chance to go beyond the restriction of the doctrine to offenses relating to legal procedure.77 Jurisdiction was assumed by the Court of Star Chamber, and later by the Court of King’s Bench, so that “all offenses may be here examined and punished, if it is the King’s pleasure.”78 This assumed jurisdiction was further expressed as follows: “. . . by the arm of sovereignty, it punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or which giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea, although no positive law or continued custom of common law giveth warrant to it.”79

According to Holdsworth, this idea that any confederacy to perform acts contrary to public policy must be treated as a criminal conspiracy was purely an assumption of power without any legislative authority on the part of the Court of Star Chamber.80 Thus, in the case of Rex v. Journeymen Tailors of Cambridge,81 it was held that a conspiracy of any kind was illegal, although the subject matter of the conspiracy might have been a lawful act if performed individually by any one of the conspirators in the absence of an agreement to act in concert.82

This assumption of power by the Court of Star Chamber was not surprising. During the 17th Century the law of England was undergoing a period of exceptional and vigorous growth. There was an effort to infuse morals into the law. Many new doctrines were consequently

76Wright, op. cit. supra note 70, at 6, 7; Holdsworth, supra note 58, at 465-467.
77See Harno, supra note 75, at 626.
78Hudson, A Treatise on the Court of Star Chamber, 2 Hargreaves, Collectionea Juridica (1792) 104.
79Ibid.
80Harno, supra note 75, at 627.
82See Note (1945) U. of Chi. L. Rev. 485, 486.
introduced, and the courts went much further in judicial legislation than was common and ordinary. In a way, the courts followed this 17th Century development of the law of Cheats. Through the use of the doctrine of criminal conspiracy the judges were able to supply the gaps in the law of Cheats. Thus the law of criminal conspiracy kept pace with the expansion of the criminal law during the period. As pointed out by Kenney, the police system of that time was ineffective and the law felt itself dangerously threatened by any concert among evil doers. Courts were always ready to hold good any indictment against conspirators. Owing to the elasticity of the definition of the crime and the unusually wide range of evidence by which an indictment therefore might be supported, the law of conspiracy was often abused. The doctrine was overextended, and such overextension drew criticism.

This extension of the bounds of the law of criminal conspiracy is said to have been caused by the unfortunate remark made by Hawkins in Pleas of the Crown. He said:

"... there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where diverse persons confederate ... together by indirect means to impoverish a third person, or ... falsely and maliciously to charge a man with being the reputed father ... of a bastard child, or to maintain one another in any manner, whether it be true or false." Hawkins cited some authorities for this statement, but on careful examination these authorities give doubtful support to his dogmatic doctrine. Nevertheless, by reason of that statement, there began to appear occasionally in judgments and in arguments of counsel the statement that a combination to do an unlawful act was criminal, and that the term "unlawful" did not necessarily mean "criminal".

Although it was the tendency of the courts in the latter part of the 17th Century to punish acts which were considered immoral, judges stoutly refused, before Hawkins' statement, to follow the suggestion there intimated. In fact, the doctrine seems to have been squarely repudiated in Daniel's case in 1704. This recession from the extreme 17th Century pretention would have continued had it not been for the

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68See, Criminal Conspiracy (1922) 35 Harv. L. Rev. 393, 420.
69Kenney, Outlines of Criminal Law (15th ed. 1936) 338.
702 Hawkins, Pleas of the Crown (7th ed. 1795) c. 72.
71Wright, op. cit. supra note 70, at 10. For a discussion and possible defense of the Hawkins doctrine, see Saieto, Prohibition and Hawkins Doctrine (1932) 66 U. S. L. Rev. 75.
unfortunate and ambiguous statement by Hawkins. The term “wrongfully” used by him was an ambiguity which created considerable confusion. If he meant by the term “wrongfully”, “criminal means”, then it was exceedingly unfortunate that he did not use a more unequivocal term which would have confined it to such a meaning. If, on the other hand, he used the term to mean “tortious” or “immoral”, the authorities he cites can be found only in the loose dicta of 17th Century courts and in arguments of counsel. Nevertheless, Hawkins’ erroneous statement lived on because of the confusion prevalent in the law and morals of the 17th and 18th Centuries, and also because the very ambiguity of the statement rendered it less liable to be challenged and more difficult to disprove. In the course of time this statement came to be regarded as authoritative and furnished the foundation of later dicta and judicial opinions, despite the fact that the decisions during the latter part of the 17th and 18th Centuries actually confined common law conspiracies to unlawful ends or unlawful means. The language of Hawkins was cited everywhere. Lord Ellenborough criticized the doctrine in Rex v. Turner. Still, as Professor Sayre says, “the ghost of Hawkins walked on”.

This Hawkins fable was later couched in the famous epigram of Lord Denman in Rex v. Jones, where it is stated that a conspiracy indictment must charge a conspiracy either to do an unlawful act or a lawful act by unlawful means. That became thereafter the classical definition, and it is to this date cited as the basic law of conspiracy. As Professor Sayre noted,

“Like the magic jingle in some fairy tale, through whose potency the bewitched adventurer is delivered from all his troubles, this famous formula was seized upon by judges laboring bewildered through the mazes of the conspiracy cases as a ready solution for all their difficulties.”

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88 For an examination of the Hawkins statement and the authorities cited by him in support, see Note (1922) 35 Harv. L. Rev. 402.
91 Sayre, Criminal Conspiracy (1922) 35 Harv. L. Rev. 405. In a legal publication it is stated that the Hawkins’ definition has been accepted by the most eminent judges and been excepted to only once. (1874) 18 Solicitor’s Journal 305. Another source of confusion in connection with this problem is said to be Thode’s case, 3 Keb. 111, 84 Eng. Rep. R. 623 (K. B. 1672). Blair, Judge Made Law of Conspiracy (1903) 37 Am. L. Rev. 58.
Even though Lord Denman later repudiated his own statement in *Regina v. Peck*, courts and counsel never ceased quoting it. As Professor Sayre explains it, the judges found the Hawkins conception of criminal conspiracy too convenient an instrument for enforcing their own individual notions of justice to be disposed to discard it lightly. Judges were able by this criminal process to punish such concerted action and conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted no crime either by statute or at common law. The case of *State v. Donaldson* is cited as a glaring illustration of a combination which can be turned by a judge, who happens to be out of sympathy with the designs of such combination, into a criminal offense. Another example may be found in Ireland, where the social conditions were extremely favorable to the growth of the law of conspiracy. Lord Fitzgerald, in the *Parnell* conspiracy cases, ruled that a combination of tenants not to pay rent was a conspiracy. As a result of decisions, text writers began to assert that, in order that a combination be considered a criminal conspiracy, the acts sought to be accomplished need not be of a very serious nature. Thus the Hawkins doctrine, as defined in the epigram of Lord Denman, created a prolific field for judicial legislation.

The basic reason for the unlimited extension of the Hawkins doctrine of criminal conspiracy was the ambiguity of the term "unlawful" as used in Lord Denman's definition. What is an unlawful act? What are unlawful means? The very danger of the rule lies in the ambiguity of this term. The very ambiguity has made a conspiracy indictment a convenient device to bring into action against offenders when other means of establishing guilt are closed. As has been pointed out by Professor Sayre, all laws exist primarily to promote social peace, social security and well being. The only law which will protect in this manner is one which is predictable. Indeed, the most essential attribute of all law is predictability; and once the law is robbed of its predictability, the state reverts to a government by men rather than by law. In Sayre's opinion, it is hard to imagine a doctrine which would more effectively

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92 32 N. J. L. 151 (1867).
93 14 Cox C. C. 508 (IR. 1881).
94 *Harno, supra* note 75, at 646.
95 Sayre, *supra* note 93, at 412, 413.
rob the law of predictability than that of criminal conspiracy. For that reason he personally considers the law of criminal conspiracy most pernicious. The ambiguity of the term "unlawful" creates the unpredictability in this class of cases. It enables judges to reflect in their decisions their personal prejudices and predilections. For example, in Commonwealth v. Carlisle the courts convicted the defendants of criminal conspiracy for organizing a strike to obtain higher wages. This decision was purely a reflection of the prejudice of the upper classes toward the working man. The elasticity provided by the term "unlawful" paved the way for the undesirable result. It is an especially injurious doctrine in the criminal law when a crime is not clearly and intelligently defined so that one may guard oneself against a violation thereof. If the term "unlawful" means "criminal", the definition is much too narrow, since there may be some cases of criminal combination without the contemplation of the doing of any individual criminal act; if "unlawful" means "wrongful", a violation of private right, the definition is much too wide, for it opens the door for the inclusion in the crime of any number of combinations which may be desirable as a whole.98 No one can really tell how a court will interpret the term "unlawful". It has never yet been precisely defined. Generally, the term has been said to apply to the following combinations:

(1) Combinations to do something which would be a crime when consummated.
(2) Agreements to commit any tort that is malicious or fraudulent.
(3) Agreements to commit a breach of contract under circumstances that are peculiarly injurious to the public.
(4) Agreements to do certain other acts which are not breaches of the law at all, but which nevertheless are outrageously immoral or are somehow extremely injurious to the public.

An examination of these classifications, however, discloses further ambiguities. What, for example, is meant by the term "injurious to the public"? What is meant by "outrageously immoral"? As Wright properly observes,

"An expression cannot be the definition of conspiracy, the defining part of which is itself so devoid of definitiveness for the purposes for which a definition is required."99

There is no possibility of reconciling the various opinions of the courts

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98Digby, supra note 63, at 137.
99Wright, op. cit. supra note 70, at 51.
as to just what is meant by the term "unlawful". Some construe it as illegal, some as wrongful, and some as immoral, the definition of illegal, wrongful and immoral being left to the individual opinion of the construing judge. Admitting that there is considerable difficulty in defining this crime with precision, the courts do not appear to hesitate to extend it beyond what seems reasonable, if the extension is in accord with their own personal theories of criminal law. Judge Stephen, in his History of the Criminal Law of England, adequately sums up the state of the law in these words:

"The Star Chamber first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offenses, and after restoration this amongst other doctrines of theirs found its way into the Court of Kings Bench. The doctrine was expressed so widely or loosely, that it became in course of time a head of law of great importance, and capable of almost indefinite extension. . . . the word "unlawful" being used in a sense closely approaching to immoral simply and at the same time injurious to the public."100

Probably the true test to determine what is unlawful is whether there was malice on the part of the combination toward the public or an individual; i.e., was there a malicious intent to injure, either in the end to be secured or in the means to be employed to secure the end? It must be admitted that this test is universally applicable, for it is difficult to spell out malice in the numerous cases involving labor troubles where the judges freely applied the doctrine of criminal conspiracy to thwart strikes and other acts tending to disturb the status quo of the upper classes. But even in those cases the courts, while not using the word "malice", indicated that something akin to malice was the compelling reason for declaring a combination criminal. Professor Digby says:

"The history of the law of conspiracy appears to show that from time to time, especially when social questions become prominent, there is a tendency to extend the area of the law of criminal conspiracy. The prevailing sentiment at the time finds almost unconsciously an echo upon the judicial bench; now combinations designed to affect objects which are generally regarded as unjust or pernicious, are at first looked upon as criminal conspiracies. Thus it was with rules of trade unions."101

Whatever may be the true test, the ambiguity of the term "unlawful" has permitted the law of conspiracy to go beyond its original limits and include combinations which corruptly, dishonestly or fraudulently aim

101 Digby, supra note 63, at 134. The tendency noted by Digby is evident in this country even today. See Cousens, supra note 25.
to injure, oppress or prejudice even individuals, although the act contemplated would not be criminal, or even tortious, if done by one person.\textsuperscript{102} There is now authority for the statement that an agreement to commit any tort constitutes indictable conspiracy if the tort is definitely antisocial, as distinguished from a tort which is a mere trespass or a minor personal injury.\textsuperscript{103} In cases of this nature, although the act contemplated would doubtless be lawful if committed by an individual, an agreement to do it in combination makes the parties liable to criminal prosecution when there is an intent to injure another or to benefit the confederates to the prejudice of the public or an individual.\textsuperscript{104} This doctrine has been extended to include even conspiracies to commit breaches of contract which the court considers to be clearly antisocial or injurious to the public. In these latter cases, it seems that the motive is important.\textsuperscript{105}

There are also instances in which the act contemplated by a combination, or the means contemplated to effect such act, is neither criminal, tortious nor a breach of contract, yet is corrupt, dishonest, fraudulent or immoral. In these instances, such a combination is held to be criminal.\textsuperscript{106} This extension of the law of criminal conspiracy has been severely criticized. It has been suggested that a combination to commit a tort should be treated as a crime only when such a combination would make the commission of the tort dangerous to the community, and that it should be the function of the legislature, and not the courts,\textsuperscript{107} to determine when such a combination is dangerous. The doctrine has also been severely criticized as being logically unsound, indefensible and dangerous. It gives judges a chance to decide social issues according to their own views. It is said:

"It is a doctrine as anomalous and provincial as it is unhappy in its results."

\textsuperscript{102}State v. Younger, 1 Dev. L. 357 (N. C. 1827); State v. Donaldson, 32 N. J. L. 151 (1867); Mogul S.S. Co. v. McGregor, 23 Q. B. D. 598 (1889); Miller, Criminal Law (1934) 113.


\textsuperscript{104}Mogul S.S. Co. v. McGregor, 23 Q. B. D. 598 (1889); Cousens, Agreement as an Element in Conspiracy (1937) 23 Va. L. Rev. 898.


\textsuperscript{107}Sayre, supra note 93, at 418, 419.
It is utterly unknown to the Roman law; it is not found in modern Continental courts; few Continental lawyers ever heard of it."

It must be conceded that the extension of the doctrine is completely unjustified when applied to private injuries not otherwise of an indictable nature and in which the public has no concern. The common law has clearly distinguished between public and private wrongs from the earliest ages to the present time. Consequently, the conversion of private injuries into public wrongs is really contrary to the very first principles of common law. It seems justifiable only if it is limited to combinations which have a tendency to prejudice the public at large. Mr. Chief Justice Shaw stated, in Commonwealth v. Hunt:

"The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social conditions; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purpose of oppression and injustice. But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretences. It looks at truth and reality, through whatever disguise it may assume."

If these words of Mr. Chief Justice Shaw were heeded, there could be no decisions such as that rendered in the fairly recent case of Rex v. Manly. In that case there was no conspiracy at all. A woman was held criminally liable for making false statements to a policeman on the ground that she had caused a public mischief. The term "public mischief" is certainly ambiguous and gives the courts considerable latitude in punishing individuals whom they for some reason dislike.

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108Id. at 427.  
109State v. Rickey, 4 Halst. 293, 305 (N. Y. 1827).  
1104 Mete. Ill, 129 (Mass. 1842).  
111[1933] 1 K. B. 529.
similar case was *Rex. v. Bassey*,112 in which Mr. Chief Justice Lord
Hawart declared that "all such acts or accords as tend to the prejudice
of the community are indictable." What a sweeping dictum this is, and
how wide it opens the door to indefinite multiplication of combinations
that can be held to be criminal conspiracies!

There is, of course, complete accord among text writers and judges
as to the propriety of the application of the doctrine of criminal con-
spiracy to all combinations against the welfare and safety of the state
and its government. Thus a combination to do acts injurious to the
revenues of the government was held criminal in *Starling's case;*118 a
combination of officers to throw up their jobs in a time of danger to
the government was so held in the case of *Vertue v. Lord Clive,*114 and
combinations to disturb the price of funds by spreading false rumors
and thus endangering the monetary system of the government have been
held criminal, as in *Rex v. DeBerenger.*115 Combinations to excite dis-
affection or insurrection against the Government,116 combinations tend-
ing to defeat or pervert the administration of justice,117 and combina-
tions to steal from the public treasury118 have all been held to constitute
criminal conspiracy. Similarly, a combination to procure others to
commit a crime is a crime.119

In general, then, any combination which has for its purpose the com-
mission of an act which would involve beyond doubt an injury to the
public good, or in which the means to the achievement of the act would
involve such injury, is a criminal conspiracy. As a matter of fact, it
can plausibly be argued that the law of criminal conspiracy is necessary
to assure the preservation of the social order, since such combinations
are calculated to be dangerous to its well being. If there had not been
any law of that kind in England, it would have been created judicially
in this country as a matter of necessity.120

There is a class of cases involving fraud in which conspiracies to
commit a fraud or to do an act by fraudulent means have generally
been considered to be criminal conspiracy. It is probable that these

118See list of such cases in WRIGHT, LAW OF CRIMINAL CONSPIRACY (1887) 23.
cases are an offshoot of the law of Cheats common in the 17th Century.121 To be sure, combinations to defraud the public are punishable, but such decisions can be justified on the ground that there is an injury to the public. The doctrine may be questioned when applied to frauds on individuals. Courts generally justify an indictment of this nature, however, on the basis that such combinations have a tendency to prejudice the public even if they only defraud an individual. Even combinations to injure an individual by fraud, however, when the act contemplated by the conspirators would not constitute a ground for recovery if committed by a single individual, do not constitute criminal conspiracy unless the act would lay the foundation for a civil action if done by an individual.122

The doctrine of common law conspiracy was conceived and nurtured to meet an urgent social necessity of the times. If a similar doctrine does not exist today in the international sphere, there is certainly a need for it to buttress the conviction of the war crime defendants who designed the serious crimes which were perpetrated against humanity and society. It is believed that if such a doctrine did exist it would form a valid answer to the critics of the Nuremberg trials; it is therefore conceivable that since a need exists, the world may see the development of a law of criminal conspiracy in international law, similar to that of common law conspiracy in Anglo-American Jurisprudence.

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121See, supra note 93, at 421.
122Miller, Criminal Law (1934) 109.
Effective Dates and Constructive Notice Before and After the Administrative Procedure Act

DURING the calendar year 1946 over twenty-two thousand documents were published in the Federal Register. Every agency in the executive branch was represented by at least one document. This mass of material comprises the primary implementation of thousands of federal statutes reaching practically every activity subject to federal influence or control.

Recognition of the need for a centralized, official filing and publication of this administrative legislation led to the passage more than a decade ago of the Federal Register Act. Less than a year ago the provisions of the Administrative Procedure Act substantially broadened the scope of the material required to be published in the Federal Register. The protection of legal interests affected by this material is basic to both of these acts. Such protection presents a multifaced problem to the legal practitioner. One important facet of this problem is the determination of the general effective date or the specific validity date of a given document. The purpose of this discussion is to provide a practical guide for making such determinations.

All documents published in the Federal Register are automatically given two dates without regard to what appears on the face of the document, i.e., the day, hour and minute of filing for public inspection is indicated in brackets at the end of each document, and the date of publication is indicated by the date of the Federal Register in which the document appears. In addition, many documents carry an issuance date or an effective date, or both, as part of the text. It is not unusual, therefore, to find a rule in the Federal Register surrounded by four conspicuous dates of varying significance. This situation, together with the possibility that none of these dates is the true day on which the rule became valid against a specific party, often poses a difficult problem.

3As required by § 2 of the Federal Register Act, note 1 supra.
Section 7 of the Federal Register Act provides that no document required to be published by Section 5 of the Act shall be valid against any person who has not had actual knowledge thereof until such document shall have been filed with the Division of the Federal Register for public inspection. Section 7 further provides that this filing is sufficient to give notice of the contents of such document to any person subject thereto or affected thereby unless (1) otherwise specifically provided by statute, or (2) notice by publication is insufficient in law. These provisions were covered by an opinion of Attorney General Cummings so that it is amply clear that constructive notice of such documents depends on filing with the Division of the Federal Register rather than on publication in the Federal Register.

Between March 12, 1936, and September 11, 1946, the problem of the generally effective date and the specific date of validity of all documents required to be published in the Federal Register, therefore, could be simplified by reference to the following outline:

Outline A

I All documents are generally effective on the day, hour and minute filed, unless:
(a) A later date is specified in the text;
(b) Otherwise specifically provided by statute; or
(c) The case is one where notice by publication is insufficient in law.

II All documents are valid against specific parties on the day, hour and minute filed, with exceptions noted in I, and also:
(a) Valid upon receipt of actual knowledge if such receipt occurs prior to filing and during the period of specified effectiveness; and
(b) Probably valid upon receipt of actual knowledge prior to

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filing if such receipt occurs during the period between the specified issuance date and filing, where no effective date is otherwise expressed or implied.\(^7\)

Under the Administrative Procedure Act

On September 11, 1946, Sections 3 and 4 of the Administrative Procedure Act became effective. On their face, particularly in paragraphs 3 (a) and 4 (c), these sections clearly modify the situation outlined above so that at first glance it would appear that the effectiveness of practically all Federal Register documents depends on actual publication. However, closer scrutiny reveals that most types of documents still fall under the old "constructive notice by filing" rule in Section 7 of the Federal Register Act.

Section 5 (a) (3) of the Federal Register Act provides for publication in the Federal Register of "such documents or classes of documents as may be required so to be published by Act of the Congress."\(^8\) The Ad-

\(^7\)Where no effective date is specified but the document carries a date of issuance designated as such, a rebuttable presumption may arise that the promulgating agency intended the document to take effect on the issuance date.

\(^8\)Federal statutes, in effect at the end of the 79th Congress, specifically referring to publication in the Federal Register are as follows:

ministrative Procedure Act clearly comes within the contemplation of this section and of Section 7 of the Federal Register Act, the pertinent provisions of which are outlined above.

Nothing in the legislative history of the Administrative Procedure Act suggests that it was intended to repeal the Federal Register Act. On the contrary, during the hearings on the bill before the Senate Committee on the Judiciary, the Attorney General specifically stated that "Section 3 (a), by requiring publication of certain classes of information in the Federal Register, is not intended to repeal the Federal Register Act but simply to require the publication of certain additional material."\(^{310}\)

Sections 3 (a) and 4 (c) of the Administrative Procedure Act should be viewed in the light of this conclusion. Section 3 (a) of this act provides in general that, except to the extent that there is involved any function of the United States requiring secrecy in the public interest or any matter relating solely to the internal management of any agency, every agency shall separately state and currently publish in the Federal Register the following material:

(1) Descriptions of its central and field organization including delegations by the agency of final authority.

(2) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures.

(3) Substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.

The last sentence of Section 3 (a) provides that "No person shall in any manner be required to resort to organization or procedure not so published." It appears to be clear that this sentence applies only to items (1) and (2), i.e., organization and procedure, and constitutes a specific statutory provision within the contemplation of Section 7 of the Federal Register Act, so that documents in these two categories are effective only upon actual publication in the Federal Register.\footnote{For categories under the Administrative Procedure Act and general provisions governing the filing and publication of documents, see Federal Register Regulations, 11 Fed. Reg. 9833 (1946); 1 Code Fed. Regs. § 2.1 et seq. (Supp. 1946).}

In considering the effective date of documents in category (3) the provisions of Section 4 (c) of the Administrative Procedure Act must be taken into account. These provisions are as follows:

"Sec. 4. . . . (c) Effective Dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemptions or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."\footnote{This section does not repeal or diminish other time requirements provided by law apart from this act.}

From this it appears that of the three types covered in Section 3 (a) (3), i.e., substantive rules, statements of general policy, and interpretations, only substantive rules which do not grant or recognize exemptions or relieve restrictions, which are not excepted by the agencies for good cause, and which are not excepted or exempted as indicated below, depend upon publication for effectiveness.

Other general exceptions to the rule of publication, enumerated in the introduction to Section 4, include (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

The last group of exceptions to the rule of publication is found in
Section 2 (a) which exempts the following from the operation of Section 4: (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and (5) the functions conferred by the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944.

In short, it finally appears that the "constructive notice by filing" provisions of Section 7 of the Federal Register Act are superseded only in regard to statements of organization and procedure under Section 3 (a) of the Administrative Procedure Act and in regard to a limited group of substantive rules within the purview of Section 4 (c) of the Administrative Procedure Act.

From the foregoing it would appear that the following outline is a sound guide to determining under the Administrative Procedure Act what documents are dependent upon actual publication and what documents depend upon mere filing with the Division of the Federal Register for their validity:

Outline B

I. Documents dependent upon actual publication:
   (a) Descriptions of organization, including delegations of final authority.
   (b) Descriptions of procedures and related matters.
   (c) Substantive rules issued by agencies subject to Section 4 and not relating to matters excepted by or under the provisions of Section 4.

II. Documents dependent upon filing:
   (a) Statements of general policy and interpretations.
   (b) Substantive rules issued by agencies exempted from Section 4 by Section 2 (a).
   (c) Substantive rules relating to matters excepted by Section 4:
       (1) military, naval or foreign affairs functions of the United States
(2) agency management or personnel
(3) public property
(4) loans
(5) grants
(6) benefits
(7) contracts
(8) exemptions or reliefs

(d) Substantive rules excepted by the agency for good cause.

In using this outline the following points should be borne in mind:

Items I (a) and (b) are effective immediately upon publication unless a later date is specified on the face of the document.

Item I (c) covers rules which are effective not less than thirty days after publication unless (1) a later date is specified or (2) an earlier date is both specified and justified on the face of the document.

Item II (d) requires justification (on the face of the document) of the waiver of publication. In this connection it should be noted that for "good cause found and published with the rule" an agency may shorten the thirty-day period or may do away with it altogether. Only the latter cases come under II (d), the others reverting to I (c).

All items under part II of this outline should be tested for general effectiveness and specific validity against the standards set up in Outline A, supra. This is important in view of the fact that this group is not only more numerous but also contains all documents dealing with emergency situations.

**Notices**

The discussion above has centered about the categories of documents set forth in Section 3 (a) of the Administrative Procedure Act. In order to complete the picture, some consideration should be given to the effect of publication in the Federal Register of notices of hearing or opportunity to be heard. Section 8 of the Federal Register Act and Section 4 (a) of the Administrative Procedure Act lead the way in this field.

Section 8 of the Federal Register Act provides that publication in the Federal Register of notices of hearing constitutes due notice to all persons residing within the continental United States except where notice by publication is insufficient in law. To be effective such notice must be published in accordance with any specific statutory requirements as to time, or, in the absence of such requirements, not less than fifteen days before the date of hearing, without prejudice, however, to the ef-
fectiveness of any notice of less than fifteen days where such shorter period is reasonable.16

This section clearly contemplates new legislation of the type exemplified by Section 4 (a) of the Administrative Procedure Act, which provides for the publication in the Federal Register of general notice of proposed rule making.

The exemption of certain agencies from the operation of Section 4 of the Administrative Procedure Act is discussed preceding Outline B, supra. In addition to these exemptions, Section 4 excepts the following types of rules from the requirement for publication of general notice of proposed rule making:

1. Those involving any military, naval, or foreign affairs function of the United States;
2. Those relating to agency management or personnel or to public property, loans, grants, benefits, or contracts;
3. Those in which all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law;
4. Interpretative rules, statements of policy, agency organization, procedure, or practice—unless notice or hearing is required by statute;
5. Rules issued in any situation in which the agency finds (and incorporates the finding and reasons in the rule) that notice and public procedure thereon are impractical, unnecessary, or contrary to public interest.

Since Section 4 of the Administrative Procedure Act does not set up any time requirements in regard to the publication of notice of proposed rule making, it is safe to assume that the effectiveness of such notices is governed by the provisions of Section 8 of the Federal Register Act as discussed above. Even more important, however, is the conclusion that every substantive rule, unless properly excepted or exempted, must be preceded by an appropriate published notice of proposed rule making. If not so preceded, such a rule may be challenged as invalid in its inception.

DAVID C. EBERHART, JR.

16For list of statutes specifically referring to publication in the Federal Register, see note 8 supra.
FEDERAL LEGISLATION

LABOR LAW—A NEW FEDERAL ANTIRACKETEERING LAW

The Seventy-ninth Congress enacted the Hobbs Bill into law on July 3, 1946. This is a general criminal statute subjecting whoever in any way or degree obstructs, delays, or affects interstate commerce by robbery or extortion, or conspires so to do, to punishment upon conviction of imprisonment for not more than 20 years or fine of not more than $10,000, or both. It supersedes a law passed in 1934 on the same subject matter, which was popularly known as the Antiracketeering Act, and the new measure is referred to as the Antiracketeering Act Amendment, although it more properly should be termed an entirely new antiracketeering act. The two measures will be distinguished herein as the 1934 act and the 1946 act.

The bill in Congress was highly controversial as a so-called antilabor measure, and it had a stormy legislative voyage. It was first introduced in the Seventy-seventh Congress as H. R. 6872. Hearings were held, and a majority of the House Judiciary Committee reported favorably on the bill, but it died with that Congress. In the Seventy-eighth Congress it passed the House as H. R. 653, but was not reported out of the Senate Judiciary Committee. In the Seventy-ninth Congress, after

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5 The use of the term "racket" or "racketeer" does not occur in any federal statute. The definition of "racketeering" given in United States v. McGlone, 19 F. Supp. 285, 287 (E. D. Pa. 1937), seems to conform to the sense of its use in the popular name of the act and in the debates in Congress: Racketeering "... is the organized use of threats, coercion, intimidation and use of violence to compel the payment for actual or alleged services of arbitrary or excessive charges under the guise of membership dues, protection fees, royalties or service rates, the cloak of blackmail and extortion." See also, Webster, New International Dictionary (2d ed. 1942) "Racketeer."


89 Cong. Rec. 3230 (1943).
having passed the House, its provisions were incorporated into the Case Bill which was passed by Congress but vetoed by the President. In his veto message, President Truman stated that he was in accord with the antiracketeering section of the measure, but objected to its provisions for their failure to state in express terms that the measure did not intend to qualify the right to strike and picket peacefully, or to take other legitimate and peaceful concerted action.

Immediately after receiving the veto message on the Case Bill, the Senate called up and passed the Hobbs Bill which had previously passed the House, and it became law. There was neither a record vote nor a division of either the House or the Senate in approving the bill. The debate in the House was especially heated on its labor aspects.

On its face, the 1946 act is marked as labor legislation only by its Title II, and then only in a negative way. This title states that nothing in the Act shall be construed to repeal, modify or affect Sections 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, the Railway Labor Act or the National Labor Relations Act. Title II was said in debate to be acceptable to organized labor, as to the changes affecting labor which the 1946 act made in the provisions of the 1934 act, although this was denied by a spokesman of organized labor.

But the 1946 act can be positively identified as "labor legislation" by going outside its provisions. Such a conclusion certainly seems reasonable when it is compared directly with the 1934 act. The Congressional

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9H. R. 4908, "An Act to provide additional facilities for the mediation of labor disputes, and for other purposes," § 7. 92 Cong. Rec., June 11, 1946, at 6798-6799.
1291 Cong. Rec. 11922 (1945).
13See note 1 supra.
14There had been a record vote in the House when the bill was passed by that body in the Seventy-eighth Congress. 89 Cong. Rec. 3230 (1943).
20Remarks of Representative Hobbs, 91 Cong. Rec. 11914 (1945).
hearings and debates previously referred to\textsuperscript{22} indicate that Congress so considered it.\textsuperscript{23} Prosecutions begun on indictments brought under the 1934 act, as far as reported cases show, predominantly involved defendants having some connection with the activities of organized labor,\textsuperscript{24} and that situation logically should not be less likely under the 1946 act, as will be seen.

\textbf{The Antiracketeering Act of 1946 Compared With the Antiracketeering Act of 1934}

In redrafting the 1934 act into its 1946 form, Congress made several changes which are traceable to statements and suggestions made in cases which arose under the 1934 act, even though these statements were not the bases for decisions. For example, the question of whether an unincorporated labor union is a person subject to prosecution under the 1934 act was argued vigorously.\textsuperscript{25} The 1934 act made its penalties applicable to "any person who" did certain things.\textsuperscript{26} One circuit court of appeals judge was impressed by the argument and, in a concurring opinion, expressed the definite view that a labor union was not a "person" within the meaning of the Act.\textsuperscript{27} It was not necessary for the Supreme Court to rule on this point when it reviewed the case, and it did not,\textsuperscript{28} but any doubt which remained on the point was resolved by Congress by changing the wording to "whoever".\textsuperscript{29}

\textsuperscript{22}See note 15 supra.
\textsuperscript{23}See especially the remarks of Representative Celler of New York, 91 CONG. REC. 11901 (1945). The debate, consuming 23 pages in the Congressional Record in 1945 and 30 pages in 1943, is almost entirely concerned with the effect of the measure on organized labor.
\textsuperscript{25}Brief for Respondent, United States v. Local 807, 315 U. S. 521 (1942).
\textsuperscript{26}48 STAT. 979 (1934), 18 U. S. C. § 420a (1940).
\textsuperscript{27}United States v. Local 807, 118 F. (2d) 684, 688 (C. C. A. 2d, 1941), \textit{aff'd}, 315 U. S. 521 (1942).
\textsuperscript{28}United States v. Local 807, 315 U. S. 521 (1942).
The 1934 act contained a provision that prosecutions thereunder should be commenced only upon the express direction of the Attorney General. It was urged that this was an unconstitutional delegation of the statutory power of the grand jury to the executive branch of government. The contention was held to be without merit, but the provision was omitted from the 1946 act.

The 1946 act, after first defining the terms in language taken almost without change from the New York Penal Code, makes "robbery" and "extortion" the crimes against which the federal power is directed. The 1934 act did not use terms with such a heritage of definition, although the language used therein is substantially equivalent.

The basic change made by the 1946 act, however, concerns the applicability of the law to labor activity and to the activities of members of labor unions. Exclusionary clauses specifically designed to protect the rights of labor had been inserted in the 1934 act in three places, as follows:

"Section 2. Any person who . . . (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee, . . . (d) . . . shall, upon conviction thereof, be guilty of a felony. . . .

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32N. Y. Penal Law, §§ 850, 2120.
33Compare the definition of the crime of robbery in connection with the special territorial and maritime jurisdiction of the United States, 35 Stat. 1144 (1909), 18 U. S. C. § 463 (1940). There the maximum imprisonment is fifteen years, as compared with twenty years in the 1946 act and ten years in the 1934 act.
34Penalties are provided by the 1934 act for any person who "Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services . . . Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right." 48 Stat. 979 (1934), 18 U. S. C. § 420a (1940).
35After having passed the Senate, the Copeland Bill, S. 2248, which became the Antiracketeering Act of 1934, was redrafted to meet objections set forth by the representatives of organized labor. 78 Cong. Rec. 5859 (1934).
"Section 3 (b). The terms 'property', 'money', or 'valuable considerations' used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.\footnote{Ibid.}

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"Section 6. . . Provided, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."\footnote{Ibid.} (Italics supplied.)

The 1946 act eliminated the first two exclusionary provisos. The specific reference in Section 6 to the principal statutes setting forth the rights of labor was inserted as Title II in the 1946 act, in place of the general form of this proviso.

**THE MEANING OF THE ANTIRACKETEERING ACT OF 1946**

In making the basic change last mentioned above, Congress was clearly attempting to write a law which would apply to activities which the Second Circuit Court of Appeals and the United States Supreme Court had held not to be subject to the 1934 act in United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America,\footnote{United States v. Compagna, 146 F. (2d) 524 (C. C. A. 2d, 1944). The facts which led to the prosecution of this case received wide publicity. Bioff and Browne, accomplices of the defendant, extorted over $600,000 from motion picture producers and $500,000 from exhibitors. The court said: "But if the accused at bar were not concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen, but to feather their own nests, they 'coerced' their victims within the meaning of the section." Id. at 527.}hereinafter referred to as United States v. Local 807. Whether this attempt succeeded will be a matter for speculation until the new law comes before the Supreme Court. As will be seen, there is argument that Congress did not accomplish this purpose.

To understand the holding in United States v. Local 807, one must not confuse the facts therein with those involved in the prosecutions of the notorious Bioff and Brown\footnote{118 F. (2d) 684 (C. C. A. 2d, 1941), aff'd, 315 U. S. 521 (1942).} or with the facts of any other situation in which union pressure is employed to exact tribute for the personal benefit of union leaders.\footnote{The Act covers no action by a labor leader honestly acting for the members of his organization. It does cover the compulsory payment of graft to a labor leader for his} The decision in United States v.
Local 807 has as its key the failure of the trial court properly to recognize that the "jury was bound to acquit the defendants if it found that their objective and purpose was to obtain by the use or threat of violence the chance to work for the money but to accept the money even if the employers refused to permit them to work".\textsuperscript{42} (Italics supplied.)

The union, twenty-four of its individual members, and two of its officers were indicted under the 1934 act for extorting money payments from interstate truck operators en route to New York City markets. The union posted its members at the Holland Tunnel and other places where truck traffic entered the city, and, after stopping each inbound truck, the union members demanded that a union driver be employed. The amounts demanded were the regular union rates for daily employment, depending on the size of the truck. The specified amount was collected, although the services of the union members generally were not utilized. Even where the services were accepted, a full day's work was not usually necessary for the driving and unloading involved. There was sufficient evidence to warrant a finding that the defendants conspired to use and did use violence and threats. However, as a result of this activity some of the operators signed contracts with the local union providing for the employment of union members for intracity driving and unloading. There was at no time any serious question as to the ability of the union members to perform the work.\textsuperscript{43}

The case on appeal turned on the correctness of the trial judge's charges to the jury. He charged that if the jury should find that the sums paid were not wages paid for services, but were made to induce the defendants to refrain from interfering unlawfully with the operation of the trucks, then the sums could not be regarded as wages paid by a bona fide employer to a bona fide employee within the terms of the first two exclusionary provisos listed above.\textsuperscript{44} He refused to charge that it was not an offense under the Antiracketeering Act to obtain employment by the use or threat of violence if the intention is actually to work for the pay received, and that a finding of guilty under the con-

\textsuperscript{42}315 U. S. 521, 538 (1942).
\textsuperscript{43}Id. at 526.
\textsuperscript{44}See notes 36 and 37 supra.
\textsuperscript{45}United States v. Local 807, 118 F. (2d) 684 (C. C. A. 2d, 1941), aff'd, 315 U. S. 521 (1942).
spionage count must be based on a finding that it was the aim and object of the conspiracy to obtain money without rendering adequate service therefor.

Mr. Justice Byrnes and five of his colleagues felt that the instruction given was erroneous and that the requested instructions should have been given. The decision of the Second Circuit Court of Appeals was affirmed. Chief Justice Stone alone dissented in the Supreme Court, as had Judge Augustus Hand in the Circuit Court of Appeals, each with opinions.

Congressional comment on Justice Byrnes' opinion was pointed and heated:

"We think a mistake was made by the Supreme Court, [and] we are attempting to correct it through enacting a new law."47

"It was the purpose of the Judiciary Committee [in eliminating Section 6 of the 1934 act] to prevent the rendition of that sort of decision by any court in the future, so the language upon which that holding was based was eliminated."48

"The necessity for this measure grows out of the misconstruction placed upon the antiracketeering law enacted in 1934 by what is popularly known as the Byrnes opinion in the case of United States against Local 807. . . Congress, at the insistence of certain labor leaders, undertook to exempt the payment in good faith of wages to an employee from the operation of this law, but the Supreme Court went beyond the intention of Congress, as expressed in the act of 1934, and libeled Congress and libeled the labor unions of this country. The Supreme Court in the Byrnes opinion said it was the intention of Congress to sanction common-law robbery."49

The holding in United States v. Local 807, although based primarily on construction of the exclusionary provisos of Sections 2(a) and 3(b)
of the 1934 act, which were eliminated by the 1946 act, was also based on the wording of Section 6, which was replaced by Title II of the later act. It is therefore important that the opinion be examined closely, where it deals with the meaning of Section 6, as an aid to the interpretation of Title II of the present law. The Supreme Court opinion states:

"We have expressed our belief that Congress intended to leave unaffected the ordinary activities of labor unions. The proviso in § 6 safeguarding 'the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof', although obscure indeed, strengthens us somewhat in that opinion. The test must therefore be whether the particular activity was among or is akin to labor union activities with which Congress must be taken to have been familiar when this measure was enacted."^{60} (Italics supplied.)

Circuit Judge Learned Hand, in the majority opinion for the Second Circuit Court of Appeals in the same case, had treated the same problem in a similar way:

"Furthermore, the proviso to § 420d, [Section 6] although that too is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere."^{61}

The concurring opinion of Circuit Judge Clark relied on construction of the meaning of Section 6. After agreeing with Judge Learned Hand's comment, he said:

". . . the effect of § 420d [section 6] . . . must be considered. . . . It may . . . mean in effect that the acts of violence here made a federal crime do not include such acts when occurring in otherwise legitimate activities of bona fide (i.e., non-outlaw) labor organizations. If the word 'otherwise' should be omitted from this statement, if the acts of violence themselves render the union activities not legitimate, then the proviso becomes wholly meaningless, since it would then say that union activities are excepted only when they do not violate the act."^{62}

Section 6 of the 1934 act compares with Title II of the 1946 act as follows:

"Section 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: Provided, That no court of the United States shall construe

^{60}United States v. Local 807, 315 U. S. 521, 535 (1942).
^{62}Id. at 689.
or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."58

"TITLE II. Nothing in this Act shall be construed to repeal, modify, or affect either section 6 or section 20 of [the Clayton Act], . . . or [the Norris-LaGuardia Act], . . . or [the Railway Labor Act, as amended], . . . or . . . [the National Labor Relations Act]."54

There is marked similarity between these two provisions. The four laws listed in Title II have been referred to as the Magna Carta of Labor, and can be said to express, in the words of the 1934 act, the rights of bona fide labor organizations in lawfully carrying out their legitimate objects. The words "repeal, modify, or affect" in the 1946 act are certainly substantially the same in effect as "impair, diminish, or in any manner affect" in the 1934 act. The arguments of Justice Byrnes and Judges Learned Hand and Clark therefore assume persuasive force as to the meaning of the provisions of Title II of the present law.

ROBBERY AND EXTORTION AS FEDERAL CRIMES

As was said initially, the Antiracketeering Act of 1946 is not legislation regulating labor organizations or their members—it is a general criminal statute. The Federal Government has authority to enact criminal laws under the commerce clause of the Constitution,55 although it has no power to punish crime generally.56

As a federal criminal statute based on the commerce clause, the 1946 act (and its predecessor) must be compared with the relatively small number of laws in that category,57 better known examples of which are the Dyer Act (National Motor Vehicle Theft Act),58 the Lindbergh Kidnapping Law,59 and the Mann Acts (White Slave Traffic Acts).60 Al-

61 United States v. Bathgate, 246 U. S. 220 (1917); In re Kollock, 165 U. S. 526 (1897); United States v. Eaton, 144 U. S. 677 (1892); Manchester v. Massachusetts, 139 U. S. 240 (1890); United States v. Fox, 95 U. S. 670 (1877).
though the Antiracketeering Acts of both 1934 and 1946 share certain features with other federal criminal statutes based on the commerce clause, they remain nonetheless in a class by themselves.\textsuperscript{61} The 1946 act especially, as will be seen below, raises difficult questions in this regard.

The question of the constitutionality of the 1934 act was argued before the Supreme Court in \textit{United States v. Local 807}, but the opinion in that case is silent on the point. Certiorari had previously been denied in a case where constitutionality was a principal issue.\textsuperscript{62} Where lower federal courts have discussed it, the holding has been that the Act was constitutional as applied to the fact situations presented.\textsuperscript{63}

The 1934 act was applicable to "any person who, in connection with or in relation to any act in \textit{any way or in \textit{any degree affecting} trade or commerce or any article or commodity moving or about to move in trade or commerce"}, does certain things.\textsuperscript{64} The 1946 act, similarly, is applicable to "whoever in \textit{any way or degree} obstructs, delays, or \textit{affects} commerce, or the movement of any article or commodity in commerce", through the use of robbery or extortion.\textsuperscript{65} (Italics supplied.)

The similarity of the language used by Congress to express its intention regarding the nature of the effect on interstate commerce required to give the Federal Government jurisdiction to prosecute under either law becomes significant in the light of the judicial remarks on the subject as reported in cases involving the 1934 act.

It was held in \textit{Nick v. United States},\textsuperscript{66} the leading case on the constitutionality of the 1934 act, that action by Congress on this subject was not unconstitutional as an invasion of the powers reserved to the states under the Tenth Amendment.\textsuperscript{67} With reference to the contention that the act was too broad, the court commented as follows:

\begin{footnotes}
\footnote{Boudin, \textit{The Place of the Antiracketeering Act in our Constitutional-Legal System} (1943) 28 \textit{CORN. L. Q.} 261, 262. The author of this excellent article was counsel for the union in the case of United States v. Local 807.}
\footnote{48 \textit{STAT.} 979 (1934), 18 U. S. C. \S\ 420b (1940).}
\footnote{\textit{Pub. L. No. 486, 79th Cong., 2d Sess.} (1946), \S\S\ 2-6.}
\footnote{122 F. (2d) 660 (C. C. A. 8th, 1941), \textit{cert. denied}, 314 U. S. 687 (1941), \textit{rehearing denied}, 314 U. S. 715 (1941), 316 U. S. 710 (1942).}
\footnote{U. S. \textbf{CONST. AMEND. X}.}
\end{footnotes}
"The argument here . . . is that the Act covers things which may only remotely affect interstate commerce. The language of this Act is broad. It evinces an intention of the Congress to cover the entire constitutional range of interstate commerce in its prohibition of racketeering. We have no doubt that the actions here involved are such as come within the range of regulation under the commerce clause. In such situation, we need not trouble ourselves as to whether the language of the Act may or may not be broader than the constitutional power."68

In United States v. Gramlich, a federal district court, discussing the same problem, said:

"The first objection is directed to the language of section 2 of the act which recites in part: 'Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce.' It cannot be gainsaid that in the use of this all-inclusive language Congress has gone farther than ever before and farther than the previous decisions of the court warrant in undertaking to define as an offense any unlawful interference with commerce, regardless of the degree of such interference."69

The court went on to say, however, that the facts in that case showed a substantial and material interference, and that

". . . if this clause had read 'any person who in connection with or in relation to any act . . . substantially and directly affecting trade or commerce' the entire argument now presented against this section would fall. . . . If Congress intended to make any interference with commerce (no matter in what degree) the gist of the offense being defined, then it seems wholly logical to conclude that they intended to define as an offense a substantial or material interference."70

Congress of course could not have intended that the 1946 act extend beyond the limits of federal power to legislate on the subject matter. Nevertheless, even though there is slight likelihood that the 1946 act will be declared unconstitutional, there is question as to when the law does and does not apply, and this question will require further judicial consideration. The courts will not be as readily able to say that Congress really intended to use "substantially and directly affecting" interstate commerce, when the matter comes up again, because the language of the 1946 law was drafted after the interpretations of the same language in the 1934 law discussed above were made. The question of how far Congress intended to go might have to be tested in connection with an

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70 Id. at 424.
application to a federal court for a writ of habeas corpus by a person indicted for robbery under a state statute, on the ground that his act obstructed, delayed, or in some way affected interstate commerce.  

In *Nick v. United States*, the court cited Supreme Court decisions rendered under the National Labor Relations Act in support of its holding of constitutionality of the 1934 Antiracketeering Act. More discrimination will have to be used in working out the answer to a case where the effect on interstate commerce is factually quite remote if major changes in our present system of state and federal division of power are to be avoided. In the sphere of the criminal law, the balance of concurrent jurisdiction of state and federal governments is not easy to maintain.

Reference to Section 1 of the National Labor Relations Act, entitled "Findings and Declarations of Policy", and to Section 2 of the Fair Labor Standards Act of 1938, "Congressional Findings and Declaration of Policy", furnish a basis for distinction between these and similar laws and the Antiracketeering Acts of 1934 and 1946. The latter are not stated to be in aid of any particular policy or corrective of any particular widespread evil over which the Federal Government must extend its activities. The tests applied to support the constitutional power of the Federal Government to enforce the application of each law in given factual situations will differ for each law. In connection with the Fair Labor Standards Act, the Supreme Court has said:

"The Fair Labor Standards Act was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work'. Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress."

The application of such a test to determine the applicability of this federal law dealing with robbery and extortion would be unthinkable.

Mr. Justice Rutledge has discussed the problem generally in the recent case of *Prudential Insurance Co. v. Benjamin*:

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11Boudin, *supra* note 61, at 284.

12Id. at 268


"The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence, is not simply a product of protective self-interest. It is a recurring manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends. . . . No phase of that process has been more continuous or at times perplexing than reconciling the paramount national authority over commerce, created by Article I, sec. 8 of the Constitution, with appropriate exercise of the states' reserved powers touching the same or related subject matter."76

The states still have the primary concern over the control of purely local violence, even though it may "affect" interstate commerce.

Conclusions

Looking first to the motivation which Congress had for writing a new antiracketeering law, it is possible that the distinctions made in the opinion in United States v. Local 807 were not fully understood. The debates reveal an assumption that the defendants in that case were extorting money for their individual benefit, without proposing to give anything in return, and not in furtherance of an objective to seek work or higher wages. There is, on the other hand, every indication that both the Supreme Court and the Circuit Court of Appeals would have sustained convictions if findings to this effect had been made on proper instructions by the trial court. Convictions under the 1934 act were uniformly sustained where the motivation of violence or other unlawful activity was the personal gain of the defendants. The necessity for and wisdom of the legislation is thus suspect on the dialectic ground that it was passed to change the effect of a Supreme Court decision which would probably not have been attacked if the premises used by the Supreme Court had been, as in all cases they should be, accepted.

The 1946 act is labor legislation of a piecemeal sort. This is revealed by the removal of two of the main clauses designed to protect labor in the attainment of legitimate objectives and by an examination of the hearings and debates which preceded its passage. It is believed that such legislation may prove unwise.

As federal criminal legislation based on the commerce clause, the 1946 act may be constitutional, but it will require considerable interpretation. From the point of view of what Congress intended in this regard, one of the Representatives summarized the paradox in debate as follows:

76 Sup. Ct. 1142, 1146 (1946).
"It is difficult to understand why members of Congress, whose entire records as national legislators have been based upon the principle of states' rights, now stand up here and attempt to fasten upon the Federal Government the responsibility of enforcing local law in every city, village, and hamlet in the Nation."\textsuperscript{77}

The Supreme Court did not sanction violence in its opinion in \textit{United States v. Local 807}. Justice Byrnes there stated:

"The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstances that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law."\textsuperscript{78}

The 1946 Antiracketeering Law may be subject to many criticisms and objections. The Eightieth Congress is preparing to consider wholesale revisions of labor legislation, and this Act may undergo changes before its effect in its present form can be determined.

\textit{JOHN A. CARVER, JR.}

\textsuperscript{77}Representative Welch of California, 91 Cong. Rec. 11903 (1945).
\textsuperscript{78}315 U. S. 521, 536 (1942).
NOTES

DOES THE PURCHASER STILL ACT AT HIS PERIL AT A JUDICIAL SALE?

IT HAS been encouraging to observe in recent years that many of our courts have been disposed to temper the harsh common law doctrine of caveat emptor in its application to judicial sales, and have indicated a willingness to protect the bona fide purchaser at such proceedings under certain circumstances, thereby greatly enhancing the integrity and stability of this important judicial function. Although the legal approach to problems arising in this connection at judicial sales has not changed to any noticeable degree in the past decade, the trend has been for the courts to render decisions more equitable to the purchaser, and at least to return him to his original status where the object of his purchase could not be retained. One reason that inadequate prices are usually obtained at judicial sales, however, is that the courts have rarely been inclined to give the speculative purchaser an attractive chance for his money. It is practically a foregone conclusion in some jurisdictions that technical flaws will be found in titles acquired through judicial sales. As a result, cash purchase prices ordinarily do not exceed a few hundred dollars, a sum which the purchaser estimates to be well below the nuisance value of his claim to adverse interests.¹

Execution Sales and Judicial Sales

For the purposes of this article, execution sales and judicial sales are considered in the same light, inasmuch as the problems involved, from the purchaser’s viewpoint, are identical. It should be noted, however, that there are fundamental differences between these types of sales. A judicial sale is one made by a court of competent jurisdiction, in a pending suit, through its authorized agent. It is a proceeding in rem in which the court acts as the vendor, confirming the sale of specific property by its agent. The decree of confirmation by the court, not the biddings and propositions to buy, gives the sale the character of a judicial sale.² On the other hand, the execution sale is a proceeding in personam conducted by a sheriff as vendor under a general judgment

for a sum of money, pursuant to statutory direction, being complete upon consummation of the sale.\(^3\) The courts do not strictly adhere to these fundamental differences between execution and judicial sales, however, and tend to include the former within the latter.\(^4\)

**THE GENERAL DOCTRINE AND ITS LIMITATIONS**

Although there is conflict among the courts, the basic doctrine generally applied to judicial sales is that the court sells, and can undertake to sell, only the right, title, interest and property, such as it is, of the parties to the proceeding, there being no warranty of title; and any warranty made by the sheriff, commissioner or other person making the sale is of no effect unless to bind him personally.\(^5\) Under this principle the purchaser takes upon himself the risk of ascertaining the outstanding rights which could have been asserted against the parties to the proceedings. He thereby acts at his own peril when he participates in such a sale.\(^6\) Many states continue to apply this doctrine with vigor and strictness, with the result that the purchaser in some instances neither receives anything in return for funds expended, even though the sale is later declared void,\(^7\) nor is he exonerated from liability as a bidder by the fact that the execution debtor had no title to the property sold.\(^8\) In *Martin v. Schillo*,\(^9\) the court stated the rule as being that a

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\(^{4}\)Hanna & McLaughlin, *op. cit. supra* note 1, at 10; *Kleber, Void and Execution Sales* (1899) §§ 15-18.


\(^{8}\)Kreps v. Webster, 85 Colo. 572, 277 Pac. 471 (1929).

\(^{9}\)389 Ill. 607, 60 N. E. (2d) 392 (1945).
purchaser, whether he be a party to the record or a stranger, and all subsequent title holders, are chargeable with notice of the condition of the record and are not protected from the consequences of purchasing under a void judgment or decree.

It is interesting to observe that, although many of the courts have fostered the strict application of the doctrine of *caveat emptor*, other courts have apparently been rendering lip service to this common law maxim while at the same time declaring the importance of maintaining public confidence in judicial sales. In *Wingard v. Hennessey*, the court stated:

“In consideration of the whole problem it should be further borne in mind that public interest and precedent dictate the fostering of the stability of judicial sales—the less attack they are subject to the more the property is apt to bring . . . it is the right and duty of the purchaser to investigate and accept at his peril the title of the parties to the suit, and he may reject it and rightfully refuse to comply with his bid if he discover an incurable defect of title of which the judgment or advertisement of sale gave no notice and he did not have actual knowledge.”

In this same regard, the court stated in *Townsend v. Tipton*:

“It is true that as a general rule the doctrine of caveat emptor applies to judicial sales after confirmation and the passing of title. But there is a radical difference where the judgment is merely erroneous and where the judgment is void. In the former case a bona fide purchaser acquires good title. In the latter case he acquires no title.

“Purchasers at judicial sales are and should be encouraged. Where one has become a purchaser and paid for property he should be protected if the sale be declared void. . . . If the purchaser in good faith has paid his money for its proper application and distribution and he fails through no fault of his own, to obtain title, equity demands that he be made whole by being restored as nearly as possible without injury to the same situation he would have occupied had there been no sale.”


“When a sale of property is decreed by a court of equity as a result of litigation, it is the purpose of the law to be final; to assure reliance upon such sales and induce biddings, no sale should be set aside for trifling reasons or on account of matters which ought to have been attended to by the complaining party thereto. . . . Although the doctrine of caveat emptor applies to judicial sales, a purchaser in good faith will be protected where objection is made to defects in title before confirmation, but the courts will ratify a judicial sale

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10206 S. C. 159, 163, 33 S. E. (2d) 390, 394, 395 (1945).
without undertaking to pronounce with certainty that the title is good, where it is free from any reasonable doubt which would prevent an ordinarily prudent man from accepting it.\textsuperscript{12}

Of further assistance to the purchaser at judicial sales have been the limitations applied by some of the courts to the doctrine of \textit{caveat emptor}, which limitations have had a salutary effect. Like most of the general rules and maxims of the common law, it has been subject to numerous exceptions where:

(1) The number of acres received by the purchaser was less than the number bargained for;\textsuperscript{13}
(2) There was fraud or misrepresentation;\textsuperscript{14}
(3) The sale was void;\textsuperscript{15}
(4) The purchaser was induced to bid under a mistake, and the mistake was not the result of his own negligence;\textsuperscript{16}
(5) The purchaser bought without notice of a secret equity;\textsuperscript{17}
(6) The sale was made for the purpose of extinguishing or satisfying a lien with which the property was burdened;\textsuperscript{18}

\textsuperscript{12}41 F. Supp. 599, 601 (E. D. S. C. 1941).
\textsuperscript{13}Edenfield v. Rountree, 33 Ga. App. 444, 126 S. E. 731 (1925); Courtney v. Farthing, 282 Ky. 54, 137 S. W. (2d) 703 (1940); Trigg v. Jones, 102 Ky. 44, 42 S. W. 848 (1897); Castleman's Adm'r v. Castleman, 67 W. Va. 407, 68 S. E. 34 (1910). \textit{Contra}: Sackett v. Twining, 18 Pa. 199 (1852), where it was held that a deficiency in the number of acres at a judicial sale did not preclude the application of the doctrine of \textit{caveat emptor}. The court said: "Being a judicial sale does not take away the rule of \textit{caveat emptor}, but more emphatically enforces it as to quantity contained in the bulk or gross. If, therefore, the purchaser bid by acre, it was his duty to see before confirmation that the tract contained the quantity estimated." \textit{Id.} at 202.
\textsuperscript{17}Lindsay v. Cooper, 94 Ala. 170, 11 So. 325 (1891); McGuigan v. Rix, 140 Ark. 418, 215 S. W. 611 (1919); Scarborough v. Holder, 127 Ga. 256, 56 S. E. 293 (1906).
\textsuperscript{18}Barker v. Pfund, 80 Wash. 143, 141 Pac. 327 (1914).
(7) The court was without jurisdiction to order a sale;\textsuperscript{19}
(8) Rights in the property were not ascertainable by an inspection of the records;\textsuperscript{20} and
(9) There were palpable defects in the proceedings under which the sale was made.\textsuperscript{21}

\textbf{MINORITY VIEW AS MORE REASONABLE APPROACH}

As indicated previously, there is conflict in the law applied to a purchaser at a judicial or execution sale. Some of the courts apply the doctrine set forth by Professor Glenn to the effect that, when one who purchases at an execution sale completes his bargain by payment of the bid price, without notice of an outstanding equity, he completely acquires the status of an innocent purchaser for value, and his rights will prevail over outstanding equities.\textsuperscript{22} Professor Glenn points out that, of course, it is different if the purchaser is notified of an outstanding equity prior to his completing the purchase.\textsuperscript{23}

In \textit{Commonwealth v. Udzienicz},\textsuperscript{24} the court stated that, generally speaking, a judicial sale of real estate divests all prior and subsequent liens on the property sold unless preserved by statute or by nature incapable of discharge. Under this doctrine, the purchaser at a judicial sale is protected by the order or decree of the court, and he need not look beyond the decree and the jurisdiction of the court.\textsuperscript{25} It was said in the case of \textit{Graham v. Floyd}: "It is well settled, that in the absence of fraud or knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such a sale, is required only to look to the proceeding to see if the court had jurisdiction of

\textsuperscript{19}Ansley v. Gault, 72 Okla. 96, 179 Pac. 16 (1919), cited \textit{supra} note 15.
\textsuperscript{20}Rosen v. Tackett, 222 Mich. 673, 193 N. W. 192 (1923).
\textsuperscript{22}1 Glenn, \textit{Fraudulent Conveyances and Preferences} (revised ed. 1940) 38. See also \textit{Restatement, Trusts} (1935) § 309; \textit{Restatement, Restitution} (1937) § 173, comment k; \textit{Freeman, Executions} (3d ed. 1900) § 336.
\textsuperscript{23}Glenn, \textit{op. cit. supra} note 22, at 38; Copper Belle Mining Co. of West Va. v. Gleeson, 14 Ariz. 548, 134 Pac. 285 (1913), (1914) 62 U. of Pa. L. Rev. 226; Jones v. Howard, 142 Mo. 117, 43 S. W. 635 (1897).
\textsuperscript{25}In \textit{re} United Toledo Co., 152 F. (2d) 210 (C. C. A. 6th, 1945).
the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale."

The public policy protecting judicial sales, according to this principle, does not require the purchaser of a title, dependent upon such a sale, to scrutinize the record so minutely as to determine whether any inference of fraud arises from it. If the judgment was procured by fraud, but is regular and valid on its face, such a purchaser cannot be charged with notice of irregularity in the procurement of the judgment except by proof that the purchaser had knowledge of the irregularity at the time of the purchase. In Howell v. French, the court stated that a purchaser at a judicial sale has certain rights which the court is bound to protect equally with the rights of the parties to the action, and that neither disputes or differences between the parties nor events occurring subsequent to the sale and confirmation can affect the rights of such a purchaser. It was said in Varnell v. Lee:

"Generally speaking, in the absence of extenuating circumstances, when a judicial sale is set aside the court will undertake to restore the status quo as is practicable under the circumstances . . . in such cases the courts will do complete justice between the parties and require the seller to account for the money received, and the defeated purchaser to account for the use of rents and profits from the land. . . . Fundamental justice usually requires that the defeated purchaser be compensated also for proper expenses in improving and preserving the property."

CONCLUSION

Thus we see that the courts, in many cases, have been reaching a just and equitable decision for the purchaser at judicial sales, even though the rule of law applied is fundamentally different in concept. As illustrated above, some of the courts have not only been disposed to render lip service to the doctrine of caveat emptor, but have also been willing to apply limitations to the doctrine to such an extent that the harsh common law maxim is possibly itself becoming the exception rather than the rule. These courts have thereby been reaching the conclusion that the rights of the bona fide purchaser at a judicial sale are paramount under certain circumstances.

2414 N. C. 77, 83, 197 S. E. 873, 876 (1938).
28Iowa —, 19 N. W. (2d) 205, 206 (1945).
The latter approach appears to be a circuitous way of arriving at the same result reached by Professor Glenn, and it is submitted that the doctrine espoused by him, and by a minority of the courts, is the more direct and logical approach to this ever-apparent legal difficulty which has been such a prolific source of litigation in the past. Needless to say, the courts which are continuing to foster the rigid interpretation of *caveat emptor* are doing an injustice to the integrity of the court structure itself, and are failing properly to evaluate the present significance of judicial and execution sales.

EDWARD J. POWERS

CONTRIBUTION BETWEEN PERSONS JOINTLY LIABLE IN TORT

The law regarding contribution between persons jointly liable in tort is in a state of change. In August, 1945, there were decided in the Municipal Court of Appeals for the District of Columbia the cases of *Peake v. Ramsey* and *Patrick v. Ramsey*.¹ The decision in these cases, interpreting the law as to contribution between joint tortfeasors in the District of Columbia, provides a suitable occasion for a review of the subject to determine what changes and trends are discernible.

JOINT TORT LIABILITY CLASSIFIED

Joint liability in tort may be divided into three classes according to the relationship between the liable parties and their acts, as follows: (1) where the persons themselves act tortiously in concert; (2) where the persons do not act in concert but their individual tortious acts concur in producing the harm; and (3) where the persons do not act so as directly to produce the harm, but are held liable because of some special relationship in order to insure compensation to the injured party as a matter of justice.²

Liability in tort may also be classified according to whether it is predicated upon (1) wilful, intentional wrongdoing; or upon (2) negligence, accident or mistake. Both of these classifications are helpful in

a consideration of the question of contribution; for both have a direct bearing on the degree of culpability of the defendant parties; and, as will be shown, any rationale of the rule against contribution appears to resolve into a consideration of the degree of culpability.

The Rule Against Contribution

It has been the general rule of the common law that there can be no contribution between persons in pari delicto. This rule, enunciated in the old English case of Merryweather v. Nixon, has been generally adhered to and may be said to be the rule today.

The case of Merryweather v. Nixon involved an action for conversion against two defendants who must have acted in concert, since they were joint defendants and joinder of defendants was permitted only in such cases. One of the two defendants had been levied on for the full judgment and sought contribution from the other for a moiety. The theory of his action was an implied promise. He was nonsuited on the ground that the parties had acted intentionally and concertedly, and the basis of his action was his own deliberate wrong. Thus the foundation of the rule against contribution seems to have been a case of wilful action by the parties themselves in concert.

Lord Kenyon expressly stated in his opinion that this decision would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves. The later English cases following the decision in Merryweather v. Nixon took Lord Kenyon's limitation of the rule and, ignoring the agency aspect of his words, held that the rule against contribution did not apply unless the plaintiff was a wilful and conscious wrongdoer. This was also the test for the application of the

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rule in the early American cases.6

Gradually, however, the United States courts generally came to deny contribution without regard to whether the tortious conduct was wilful and intentional or merely negligent and accidental.7 Professor Prosser, in surveying the decisions in the various American jurisdictions, concluded that: "Pennsylvania,8 Wisconsin,9 Minnesota,10 Louisiana,11 and perhaps Oregon12 stand out alone, in the absence of statute, against such a result."13 Of these, Wisconsin14 and Louisiana15 now have statutes bearing on the matter. The District of Columbia was thought by many to have joined this minority group with the rule enunciated in George's Radio v. Capital Transit Co.16 and followed in McKenna v. Austin.17

In deciding the case of George's Radio v. Capital Transit Co., the court said: "The question in this case is whether—in the District of Columbia—a right of contribution exists and should be declared between two persons liable for a tort in the absence, on the part of either, of any personal participation, personal culpability, fraud, or moral wrong."18 The court then adopted the rule allowing contribution in

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6Bailey v. Bussing, 28 Conn. 455 (1859); Hunt v. Lane, 9 Ind. 248 (1857); Nickerson v. Wheeler, 118 Mass. 295 (1875); Miller v. Fenton, 11 Paige 18 (N. Y. 1844); Peck v. Ellis, 2 Johns. Ch. 131 (N. Y. 1816); Acheson v. Miller, 2 Ohio St. 203 (1853); Armstrong County v. Clarion County, 66 Pa. 218 (1870); Horbach's Adm'r v. Elder, 18 Pa. 33 (1851); Rhea v. White, 3 Head 121 (Tenn. 1859); Atkins v. Johnson, 43 Vt. 78 (1870); Thweatt's Adm'r v. Jones, 22 Va. 328 (1823); cf. Spaulding v. Oakes' Adm'r, 42 Vt. 343 (1869).
7See note 13 infra.
8Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928) But note that liability here was predicated on respondeat superior, hence the case may not be conclusive as to cases involving liability for defendant's own personal acts.
10Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 236 N. W. 766 (1931); Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 208 N. W. 13 (1926).
11Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933).
13PROSSER, HANDBOOK OF THE LAW OF TORTS (1941) 1113.
14UNIFORM JOINT OBLIGATIONS ACT, Wis. Statutes 1945, c. 113.
15LOUISIANA CIVIL CODE, arts. 2103, 2104, 2324.
these words: "... we adopt for the District of Columbia the rule that when the parties are not intentional and wilful wrongdoers, but are made so by legal inference or intendment, contribution may be enforced."19

The rule thus adopted was clear as to wilful wrongdoers and those made liable by legal inference, but was indefinite as to the tortfeasor who was merely negligent himself. For this reason the decision was subject of conjecture as to whether it was capable of application to other cases in which the liability was not predicated upon these two grounds. Some doubts were expressed at the time, however, as to whether the case represented "a wholehearted adoption of the doctrine of contribution or merely . . . a refinement applicable to the particular circumstances."20 In the later case of McKenna v. Austin, the broader application of the rule appeared to be given some support by implication; but in both cases liability was predicated upon respondeat superior.

In Peake v. Ramsey, the Municipal Court of Appeals, made an interpretation of the rule set up by the United States Court of Appeals, as to when contribution would be allowed, and stated that it excluded cases in which liability is based upon actual personal wrongdoing by the liable parties, whether negligent or wilful. In this case, a collision occurred at the intersection of two streets in the District of Columbia. The Peake car was going south on one, and the Ramsey car was going east on the other. The intersection was controlled by lights. From the testimony it appeared that the Peake car approached or entered the intersection as the traffic light facing north turned from green to "caution", while Ramsey's car must have entered the intersection either just after or just before the light facing west turned from red to green. The testimony was in conflict. As the accident occurred at approximately the time the lights were changing, the court was forced to the conclusion that one or both of the drivers had tried to "beat the light". Judgment was for the defendant Ramsey, and the plaintiffs appealed.

The defendant had filed a counterclaim to the action of William Peake and, in the action of the two passengers, had brought William Peake in as a third-party defendant, seeking contribution from him in the event the jury should find that the injuries to Peake's passengers resulted from the concurring negligence of Peake and Ramsey.

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19Id. at 223.

20(1942) 3 Wash. & Lee L. Rev. 307. See also (1942) 30 Georgetown L. J. 481; (1942) 27 Iowa L. Rev. 478; (1942) 1 Loyola L. Rev. 237.
After deciding that the court below had erred in giving the jury instructions on contributory negligence on the part of the passengers in the absence of any basis in the evidence for a finding of contributory negligence against them, the court moved to a consideration of the question of the correctness of allowing third-party proceedings to enforce contribution. “The question here,” said the court, “is whether the rule applies between two strangers who have personally participated in the acts of concurrent negligence resulting in injuries to a third party.”

After reviewing the decision in the George’s Radio case, the court said:

“It appears to us that the rule laid down was restricted in its application. There the parties were wrongdoers under the legal principle of respondent superior. The court in its opinion emphasized the absence of personal participation of the parties and their vicarious liability; and this was not necessary if the court intended to rule that contribution may be had between negligent tortfeasors as distinguished from wilful wrongdoers, without regard to personal participation or personal culpability. . . .

“Our conclusion is that the doctrine of the George’s Radio case does not apply to the situation presented in the case before us.”

Thus while a lower court has definitely stated that in its opinion the rule promulgated by the United States Court of Appeals does not enlarge the doctrine as to contribution, the final decision must remain in doubt until such time as the Court of Appeals clarifies its rulings in the George’s Radio case and McKenna v. Austin.

Exceptions to the Rule Against Contribution

The decision in the Peake case thus interpreted the position of the District of Columbia as following the majority American rule and allowing an exception which has been generally recognized in other jurisdictions—that is, that there may be contribution in favor of one who is responsible solely by imputation of law. This is perhaps the most generally recognized exception to the rule denying contribution. Other generally recog-

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21 Id. at 766, 767.
nized exceptions are as follows: (1) Where one is directed or employed by another to do an act not manifestly wrong, (2) where one is induced to act by the fraudulent representations of another, (3) where one has negligently relied upon the proper care of a supplier of goods or a contractor who has made repairs or improvements, and (4) where one party is under only a secondary duty while the other is primarily responsible.24

**Gradations of Culpability**

The trend in all of these exceptions is toward finding that degree of culpability which will justify the court in lending its aid in enforcing contribution from one wrongdoer to another. So too with the profusion of tests for determining whether contribution should be allowed: Whether there was "wilful or conscious wrong";25 whether the party "knew that such act was wrongful";26 whether the party "knew, or must be presumed to have known, that the act for which he has been held liable was wrongful";27 whether the party "must be presumed to have known that he was doing an illegal act";28 whether "the wrong is malum in se";29 whether the party "acted without moral guilt or wrongful intent".30 "None of these tests," said the court in *Peake v. Ramsey*, "gives a satisfactory standard for applying the test of contribution where the one seeking it has been guilty of a personal act of negligence."31

Since the objective of all these tests is to arrive at and define that degree of culpability which, though sufficient to make the parties liable to the innocent injured party, is not enough to prevent the court from lending its aid to one liable party in securing contribution from another, it may be fairly inferred that there are gradations or degrees of culpa-

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27Horrabin v. City of Des Moines, 198 Iowa 549, 553, 199 N. W. 988, 990 (1924).

28Underwriters at Lloyds of Minneapolis v. Smith, 166 Minn. 388, 390, 208 N. W. 13, 14 (1926).


bility requiring different treatment in this respect in the eyes of the law. We may think of the basis of the tort liability of persons seeking contribution as falling into a simple three-point scale:

1. Wilful or intentional wrongdoing by the party himself (greatest culpability).
2. Negligence by the party himself.
3. Liability solely by imputation of law (least culpability).

The majority United States rule draws the line, below which contribution is allowed, between "2" and "3";\(^{32}\) while the minority tendency is to place the dividing line between "1" and "2".\(^{33}\)

**The Statutory Trend**

It is beyond the scope of this article to treat in detail the statutory provisions governing contribution between persons jointly liable in tort in the various jurisdictions of the United States. It is necessary to state, however, that there is a marked tendency toward allowing contribution by statute in the United States. Georgia, Kentucky, Louisiana, Maryland, Michigan, Missouri, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia and Wisconsin have all enacted statutes bearing on the question.\(^{34}\)

In May, 1939, the American Law Institute adopted a Uniform Contribution Among Tortfeasors Act which was approved by the Conference of Commissioners on Uniform State Laws in July, 1939.\(^{35}\) This "statute" provided for contribution among all persons jointly or severally liable in tort for the same injury to person or property, without regard to whether such liability is predicated on wilful or negligent conduct. The statutes of some of the states enumerated above are similarly liberal in allowing contribution between all persons jointly liable in tort.\(^{36}\)

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\(^{32}\)See note 3 **supra**.

\(^{33}\)See notes 8, 9, 10, 11, 12 and 13 **supra**.


\(^{35}\)(1939) 16 AM. L. INST. PROC. 347, 367.

\(^{36}\)E.g., Maryland, Missouri, New Mexico, New York, Texas, West Virginia. See note 34 **supra**.
there is a distinct tendency in the statutes to ignore common law distinctions between wilfulness and negligence and to permit contribution in all cases. Some of the statutes, however, permit contribution only in a limited group of cases.37

CONCLUSION

What, then, is the law today in the United States governing contribution between persons jointly liable in tort? In the absence of statute, it is surprisingly close to the rule enunciated in England over one hundred and fifty years ago in Merryweather v. Nixon. Contribution is not allowed between wilful or intentional wrongdoers. Contribution will generally be allowed between persons held liable only by legal inference or intendment. Between these poles no uniform rule prevails. A tendency in a minority of cases is toward allowing contribution where liability is not based on wilful or intentional conduct, but is founded on mere negligence, accident, or mistake. By statute, the trend is toward greater liberality in allowing contribution, with a marked tendency toward allowing contribution in all cases without regard to whether the basis of liability is negligence or wilful conduct.

HORACE BUCHANAN BAZAN

CHARITABLE TRUSTS AND CAPITAL GAINS

IN THE Andrus case,1 promulgated on August 16, 1946, the Tax Court of the United States ruled that long-term capital gains need not be prorated between the taxable and the nontaxable beneficiaries of a trust. By the provisions of the Andrus trust agreement, forty-five per centum of the net income, including capital gains, was to be paid or be permanently set aside for a charitable corporation; and the balance was to be distributed among a number of beneficiaries whose incomes were subject to the income tax. Upon termination of the trust the corpus was to be similarly divided.

During the year 1941 the total net long-term capital gain was

1E.g., Georgia, Kentucky, Michigan, Virginia. See note 34 supra.

$84,945.14, income other than capital gains was $16,769.39, and deductions other than contributions totaled $19,224.01, the net income of the trust prior to deductions for contributions thus being $82,490.52. The trustees first deducted under Section 162(a) of the Internal Revenue Code$^{2}$ forty-five per centum of the net trust income, or $37,120.74, as the contribution to the charitable corporation; and then applied the percentages of Section 117(b)$^{3}$ in deducting the contributions to the taxable beneficiaries and in determining the income tax of the trust. The Commissioner assessed a deficiency, contending that the trustees ought first to have applied the percentages of Section 117(b) to the total long-term capital gains, and then deducted $17,823.48, or forty-five per centum of the net taxable income, as the contribution to the charitable corporation. Otherwise stated, the trustees claimed forty-five per centum of the net income of the trust as a deduction under Section 162(a); the Commissioner contended that the deduction was limited to forty-five per centum of the taxable income of the trust on the grounds that the tax-free income under Section 117(b) must be allocated between the charitable corporation and the taxable beneficiaries in proportion to relative shares set aside in the trust agreement. It should be noted, before further discussion, that the charitable corporation would receive the same amount, that is, $37,120.74, regardless of the computation used. The trustees would take the full amount out of the net income before application of the percentages of Section 117(b); the

$^{2}$Int. Rev. Code § 162(a) (1942): "The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that:

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit. . . ."

$^{3}$Int. Rev. Code § 117(b) (1942): "Percentage taken into account. In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing . . . net income: 100 per centum if the capital asset has been held for not more than six months; 50 per centum if the capital asset has been held for more than six months." Note that at the time of the Andrus case the time limit was eighteen and twenty-four months respectively—immaterial here.
Commissioner would take $17,823.48 out of the taxable income and $19,297.26 out of the nontaxable income.

The Commissioner based his contention principally on the *Grey* case, in which the court ruled that tax-exempt income and allowance for depreciation must be prorated between the taxable and the nontaxable beneficiaries of a trust in computing the net taxable income. The Tax Court attempted to distinguish the *Grey* case thus: (1) allocation of depreciation is specifically provided for by Section 23(1) of the Internal Revenue Code, but no similar statute requires allocation of long-term capital gains; (2) tax-exempt income is not included in gross income under Section 22(b)(4), but capital gains are included; and Section 117(b) only prescribes the "percentages taken into account" in computing net income subject to tax.

The trustees' argument was grounded basically on the unlimited and unqualified deduction explicitly allowed by Section 162(a):

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that: (a) There shall be allowed as a deduction . . . any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit. . . ."

As the court emphasized, Section 162(a) refers to gross income and not to taxable net income; and the trustees under the trust agreement were to distribute to the charitable corporation forty-five per centum of the net income—that is, the gross income less expenses—and not forty-five per centum of the taxable net income—that is, the gross income less expenses less nontaxable income.

The *Andrus* case focuses attention anew on the tax advantages offered

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4 Charles F. Grey, 41 B. T. A. 234 (1940), aff'd, 118 F. (2d) 153 (C. C. A. 7th, 1940).
5 *Int. Rev. Code* § 23(1) (1942): "Depreciation. A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) . . . of property held for the production of income. . . . In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each."
7 See note 2 **supra**.
by Section 162(a) of the Internal Revenue Code, especially as compared with Section 23(o). The latter limits charitable and similar contributions to fifteen per centum of the taxpayer's adjusted gross income; but the former allows as a deduction any part of the gross trust income which is paid to or permanently set aside for such purposes. Section 23(o) restricts the donees to corporations, community chests, and similar nonpersonal entities; whereas under Section 162(a), it is thought by some commentators, a settlor by means of a trust can sponsor a scientist in research or an artist in literary or artistic work. While the former requires that the donees be created or organized in the United States or its possessions, the latter is silent as to their location and impliedly allows contributions to foreign organizations and individuals for charitable and similar purposes. The flexibility and the latitude of Section 162(a) make the trust a very satisfactory and efficient device for contributing to charity and other good works, not only because it allows the donor a wide breadth of choice and action, but also because it enables him to lower his own tax brackets and those of taxable beneficiaries by the unlimited deduction permitted thereunder.

If the Andrus case stands, the tax advantages of Section 162(a) will, moreover, be materially increased. It is possible under this decision for a trust which has a substantial amount of capital gains to reduce or eliminate the capital gains tax, otherwise payable, by distributing to or setting aside for charity a percentage of income and corpus. To illustrate: Trust X has a net income of $80,000.00, of which $60,000.00 is net long-term capital gains and $20,000.00 is other income. By the provisions of the trust agreement the trustees are to distribute fifty per centum of the net income to charity and accumulate the balance for taxable beneficiaries. Applying the Andrus formula, the trustees will deduct fifty per centum of the net income or $40,000.00 under Section

\(^{8}\text{Int. Rev. Code § 23(o) (1942): "In computing net income there shall be allowed as deductions—Charitable and Other Contributions. In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of: (1) The United States, any State, etc.; (2) A corporation, trust, or community chest, fund or foundation, created or organized in the United States . . . , organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . , no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . ; (3) the special fund for vocational rehabilitation . . . ; (4) posts or organizations of war veterans . . . ; (5) a domestic fraternal society, order or association . . . ; to an amount which in all the above cases combined does not exceed fifteen percentum of the taxpayers' adjusted gross income. . . ."}
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162(a), will disregard for tax purposes fifty per centum of the long-term capital gains or $30,000.00 under Section 117(b), and will then owe a tax on $10,000.00. If the Commissioner had prevailed, the trustees would have to deduct $25,000.00 or fifty per centum of the taxable income ($20,000.00 of other income plus fifty per centum of the long-term capital gains, or $30,000.00) under Section 162(a), would divide the nontaxable income of $30,000.00 between the trust and the charitable corporation, and would then owe a tax on $25,000.00. If the trust agreement provided that seventy per centum of the trust income was to be distributed to charity, then the trustees, applying the Andrus formula, would deduct $56,000.00 under Section 162(a), would disregard for tax purposes $30,000.00 under Section 117(b), and would have a net loss of $6000.00.

It is possible under the Andrus decision for a trust, through a distribution of capital gains to charity, to reduce materially or even to eliminate the amount of taxes which the government might otherwise have collected from taxable beneficiaries. To illustrate: Trust Y has a net income of $50,000.00, of which $30,000.00 is long-term capital gains and $20,000.00 is other income. By the provisions of the trust agreement the trustees are to distribute sixty per centum of the net income to charity and forty per centum to the wife of the settlor. Applying the Andrus formula, the trustees will distribute $30,000.00 of the net income to charity, will deduct that amount from the taxable income of $35,000.00, and will distribute to the wife $5000.00 in taxable income and $15,000.00 in nontaxable income. Under the Commissioner's formula, charity would receive $21,000.00 out of the taxable income and $9000.00 out of the nontaxable income, and the wife would receive $14,000.00 in taxable income and $6000.00 in nontaxable income. To illustrate further: Trust Z has a net income of $60,000.00, of which $40,000.00 is long-term capital gains and $20,000.00 is other income. By the provisions of the trust agreement the trustees are to distribute seventy per centum of the net trust income, or $42,000.00, to charity and thirty per centum, or $18,000.00, to the daughter of the settlor. The taxable income of the trust, after applying the percentages of Section 117 and before the deduction for contributions, is $40,000.00. Under the Andrus formula the trustees will deduct seventy per centum of the net income for charity, which amount will include all of the taxable income, and will have $18,000.00 of nontaxable income for the settlor's daughter.
The Andrus treatment of capital gains in charitable trusts necessarily results in a loss of tax income to the Government. The court concedes this result and suggests that the problem is legislative rather than judicial. Its decision was determined, more or less, by the language of Section 162(a) and by previous court decisions interpretive of that section and preceding statutes. The Commissioner in Continental Illinois National Bank and Trust Co. v. United States 9 contended that the charitable deduction ought to be adjusted by allocating the depreciation sustained on the trust property between the trust and the hospital-donee. The Court of Claims, in rejecting this contention, stated: "If an adjustment is to be made which affects that allowance, it must be clearly shown that it does not do violence to that section which allows the deduction without limitation."10 The Tax Court in Marion C. Tyler Trust11 held an amount in excess of the gross income of the trust paid to charitable institutions to be a legal deduction under Section 162(a). Finally, the Supreme Court in Old Colony Trust Co. v. Commissioner construed Section 162(a) as allowing deductions to the full extent of the gross income, declaring: "The design was to forego some possible revenue in order to promote aid to charity."12

The Commissioner has withheld acquiescence, and it is understood that the Andrus case will be appealed to the Circuit Court of Appeals for the Second Circuit. Regardless of the final outcome on appeal, it is very probable that amendatory legislation will be sought, because Section 162(a) under the Andrus decision promotes not only aid to charity but also tax reduction for taxable beneficiaries. Until the Supreme Court has reviewed the Andrus case and Congress has registered its reaction, the practical application of the case in drafting trust agreements ought to be postponed. Once the Andrus formula has become settled law, trust lawyers will find it unusually advantageous in achieving tax reduction.

THOMAS MCDERMOTT

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10Id. at 234.
11Marion C. Tyler Trust, 5 T. C. 729 (1945).
12Old Colony Trust Co. v. Commissioner, 301 U. S. 379, 384 (1937).
RECENT DECISIONS

CONSTITUTIONAL LAW—A State May Not Impose a Retail Sales Tax Upon the Proceeds of a Sale of Goods Which Are Delivered to the Vendee's Ship Within the State.

The appellant oil company entered into a contract with the Government of New Zealand for the sale of oil to that government. The contract specified delivery f.o.b. Los Angeles and payment in London. In pursuance of this contract, the appellant pumped the oil on board the vendee's tanker in Los Angeles harbor, having previously pumped the oil from their refinery in California. The oil was then transported directly to Aukland, New Zealand; no portion of it being used or resold within the United States. The state of California levied a retail sales tax upon the gross proceeds of this sale, and this suit is brought to obtain a refund of the payment. The appellant asserted that the application of the California Retail Sales Tax in this case violated the export-import clause of the Federal Constitution. U. S. Const. Art. I, § 10. Held, that the application of the California Sales Tax to this transaction is in violation of the constitutional prohibition against duties and imposts on exports. Richfield Oil Co. v. State Board of Equalization, 67 Sup. Ct. 156 (1946).

This case reached the United States Supreme Court on appeal from a decision in the Supreme Court of California wherein that court sustained the validity of the tax levy. It held that the delivery which resulted in the passage of title occurred prior to the commencement of exportation, and that the state tax could thus not be said to be a levy upon an export. Richfield Oil Co. v. State Board of Equalization, 27 Cal. (2d) 150, 163 P. (2d) 3 (1945).

The Supreme Court noted that the California court had rested its decision in part upon several recent Supreme Court decisions under the commerce clause. U. S. Const. Art. I, § 8. McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940); Department of Treasury of State of Indiana v. Wood Preserving Corp., 313 U. S. 62 (1941); International Harvester Co. v. Department of Treasury of State of Indiana, 322 U. S. 340 (1944). This line of decisions holds that non-discriminatory taxes upon goods in interstate commerce are not invalid. The California court, citing these cases to support its decision, said that it could see no greater restriction upon the power of the states under the export-import clause, U. S. Const. Art. I, § 10, than existed under the commerce clause, and that the tax would have been valid under the commerce clause. The Supreme Court considered it unnecessary to pursue the question as to whether the tax was invalid under the commerce clause as it was clearly invalid under the export-import clause. However, the Court carefully distinguished the difference between these two provisions, declaring that while the questions of what constitutes exportation and what is interstate commerce do not bind the tax levies of the states, there was no indication that the tax was upon exportation, but rather was levied upon the proceeds of a sale made to a vendee's ship. Therefore, the tax was held invalid under the commerce clause.
commerce are blended, the clauses are not coterminous. The commerce clause has been interpreted by the Supreme Court in an effort to reconcile the conflicting demands for an area of trade free from the burden of state taxation, on the one hand, and the demand to make interstate commerce pay its own way, on the other hand. Upon this basis, the Court has allowed "non-discriminatory taxes" upon goods in interstate commerce. In the instant case, however, the Court refused to accept any thesis which would write a qualification into the absolute prohibition of the export-import clause. The export-import clause clearly prohibits the imposition of "any" taxes on exports or imports with the single exception of those necessary for inspection fees. The Court agreed, however, that the question as to what is exportation is complementary to the question of what is interstate commerce, and the Court proceeded to use the line of decisions under the commerce clause to aid in determining a test as to the time when a product becomes an export within the constitutional meaning of the word. The leading case in deciding the application of the commerce clause was Coe v. Errol, 116 U. S. 517, 527 (1886), which held that, "... goods do not cease to be a part of the general mass of the property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon transportation in a continuous route or journey." The Court cites this case as setting forth what it deems to be the correct principle governing exports. Thus it would appear that the general rule of this case remains good today, and that it governs exports as well as interstate commerce. However, it is important to note that the Court in this same case of Coe v. Errol, said that no definite rule had been adopted with regard to the point of time at which the taxing power of the state ceases. It may be added that, no such rule has been enunciated for exports either. On the other hand, the similar question of what constitutes an import, and when it becomes subject to the tax power of the states, was settled in the classic case of Brown v. Maryland, 12 Wheat. 419 (U. S. 1827). Therein the court laid down the now famous "original package doctrine". This judicial rule states that so long as an import remains in its original package and is not resold it is not subject to taxation as a part of the general property of the state.

The line of decisions under the commerce clause which follow Coe v. Errol have done little to qualify the holding of that case, but have served only to define the general limits of that test. The point of difficulty lies in determining the precise point at which goods enter the channels of commerce or export and thus become detached from the property of the state. That goods must have started their transportation is no longer questioned. In the case of Brown v. Houston, 114 U. S. 622 (1885), the Court refused to exempt coal from a tax assessment simply because some of the coal was later exported. Nor are goods exempt because they are in the process of manufacture under contract
for export. *Cornell v. Coyne*, 192 U. S. 418 (1904); *Turpin v. Burgess*, 117 U. S. 504 (1886). The point of the commencement of transportation appears to be that time when goods are genuinely committed to the channels of transportation.

Another line of cases involving the question of transshipment throws some light on this problem. It was contended in the cases of *Carson Petroleum Co. v. Vial*, 279 U. S. 95 (1929); *Hughes Bros. v. Minnesota*, 272 U. S. 469 (1926); and *Texas & N. O. R.R. v. Sabine Tram Co.*, 227 U. S. 111 (1913), that goods which were stored or accumulated at a transshipment point pending transportation abroad were removed from the channels of commerce so as to be subject to the imposition of state taxes. The Supreme Court held in these cases that the continuity of the journey had not been broken and that state taxes on these goods were unconstitutional. The opinions in these cases indicate that the commencement or continuation of interstate commerce (or exportation) is evidenced by something more than a single incident of bill of lading, control of shipment by the owner, stop-over for transshipment, or transfer of title. The court said in *Hughes Bros. v. Minnesota*, supra at 475: "The conclusion in cases like this must be determined from the various circumstances. Mere intention . . . does not put them in interstate commerce. . . . It must appear that the movement for another state has actually begun and is going on."

The holding *Spalding & Bros. v. Edwards*, 262 U. S. 66 (1923), which is directly in point with the instant case, indicates that the reasoning which was applied in the cases cited above to determine the beginning and continuation of interstate commerce is equally applicable to exportation under the export-import clause of the Constitution. The issue in that case, as in the instant case, was whether the sale was a step in exportation. The Court pointed out that, while the goods would not have been subject to taxation while in the process of manufacture, it was equally certain that they were exempt after they were loaded on board the vessel and the bill of lading issued. The Court said that the very act which passed the title, and would have incurred the tax in domestic commerce, committed the goods to the carrier and the fact that further acts were to be done before the goods would get to sea does not matter. In the instant case, the California court relied upon the case of *Spalding & Bros. v. Edwards*, as following the case of *Coe v. Errol*, and seized upon the fact that the delivery was to a common carrier to differentiate it from the instant case. The Supreme Court refused to accept this restriction saying, "The certainty that goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist although no common carrier is involved." *Richfield Oil Co. v. State Board of Equalization*, supra at 163. Thus holding, the Court removes the implied qualification in the holding of *Spalding & Bros.*
v. Edwards, and the line of cases which preceded it, that delivery to any carrier other than a common carrier did not constitute the commencement of exportation.

The Court again in the instant case does not lay down a precise judicial rule for the determination of the beginning of the export process. As stated above, it does dispel any illusion that delivery to a common carrier is any more significant than to a private carrier. It would appear that the Court decided this case upon the unity of the entire export process, rejecting the theory that any one fact such as delivery to a common carrier or transfer of title is in itself determinative of the commencement of exportation. The certainty that export has begun and that the goods are thus subject to the protection of the export-import clause is to be gathered from all of the facts at hand. A genuine entry into a channel of commerce with reasonable certainty of export determines the time at which the goods are separated from the common mass of property within a state. The dissenting opinion of Mr. Chief Justice Hughes in the case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940), offers a good summary of the unity of process which the Court appears to have employed in this case. This case was decided under the commerce clause, and turned upon the effect to be given to the "non-discriminatory" character of the tax. No such qualification exists in the export-import clause. He said therein, "The delivery is but the necessary performance of the contract of sale. Like the shipment from the mines, it is an integral part of the interstate transaction . . . the place where the title passes has not been regarded as the test of the interstate character of a sale. . . ." Id. at 64.

GEORGE C. PENDLETON

EVIDENCE—When the Presumption of Legitimacy, the Strongest Known to Law, Conflicts with the Presumption of a Continuing Marriage, the Presumptions Are Not Conclusive of the Issue According to Their Legal Strength but Stand or Fall as They Are Supported by the Surrounding Circumstances.

Appeal from a decree of Surrogate Court recognizing the Respondent Lovell as half-brother of the decedent Samuel Pinder and distributee in his estate. Benjamin and Albertina Pinder lived as man and wife until 1888; four children, including decedent Samuel, were born to them prior to that time. In 1888 Benjamin ceased to cohabit with Albertina Pinder and did not return until 1897. It seems unquestioned that at no time between 1888 and 1897 did Benjamin have any access to Albertina. In 1893 respondent was born of Albertina and one Simeon Lovell. Albertina and Lovell neither cohabited nor sustained the reputation of marriage. There was no ceremonial marriage. Albertina, at the time of the birth of respondent, was holding herself out as the wife of Benjamin and continued to do so. Respondent based his claim to a
share in Samuel Pinder’s estate on the presumption that every person is born legitimately. **Hold,** that where there is a conflict of presumptions, even where one of them is the strongest known to law (the presumption of legitimacy), either presumption will stand or fall according as the circumstances support or fail to support it. Matter of Pinder, — App. Div. —, 65 N. Y. S. (2d) 274 (2d Dep’t 1946).

A presumption is a legal substitute for proof. One New York court gives the following definition: “A rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of such inference is disproved.” Ulrich v. Ulrich, 136 N. Y. 120, 32 N. E. 606 (1892). Another court has defined a presumption as follows: “A presumption is neither more nor less than that which is accepted fact without proof, by reason of its probability born of human experience.” In re Raisback’s Will, 52 Misc. 279, 102 N. Y. Supp. 967, 969 (Surr. Ct., 1906).

The presumption of legitimacy was originally a very nearly irrebuttable one; if a husband was within the “four seas of England”, a child born to his wife was presumptively his. Co. Litt. 244a; cf. Shakespeare, King John, scene 1, act I. One of the first breaches in its conclusiveness was made in the case of Pendrell v. Pendrell, 2 Strange 925, 93 Eng. Rep. R. 945 (K. B. 1732), in which it was held that the presumption of access by a husband might be overcome even if he was within the above mentioned geographical area. Today, when the proponent of illegitimacy has the burden of proving his point, the character of the proof he is required to adduce varies considerably with the jurisdiction: Compare In re Walker’s Estate, 180 Cal. 478, 181 Pac. 792 (1919), with In re Jones’ Estate, 110 Vt. 438, 8 A.(2d) 631 (1939). In the former case preponderance of the evidence will overcome the presumption; in the latter case, proof beyond a reasonable doubt is required. Where the presumption conflicts with another presumption of great force, the New York cases seem to hold that both presumptions are, in effect, inoperative, and the case goes to the jury on its facts. It is likely that the present case stems from the parent case of Matter of Meehan, 150 App. Div. 681, 135 N. Y. Supp. 723 (1st Dep’t 1912); there is an undeniable similarity of language used by the court in both cases when it speaks of the force and effect of the conflicting presumptions. A discussion of the presumption of legitimacy and an evaluation of the requirements of the various jurisdictions as to the character of contradictory proof will be found in the annotation at (1919) 7 A. L. R. 329.

The cases on this issue of illegitimacy point to at least two situations out of which the presumption may arise. See Matter of Matheus, 153 N. Y. 443, 447, 47 N. E. 901, 903 (1897). The first situation is that in which the mother is a married woman and the presumption operates to make the child the issue of her husband. Powell v. State, 84 Ohio St. 165, 95 N. E. 660 (1911). The second is that situation in which one of the parents has previously
been married, with no affirmative evidence of the dissolution of such marriage, and in a subsequent marriage produces offspring whose legitimacy is in issue. Matter of Meehan, supra; Matter of Tuttle, 234 App. Div. 1, 254 N. Y. Supp. 65 (2d Dep't 1931). In this second situation most of the cases seem to deal with sets of facts wherein there is some evidence tending to support the fact of a second marriage, such as ceremony, prolonged cohabitation, prolonged reputation and holding out of marriage: e.g. Matter of Tuttle, supra. The courts seem to be willing to hold that the presumption of legitimacy may raise an "inferential" presumption of a valid second marriage. It was said by Clerke, J., in Caujolle v. Ferrie, 26 Barb. 177, 185 (N. Y. 1857): "The common law also presumes marriage; that is, it presumes every man legitimate until the contrary be shown, . . ." That the presumption of legitimacy may raise a corollary presumption of a valid second marriage is pointed out in Adger v. Ackerman, 115 Fed. 124, 126 (C. C. A. 8th, 1902): "... the legal presumption is that every child is the fruit of a lawful, rather than of a meretricious, union, and that there had been a timely and legal marriage between the father and mother before the birth of the child." It would seem that the ordinary indicia of marriage are required to be present when the existence of such a union depends on the destruction of a former and presumptively continuing marriage. Adger v. Ackerman, supra.

The situation the court faced in the instant case definitely can be classified with the second situation above, with this distinction, that here there are no indicia of a second union. Looking at the problem objectively, and not presumptively, the court decided not to utilize the full probatory power of the presumptions but to accord to each the full force and effect of the facts supporting it and to compute its conclusiveness in the light of such facts. As a result the Surrogate's Court was reversed.

In following the line of reasoning it does in this case, the New York court seems to have assigned to the presumption of legitimacy a lower position in the hierarchy of presumptions. Any conflict of presumptions seems at best to put the court in the position of Don Quixote tilting with windmills. When a situation like this, arising out of confusing as well as conflicting fictions, has to be dealt with, the mode of resolution employed by the New York court seems a highly satisfactory one—accord your honors to age-old presumptions but accord your credence to the facts.

JOHN W. WHelan
INSURANCE—Provision Excepting Liability for Double Indemnity in Case of Death from "War or Any Act Incident Thereto", Includes, Besides Combat Casualties, only Such Other Deaths as Resulted from Activities in Immediate Support of Operations Against Enemy or from Enemy Action not in Combat or from Other Activities Peculiar to War.

John P. Hooker brought an action in a United States District Court against the New York Life Insurance Company to recover the double indemnity benefits provided under a policy issued by the Company on the life of his son. The Company paid the face value of the policy but resisted payment of the double indemnity benefits, contending that the insured's death resulted from "war or any act incident thereto", and was therefore within the exception clause of the policy limiting payment to the face value if death resulted "directly or indirectly from * * * (d) War or any act incident thereto". The insured, a member of the United States Marine Corps on active duty in New Zealand, met his death during training maneuvers. While acting as an "enemy" scout, he was "captured", and in attempting to "escape", jumped into a clump of bushes which concealed the edge of a cliff. Held, that plaintiff is entitled to recover double indemnity payment since the policy exception includes, besides combat casualties, only such other deaths as result from activities in immediate support of operations against the enemy, or from enemy action not in combat, such as the sinking of a troop transport, or from other activities peculiar to war. Hooker v. New York Life Ins. Co., 66 F. Supp. 313 (N. D. Ill. 1946).

Exception clauses in insurance policies are inserted to limit the area of risk assumed by the insurer because certain hazards or occupations are not susceptible of actuarial prediction, because the risk to be born is too great for the premium charged, or if a premium were to be charged as an approximation of the risk assumed, the premium would be prohibitive. In the days of the Spanish-American War, most insurance companies attempted to meet this situation by levying a certain extra premium on each contract of insurance where the insured was a member of the military forces in time of war. See Phelps, War Risks (1898). The insurance companies found objectionable features in the extra premium method of dealing with these risks and later attempted to limit the insurer's liability by limiting the area of risk rather than by increasing the premium.

An insurance contract may be so inclusive as to provide that death, resulting while the insured is in the military or naval service in time of war, is not covered, or that the insurance is suspended while the insured is in the military or naval service in time of war. In Bending v. Metropolitan Life Ins. Co., 74 Ohio App. 182, 58 N. E. (2d) 71 (1944), it was held that the death of the insured resulting from a fall from a hotel window while he was on leave from his military post was within such an exception clause. In Marks v. Supreme Tribe of Ben Hur, 191 Ky. 385, 230 S. W. 540 (1921), where the exception
The exception clause exempted the insured from liability if death occurred while the insured was in the armed forces, it was held that death from pneumonia or influenza, while the insured was in the armed forces, was not covered by the policy. Accord, Miller v. Illinois Bankers Life Ass'n, 138 Ark. 442, 212 S. W. 310 (1919); Reid v. Am. Nat. Ass. Co., 204 Mo. App. 643, 218 S. W. 957 (1920). These, and other types of inclusive "status" clauses, making the liability of the insurer dependent on the status of the insured as a member of the military forces in time of war, have led to restricted and narrow distinctions. Thus, where the policy excepted liability while the insured was "engaged in military or naval service, . . . outside the continental limits of the U. S. in time of war", death was within the exception when the insured died from pneumonia in France. Swanson v. Provident Ins. Co., 194 Iowa 7, 188 N. W. 677 (1922). Death resulting from pneumonia contracted at a training station was also held to be within the exception. Bradshaw v. Farmers & Bankers Life Ins. Co., 107 Kan. 681, 193 Pac. 332 (1920); Ruddock v. Detroit Life Ins. Co., 209 Mich. 638, 177 N. W. 242 (1920) (death from disease within exception) Boatwright v. American Life Ins. Co., 191 Iowa 253, 180 N. W. 321, (1921) semble.

Other cases tend to interpret such a clause as referring not to the status of the insured, but to whether his death results from such service, adopting the familiar rule that insurance contracts will be construed most strongly against the insurer. These decisions turn on the interpretation of the term "engaged"; some courts define it as meaning "taking part in, participating in", see dissent in Swanson v. Provident Life Ins. Co., supra at 24, 188 N. W. at 684; others as meaning "performing or taking part in some military service . . . ," Benham v. American Central Life Ins. Co., 140 Ark. 612, 217 S. W. 462 (1919); Rex Health and Accident Ins. Co. v. Pettiford, 74 Ind. App. 507, 129 N. E. 248 (1920); Starr v. Great Am. Life Ins. Co. of Hutchinson, 114 Kans. 315, 219 Pac. 514 (1923); Myli v. American Life Ins. Co. of Des Moines, Iowa, 43 N. D. 631, 175 N. W. 631 (1919).

In Benham v. American Central Life Ins. Co., supra, where the insured died of influenza while in the military service in time of war, the court held that the exception clause "could only relate to death occurring while doing, performing or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service. In contradistinction to death while in the service due to causes entirely, or wholly unconnected with such service." Id. at 617, 217 S. W. at 464. Accord, Gorder v. Lincoln Nat. Life Ins. Co., 46 N. D. 192, 180 N. W. 514 (1920); Atkinson v. Indiana Nat. Life Ins. Co., 194 Ind. 563, 143 N. E. 629 (1924), Malone v. State Life Ins. Co., 202 Mo. App. 499, 213 S. W. 877 (1919).

The other broad type of exception clause, like that in the instant case, is described as a "result" clause rather than a "status" clause, because the liability of the insurer is made to depend on whether death occurs "as a result of" military or naval service, and not whether the insured "was a member
of” the military service in time of war. 1 Appleman, Insurance Law & Practice (1941) § 561. Courts have tended, in interpreting such clauses, to restrict the scope of the “result” clause to such hazards as are peculiar to military service. Thus where the insured’s death resulted from the accidental discharge of a gun, recovery was allowed since military service did not cause the death but was merely an “accidental incident”. Malone v. State Life Ins. Co., supra. See also Kelly v. Fidelity Mutual Life Ins. Co. of Phil., 169 Wis. 274, 172 N. W. 152 (1919); Johnson v. Mutual Life Ins. Co. of N. Y., 154 Ga. 653, 115 S. E. 14 (1922)

In the instant case, the exception clause reads “directly or indirectly from . . . (d) War or any act incident thereto”. The court points out that the obvious difference between such an exception clause, and those above discussed, is that the phrase “War or any act incident thereto”, is of a narrower scope than “service” clauses or “active duty in time of war” clauses. Here, the court was forced to decide just what risks such a clause will include, and it was held that the mere fact that insured’s death resulted from an act peculiar to military service will not be sufficient to bring the death within the exception clause, since “it must also appear that the death resulted from a hazard peculiar to war.” Hooker v. New York Life Ins. Co., supra at 317.

Since the insurer could, if it chose, exclude all deaths occurring while the insured was acting as a member of the military service, Bending v. Metropolitan Life Ins. Co., supra; Benham v. American Central Life Ins. Co., supra, effect should be given to the obvious intent not to so restrict the coverage when the insurer chooses to give a wider scope to his liability.

In Eggena v. New York Life Ins. Co., — Iowa —, 18 N. W. (2d) 530 (1945) the same exception clause was before an Iowa court for interpretation. There the insured was killed while serving as a member of an army tank crew, in training, in war time. The tank in which he was riding fell off a bridge while proceeding in a routine training convoy to a bivouac area. The court held that such a cause of death resulted directly from “War or any act incident thereto.” Acts performed while training for military combat, and peculiar to military service, may generally be held to be within such an exception clause as is here in question.

But to say that acts peculiar to military service, or acts which are an essential part of the prosecution of the war, should be resolved within the clause “war or any act incident thereto”, lays down no more definite an interpretation than if the court were interpreting a “service” clause. As is pointed out in the instant case, there is a difference which should be recognized. Thus, the bombing of a civilian town is an act peculiar to war, but is not exclusively peculiar to military service in time of war. The sinking of a belligerent country’s ship, carrying a non-belligerent country’s citizens as passengers, is an act peculiar to war, but the insured is not denied payment of an insurance policy because of the fact he was or was not engaged or enrolled in military service,
Vanderbilt v. Travelers Ins. Co., supra, but because such an act was an act of war.

While there are few cases which deal directly with this phrase, Commercial Union Ass. Co. v. Pacific Union Club, 169 Fed. 776 (C. C. A. 9th, 1909), and Pacific Union Club v. Commercial Union Ass. Co., 12 Cal. App. 503, 107 Pac. 728 (1910), afford an analogy to guide the court in reaching its decision. In both cases insured sought to recover on a fire insurance policy, which excepted loss caused “directly or indirectly by . . . earthquake. . . .” Insured's property was destroyed by fire the day after an earthquake had ruptured the city water mains. The insurer denied liability, claiming that the failure of the water mains resulted directly or indirectly from the earthquake, and therefore the insured suffered the loss as a result of the earthquake. However the court found for the insured, holding that the proximate cause of the fire was certainly not the earthquake, and that it was unreasonable to suppose that such could be the intent of the parties where the connection between the earthquake and the fire was so remote. The case of Bull v. Sun Life Ass. Co. of Canada, 141 F.(2d) 456 (C. C. A. 7th, 1944), cert. denied, 323 U. S. 723 (1944), deals with a comparable problem involving an aeronautical exception clause. The question was whether plaintiff could recover for the insured's death which occurred while he was standing on the pontoon of his plane, after being shot down by the Japanese. The exception clause excluded liability if death resulted “directly or indirectly, of service, travel, or flight in any species of aircraft, as a passenger or otherwise. . . .” The court interpreted the clause strictly on the basis of proximate and intervening cause, holding that death was caused by the bullets from guns, not from service, travel or flight, and recovery was allowed.

MARTIN L. WOLF

INTERSTATE COMMERCE—Interstate Pipeline Owned and Operated by Refining Company is Common Carrier Within Interstate Commerce Act Although It Transports Only Its Own Petroleum Products.

The Champlin Refining Company owns and operates a line of six-inch pipe five hundred and sixteen miles in length, running through five states from its refinery at Enid, Oklahoma, to its terminal stations in Kansas, Nebraska, and Iowa. Champlin pumps refined oil to the terminal points for sale, but at all times retains title to the products in transit. It has never transported, offered to transport or been asked to transport products belonging to any other company or person. The Interstate Commerce Commission acting under the Interstate Commerce Act, 24 STAT. 379 (1887), 49 U. S. C. § 19 (a) (1940), ordered the company to furnish certain data required for use in valuation of its pipe line property. Champlin objected that the Act does not authorize the
order, or that if it is construed to do so, it is unconstitutional; this contention was overruled by the Commission, and by the District Court for the Western District of Oklahoma, 59 F. Supp. 978 (1945). Held, that while the refinery is technically transporting its own oil, the oil is not being moved for Champlin's own use and is transportation within the meaning of the Act; Champlin as a statutory common carrier is required to answer the Commission's order. To hold the Act applicable is not an excessive use of the commerce powers of Congress so as to violate the due process clause of the Fifth Amendment. *Champlin Refining Co. v. United States*, 67 Sup. Ct. 1 (1946).

In an earlier case, the Supreme Court held that the operation of the Uncle Sam Oil Company in transporting its own oil from its wells to its refinery for its own use did not constitute transportation within the meaning of the Act. *The Pipe Line Cases*, 234 U. S. 548 (1914). In the instant case the company was transferring refined oil across state lines to market for sale to the public and is therefore transporting oil in commerce. An examination of Champlin's pricing methods was used to support the majority view, since the oil purchased at the terminal of the line included an amount equal to the f.o.b. price at the point of origin plus a "differential" equal to the through railroad rate from origin to the destination less carrying charges from the terminal to the final destination.

The original act to regulate commerce, proposed to correct existing evils by requiring carriers to furnish transportation at reasonable rates upon reasonable demand. *Interstate Commerce Commission v. Baltimore & Ohio R.R.*, 145 U. S. 263 (1892). It was amended by the Hepburn Amendment, 34 STAT. 584 (1906), 49 U. S. C. § 1 (1940), designedly to bring interstate transportation of oil through pipelines within its regulatory powers. In 1912, under the power of the new amendment, the Commission ordered certain oil pipeline companies to file schedules of their rates and charges for transportation. *In the Matter of the Pipe Lines*, 24 I. C. C. 1 (1912). The disputations of the affected companies resulted eventually in *The Pipe Line Cases, supra*, and the pronouncement that the control of Congress over commerce may require those who are common carriers in substance to become so in form. This was necessitated by the evasive practice of one of the leading companies of refusing to transport oil through its extensive pipeline system unless the oil was first sold to it, so that it would be merely transporting its own oil for its own use. The company could insist on this provision since it clearly monopolized the only practical means of transportation between the Rocky Mountains and the Atlantic Coast. In substance it carried "everybody's oil" and was clearly within the purview of the Act. It was also in this decision that exception was made for the practice of the Uncle Sam Oil Company.

Amendment to the Interstate Commerce Act was made again in 1920, 41 STAT. 474, 49 U. S. C. § 1 (1940), an interpretation of which is important to a consideration of the instant case.
In *Valvoline Oil Co. v. United States*, 308 U. S. 141 (1939), the Valvoline Co. owned and operated a pipe line through which it transported crude oil across a few states to its refineries. The oil was purchased from the mouth of the well from many owners and transported for refining purposes; the Supreme Court held that it was a "common carrier" within the meaning of the Interstate Commerce Act, 24 Stat. 379, 49 U. S. C. § 1 (1) (b), and (3) (1940). It further noted that in § 1 (3a) of the Act, which provides that the term "common carrier" shall include "all pipe line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire", the final clause is conjunctive, not a modifier, and does not affect the generality of the first clause as to pipe line companies. The majority in the instant case construed such language to give the Commission regulatory powers over all pipe line companies and such powers were not restricted to those common carriers in substance who purchased and carried all oil offered. The 1920 Amendment was held not to be a meaningless addition, but was meant to include all pipe line companies, despite the holding in the *Valvoline case*, supra, at 145, that "... In the present Act there is a change of language but we perceive none in meaning, ...", since the House Committee on Interstate and Foreign Commerce reported that the section under consideration recast the Hepburn Amendment into its present form but made no important change in policy. H. R. Rep. No. 456, 66th Cong., 1st Sess. (1919). Thus it would seem that the Court's ruling in the *Valvoline* case was based on the original act as modified by the 1906 Amendment, and it was the purchase from many sources and subsequent carriage that determined the applicability of the statute. The *Valvoline* case confirmed the exception of the Uncle Sam Oil Company contained in *The Pipe Lines Cases*, supra, where the Court recognized that the company, though operating a pipe line carrying oil, was not engaged in the transportation of oil as a common carrier within the purpose of the act.

The power of Congress to regulate commerce has been often demonstrated to be entirely limited by the due process clause of the Fifth Amendment, *The Pipe Line Cases*, supra; *Carrin v. Wallace*, 306 U. S. 1 (1939); *Railroad Retirement Board v. Alton R.R.*, 295 U. S. 330 (1935). Mr. Justice Jackson in the majority opinion claimed that the Commission's order to the Champlin company to supply the pertinent data for its proceedings was clearly within those commerce powers of Congress, regardless of Champlin's status as a common carrier or a private carrier. An imposition of such obligations could not be considered a taking of private property, and an inquiry into Champlin's rights under the Fifth Amendment would be too premature and hypothetical to warrant consideration in this record.

Thus in the instant case is demonstrated the skill of the courts in detecting, in seemingly private carriers, signs of a devotion to public use, and the subjection of such hybrid statutory common carriers to the regulatory powers of
federal legislation. To what extent these powers may be used by the Federal Government without violating the Constitutional protection afforded these pipeline companies will be an ever increasing problem. On a magnified scale this important growing adjunct of the nation's transportation system will be available to all shippers, as in the case of all common carriers. This is merely an early engagement in the fight to extend government control over the interstate pipelines. It is clear, however, that calling all pipe lines common carriers would be an acquiescence by the Supreme Court to the hazards of rule by legislative fiat. This might be already read in this decision by some who consider the submission of valuation reports a mere formal preliminary to rate-fixing by the Commission, but this cannot actually be inferred until such time as the Court squarely interprets the full implications of the Amendment.

JAMES G. BUTLER

STATUTES—Interstate Transportation of a Plural Wife, for the Purpose of Cohabiting with Her, is a Violation of the Mann Act.

Petitioners are members of a religious sect known as Fundamentalists. Being unable to reconcile their religious convictions with the Mormon Church's Manifesto of 1890 forbidding polygamy, they formed their own cult and practiced plural marriage. The doctrine of the sect authorizes ecclesiastical marriages by men to a second wife while the first or legal wife is still living. Each of the petitioners transported his plural wife across state lines for purposes of cohabiting with her, or aided another in transporting his plural wife for such purpose. They were convicted of violating the White Slave Traffic Act, popularly known as the Mann Act, 36 Stat. 825 (1910), 18 U. S. C. § 398 (1940), in the district court and the conviction was affirmed on appeal. Cleveland v. United States, 146 F. (2d) 730 (C. C. A. 10th, 1945).

The Act makes it an offense to transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." The petitioners admit that their conduct is violative of state laws forbidding plural marriage. They stress the family aspect of their plural marriage, with the resulting obligation to maintain homes, care for children, and other incidents of serious marriage; and they claim that their activity is not "for the purpose of prostitution or debauchery, or other immoral purpose". Held, the transportation of a woman in interstate commerce for the purpose of making her a plural wife or for the purpose of cohabiting with her as such is a violation of the Mann Act. Cleveland v. United States, 67 Sup. Ct. 13 (1946).

The principal question confronting the court was one of statutory construction. The question of freedom of religion under U. S. Const. Amend. I, providing that "Congress shall make no law respecting an establishment of re-
ligion or prohibiting the free exercise thereof”, was settled, so far as the practice of polygamy is concerned, by Reynolds v. United States, 98 U. S. 145, 164 (1878), and was not strongly urged in this petition. However, Mr. Justice Douglas, speaking for the court, rejected the petitioners’ claim that criminal intent was lacking, because of religious belief, stating: “If upheld, it would place beyond the law any act done under claim of religious sanction.”

The words “other immoral purpose” were construed by the Court in United States v. Bitty, 208 U. S. 393 (1908), which was based on a prosecution for violation of an immigration statute forbidding “... the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose. ...” 34 Stat. 899 (1907). The Court held these words embraced the importation of a concubine from England. There it was said:

“It may be admitted that in accordance with the familiar rule of ejusdem generis, the immoral purpose referred to by the words ‘any other immoral purpose’ must be one of the same general class or kind as the particular purpose of ‘prostitution’ specified in the same clause of the statute. ... But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution.” United States v. Bitty, supra at 402.

It is significant to note that this forced construction was not necessary. The statute in this case had twice been enacted without the words “or other immoral purpose”. 18 Stat. 477 (1875), 32 Stat. 1213 (1903). Necessarily the amendment of 1907 (34 Stat. 899) had purpose, and the significance of the added words, therefore, should not be limited to the preceding words under the rule of ejusdem generis.

Caminetti v. United States, 242 U. S. 470 (1917), brought the White Slave Traffic Act before the Supreme Court when the defendant transported a woman from California to Nevada to be his mistress or concubine. The argument was that the legislative history of the Act indicated that its purpose, as indicated by the title in § 8, was to reach a diabolical interstate and international trade in white slaves, the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes. The petitioner urged that the Act applied only to commercialized vice. An attempt was made to get the court to recognize the legislative history and to apply the rule of reason laid down in Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 472 (1892), where the Court said, “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers”; and added, “It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot
be within the statute." But the rule of literalness was laid down in the Caminetti case by Mr. Justice Day, who held that the statute was not to be limited to commercialized vice, but that it embraced transporting a concubine or mistress. He said,

"... when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent." Caminetti v. United States, supra at 490.

Mr. Justice McKenna wrote a vigorous dissent in the Caminetti case, stating that the words were not clear, that § 8, entitling the statute the White Slave Traffic Act, has a purpose and all parts of the statute must be considered. The term "white slave traffic" in his opinion was axiomatic and there was no uncertainty of the conduct it described, viz. commercialized vice, immoralities having a mercenary purpose.

The rationale of the dissent of Mr. Justice McKenna, who was joined by Mr. Chief Justice White and Mr. Justice Clarke, has been the argument in several cases since that time, including the instant case, and has been the basis for a tendency upon the part of members of the Court to limit, if not overrule, the Caminetti case.

Mr. Justice Murphy, writing the opinion in Mortensen v. United States, 322 U. S. 369 (1944), 33 Georgetown L. J. 114, indicated that tendency. There it was held that the transporting of two prostitutes on an interstate trip, as a vacation unconnected with their profession, was not within the Act even though such transportation involved returning the women to the brothel. It was said:

"We do not here question or reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have a similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions 'are liable to furnish boundless opportunity to hold up and blackmail and make unnecessary trouble without any corresponding benefits to society'. Mortensen v. United States, supra, at 376.

An alleged conflict between that case and the decision in the lower court in the instant case probably prompted the Court to grant certiorari.

The result reached in the subject case is in line with the troubled history of the litigation on the Act. Mr. Justice Black and Mr. Justice Jackson dissented on the grounds that it is an unwise extension of the Caminetti rule.
Mr. Justice Rutledge concurred only because he thought to do otherwise required the overrule of the Caminetti case, which the Court refused to do. Mr. Justice Murphy dissented on the grounds that the case misapplied the language of the act and disregarded the intention of the legislature. He further reasoned that under the rule of *ejusdem generis*, admitted by the majority of the Court, polygamy as a form of marriage is not in the same class as prostitution and debauchery.

The case indicates that the intimation in the Mortensen case, that the court might overrule the Caminetti case, was not well founded. The Court here adhered to the holdings of that case saying that the Act, while primarily aimed at the use of interstate commerce for the purpose of commercialized sex, is not restricted to that end. Therefore, the Caminetti case as extended by this case, will continue to be the classic example of literalness in statutory construction.

ROBERT W. BARKER

TAXATION—Where Income of Trust Is Impressed with Trust as It Arises, It Does not Represent Gift from Grantor Even Though It Is Taxable to Him as Income.

The Commissioner included as taxable gifts made by the petitioner the net gains and profits from marginal trading in securities and grain futures realized from 1936 through 1941 by two trusts created by petitioner and his wife for the benefit of their three children. The trusts were alike in all material aspects. Both trusts were irrevocable, none of the income or principal of the trusts could ever revert to the petitioner, and he retained no right to alter, to amend or to change the beneficial interests. The corpus of the trusts consisted of trading accounts set up on the books of a brokerage business regularly carried on by a partnership consisting of the petitioner, his wife and his children. The net worth of the accounts during the years involved was far more than was necessary to provide the margin required for the trading carried on in the accounts. The Circuit Court of Appeals for the Tenth Circuit, in *Hogle v. Commissioner of Internal Revenue*, 132 F.(2d) 66 (C. C. A. 10th, 1942), held that the income from marginal trading realized by the trusts in the years 1934 through 1937 was taxable to the petitioner because it was directly attributable to the voluntary exercise by him of his personal skill in trading for the account of the trusts. *Held*, the legal title to the amounts in question was never in the petitioner and was never transferred by him to the trusts; the profits were impressed with a trust when they first came into existence and the trust did not merely attach after they had come into existence, and hence the petitioner could not be held liable for a gift tax on such amounts. *Hogle v. Commissioner of Internal Revenue*, 7 T. C. No. 114 (1946).
The integration of the income, estate, and gift taxes of the Internal Revenue Laws has been a source of much litigation before the federal courts. Commissioner of Internal Revenue v. Prouty, 115 F.(2d) 331 (C. C. A. 1st, 1940); Commissioner of Internal Revenue v. Beck's Estate, 129 F.(2d) 243 (C. C. A. 2d, 1942); Higgins v. Commissioner of Internal Revenue, 129 F.(2d) 237 (C. C. A. 1st, 1942); Commissioner of Internal Revenue v. Marshall, 125 F.(2d) 943 (C. C. A. 2d, 1942); Herszog v. Commissioner of Internal Revenue, 116 F.(2d) 591 (C. C. A. 2d, 1941). Repeatedly, when confronted with these cases, the courts have stated "that the interrelation of the income, estate, and gift taxes presents many puzzling problems which deserve the attention of Congress." Commissioner of Internal Revenue v. Prouty, supra at 337. "... without further aid from Congress it is perhaps impossible for the courts to work out a complete integration of the three taxes." Higgins v. Commissioner of Internal Revenue, supra at 239.

In the case of Commissioner of Internal Revenue v. Beck's Estate, supra, the grantor created an irrevocable insurance trust by transferring securities and seven insurance policies on his life to the trustee; the income of the trust was to be used to pay the premiums on the insurance and at the death of the grantor the proceeds of the policies were to become a part of the corpus. In computing the gift tax liability on the transfer in trust, the grantor deducted the capitalized value of the income necessary to pay the insurance premiums during his life expectancy, on the ground that he was required to include that portion of the trust income within his taxable income, by virtue of § 167(a) of the Revenue Act of 1934, 48 Stat. 729, 26 U. S. C. § 167(a) (1940). In holding the grantor liable for a gift tax on the amount deducted by him, the Second Circuit stated: "... there was no Congressional intention completely to integrate the income, gift and estate tax." Commissioner of Internal Revenue v. Beck's Estate, supra at 246.

In the instant case, the majority, through Murdock, J., pointed out that in Hogle v. Commissioner of Internal Revenue, 132 F.(2d) 66 (C. C. A. 10th, 1942), the court, though holding that the income accruing to the trust from marginal trading was taxable to the petitioner, "recognized that all of the income realized in the accounts was realized as the income of the trusts and not the income of Hogle." Stressing further that the court in the first Hogle case was discussing the taxability of the income derived by the trust, and that Hogle was "the owner of the corpus" under the "statutory scheme" portrayed in Helvering v. Clifford, 309 U. S. 331 (1940), the majority concluded that the Clifford case was not "... authority for the proposition that, by allowing the profits to remain the property of the trusts, the grantor thereby made a gift of those profits to the trusts." The Supreme Court in that case recognized the grantor's disability to make a gift of the corpus to others during the term of the trust, although he was the owner of the corpus for the purpose of "the broad sweep" of Int. Rev. Code § 22(a) (1942). Here, too, though Hogle was the owner...
of the income for the purposes of §22 (a), he was precluded from making a gift of the income to others during the term of the trust. It is the command of the taxpayer over the income which is the concern of the tax laws, Harrison v. Schaffner, 312 U. S. 579 (1941), and although he was instrumental in earning the income, after it had been earned and had accrued to the trust, (which under the majority opinion it did as soon as it arose) the petitioner could in no manner exercise command over it, under the terms of the trust agreement.

The court differentiated the case from Lucas v. Earl, 281 U. S. 111 (1930), where, under an agreement between Earl and his wife, his earnings were to be considered as having been received and owned by him and his wife as joint tenants. There, the Supreme Court did not say that the salary did not vest in Earl, but held it taxable to him because he earned it, even if it never vested in him. The majority in the subject case pointed out that here the profits vested as realized in the trusts, not in Hogle, and he could not make a transfer of them by gift. In the imposition of a gift tax, there is no statute such as § 22(a), having such a broad sweep as to require the courts to look behind the legal arrangements and situation to find another ground on which to hold the grantor liable for the gift tax.

Voicing the dissent of five judges, Black, J., argued that the gift tax should be imposed. Of the trusts in question, one had been created in 1922 and the other in 1932. When the Copley trust was created in 1922, no gift tax law was in effect. The minority contended that even if there had been a gift tax law then in existence, no gift tax could have been imposed upon the creation of the trading accounts, because any gift thus made, from the standpoint of substance, was inchoate and imperfect; that only in later years, when petitioner operated the trading accounts and profits were made, were the gifts complete and taxable under the rule of Burnet v. Guggenheim, 288 U. S. 280 (1933), that a gift tax is imposed in the year when the gift becomes complete. Emphasis was placed by the minority on the fact that in the first Hogle case, the court said that, in substance, Hogle gave to the trusts in each of the years there in question the profits realized from a designated portion of his individual efforts, which amounted to a voluntary assignment of a portion of his personal earnings, and that therefore, a completed gift had been made in each year when income accrued to the trust. The majority, however, in its opinion, stated: "They (the parties) have stipulated that the items in dispute are 'the net gains and profits realized from marginal trading in securities and from trading in grain futures for the account of two certain trusts.' This, in effect, is a stipulation that the gains and profits were the gains and profits of the trusts as they were realized."

Generally, when an irrevocable trust is created and the grantor retains powers to control the income therefrom as to distribution, changes in the beneficial interests, or the investment of the income, that income is held taxable to him under § 22(a) of the Int. Rev. Code (1942) and no gift tax is payable until
that control is relinquished by the grantor, making the gift complete at that point for gift tax purposes. *Commissioner of Internal Revenue v. Prouty*, supra. In the instant case, however, the petitioner retained no control over the income after it accrued to the trusts; he retained no power to change the beneficial interests nor any control over the distribution of the income or corpus during the term of the trust.

The widely divergent views of the majority and the minority of the Tax Court in the instant case amply demonstrate the need for some clear-cut legislative statement of policy.

JOHN J. MYERS

TORTS—New York "Right of Privacy" Statute Held Not to Apply to Narration Alleged by Plaintiff to be a Portrayal of Himself.

Plaintiff sued both the author and the publisher of the novel and play "A Bell for Adano". He contended that the narration describing "Major Victor Joppolo", the central figure of the story, related in the main to acts and events of and concerning the plaintiff when he was an officer of the American Military Government in Sicily. Plaintiff termed this narration, a "portrayal" of himself and an exploitation of his personality and claimed that this portrayal violated the New York Civil Rights Law § 51, which prohibits the use of the name, portrait, or picture of any living person without his prior consent, for advertising purposes or for the purposes of trade. Neither the name nor the picture of the plaintiff was used. *Held*, that the statute was not intended to give a cause of action merely because the actual experiences of a living person had been similar to the narration of acts and events concerning a figure designated fictitiously in a novel or play. *Toscani v. Hersey*, — App. Div. —, 65 N. Y. S. (2d) 814 (1st Dep't 1946).

The existence of an independent legal concept known as the right of privacy was first heralded by Professors Warren and Brandeis in their legendary article, *The Right to Privacy* (1890) 4 Harv. L. Rev. 193. Prior to 1890, Judge Cooley had originated the phrase "the right to be alone", Cooley, Torts (2d ed. 1888) 29; and the English courts had in effect recognized this right in *Prince Albert v. Strange*, 2 De G. & S. 652, 697, 64 Eng. Rep. R. 293, 312 (Ch. 1849) and in *Gee v. Pritchard*, 2 Swans. 402, 36 Eng. Rep. R. 670 (Ch. 1818), but no court either in that country or in America had granted a judgment clearly based upon the invasion of the right of privacy.

Today eighteen American jurisdictions appear to have accepted the doctrine announced a half century ago by Warren and Brandeis.

(2d) 80 (Ch. 1940). However, in the entertaining case, Kerby v. Hal Roach Studios, 53 Cal. App. (2d) 207, 127 P. (2d) 577 (1942), the court did not rely upon the constitution yet granted the plaintiff relief.

Two states have established the "new tort" by legislation. N. Y. CIVIL RIGHTS LAW §§ 50, 51; UTAH REV. STAT. (1933) §§ 103-4-7 to 103-4-9. The Utah statute is notable for extending the protection of the right of privacy to "public institutions" and to relatives of deceased persons. There is also a Federal statute which protects privacy to some extent by providing that no portrait of a living person may be registered as a trade mark, except by the consent of such person. 33 Stat. 726 (1905), 15 U. S. C. § 85 (1940).


In three other states the existence of a right of privacy has been recognized by courts below those of last resort. Blazek v. Rose, unreported, printed in POUND and CHAFFEE, CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY (1930) 138 (Cir. Ct. Cook County, Ill. 1922); Friedman v. Cincinnati Local Board, 20 Ohio O. 473 (C. P. 1941); Clayman v. Bernstein, 38 Pa. D. & C. 543 (C. P. 1940).

Rhode Island is the sole American jurisdiction which today expressly denies the existence of a legal remedy for invasion of the right of privacy. Henry v. Cherry & Webb, 30 R. I. 13, 73 Atl. 97 (1909); Notes (1942) 138 A. L. R. 22, 27.

A famed precedent for the decision in the Henry case, supra, was Robertson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902). There the Court of Appeals held that the right of privacy did not exist in the State of New York. The opinion stressed the absence of precedent and the likelihood that a vast amount of litigation would follow a common law recognition of this new concept. The court, however, did suggest that the legislature could "... provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent." Id. at 545, 64 N. E. at 443. Language strikingly similar to this recommendation was used in the statute, which was enacted a year later and which is now §§ 50, 51, of the Civil Rights Law. This statute was declared constitutional in Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223,
85 N. E. 1097 (1908), aff'd., 220 U. S. 502 (1911), and as illustrated by Dache v. Abraham & Strauss, Inc., 39 N. Y. S. (2d) 981 (Sup. Ct. 1942), an action in New York predicated upon an invasion of one's right of privacy is now wholly statutory.

The courts have stated that the statute might apply where a stage name is used, Gardella v. Log Cabin Products Co., 89 F. (2d) 891 (C. C. A. 2d, 1937); or where a wife's maiden name is used, Bailey v. Bloomingdale Bros., 103 N. Y. L. J. 1533:3 (April 4, 1940); and the courts have held that where a picture is used it need not be an exact reproduction, Loftus v. Greenwich Lithographing Co., 192 App. Div. 251, 182 N. Y. Supp. 428 (1st. Dep't. 1920); and even that there can be a violation of the statute where the plaintiff's name has been coupled with a picture of an actor made up to represent the plaintiff, Binns v. Vitagraph Co. of America, 210 N. Y. 51, 103 N. E. 1108 (1913); but it has been decided consistently that the statute applies only where there has been an identification of the plaintiff, Pjaudler v. Pjaudler Co., 114 Misc. 477, 186 N. Y. Supp. 725 (Sup. Ct. 1920); and no case has ever held that there could be identification sufficient to violate the statute where neither the name nor the picture of the plaintiff was used.

Binns v. Vitagraph Co., supra, was relied upon by the plaintiff in the instant case. John Binns was the first person to use wireless to broadcast distress signals at sea. The Vitagraph Company published a picture, largely fictional, but based upon true experiences in the life of Binns. The name, John Binns, was used in the scenario and in the advertising and an actor was made up to impersonate Binns. The court awarded a judgment under the New York statute. The opinion included this statement: "A picture within the meaning of the statute is not necessarily a photograph of the living person but includes any representation of such person." Id. at 57, 103 N. E. at 1110.

Toscani argued in the reported case that this statement indicated an interpretation of the statute broad enough to include a word portrayal of the events in the life of an actual person even where fictitious names appear and no picture or similar likeness is used. The court, speaking through Judge Callahan, answered this contention by declaring that studied in conjunction with the facts involved and with the opinion as an entity the statement relied upon merely held that where a person's name is used, coupled with a picture of an actor represented to be a likeness of that named person, the statute may be violated even though the person posing for the picture was not in fact the person named. This holding obviously could not aid Toscani who was not named in "A Bell for Adano" and whose picture or similar likeness was not used.

The decision in the principal case observes the requirement that the person must be identified by name or by picture and continues the protection of the New York courts from the deluge of litigation feared in the Robertson opinion.

FRANK FORVE
TRUSTS—Under Pennsylvania Rule, Apportionment Between Life Tenant and Corpus May Be Made After Sale of Only Part of Stock Received in Merger, But Apportionment Must Be Limited to Shares Sold.

Under a testamentary trust of one Willis King, the trustee held certain cumulative preferred shares and certain $100 par value common shares of a steel manufacturing corporation. The corporation effected a reorganization and merger with two of its wholly owned subsidiaries in 1941 when the cumulative preferred shares had arrearages for dividends, undeclared and unpaid. Under the reorganization plan, the trustee received preferred shares in the new corporation of equal par value to the preferred shares in the old corporation. He also received one and one-quarter shares of new no-par common stock for each preferred share previously held. The additional common stock was to compensate for eliminated accrued dividends on the old preferred shares, according to the corporation letter recommending approval of the proposed reorganization plan. The trustee exchanged, on a share for share basis, the $100 par value common shares in the old corporation for no-par common shares with a stated value of $25. The common stock given preferred shareholders by the reorganization plan was not newly subscribed capital nor did it decrease surplus; it was contributed by the common stockholders of the old corporation when they agreed to the reorganization plan which increased the number of common shares in the new corporation over the outstanding issue of the old corporation without increased capitalization. The change in common stock from $100 par value to no-par value stock with a stated value of $25 provided the legal means for increasing the number of common shares with no change in capitalization or surplus. After the trustee received the new stocks and before any sale was made of either class of stock, the life tenant demanded that the trustee arrange an apportionment. The refusal of the trustee to grant an apportionment was appealed to the Orphans Court of Allegheny County and to the Supreme Court of Pennsylvania. The Supreme Court's opinion, in upholding the lower court, refused to order an apportionment until (1) the increased value is distributed by a cash dividend; (2) distributed as a stock dividend; (3) a corporate liquidation and distribution of assets; (4) a sale of the stock.

The life tenant asked the court to consider the affect upon her case of the Uniform Principal and Income Act, May 3, 1945, P. L. 416 § 15, 20 P. S. §§ 3471-3485, which became law in Pennsylvania after the initiation of the action. The court refused to consider the provisions of the Act or their effect because it was foreclosed by the Statutory Construction Act of May 28, 1937, P. L. 1019, art. iv, § 56, 46 P. S. § 556 from applying an act retroactively unless clearly and manifestly so intended by the Legislature.

Subsequent to the appeal, the trustee sold part of the preferred shares and part of the common shares. The life tenant again demanded an apportion-
ment. The Orphan's Court again refused an apportionment until all the shares were sold. Another appeal was taken to the Supreme Court of Pennsylvania. Held under the Pennsylvania rule of apportionment, an apportionment between life tenant and corpus may be made after the sale of only a part of the stock received in a merger but the apportionment must be limited to the shares sold. In re King's Estate 355 Pa. 64, 48 A.(2d) 858 (1946).

The Pennsylvania rule for apportionment, which does not function mechanically as do the Massachusetts and Kentucky rules, has been a fertile source of litigation since it was laid down in Earp's Appeal, 28 Pa. 368 (1857). A broad statement of the rule is that on distribution, a life tenant is entitled to receive accumulated profits and earnings except where necessary to preserve the intact value of the corpus of the trust. In re King's Estate, supra. "Intact" value in the case of corporate stocks includes the par value of the stocks plus any accumulation of interest before the death of the testator. In re Waterhouse's Estate, 308 Pa. 422, 162 Atl. 295 (1932); In re Flinn's Estate, 320 Pa. 15, 181 Atl. 492 (1935). Intact value is so called because it is the value that is to be kept untouched for the remainderman throughout the various distributions of earnings during the life of the life tenant. In re Waterhouse's Estate, supra. The Massachusetts rule regards cash dividends, however large, as income, and stock dividends, however made, as capital. Talbot v. Müliken, 221 Mass. 367, 108 N. E. 1060 (1915). This means, in general, that all cash dividends are awarded to the life tenant and all stock dividends to the remainderman. The courts which have followed this rule have admitted that it is a rule of expediency and not of logic. 4 Bogert, Trusts (1st ed. 1935) § 843. Under the Kentucky rule, a dividend, whether of stock or cash, goes to the person entitled to receive the income at the time the dividend is declared without regard to the time it was earned. Cox v. Goulbert's Trustee, 148 Ky. 407, 147 S. W. 25 (1912).

In the instant case, the trustee held common shares as well as preferred shares before the reorganization and received additional common shares under the reorganizational agreement. The fact that the common share holders contributed the shares given to the preferred shareholders by the reorganization had the effect of depressing the book value of the common shares. In order that the intact value might be preserved for the trust, it was necessary that the court require a conversion into cash of some, or all, of the shares received in the merger before an apportionment of the profit could be ordered. Merger is not a sale or liquidation of corporate property, but consolidation of property, powers, and facilities. In re Daily's Estate, 323 Pa. 42, 186 Atl. 754 (1936). The court required a sale or conversion of some sort in the first appeal of the King's case, 349 Pa. 27, 36 A.(2d) 504 (1944).

The trustee in In re Fisher's Estate, 344 Pa. 607, 26 A.(2d) 192 (1942), held only accumulative preferred share of a corporation which effected reorganization. The reorganization gave to each preferred shareholder one and
four-tenths preferred shares of the new stock for each one share of the old stock. The shares given to the preferred shareholders were in compensation for the accumulated and undeclared dividends and were supplied by the contribution of the common shareholders. The life tenant demanded apportionment and the Supreme Court of Pennsylvania awarded to the life tenant all of the preferred shares which were given to the trustee over and above the number held by the trust before the reorganization. The reasoning of the case was that an exchange of preferred shares for new preferred shares of equal par value has no effect upon the intact value of the trust so long as the preferred capital of the corporation before and after the reorganization is not impaired.

In a vigorous dissenting opinion by Mr. Justice Jones in the second In re King's Estate, supra, the claim is made that the reasoning of the Fisher case, supra, must apply to the King's case because again preferred shares were exchanged for preferred shares of equal par value. The dissenting opinion does not take into account that in the King's case the trustee held two classes of stock in the corporation and that the additional stock given to preferred shareholders in the reorganization was contributed by the common shareholders of which the trustee was one. If the Fisher case holding were followed in the King's case it would amount to treating each class of stock in the trust fund as an entirely unrelated unit from each other class of stock of the same corporation. The holding of the majority of the court in the second King's appeal is in accord with the Pennsylvania rule of apportionment and shows that when a trust includes two classes of stock in the same corporation which have been received in the same transaction, the two classes must be treated as a single unit in preserving the intact value of such stocks.

A judicial recognition of the difficulty attending the application of the Pennsylvania Rule of Apportionment was made by Mr. Justice Stearne when, in the first appeal of the King's case, 349 Pa. 27, 29, 36 A. (2d) 504, 505 (1944), he said, "There is probably no more difficult and intricate branch of the law than the application of what is termed the Pennsylvania, or American, Rule of Apportionment." Undoubtedly it was in an effort to simplify the duties of a trustee and to reduce the number of litigations arising from trusts that the Legislature of Pennsylvania adopted the Uniform Principal and Income Act, May 3, 1945, P. L. 416 § 15, 20 P. S. §§ 3471-3485.

ROBERT SULLIVAN
VETERANS—Provisions of the Selective Training and Service Act of 1940 Compelling Reemployment of Veteran Held Inapplicable to President of Insurance Company Because Position Is Elective.

Plaintiff, a director of the Texas State Life Insurance Co. and also its president at an annual salary of $4800, was inducted in April, 1942. He received a certificate of completion of duty in December, 1945. At his request, the United States District Attorney brought action to compel the insurance company to reemploy him as provided in the Selective Training and Service Act, 54 Stat. 890, 50 U. S. C. App. § 308 (1940). Held, that the court had no power to interfere with the right of the stockholders to elect a president annually as provided in the charter of the corporation and under the insurance laws of the state of Texas. The situation was therefore held to be "unreasonable" under the terms of the Act which provides for a denial of reemployment where "... the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 54 Stat. 890, 50 U. S. C. App. § 308 (b) (B) (1940). Houghton v. Texas State Life Ins. Co., 68 F. Supp. 21 (N. D. Tex. 1946).

Congress expressed the purpose of the Selective Training and Service Act of 1940 in Section 301 (a) and (b).

"The Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

"The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."

In the light of Section 308, which provides for the reemployment of a veteran who has left his position and after serving has received a certificate of completion of duty, the desire of the legislature evidently was to balance the duty of military service with a beneficial right.

The purpose of the Act has been declared at greater length and in greater detail by the courts to which it was left for interpretation.

In Hall v. Union Light, Heat and Power Co., 53 F. Supp. 817 (E. D. Ky. 1944), the court explains the purpose as being the desire to safeguard the jobs of those required to enter military service and to return them to their status quo ante so as to minimize, wherever possible, their sacrifices. The court in Droste v. Nash-Kelvinator Corp., 64 F. Supp. 716 (E. D. Mich. 1946), goes even farther in its statement that the Act does more than return the veteran to a status quo, giving him the right, in addition, to be placed in the relative position he would have attained. Dacey v. Bethlehem Steel Co., 66 F. Supp. 161 (D. Mass. 1946) states that those whose skills have become blunt because of war service should have the opportunity to resharpen them by actual usage in the course of regular employment under the former em-
employer. Along the same line, Kay v. General Cable Corp., 144 F. (2d) 653 (C. C. A. 3d, 1944), holds that the veteran should be rehabilitated under his former employer in order that he may enter a highly competitive world of job finding without the handicap of a long absence from work. In addition he should have a year of financial security.

If such is the purpose of the Act, what are the boundaries as to its scope within or without which the holder of an elective position must stand?

The controversial section of the statute to which the courts have turned in seeking the intent of the legislature demands that the veteran seeking re-employment be one who "... has left or leaves a position, other than a temporary position, in the employ of any employer. ..." 54 Stat. 890, 50 U. S. C. App. § 308(b) (1940).

The same section also demands that "... such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. ..." Ibid.

In regard to the phrase, "... in the employ of any employer", the courts seem to be striving for a boundary for the scope of the Act and the one found seems to include labor and even management up to the border of those positions essentially elective, executive and controlling. Kay v. General Cable Corp., 144 F. (2d) 653 (C. C. A. 3d, 1944), holds that the medical director of a corporation is entitled to his former position under the Act, stating that it includes employees in superior positions and those whose services require special skills and that with the exception of temporary workers and independent contractors almost every other kind of relationship is included wherein one renders to another regular and continuous services. Independent contractors are without the scope of the Act. Frank v. True-Vue, Inc., 65 F. Supp. 220 (S. D. Ill. 1946).

A golf professional whose services were subject to the satisfaction of the board of directors which also retained the right of discharging him on notice was held to have "a position in the employ of any employer"; the court commented in addition that many situations come under the terms of the Act which would not come within the orthodox definition of the word "employee". MacMillan v. Montecito Country Club, Inc., 65 F. Supp. 240 (S. D. Cal. 1946).

In McClayton v. W. B. Cassell Co., 66 F. Supp. 165 (D. Md. 1946), we find a situation comparable to the principal case in which the plaintiff, a vice-president of the company and a member of the board of directors, was held to have a position beyond the scope of the Act. The court held that the duties of an officer of a corporation were so entirely connected with management that he was not in the ordinary sense an employee of the corporation and referred to Shriver v. Carlin and Fulton Co., 155 Md. 51, 141 Atl. 434 (1928), which held that an officer of a corporation is only an employee "... where
the duties and incidents of his employment are separate and distinct from those pertaining to his office."

Is such a position without the scope of the Act because as an elective position it is necessarily temporary? In Fraser v. Shoberg, 65 F. Supp. 83 (E. D. Wash. 1946), the position of an elective officer of a local labor union was held to be a temporary one and the court refused to compel the union to reinstate him in such a position, his term of office having expired while he was in the military service. In McClayton v. W. B. Cassel Co., supra, it was held that the plaintiff's elective position was not temporary; however, the court leaned heavily on the fact that plaintiff had been associated for many years with the company and had held the same position for several years.

What power has the court to interfere with previously existing law in order to carry out the Act? Mr. Justice Douglas, speaking for the Supreme Court in Fishgold v. Sullivan Dry Dock Co., 66 Sup. Ct. 1105 (1946), held the Act gives no authority to supersede a contract with reference to seniority in order that a serviceman may insist on a seniority status greater than that provided by the contract. Fraser v. Shoberg, supra, holds that nothing in the Act provides for nullifying the by-laws and the constitution of a union in regard to reinstating an elective officer in his position after his term of office has expired. Dacey v. Trust Funds, Inc., 66 F. Supp. 321 (D. Mass. 1946), held that the plaintiff was entitled to be returned to a position which would give him a salary comparable to what he would have had if he had not entered the military service but held also, as does the principal case, that the court had no authority to reinstate him in an elective position because it could not so grossly usurp the power and right of the stockholders.

Whether an elective position is temporary within the meaning of the Act, and therefore outside the purview of the Act depends on the facts of the particular case; however, even though the scope of the Act has been held to extend well into the field of management, elective positions are beyond the established boundary and without its scope. For this reason, there is no authority in the courts to interfere with the rights of the stockholders to elect their officers.

FRANCIS P. LINENDOLL

This book is designed to furnish the basic materials for a law school course designated by the authors as "legal method". It envisages an introductory course in the study of Anglo-American law to teach the student how to study law. Students and teachers of law have long deplored the system which simultaneously subjected students to a number of courses involving both substantive and procedural law, leaving to chance the acquisition of a minimum of understanding of legal method. The purpose of any such introductory and orientation course is to lessen the fumbling period in the life of the student and to lead to an early acquisition of understanding, knowledge and appreciation of the professional techniques as related to law and its study.

The materials selected by the authors to attain their objectives fall into four parts:

(a) The forms and characteristics of law and the main divisions thereof.
(b) How to study case law.
(c) How to study statutory law.
(d) The processes of legal reasoning and its pitfalls.

The physical material set forth consists of text by the authors and excerpts from text books, legal periodicals, statutes and reported decisions. Each chapter is preceded by an outline of the material following. Likewise, many chapters and cases are followed by quiz sections designed to aid the student in his study and serve as a measure of his knowledge with respect to the particular subject matter. This material is grouped under the following chapter headings: The Sources and Forms of American Law; The Reading of a Case; The Study of Law via the Study of Decisions; The Authority Hierarchy of Tribunals; The Finding of Case Law; Interpretation of Statutes; Coordination of Judge-Made and Statute Law; Some Characteristic Differences between Case Law and Legislation; Legal Reasoning in Judicial Precedents; and The Law As a System.

One feature of the materials is a sequence of cases presenting chronologically the development of the present doctrine of the liability of a seller or manufacturer of goods to one injured by the product. This
sequence is designed "... to present an analytical and historical synthesis of a body of legal doctrine."1

There are several additional noteworthy features about the materials presented, but it appears sufficient to say in conclusion that this book fills a need long recognized by law teachers. The material and its arrangement are sufficiently flexible to meet the vagaries of teachers and curriculum.

CHARLES V. KOONS*


As the authors point out, the applicability of established legal concepts to aviation is not altogether "putting new wine in old bottles". In the same manner as the general use of the automobile gave rise to new problems in the application of established principles of law, so also will the general use of aircraft result in similar problems. The authors of this book have concluded that the time has come when certain general premises with respect to the law as applied to aviation can be correlated for study by students and lawyers. It is questionable whether that time has yet arrived, but it is not to be questioned that the time will arrive in due course. As in every field of the law, however, some pioneer has to break ground by attempting to compile the authorities. So must the same pioneering efforts be made in the law of aviation. Such pioneering efforts are the foundation upon which can be built the ultimate compilation of legal precedents.

The title of the work is not too apt, but it is provocative. It is the inclusion of certain chapters in the book which makes the title too narrowly descriptive, but such a defect can be readily overlooked when the pioneering character of the work is appreciated. The authors attempt to cover in this book all of the nonregulatory phases of aviation law. These are the aspects which are all too often overlooked until the prevalence of litigation makes such a work popular. These are also the phases of aviation law which are difficult to find in the various guides to case law which a lawyer customarily uses. In the sense that they have provided a starting point for lawyers having cases involving aviation in

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1P. viii.
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other than its regulatory aspects, the authors have done a great service to the profession.

In developing their thesis that there is a "business law of aviation", the authors have first attempted to demonstrate the scope of the federal and state power over aviation in its various forms. Secondly, they have included a good chapter on the power of the state to tax aircraft and other instrumentalities of flight, whether owned by private individuals or common carriers. Other chapters dealing with trespass, nuisance, common law liability of common carriers, contracts, bailments, and penalties and crimes are all well done and properly regarded as a part of the "business law of aviation". Certain sections of the chapters dealing with municipal corporations and eminent domain, however, cover problems too narrow to be of interest to the bar as a whole. There is no objection to the inclusion of these sections, but they do not conform to the avowed purpose for which the book was written. The chapters on insurance and workmen's compensation are surplusage because both involve the interpretation of particular and peculiar words of insurance policies or statutes. It is extremely difficult to sustain the proposition that the interpretation of language dealing with aviation found in insurance policies is a matter of general law. It is no more a matter of general law than is the interpretation of particular words of any other contract. Certainly the meaning of words and phrases is important to a lawyer, but the manner in which a court may interpret words in an insurance contract does not involve any general principle of law. The same thing can be said for cases interpreting the provisions of state workmen's compensation laws which are probably not exactly alike in any two states of the Union.

The fact that the law of aviation has not yet crystallized is demonstrated by the fact that the two chapters on eminent domain and trespass are now inadequate in so far as they fail to include any reference to the recent decision of the United States Supreme Court in *United States v. Causby*, 66 Sup. Ct. 1062 (1946), wherein the Court held that the United States Government, in owning an airport and in operating its aircraft to and from it in such a way as to interfere with an adjoining landowner's reasonable use of his property, could be held liable under the Fifth Amendment of the Constitution for just compensation for the taking of property. The *Causby* case is certain to provoke considerable litigation which may cause the authors to revise substantially their chapters on eminent domain and trespass. Moreover, it would seem that the chapter dealing with International Aspects should contain some
mention of the so-called Chicago Convention of 1944, in which the United States and numerous other countries participated, and which established the machinery for the promulgation of uniform rules and regulations governing international flights.

As a whole, the authors are to be commended for doing a good job of pioneering in a field which has never been adequately pioneered before. Their book would seem to be particularly appropriate for use in a college or law school course on aviation law because the authors have included in each chapter, before the case material, a narrative discussion of the particular principles of law involved. The book is highly recommended for such a use, and for use as a handbook for any lawyer who is frequently called upon to advise clients with respect to the non-regulatory aspects of aviation.

GERALD P. O'GRADY*


Professor Glueck has divided his brief book into seven chapters which indicate the major topics under consideration. In Chapter I he discusses the issue: "Is there a rational and just basis for this regarding of a war of aggression . . . as an international crime?"1 If so, who is the criminal, the State or its leaders? In his second chapter, The Briand-Kellogg Pact and Aggressive War, the author concludes: "But the fact that the contracting parties to a treaty have agreed to render aggressive war illegal does not necessarily mean that they have decided to make its violation an international crime."2 Thereafter, in Chapter III, Aggressive War as an International Crime, Professor Glueck seeks to establish penal sanctions for the act of waging aggressive war. Chapter IV, Acts of State, finds the author still wrestling with the law as it is, and seeking to show what it ought to be according to his lights. Are Individuals Liable under International Law?, Chapter V, is answered in the affirmative by Professor Glueck, although his view differs markedly from that of the orthodox writers on the subject. He then asks himself, in Chapter VI, Are the Nuremberg Proceedings Illegal?; then there are Some Concluding Observations, Chapter VII.

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1P. 4.
2P. 21.
Professor Glueck has made a determined effort to demonstrate that international law, the subjects of which are the States of the international community, now extends to individual persons. He attempts to adduce a respectable body of precedent, including the classic case of Respublica v. DeLongchamps.\(^3\) It would appear, however, that that case is indicative of the fact that criminal courts are called upon to punish criminals, and that parts of international law are or may be incorporated in the municipal law of a given country.

Thereafter, the author discusses violations of the laws of war and seeks to draw analogies which, however, are far from convincing. We have Professor Glueck's word for it, though, that the argument that prosecution for the international crime of aggressive war is necessarily ex post facto because no world legislature has previously spoken, is specious. Yet two distinguished representatives of the United States, Messrs. Lansing and Scott, whose competence in the field of international law (as distinguished from penology) cannot be seriously questioned, developed this thesis during the conference at Versailles, basing their argument on United States on.\(^4\)

The author mentions the existence of common law crimes which have no specific statutory recognition, and seeks to extend that doctrine to the law of nations. In his discussion of acts of State, Professor Glueck reaches the conclusion that it “is simply bad law”, and should be replaced with “good law”.\(^5\) But who determines what is “bad” and what is “good” law? Apparently, Professor Glueck!

Actually, the conclusion the reader may be expected to reach is that Vae victis! is the real answer.

WALTER H. E. JAEGGER*

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\(^{1}\) Dall. 111 (U. S. 1784).
\(^{2}\) Cranch 32 (U. S. 1812).
\(^{3}\) P. 59.

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