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## PROBLEMS IN THE PREVENTION OF "RUM-RUNNING"

Proceedings in the federal courts having to do with the prevention of the smuggling of liquor into the United States are divisible into two main classes: criminal actions having as their aim the punishment of the smugglers, and libels for forfeiture of

liquor-ships and their cargoes.[1] In both forms of action two difficult problems are submitted to the courts: first, whether there is jurisdiction over the subject matter; and second, whether the evidence shows a crime against the United States.[2] In solving these problems the results reached have been widely divergent and a great variety of opinion as to the grounds upon which the decisions should be placed has been displayed. If those of the opinions be sound which the writer believes so to be, then there is need of immediate Congressional legislation. But whatever be the sound opinions there is need of an authoritative Supreme Court decision to settle a number of doubtful points and to inform the enforcement officials what acts are prerequisite to securing a conviction or a forfeiture.

A number of statutes are in existence under which (supplemented when necessary by claims of "inherent" powers) indictments and libels are at present framed.[3] There is first the National Prohibition Act.[4] But since this has been held not to authorize proceedings *in rem* against the vessel and cargo until the conviction of the personal defendant has been secured,[5] it has been found less convenient[6] for the framing of libels than certain sections of the Tariff Act of 1922[7] forbidding the unloading or transshipment of merchandise without report or entry within four leagues[8] of the shore of the United States and providing fines and forfeitures for violations.[9] These provisions have been

[1] The difference is brought out in NOTES (1923) 36 HARV. L. REV. 609, at 611.

[2] This classification is pointed out by Dickinson, EDITORAL COMMENT, *Rum Ship Seizures under the Recent Treaties* (1926) 20 AM. JOUR. INT. L. 111, 112.

[3] See collection by Dickinson, *op. cit. supra* note 2, at 112, note 3.

[4] U. S. Comp. Sts. Ann. Supp. 1923, secs. 10138¼–10138½ e. Transportation and importation of liquor for beverage purposes are prohibited. Sec. 10138½ aa. It is declared the duty of any officer of the law discovering any person transporting liquor unlawfully in any water craft, etc., to seize the vehicle and liquor and arrest the person; and of the court, on conviction of the person arrested, to order the liquor destroyed and the vehicle sold unless good cause to the contrary is shown. Sec. 10138½ mm.

[5] Construction of sec. 10138½ mm, *supra* note 4. *United States v. Slusser* (1921, S. D. Ohio) 270 Fed. 818; *United States v. One Cadillac Touring Car* (1921, E. D. Mich.) 274 Fed. 470; *Reo Atlanta Co. v. Stern* (1922, N. D. Ga.) 279 Fed. 422; *United States v. One Packard Motor Truck* (1922, E. D. Mich.) 284 Fed. 394.

[6] Desmond, *Forfeiture of Vessels in Enforcement of National Prohibition* (1925) 11 A. B. A. JOUR. 21.

[7] U. S. Comp. Sts. Ann. Supp. 1923, secs. 5841a–5841i-6.

[8] In this article "league" refers to the marine league and "mile" to the nautical mile. These are the units commonly referred to merely as "leagues" and "miles" in the statutes, texts, and decisions. 1 marine mile=⅓ marine league= 6080 feet=1/60 degree of latitude.

[9] U. S. Comp. Sts. Ann. Supp. 1923, secs. 5841h-4–5841h-6. These sections supercede U. S. Comp. Sts. 1916, secs. 5555 and 5556 (better known

found of use in both types of proceeding[10] in view of the Supreme Court decision that contraband is merchandise within the meaning of the tariff act.[11] Another section of this same act authorizing searches, seizures, and arrests within four leagues of the coast of the United States for breach of any of its laws[12] is invoked to justify seizures outside the three-mile limit of American territorial waters,[13] while attempts are made to sustain seizures and

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as the "Hovering Acts of 1799") providing fines and forfeitures for unlawful unlading and transshipping of merchandise within four leagues of the coast from vessels bound for the United States. Other sections repealed are U. S. Comp. Sts. 1916, secs. 5508 and 5511, requiring production on demand within four leagues of shore of accurate manifests and providing fines for violation. The corresponding section of the 1922 Act (U. S. Comp. Sts. Ann. Supp. 1923, sec. 5841h-3), probably through oversight, makes no reference to the four-league zone. Prior to the act of 1922 libels and indictments against "rum-runners" were customarily framed under the repealed sections above cited. See NOTES (1923) 36 HARV. L. REV. 609, 610, note 6.

[10] *Supra* note 1.

[11] *United States v. Sischo* (1923) 262 U. S. 165, 43 Sup. Ct. 511. The case involved opium smuggling but is equally applicable to the liquor trade.

[12] U. S. Comp. Sts. Ann. Supp. 1923, sec. 5841h. This section also authorizes the demanding of manifests within four leagues of shore.

[13] To say that the limit of the territorial jurisdiction of the United States is three miles from shore obviously does not mean that the government has the same power over persons and ships within three miles of shore as it does over persons and vehicles on land. See Brown, EDITORIAL COMMENT, *The Marginal Sea* (1923) 17 AM. JOUR. INT. L. 89. Certain limitations on that power are established in international law; *e. g.*, the "rights" of innocent passage and of refuge under which foreign ships may bring liquor within the three-mile zone with immunity from seizure. The latter was recognized in *United States v. 2180 Cases of Champagne* (1926, C. C. A. 2d) 9 Fed. (2d) 710; while in *Latham v. United States* (1924, C. C. A. 4th) 2 Fed. (2d) 208, 210, the former was alluded to but held inapplicable where a "rum-runner" skirting the three-mile limit had inadvertently passed over, apparently on the ground that she was not in passage between foreign ports. It is likewise admitted in international law that a government may have some powers beyond the three-mile limit; *e. g.*, that of "fresh pursuit." *The Ship North v. the King* (1906) 37 Can. Sup. Ct. 385. The existence of a three-mile limit in international law has been vigorously denied. The history of the question is reviewed at length in NOTES (1923) 23 COL. L. REV. 472, where the conclusion is reached that there is no such thing as a three-mile limit. It is undeniable that such a limit is not recognized by all or even a majority of civilized nations and that certain rights of seizure beyond that limit have been declared by the statutes and enforced by the courts of the United States from the end of the eighteenth centuary. See note 9, *supra*. The State Department, however, has been a constant upholder of the three-mile limit. See, for example, the correspondence between Mr. Seward, U. S. Sec. State, and Mr. Tassara, Spanish Minister, in 1862, concerning the marginal sea of Cuba: 1 Moore, *Int. L. Dig.* (1906) 706; Fulton, *The Sovereignty of the Sea* (1911) 665. The United States at one time claimed a wider territorial jurisdiction in Behring Sea and forfeited for breach of municipal

arrests even outside the twelve-mile limit of the act on a theory of "inherent" power in the United States to enforce its criminal laws.[14] Under two sections of the Criminal Code, one making persons aiding and abetting a crime responsible as principals[15] and another providing punishment for a conspirator if an overt act has been committed by his co-conspirator,[16] indictments have been framed against persons and libels against ships which never came within the twelve-mile limit until forcibly brought there, on the theory that they were constructively present by means of their colleagues who did the physical act of importing liquor into the United States.

In the early days of prohibition, seizures committed more than three and less than twelve miles from shore and forfeitures decreed thereunder[17] led to protest by the British government and orders by our government to release vessels seized between three and twelve miles from shore and to confine future seizures to the three-mile limit.[18] The result to enforcement was so unsatisfactory that retaliation was undertaken in the threat of an order to seize liquor brought into United States ports on foreign vessels even though they were sea-stores kept under seal during the entire period of the vessels' remaining in port.[19] Such an order was practically sustained in advance by the Supreme Court of the

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law certain foreign vessels sealing beyond the three-mile limit. *The James G. Swan* (1892, D. Wash.) 50 Fed. 108; *The Kodiak* (1892, D. Alaska) 53 Fed. 126; *In re Cooper* (1892) 143 U. S. 472, 12 Sup. Ct. 453; *The Alexander* (1894, D. Alaska) 60 Fed. 914. But on protest of the foreign nations the matter was submitted to an international court of arbitration whose award recognized the three-mile limit. Knott, *The Behring Sea Arbitration* (1893) 27 AM. L. REV. 684. To this the United States submitted. Fulton, *op. cit. supra,* at 695; Fenwick, *Int. Law* (1924) 295. Thereafter forfeiture of sealing vessels seized beyond the three-mile limit was denied. *The La Ninfa* (1896, C. C. A. 9th) 75 Fed. 513; *The Alexander* (1896, C. C. A. 9th) 75 Fed. 519. The conclusion to be drawn seems to be that in 1923 a three-mile limit existed in the contemplation of international law at least as between the United States, Great Britain, and certain other nations. The meaning of the term is, however, vague.

[14] For this purpose reliance is placed on a strong *obiter dictum* of Chief Justice Marshall in *Church v. Hubbart* (1804, U. S.) 2 Cranch, 187, 234.

[15] Sec. 332 (U. S. Comp. Sts. 1916, sec. 10506).

[16] Sec. 37 (U. S. Comp. Sts. 1916, sec. 10201).

[17] *United States v. Bengochea* (1922, C. C. A. 5th) 279 Fed. 537; *The Grace and Ruby* (1922, D. Mass.) 283 Fed. 475; *United States v. 1250 Cases of Liquor* (1922, S. D. N. Y.) 286 Fed. 260, *aff'd* (1923, C. C. A. 2d) 292 Fed. 486, *certorari denied* (1923) 263 U. S. 712, 44 Sup. Ct. 38.

[18] See COMMENTS (1923) 32 YALE LAW JOURNAL, 259, note 3; NOTES (1924) 23 MICH. L. REV. 163, 164.

[19] See *Cunard Steamship Co. v. Mellon* (1923) 262 U. S. 100, 120, 43 Sup. Ct. 504, 506.

United States;[20] and soon afterwards Great Britain was induced to enter into a treaty[21] with the United States whereby, in consideration of a provision allowing her freedom from forfeiture of liquor entering United States ports in British vessels as sea-stores under seal,[22] she agreed to raise no objections to seizures within a one-hour steaming distance of our shore for violation of the laws of the United States, the one-hour zone to be measured by the speed of the vessel seized or of a connecting vessel if the intent should be to land liquor by such vessel.[23] In this treaty the three-mile limit of territorial waters of the contracting parties was expressly preserved.[24] Similar treaties have been entered into by a number of other nations with the United States. Some of these affirm the three-mile limit[25] while others merely reserve previous claims of territorial jurisdiction without stating their extent.[26] Indictments and libels for arrests and seizures beyond the twelve-mile limit have been framed under these treaties in an attempt to construe them as extending[27] the criminal law of the United States and the jurisdiction of its courts to a new one-hour limit.[28]

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[20] *Cunard Steamship Co. v. Mellon, supra* note 19. The international effect of this decision is discussed in COMMENTS (1923) 33 YALE LAW JOURNAL, 72.

[21] (1924) 43 Stat. at L. 1761. For an interesting discussion of the treaty written prior to its construction by the courts, see Scott, EDITORIAL COMMENT, *The Liquor Treaty between the United States and Great Britain* (1924) 18 AM. JOUR. INT. L. 301.

[22] Article III.

[23] Article II.

[24] Article I.

[25] Germany (1924) 43 Stat. at L. 1815; Panama (1924) 43 Stat. at L. 1875; Netherlands (1924) published in (1925) 19 AM. JOUR. INT. L. 115, Supp.

[26] Norway (1924) 43 Stat. at L. 1772; Denmark (1924) 43 Stat. at L. 1809; Sweden (1924) 43 Stat. at L. 1830; Italy (1924) 43 Stat. at L. 1844. Similar treaties (not yet ratified) have been signed with France (1924), Belgium (1925), and Spain (1926). See Dickinson, EDITORIAL COMMENT, *Treaties for the Prevention of Smuggling* (1926) 20 AM. JOUR. INT. L. 340, 341, 342. The variance in the language of these treaties is doubtless due to the fact that these nations have in the past claimed a territorial jurisdiction in excess of three miles. *Cf. supra* note 13.

[27] For all practical purposes the treaty marks an extension and so it was regarded by its framers. Under modern conditions it is not probable that a case will ever arise where the boat in question is so slow that the one-hour limit will fall within the twelve-mile limit. Questions relating to a seizure within the twelve-mile and without the one-hour limit are therefore academic.

[28] *The Marjorie E. Bachman* (1925, D. Mass.) 4 Fed. (2d) 405; *The Over the Top* (1925, D. Conn.) 5 Fed. (2d) 838; *United States v. Henning* (1925, S. D. Ala.) 7 Fed. (2d) 488; *Ford v. United States* (1926, C. C. A. 9th) 10 Fed. (2d) 339, *affirming United States v. Ford* (1925, S. D. Calif.) 3 Fed. (2d) 643; *United States v. the Sagatind* (1926, C. C. A. 2d), not yet reported, *affirming The Sagatind* (1925, S. D. N. Y.) 4 Fed. (2d)

The jurisdictional question in these cases is really this: will the court decide the case before it? In other words, has the defendant been brought into court in such a manner that the court will undertake to determine whether a crime has been committed? In the purely criminal actions (*i. e.*, those aimed at punishment of persons) it would seem that there should be little difficulty.[29] A court is generally deemed to have jurisdiction to try a person accused of crime by the very fact of his presence in court regardless of the methods taken to procure that presence.[30] Accordingly it has been held that the place where the seizure and arrest occurred is not of importance in this connection.[31] It has been suggested that the same rule should apply to the libels, on either of two grounds: that libels are criminal in fact if not in form or that the ship is deemed held by the arrest of the marshal after it is brought into port rather than by seizure at sea.[32] While the latter ground seems an unconvincing fiction the former appears more worthy of notice.[33] However, the courts in many instances have thought they must look further to sustain their jurisdiction. Some have thought it a political matter.[34] What seems to be a majority have deemed it necessary that the seizure be "lawful," [35] but have differed as to the interpretation of that word. Apparently it means authorized by municipal law, and, according to the better view, municipal statute law,[36] although

928 and *United States v. the Sagatind* (1925, S. D. N. Y.) 8 Fed. (2d) 789. In *The Pictonian* (1924, E. D. N. Y.) 3 Fed. (2d) 145, leave was given to amend the libel to show the seizure within the one-hour limit.

[29] *Cf.* NOTES (1923) 36 HARV. L. REV. 609, 611.

[30] *Ker v. Illinois* (1884) 110 Ill. 627, *aff'd* (1886) 119 U. S. 436, 7 Sup. Ct. 225; *cf.* (1925) 34 YALE LAW JOURNAL, 801.

[31] *Ford v. United States, supra* note 28; but see *United States v. Henning, supra* note 28, at 490, where the conviction was put on the ground that the treaty extends the territorial waters of the United States to the one-hour limit, the court being apparently of the opinion that such an extension was necessary to confer jurisdiction to try for crime a person arrested beyond the twelve-mile limit.

[32] NOTES (1923) 36 HARV. L. REV. 609, at 611–613, cited with approval by Dickinson, *op. cit. supra* note 2, at 112, 115.

[33] The point is made that the purpose of forfeiture is punishment, not compensation, and that the absence of a personal defendant is purely a formal matter. NOTES (1923) 36 HARV. L. REV. 609, 612, note 23.

[34] See *The Grace and Ruby, supra* note 17, at 478.

[35] A clear explanation of this rule occurs in *The Underwriter* (1925, D. Conn.) 6 Fed. (2d) 937, at 939, where an American vessel, seized beyond the twelve-mile limit, was released on the ground of lack of jurisdiction.

[36] *The Underwriter, supra* note 35; accord: *United States v. Bentley* (1926, D. Mass.), not yet reported. Although this was a criminal case which came up on a motion for exclusion of evidence, the point involved is identical, since the court held it to be settled law that evidence obtained by an unlawful search and seizure was inadmissible. A similar view

some courts relying on statements in a rather confused series of early Supreme Court decisions have thought the express authorization of Congress unnecessary on the theory that the United States has an inherent power, exercisable beyond the limits of its own territory, to secure itself from injuries.[37] The State Department has not supported this view. Although some courts have thought it necessary to sustain their jurisdiction on principles of international law also,[38] this would not seem essential where there is statutory authorization to seize. The established rule seems to be that it is the duty of a judge to decide in accordance with the plain meaning of a statute although that necessitates the breach of an international obligation.[39]

Assuming, then, that statutory authority to seize is necessary and sufficient to confer jurisdiction on the courts, it would seem to be apparent that where the seizure is within twelve miles of shore such jurisdiction will be conferred, and so the courts have

occurs in *Ford v. United States*, *supra* note 28, at 348, where the evidence was admitted on the ground that it was lawfully obtained.

[37] *United States v. The Island Home* (1924, S. D. Tex.) 6 Fed. (2d) 467 (note 1); *The Rosalie M.* (1925, S. D. Tex.) 4 Fed. (2d) 815; *The Muriel E. Winters* (1925, S. D. Tex.) 6 Fed. (2d) 466; *The Homestead* (1925, S. D. N. Y.) 7 Fed. (2d) 413. The principal authority referred to in these cases is the dictum of Chief Justice Marshall in *Church v. Hubbart*, *supra* note 14. The dictum seems to be overruled by the opinion of the same judge in *Rose v. Himely* (1808, U. S.) 4 Cranch, 241, which in turn appears to the syllabus writer to be overruled by *Hudson v. Guestier* (1810, U. S.) 6 Cranch, 281, *affirming* (1808, U. S.) 4 Cranch, 293. The opinions are enigmatic and have given rise to much divergent discussion by text writers. See Wright, *The Prohibition Amendment and International Law* (1922) 7 MINN. L. REV. 28, 38; COMMENTS (1923) 32 YALE LAW JOURNAL, 259, 262; NOTES (1923) 23 COL. L. REV. 472, 473, note 19; NOTES AND COMMENTS (1924) 23 MICH. L. REV. 163, 164; Potter, *Jurisdiction over Alien Merchant Vessels* (1924) 2 WIS. L. REV. 340, 419; Dickinson, *op. cit. supra* note 2, at 115. It is submitted that the dictum of *Church v. Hubbart*, *supra*, if it can be accorded any weight to-day in view of the subsequent Supreme Court decisions, must be confined to the existent conditions (discussed in the opinion, at 235) of a distant colonial coast "seldom frequented by vessels but for the purpose of illicit trade" and that it should have no application to the present "rum-running" situation.

[38] See Dickinson, *op. cit. supra* note 2, at 115. In *The Frances Louise* (1924, D. Mass.) 1 Fed. (2d) 1004, at 1005, the government attempted to sustain the jurisdiction over a vessel seized without the one-hour limit on "general principles of international law." The court, at 1006, in declaring that the treaty was intended "to deal with the matter in a complete way" apparently admitted that international law governed.

[39] *Head Money Cases* (1884) 112 U. S. 580, 5 Sup. Ct. 247; *Whitney v. Robertson* (1888) 124 U. S. 190, 8 Sup. Ct. 456; see Wright, *Conflicts of International Law with National Laws and Ordinances* (1917) 11 AM. JOUR. INT. L. 1, 7; Hughes, *Recent Questions and Negotiations* (1924) 18 AM. JOUR. INT. L. 229, 230, quoting from *Great Britain v. Costa Rica* (international arbitration case, opinion by Ch. J. Taft); Fenwick, *op. cit. supra* note 13, at 256; Nielsen, *International Aspects of Recent Prohibition Act Decisions* (1925) 13 GEORGETOWN L. JOUR. 248, 259; Dickinson, EDITORIAL

held.[40] The same would seem to be true even in the highly improbable event of the one-hour limit falling within the twelve-mile limit with the seizure in between. But the effect of a seizure made more than twelve miles and less than one hour from land is more difficult of determination. The question is one of interpretation of the one-hour treaties as part of "the supreme law of the land."[41] Some courts have held them, since they were intended to cover the whole matter of seizures of "rum-runners," to extend the criminal jurisdiction of the United States to the one-hour limit,[42] surely an anomalous result since it would justify seizures of foreign ships under circumstances where American ships would be immune. Other courts have declared no such extension of jurisdiction to be deducible from a reasonable construction of the treaties.[43] This seems to be the better view. The treaties seem explicitly to contain only promises by certain foreign nations not to object to certain seizures. Nowhere in them is expressly contained an authorization by the United States to its officers to make such seizures.

In *The Panama* (1925, S. D. Tex.) 6 Fed. (2d) 326, the court decreed the forfeiture of a British vessel seized beyond both the twelve-mile and one-hour limits. If the doubtful conclusion be admitted that statutory authorization to United States officers to seize is unnecessary for the courts' jurisdiction, as had been consistently held by this court,[44] the decision seems sustainable. The treaty no more restricted the jurisdiction than extended it. No promise by the United States not to seize beyond the one-hour limit is to be found in the British treaty, nor any release of any claim of power or privilege to seize British vessels for infraction of our laws at any distance from our coast. Such a promise or release does not seem to be implied from any of the terms of the

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COMMENT, *International Political Questions in the National Courts* (1925) 19 AM. JOUR. INT. L. 157. It becomes then the duty of the executive to reconcile foreign governments; if the municipal statute and decisions do violate international law, the municipal law must give way in the international forum. *Cf.* the release of foreign ships seized outside territorial waters, *supra* note 18.

[40] *Supra* note 17; *Latham v. United States, supra* note 13; *United States v. 2180 Cases of Champagne* (1925, E. D. N. Y.) 4 Fed. (2d) 735, (1924, E. D. N. Y.) 8 Fed. (2d) 763, reversed [on question of crime] (1926, C. C. A. 2d) 9 Fed. (2d) 710; *The Muriel E. Winters, supra* note 37; in *Romano v. United States* (1925, C. C. A. 2d) 9 Fed. (2d) 522, 524, where the indictment was dismissed for insufficient evidence, the jurisdictional point was apparently assumed.

[41] U. S. Const. Art. VI, paragraph [2].

[42] *The Frances Louise, supra* note 38; *The Pictonian, supra* note 28; *United States v. Henning, supra* note 28.

[43] *United States v. The Sagatind, supra* note 28.

[44] *United States v. The Island Home, supra* note 37; *The Rosalie M., supra* note 37; *The Muriel E. Winters, supra* note 37.

treaty—not even from the provision retaining the three-mile limit of territorial jurisdiction[45] in view of the fact that the claim of the United States to a power and privilege of seizure beyond that limit had existed for many years[46] simultaneously with a refusal to admit that that vague concept, "territorial jurisdiction," extends beyond three miles from land.[47]

When a court has decided to its own satisfaction that it has jurisdiction of the case there remains the question: has a crime been committed? To constitute a crime there is necessary an overt act forbidden by the criminal law of the United States and committed at a place to which that law extends. There is no dispute that any such act is a crime if committed within the three-mile limit,[48] the National Prohibition Act having been expressly held by the Supreme Court to extend that far,[49] nor that the specific acts of unlading and transshipping without making report or entry are crimes if committed within twelve miles of shore under the Tariff Act of 1922.[50] Furthermore, it seems to be the majority rule that if an overt act is committed under any of the above circumstances so as to constitute a crime, a person remaining outside the three- or even the twelve-mile limit and there doing another act which with the first forms part of a general scheme to commit a crime against the United States is guilty of a crime either as a conspirator or as a principal;[51] but there is contrary authority.[52] The treaties have been held by some courts to extend the criminal law of the United States to the one-hour limit,[53] although others have been able to find no such implication in their terms.[54] The problem is similar to that previously discussed in respect to jurisdiction.[55]

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[45] *Supra* notes 13, 24.

[46] In the "Hovering Acts of 1799," *supra* note 9.

[47] See the controversy concerning Cuba, *supra* note 13.

[48] *United States v. 2180 Cases of Champagne, supra* note 13.

[49] *Cunard Steamship Co. v. Mellon, supra* note 19.

[50] *The Muriel E. Winters, supra* note 37. The ship was seized between three and twelve miles from shore where she had been transshipping liquor. *Held,* only the liquor there transshipped and the ship, not the balance of the liquor still on board, were subject to forfeiture.

[51] *Latham v. United States, supra* note 13; *Ford v. United States, supra* note 28; see *United States v. Bentley, supra* note 36. In *The Pictonian, supra* note 28, where the ship seized was only waiting outside the twelve-mile limit for connecting vessels, it was held that a forfeiture could be decreed on proper amendment to the libel since the treaty (held to completely govern the matter) authorized seizure for an attempt to commit a crime against the United States.

[52] *The Muriel E. Winters, supra* note 37; see *The Marjorie E. Bachman, supra* note 28, at 408.

[53] *The Pictonian, supra* note 28; *United States v. Henning, supra* note 28.

[54] *The Over the Top, supra* note 28; *The Panama,* text, *supra,* at 986; *Romano v. United States, supra* note 40.

[55] Text, *supra,* at 986.

No very difficult problem has arisen as to what the criminal overt act must be. Unlading or transshipping,[56] and failing to exhibit manifest on demand[57] within the twelve-mile limit are of course sufficient, as is also the bringing of liquor within a collection district with intent to defraud the United States of customs.[58] One seizure of an American vessel was sustained, when no other crime could be proved, on the ground of engaging in a business other than that for which licensed, that business being the transportation of liquor outside the three-mile limit.[59] A sale of liquor on the high seas with knowledge that it is to be unlawfully imported into the United States is a crime under the better view on the theory of conspiracy or of aiding and abetting, if the liquor is actually brought by the purchaser within the three-mile limit;[60] but there is authority *contra*.[61] A gift under similar circumstances although for the purpose of inducing the donee to buy is not a crime.[62] Where the sale is made to revenue officers outside the twelve-mile limit the courts have properly refused to find a crime since such a sale can be a crime only by virtue of knowledge of the buyer's unlawful intent to import and there was no unlawful importation or intent to import by the buyers.[63]

It is remarkable how few of the "rum-running" cases have been taken to the Supreme Court. We have so far by that tribunal only three decisions on the subject, informing us respectively that the National Prohibition Act makes it a crime to bring any liquor within the three-mile limit;[64] that contraband is merchandise under the tariff act, and jurisdiction is acquired over a foreign vessel seized between three and twelve miles from shore;[65] and that a crime was committed in transshipping liquor within the

[56] *The Grace and Ruby, supra* note 17 (the decision was put on the ground that the vessel assisted in the landing with its small boat and men); *United States v. 1250 Cases of Liquor, supra* note 17 (this case and the preceding arose prior to the tariff Act of 1922, *supra* note 7); *Latham v. United States, supra* note 13.

[57] *United States v. Bengochea, supra* note 17.

[58] *United States v. 2180 Cases of Champagne, supra* note 13.

[59] *The Rosalie M., supra* note 37.

[60] *Latham v. United States, supra* note 13; *The Panama*, text, *supra* at 986; *Ford v. United States, supra* note 28.

[61] *The Muriel E. Winters, supra* note 37; *Romano v. United States, supra* note 40; see the *Marjorie E. Bachman, supra* note 28, at 408.

[62] *United States v. 2180 Cases of Champagne, supra* note 13.

[63] *The Marjorie E. Bachman, supra* note 28; *The Over the Top, supra* note 28; *United States v. the Sagatind, supra* note 28. These cases bring up a further question as to the measure of the one-hour zone. The better rule seems to be that the vessel must be capable of reaching shore in one hour under existent conditions of load and weather. *The Over the Top, supra* note 28. But there is authority that the most favorable conditions may be taken for a test of speed. *Ford v. United States, supra* note 28.

[64] *Cunard Steamship Co. v. Mellon, supra* note 19.

[65] *United States v. Sischo, supra* note 11.

twelve-mile limit for shippage ashore.[66] The need is apparent of a decision determining the question of jurisdiction when the seizure is made beyond the twelve-mile limit and also of the commission of a crime where the act was beyond that limit. It is submitted that such a decision will show that Congressional legislation is necessary to extend our criminal law and the jurisdiction of our courts to the one-hour limit. Apparently legislation similar to the "twelve-mile" sections of the Tariff Act of 1922[67] would be sufficient. It might also be advisable to expressly enact that there is no jurisdiction where the seizure was beyond the one-hour limit and no crime where no act was committed within it, in order to forestall any more decisions, such as *The Panama,* likely to involve our government in international complications.

### THE CHRYSLER PLAN OF FIRE AND THEFT INSURANCE

A great part of the total number of automobiles purchased by the American public is sold under plans whereby the purchasers at retail pay only part of the purchase price when they take delivery of the car, and are given credit for the balance, made payable in installments. It is the common practice of dealers selling cars on time to assure themselves of the services of some banking or finance company, which agrees to purchase or discount the purchase money notes. In order to protect themselves, these companies require insurance against the perils of fire and theft on the cars involved. The Chrysler plan of fire and theft insurance is an attempt to reduce the charges for such financing, and to procure uniform insurance protection on all Chrysler cars, by having all financing of the time payment purchases done by the Chrysler Corporation itself. This is effected by an open policy of insurance taken in the Palmetto Insurance Company of South Carolina which purports to insure the Chrysler Corporation of Michigan "and/or whom it may concern" against fire and theft of all cars manufactured during a given period, the insurance to be for the term of one year *after the car is sold to the retail purchaser.* The policy is executed in Detroit, Michigan, with the resident agent of the Palmetto Company, and states that it is to be performed in that state. The original policy is kept by the Chrysler Corporation in Detroit. When a car is sold to a retail purchaser, the dealer notifies the Chrysler Corporation of the sale, and the Chrysler Corporation notifies the agent of the Palmetto Company, who sends direct to the purchaser, naming him, a certificate of insurance, a counterpart of which is sent to others who have an equity in the car, such as finance companies, and banking concerns discounting purchase money notes. This cer-

[66] *United States v. 1250 Cases of Liquor, supra* note 17.

[67] *Supra* note 7.

tificate states that the purchaser agrees that its terms shall embody all agreements then existing between himself and the company. The policy provides, however, that the omission to report the sale of a car, or to issue a certificate in respect thereto, shall not prevent the retail buyer of a car from being protected under the policy.

The validity of the Chrysler plan has been challenged in the federal courts of four states, and the failure of these courts to agree will undoubtedly lead to further litigation.

In *Palmetto Fire Insurance Co. v Conn.*,[1] the Palmetto Company, licensed to do business in Ohio, sought an injunction restraining the superintendent of insurance from revoking its license, which he had threatened to do on the ground that the Palmetto Company, in issuing certificates of insurance in Michigan under its contract with the Chrysler Corporation, insofar as such certificates applied to Chrysler cars sold in Ohio, violated the insurance laws of that state. The court did not deny that the contract was a Michigan contract, but held that, whether it was or not, the Palmetto Company had violated the laws of Ohio which prohibit an insurance company, legally authorized to transact business in Ohio, from writing, placing, or causing to be written or placed insurance upon property located in the state, except through a legally authorized agent in the state.[2] The court said: "Chrysler retail car dealers are not insurance agents, nor are they qualified nor have they attempted to qualify as such under the insurance laws of the state," and therefore denied the injunction.

In *Palmetto Insurance Co. v. Beha*[3] the superintendent of insurance likewise sought to revoke the license granted to the Palmetto Company to do business in that state, claiming that the Chrysler plan violated the laws of New York in that it was "for the purpose of cheating and defrauding the State of New York and the people thereof out of taxes and revenues on business transacted in the State of New York." The court granted an injunction restraining the threatened action of the commissioner. The court said that the insurance entered into under the plan was effected in Michigan, not in New York, and that the Palmetto Company, by insuring in Michigan a Chrysler car owned in New York by a resident thereof was not doing business in the latter state, and therefore was not as to such contracts doing business in New York contrary to its laws.

In *Chrysler Sales Corporation v. Smith*[4] the Palmetto Company was not licensed to do business in Wisconsin. The Chrysler Corporation of Michigan brought suit to enjoin the insurance com-

[1] (1925, D. Ohio) 9 Fed. (2d) 202.
[2] Ohio Gen. Code, 1921, sec. 5438.
[3] (1925, S. D. N. Y.) not yet reported.
[4] (1925, D. Wis.) 9 Fed. (2d) 666.

missioner from publicly asserting that the insurance issued by the Palmetto Company was contrary to the laws of Wisconsin, and from threatening to prosecute Wisconsin dealers in Chrysler cars for violating Wisconsin statutes regulating the insurance business within the state. The court denied the application for an injunction on the ground that the Michigan contract was not an insurance *in praesenti,* but a contract to insure in the future, and that the contract of insurance was made in Wisconsin. Therefore, the court held, the Palmetto Company was doing business within the state without a license, and Chrysler dealers were agents selling insurance in Wisconsin in violation of the laws of that state requiring such agents to be licensed.[5]

In *Chrysler Sales Corporation v. Spencer*[6] the court, relying on the Wisconsin case, likewise held that Chrysler dealers were agents selling insurance in Maine without a license,[7] in violation of the statute.[8]

There seems to be no doubt of the general proposition that the Palmetto Company of South Carolina had the power and the privilege to make a contract of insurance in Michigan with a citizen of another state upon property situated in that state.[9] On the other hand it seems equally clear that a state may punish a person who procures insurance for a resident of that state from a South Carolina corporation not admitted to do business in that state.[10] It is believed that the validity of the Chrysler plan may be considered by keeping these propositions separate and distinct.

The Wisconsin and Maine courts denied that the "contract of insurance" was made in Michigan. The legalistic grounds upon which this conclusion is predicated are: (1) That the contract

[5] "No person, officer, or broker, agent or sub-agent of any insurance corporation of any kind required to pay any tax or license fee to the state shall act or aid in any manner in transacting the business of or with such corporation in placing risks or in collecting any premiums or assessments or effecting insurance therein, without first procuring from the insurance commissioner a certificate of authority." Wis. Sts. 1925, sec. 209.04.

[6] (1925, D. Me.) 9 Fed. (2d) 674.

[7] The Maine court did not consider whether the Palmetto Company was doing business in the state without a license.

[8] "The insurance commissioner may issue a license to any person to act as an agent. . . . If any person solicits, receives, or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he shall be punished. . . ." Maine Rev. Sts. 1916, ch. 53, sec. 121.

[9] *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 17 Sup. Ct. 427.

[10] *Hooper v. California* (1895) 155 U. S. 648, 15 Sup. Ct. 207. But it has been held in New York that the legislature has no power to prohibit a resident of New York from entering into a contract with a corporation of another state having the privilege of doing business therein. *Hammond v. International Ins. Co.* (1909) 63 Misc. 437, 116 N. Y. Supp. 854, *aff'd* 134 App. Div. 995, 119 N. Y. Supp. 1127.

of insurance is a "personal" contract, which does not "attach to property." (2) That the insurance contemplated under the plan never has effective existence until the sale at retail, the implication being that unless there be an existing risk covered there can be no valid contract of insurance. It is believed that neither of these grounds is tenable.

The rule that insurance is a personal contract was one probably evolved for the purpose of protecting the insurer, so that the policy could not be assigned, and the moral hazard changed, without the consent of the company.[11] While this rule may obtain where no intention to the contrary is expressed, it would seem that the parties may frame a contract which shall "attach to property," and which shall give to future owners of the property rights under the contract.[12]

Where such an intention is expressed, contracts of insurance which shall attach in the future have often been held valid. Perhaps the most typical instance is a contract of marine insurance, insuring goods on a return voyage long before they are bought. In *De Hahn v. Hartley*,[13] the policy was drawn in London on a

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[11] *Cf. Lynch v. Dalzell* (1729) 4 Bro. P. C. 432. To say that an insurance contract is "personal" means merely that the insured has no power of assignment, for the reason that the contract is aleatory, and assignment might increase the "risks."

[12] Vance, *Insurance* (1904) 50. See the comment on the Maine case, *supra* note 6, in NOTES (1926) 74 U. PA. L. REV. 491. The rule of "personality" has not prevented many American courts from holding that when a vendor of realty receives money payable under an insurance policy previously procured on the buildings sold, which have been damaged by fire after the execution of the contract but before conveyance to the vendee, the vendee may maintain a bill to compel the vendor to pay over the insurance money, that is, that in such cases "the insurance runs with the land." See COMMENTS (1924) 34 YALE LAW JOURNAL, 87; *cf. Lingenfelter v. Phoenix Ins. Co.* (1885) 19 Mo. App. 252. Nor has the rule prevented the courts from holding that where a loss occurs by fire after the death of the insured, the proceeds of an insurance policy which is expressed to run to his executors, administrators, or assigns, passes to the heirs at law, and not to the administrator. *Wyman v. Wyman* (1863) 26 N. Y. 253; Vance, *Cases on Insurance* (1914) 594, note; (1921) 16 A. L. R. 313, note; *cf. Oldham's Trustee v. Boston Ins. Co.* (1920) 189 Ky. 844, 226 S. W. 106. In *Quarles v. Clayton* (1899) 87 Tenn. 308, a fire policy upon a dwelling house provided that the loss should be "payable to the assured, his executors or administrators," conditional upon there being no change in title or possession of the property insured "except by succession by reason of death of the assured." The court said that a contract of fire insurance is a personal contract, but that the legal effect of this exception in the policy was to continue and extend the policy in favor of those who by succession take the property covered by the risk. (The widow of the assured was held not entitled to the insurance money because, since she occupied the dwelling house by virtue of her marriage contract with the assured, she took by "purchase" and not by "succession").

[13] (1786, K. B.) 1 Term. Rep. 343; Vance, *Cases on Insurance* (1914) 383.

ship then in Liverpool to cover ship and cargo at and from the West Coast of Africa to the British West Indies. The validity of the contract was not even questioned on this account. And in *Rhind v. Wilkinson*[14] it was said: "It is an everyday's practice to insure goods on a return voyage long before they are bought." In such cases obviously the property is not in existence at the time the policy is drawn, and the risk attaches in the future, yet the validity of the contract of insurance as at the time it was drawn seems never to have been questioned.[15]

Again, policies upon a fluctuating stock of goods, drawn intentionally to cover goods which should be acquired by the insured from time to time during the continuation of the policy, are considered valid.[16] Insurance upon the constantly changing contents of an oil tank is valid.[17] And so of a policy issued to a farmer, covering not only the live stock then owned by him, but that to be subsequently acquired during the term of the policy.[18] And a policy upon crops to be grown during a period of five years was held to cover grain that was properly within the description of the policy, but which had been raised on land not owned by the insurer at the time of the execution of the policy.[19]

[14] (1810, C. P.) 2 Taunt. 237. See Arnould, *Marine Insurance* (9th ed. 1914) sec. 258. In *Henshaw v. Mutual Safety Ins. Co.* (1848, S. D. N. Y.) 2 Blatchf. 99, the court said: "A policy upon an interest to be acquired after the execution of the contract is valid. This is the ordinary and perhaps the most serviceable class of insurance. Cargoes can be purchased, and laden from port to port, on trading voyages, under the protection of policies already in existence, without waiting for the means of obtaining satisfactory insurance after the interest is acquired."

[15] The Wisconsin court attempted to distinguish the marine insurance cases on the ground that "in those cases operative insurance did not await the selection and assent of one of those intended by the phrase 'whom it may concern,' nor was the term of effective insurance fixed by the transaction with him." But this assumes the very point in issue. For it is here contended that the terms of the insurance were fixed under the Michigan contract, and the marine insurance cases sanction the postponement of the risk until property shall come into existence or be purchased by the insured. As to who may take under the designation "for whom it may concern" see *infra*, note 22. The distinction drawn by the Maine court, that in the marine cases the insurance was on a specific ship or cargo, and the thing to which the insurance attached was known when the policy was made, fails to consider the cases where the insurance is on goods not yet bought or in existence.

[16] *Hoffman v. Ins. Co.* (1865) 32 N. Y. 405; *Lane v. Ins. Co.* (1835) 12 Me. 44; *Hooper v. Fire Ins. Co.* (1858) 17 N. Y. 424. Vance, *Insurance* (1904) 120; 2 Joyce, *Insurance* (1917) sec. 901; (1909) 52 L. R. A. 340, note.

[17] *Western Pipe Lines v. Home Ins. Co.* (1891) 145 Pa. 346, 22 Atl. 665.

[18] *Mills v. Ins. Co.* (1873) 37 Iowa, 400.

[19] *Sawyer v. Dodge County Mut. Ins. Co.* (1875) 37 Wis. 503. An insurance on "fixtures" placed or to be placed in certain buildings covers fixtures erected in the building subsequent to the issuance of the policy. *New York Gas Light Co. v. Fire Ins. Co.* (1829, N. Y.) 2 Hall, 108. A builder's policy

The same rule obtains with respect to policies of re-insurance. Such policies, by which a company undertakes to indemnify another company to the extent of its losses on risks it then holds or *may thereafter take* during the life of the contract are valid, both in cases of marine[20] and fire[21] insurance.

It thus appears that policies of insurance have been held valid though the property may not have been in existence, and part or all of the risk was to attach in the future. The designation "for whom it may concern" in such cases includes all persons possessing an insurable interest who are contemplated by the person taking out the insurance.[22] The person really interested in the property insured under such a policy may take the benefit of the insurance, though the insurance was not authorized, by ratifying the agent's act even after loss.[23] The English courts, while applying this rule to cases of marine insurance,[24] have not extended it to an unauthorized contract of fire insurance.[25] This distinction has, however, been repudiated in this country.[26]

In such cases it is obvious that an insurable interest at the time of the loss is sufficient, and need not, in fact could not exist at the time the contract was made. But the dictum early announced,[27] that an insurable interest must exist at the time the contract was made, has been thought to prevent contracts of anticipatory fire insurance.[28] The strong tendency of the courts,

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is valid, and the risk will attach in proportion as the construction progresses and the interest of the insured increases. *Commercial Fire Ins. Co. v. Capitol City Ins. Co.* (1886) 81 Ala. 320, 8 So. 222; *Ulmer v. Ins. Co.* (1901) 61 S. C. 459, 39 S. E. 712; *Sullivan v. Ins. Co.* (1892, 2d Dept.) 34 App. Div. 164, 54 N. Y. Supp. 629. A policy upon the expected profits of a venture undertaken is valid, but there can be no recovery for loss of profits unless such profits are specifically covered by the policy. See Vance, *loc. cit. supra* note 16; L. R. A. 1917C, 726.

[20] *Boston Ins. Co. v. Globe Fire Ins. Co.* (1899) 174 Mass. 229, 54 N. E. 543.

[21] *Sun Ins. Office v. Merz* (1900) 66 N. J. L. 301, 45 Atl. 785.

[22] *Hagan v. Scottish Union Ins. Co.* (1902) 186 U. S. 423, 22 Sup. Ct. 862; *Duncan v. China Mut. Ins. Co.* (1891) 129 N. Y. 237, 29 N. E. 76.

[23] *Hagan v. Scottish Union Ins. Co. supra* note 22; *Fire Ins. Asso. of England v. Merchants and Miners Trans. Co.* (1886) 66 Md. 339, 7 Atl. 905. Vance, *Cases on Insurance* (1914) 93, note; 2 Joyce, *op. cit. supra* note 16, sec. 619; 3 Joyce, *op. cit.* sec. 1689.

[24] *Williams v. North China Ins. Co.* (1876) L. R. 1 C. P. D. 757.

[25] *Grover v. Matthews* [1910] 2 K. B. 401.

[26] *Marqusee v. Hartford Fire Ins. Co.* (1912, C. C. A. 2d) 198 Fed. 475; petition for writ of certiorari denied, (1912) 229 U. S. 621, 33 Sup. Ct. 1049.

[27] *Sadlers' Co. v. Babcock* (1743, Ch.) 2 Atk. 554.

[28] *Howard v. Lancashire Ins. Co.* (1885) 11 Can. Sup. Ct. 92, criticized in May, *Insurance* (3d ed. 1891) sec. 100 a. A dictum to the same effect is contained in *Ohio Farmers' Ins. Co. v. Vogel* (1903) 30 Ind. App. 281, 65 N. E. 1056.

however, seems to be to disregard the dictum, and to hold valid bona fide anticipatory fire insurance.[29]

It is believed that there is no legal objection to the making of a bona fide contract of insurance upon goods not yet in existence, which shall attach in the future, and that the interested party contemplated under such a policy would be able to take the benefit. From this standpoint, it is proper to consider the agreement between the Palmetto Company and the Chrysler Corporation, as "the contract of insurance," effected in Michigan. The certificate issued to the purchaser of a car, upon which some stress was laid, should not affect the result if we concede that a valid contract of insurance was in effect, especially since the purchaser is protected even though no such certificate was issued.

The holding of the Maine and Wisconsin courts, that the contract of insurance was not made until the purchase of a car in those states, necessarily induces the conclusion that Chrysler dealers are agents selling insurance in those states. For then the transaction can be treated only as a standing offer made by the Palmetto Company to unidentified parties, who may accept by the doing of the act stipulated. Under this construction, the Palmetto Company creates in the Chrysler Corporation a power to extend its offer to the purchaser of a Chrysler car, and the acceptance of the offer in Maine or Wisconsin by the purchase would be "selling" insurance in those states. The determination of these courts, that the purchaser of a car is not insured without his express assent, is in accord with this view. But what induced the courts to reach this result was their unwillingness to see that there may be a valid contract of insurance upon goods not yet in existence, with the risk attaching in the future. It seems that the parties have attempted to frame a contract which shall be valid in all respects in Michigan, irrespective of the assent of the purchaser, and no legal objection can be perceived to their so doing. The contract under this theory should be construed as one made in Michigan between the Chrysler Corporation and the Palmetto Company, for the benefit of a third party not yet identified.

This view of the contract, however, does not *necessitate* a result opposite to the one reached by the Maine and Wisconsin courts. The contract made in Michigan created a future and conditional right in the Chrysler Corporation that the Palmetto Company should pay it or its nominee to be specified in the future. This nominee must pay for his nomination as the party to take

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[29] *Cf. Davis v. New England Fire Ins. Co.* (1892) 70 Vt. 21; *Hooper v. Robinson* (1878) 98 U. S. 528; *Sun Office Fire Ins. Co. v. Merz*, *supra* note 21. Though these cases dealt with recognized exceptions to the interest rule, the broad language used would seem to cover the case of fire insurance contracts also. See Vance, *Insurance* (1904) 121.

under the contract.[30] The statement made by the New York court, that the transaction amounts to a "gift" of the insurance, can scarcely be supported. The purchaser is obviously paying for the insurance, and the price of Chrysler cars was raised as soon as the plan went into effect. The act of nomination takes place in the state of the purchaser. The basic question, then, is one of statutory interpretation, whether the doing of this act constitutes Chrysler dealers agents "effecting" or "procuring" insurance within the meaning of the statutes. There is some color for this view. When a dealer sells a car, the insurance goes with it, and until such act, by the very terms of the policy, the risk does not attach. Prior to this act there was no right in the nominee. The dealer has the power to create such a right in the purchaser. Assuming that the insurance may run with the car like the tires or other automobile accessories, a proposition denied by the Maine and Wisconsin courts, the dealer might still be considered, in ordinary parlance, as "effecting" or "procuring" insurance when he sells the car. On the other hand, it may be argued that since the dealer is primarily interested in the sale of a car, and since a valid contract of insurance is already in effect, and the premiums paid, the acts performed by him should not be construed as coming within the statutes. Moreover, it is difficult, under any strict principles of agency, to consider the Chrysler dealer as an agent of the Palmetto Company. He is neither hired by the company nor paid by it, nor has he any direct authority from it or connection with it, or any discretion as to the terms of the insurance. Probably it would be more consistent with the principles of agency, and the rules governing the creation of bona fide anticipatory contracts of insurance, to hold that such a plan as is here involved was not within the contemplation of the framers of the insurance laws, and further legislative action should be awaited before holding it invalid. But even assuming that the language of the statute is ambiguous, the construction to be placed on it should be determined only on the basis of the purpose of the insurance laws, and of the merits of the conflicting policies involved in the plan.

The most obvious arguments in favor of the view that the Chrysler plan violates the insurance laws are those based upon the loss of revenue and the protection of vested interests. The insurance which formerly the purchaser of a Chrysler car would place with a resident or licensed corporation is now removed from these companies, with a proportionate lessening of their business,

[30] The nominee might be considered as a third party beneficiary unascertained in the contract. The cases dealing with anticipatory insurance, however, treat the party taking under the designation "for whom it may concern" as the principal of an agency supposed by that phrase. See *supra* note 23.

and a proportionate lessening of the revenues to be collected by the state from such policies. Although these considerations are bound to influence the courts, it is believed that they are entitled to little weight. The purpose of insurance regulation, it would seem, is not to secure revenue, but control.[31] And the interests of insurance companies, or considerations of revenue, should not be placed before those of the purchasing public of Chrysler cars.

A more weighty consideration in favor of this view is the fact that the effect of a contrary holding would be to remove the contract from the jurisdiction of the state of the purchaser. This would tend to defeat the very purpose of the insurance laws. For the purchaser in Maine or Wisconsin would have to go to Michigan, or to some other state where he could get service of process on the Palmetto Company, in order to sue on the policy. Further, the insurance laws of Michigan may not be stringent enough to meet the standards set in Maine or Wisconsin. Thus a poorly equipped company, which may satisfy the requirements of the Michigan laws, might nevertheless, according to the standards of those other states, be deemed an unsafe one to be entrusted with the protection of its citizens. Although this argument presents the greatest technical difficulty in the Chrysler plan, it is believed that as a practical matter the objections can have no great weight. The contract is protected by the laws of Michigan, and the insurance requirements of all states probably tend to approximate each other. And since the very purpose of the plan is to sell more automobiles, the choice of a safe insurance company by the Chrysler corporation is practically assured.

Against this view, and in favor of the plan, are the manifold advantages of securing a uniform and moderate charge on time payment sales of automobiles, by eliminating the middleman, and dealing directly with the purchaser through the wholesaler. As an economic device, the Chrysler plan is eminently sound, and it is believed that legally it is unobjectionable, and that the balance of convenience and sound policy is in favor of it.

## CONTRACTS EXEMPTING CARRIERS FROM RESPONSIBILITY FOR NEGLIGENCE AND THE CONFLICT OF LAWS

The question of the validity of stipulations exempting carriers from responsibility for negligence in contracts for interstate carriage was long a source of much confusion in the state courts owing to the conflicting state laws on this subject.[1] This unsatisfactory condition was eliminated by federal legislation, the Car-

[31] *Cf. Jalonick v. Green County Oil Co.* (1910, Ga.) 66 S. E. 815; *Nat. Union Fire Ins. Co. v. Wanberg* (1922) 260 U. S. 71, 43 Sup. Ct. 32.

[1] Hutchinson, *Carriers* (3d ed. 1906) secs. 199–224.

mack Amendment to the Interstate Commerce Act, making such stipulations void.[2]

Similarly, the Harter Act has rendered much more certain the law in this respect with regard to carriage by sea.[3] This act applies to both American and foreign vessels operating to and from the ports of the United States as to carriage of goods,[4] but it has no application to the carriage of passengers or their personal baggage.[5] That perplexing problems in the Conflict of Laws may still arise, outside the scope of this legislation, is shown by two recent cases, one in this country and one in England.

In *Oceanic Steam Navigation Co. v. Corcoran* (1925, C. C. A. 2d) 9 Fed. (2d) 724, the plaintiff, a resident of Indiana, through her agent, a tourist company in Boston, purchased in Massachusetts from the agent of defendant, an English steamship company, a ticket booking her through to Paris and entitling her to passage from Montreal to Liverpool on defendant's ship of English registry. Plaintiff brought suit in a New York court for personal injuries received during the voyage between Canada and England due to the negligence of defendant's employee. The case was removed to the Federal District Court, where the defense offered was a clause in the contract for passage exempting the defendant from responsibility for negligence. Such exemption was valid under English law and the contract expressly stipulated that all questions arising under this clause should be decided according to English law with reference to which the contract was made. The District Court gave judgment for the plaintiff, and defendant appealed. The Circuit Court held (one judge *dissenting*), that a clause in the contract of a common carrier exempting the carrier from responsibility for negligence, when made in the United States, is illegal

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[2] Act of March 4, 1915 (38 Stat. at L. 1196, 1197).

[3] Act of Feb. 13, 1893 (27 Stat. at L. 445).

"The [Harter] act is a compromise between the interests of shipper and carrier, and was intended, in the interests of American shipping, to put the American carrier on an equality with the foreign carrier.

"The first section forbade any stipulation against negligence in connection generally with the handling of the cargo.

"The second section allowed the carrier to reduce his former absolute warranty of seaworthiness to the measure of due diligence, provided he so stipulated, but did not do this *proprio vigore* for him.

"It allowed a similar stipulation as to the handling of the cargo.

"The third section of its own force exempted the carrier from liability for faults in navigation, sea perils, acts of God or public enemies, inherent vice in thing carried, insufficiency of package, legal process, and deviation, provided the carrier showed due diligence as to seaworthiness in case he wished to set up any of these defenses."

Hughes, *Handbook of Admiralty Law* (2d ed. 1920) 194.

[4] *The Silvia* (1898) 171 U. S. 462, 19 Sup. Ct. 7.

[5] *The Rosedale* (1898, S. D. N. Y.) 88 Fed. 324; *La Bourgogne* (1906, C. C. A. 2d) 144 Fed. 781; *cf. The Kensington* (1902) 183 U. S. 263, 22 Sup. Ct. 102.

and void and unenforceable in the courts of the United States, notwithstanding the expressed intention of the parties that English law should govern.

In the English case, *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K. B. 730, an Englishman purchased in Detroit, from the same defendant, a ticket with identical stipulations for passage from New York to his home in England and was injured enroute due to the negligence of defendant's employees. The English Court held for the defendant, giving effect to the expressed intention of the parties as to their choice of law.

If either of these cases had come before one of our state courts, since neither is within the scope of federal legislation, the state court would have been free to apply one of the following recognized theories of the Conflict of Laws as to the validity of a contract, and the result would depend on the theory used:—

(1) The "territorial theory," under which the state where the contract is technically made has the exclusive power to create the contract.[6] In these cases, under this theory, the court must look to American law and the stipulation would be held void. As a fixed rule this has been found unsuited to meet the purposes of the Conflict of Laws[7] and has been departed from both by the English courts and by a majority of American jurisdictions.[8]

(2) The "intention theory," whereby the court looks to the presumed intention of the parties as to their choice of law, as determined by the circumstances of each case.[9] Here the parties

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[6] *McDaniel v. Chicago & N. W. Ry.* (1868) 24 Iowa, 412; *Fonseca v. Cunard S. S. Co.* (1891) 153 Mass. 553, 27 N. E. 665.

[7] For a criticism of this rule in its practical application see Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws* (1921) 30 YALE LAW JOURNAL, 655, 658 *et seq.*

That there is no logical necessity for such a rule, except for those who persist in reifying rights and other legal relations and who start with the fixed premise, based on territorial assumptions as to jurisdiction, that the forum in applying the principles of the Conflict of Laws is enforcing an *obligatio* created elsewhere, see Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457 .

[8] For a summary of the English and American cases, see Beale, *What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 79 (with an appendix of federal cases at 100).

[9] *In re Missouri S. S. Co.* (1889) L. R. 42 Ch. D. 321.

In most cases the acts of the parties and the surrounding circumstances are such that it would be difficult, if not impossible, to determine what law governs, and so the court must resort to a legal fiction for its guidance. Most courts raise a prima facie presumption that the parties intended to accept the law of the place of making. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 9 Sup. Ct. 469. This is admittedly a mere fiction as to the intention of the parties, and with the "territorial" or "*obligatio*" theory of the Conflict of Laws exploded, it satisfies no logical necessity. On the other hand, a presumption that the parties intended to make a valid agreement rests on a solid foundation of fact. It is submitted, therefore, that the courts which follow the "intention theory" should

having expressed their intention that English law, the law of the place of performance, shall control, the stipulation would be held valid.[10] Although courts favor a flexible rule of this sort, it seems theoretically indefensible to allow the parties by choosing their own law to determine the validity of their own acts.[11]

(3) The law of the place of performance.[12] Under this theory English law would govern and the stipulation would be upheld. Originally this was merely an application of the "intention theory," the courts presuming that in the absence of evidence of a contrary intention, the parties contracted with a view to the law of the place of performance,[13] but in a few states this has developed into a positive rule of law. This rule seems particularly inapplicable to a contract of carriage, which is frequently to be performed in a number of jurisdictions. To obviate this difficulty the law of the place of delivery (place of final performance) has arbitrarily been held to govern.[14]

(4) The law of the place of breach.[15] In these two cases, under this theory, the law of the flag[16] would govern and the stipulation would be upheld under English law. This is in reality an application of the delictual rather than the contractual theory to the relation of the carrier, for the generally accepted view is that contracts of carriage are indivisible.[17] As applied to the carriage of passengers, as distinguished from the carriage of goods and baggage, this theory has some support from both writ-

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work with a prima facie presumption that the parties contracted with reference to the law that will sustain the contract. *Cf. Pritchard v. Norton* (1882) 106 U. S. 124, 1 Sup. Ct. 102.

[10] An express stipulation by the parties that the validity of the contract should be governed by a certain law would seem conclusive evidence of their intention, yet the United States Supreme Court has never expressly decided this point. *Cf. Compania de Navigacion la Flecha v. Brauer* (1897) 168 U. S. 104, 18 Sup. Ct. 12 (where the court avoided the issue). Certainly not when the acts of the parties are *mala fide. Andrews v. Pond* (1839, U. S.) 13 Pet. 65. Or against public policy. *The Kensington, supra* note 5.

[11] For a criticism of the "intention theory," see Beale, *op. cit. supra* note 8, at 260; Lorenzen, *op. cit. supra* note 7, at 655.

[12] *Brown v. Camden etc. Ry.* (1877) 83 Pa. 316.

[13] Story, *Conflict of Laws* (8th ed. 1883) 376.

[14] *Railroad Co. v. Sheppard* (1897) 56 Ohio St. 68, 46 N. E. 61. The law of the place of shipment has also been held to govern. *Western R. R. Co. v. Exposition Cotton Mills* (1888) 81 Ga. 522, 7 S. E. 916.

[15] *Hughes v. Pennsylvania Ry. Co.* (1902) 202 Pa. 222, 51 Atl. 990; *Railroad Co. v. Druien* (1904) 118 Ky. 237, 80 S. W. 778; *Barter v. Wheeler* (1869) 49 N. H. 9; *The Trinacria* (1890, S. D. N. Y.) 42 Fed. 863; *Baotjer v. La Compagnie Generale Transatlantique* (1894, S. D. N. Y. )59 Fed. 789.

[16] The law of the flag is also a circumstance of weight in arriving at the governing law under the "intention theory." *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115.

[17] Hutchinson, *op. cit. supra* note 1, sec. 210; see *Fish v. Delaware L. & W. Ry.* (1914) 211 N. Y. 374, 105 N. E. 661.

ers[18] and courts,[19] for the obligation of a carrier to a passenger is fundamentally one of tort law.[20]

(5) That law which will sustain the validity of the contract, provided that it has a substantial connection therewith.[21] Applying this principle, the stipulation could be upheld under English law. This theory perhaps best meets the requirements of both the courts and the parties where a choice of law is involved.[22]

The instant American case, however, came up in a federal court, where the problem is further complicated by the fact that the enforcement of such contracts is said to be opposed to the public policy of the forum.[23] The federal courts have been particularly hostile to the enforcement of stipulations by a carrier against responsibility for negligence,[24] and even before federal

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[18] See 1 Hutchinson, *op. cit. supra* note 1, sec. 205 (to the effect that the relation of the carrier to the passenger depends primarily on the law of negligence, and that the same law should govern both the cause of action and the defense thereto.)

[19] *Smith v. Atchison T. & S. F. Ry.* (1912, C. C. A. 8th) 194 Fed. 79; *Burnett v. Pennsylvania Ry. Co.* (1896) 176 Pa. 45, 34 Atl. 972; *Lindsay v. Chicago B. & Q. Ry. Co.* (1915, C. C. A. 7th) 226 Fed. 23 (stipulation against responsibility for negligence in a contract of employment); *contra*: *Dyke v. Erie Ry.* (1877) 45 N. Y. 113; *cf. Merritt Creamery Co. v. Santa Fe Ry.* (1908) 128 Mo. App. 420, 107 S. W. 462 (where the choice of law was made to depend upon the form of action—obviously unsound.)

[20] 2 Williston, *Contracts* (1920) sec. 1113.

[21] *Talbott v. Merchants' Despatch* (1875) 41 Iowa, 247; *Smith v. Atchison T. & S. F. Ry.* (1913) 38 Okla. 157, 132 Pac. 494; *Miller v. Tiffany* (1864, U. S.) 1 Wall, 298 (usury case); *cf. Pritchard v. Norton, supra* note 9.

[22] Lorenzen, *op. cit. supra* note 7, at 673. This theory offers an explanation of the apparent conflict between *Scudder v. Union Nat. Bank* (1875) 91 U. S. 406, and *Hall v. Cordell* (1891) 142 U. S. 116, 12 Sup. Ct. 154.

[23] In *The Kensington, supra* note 5, the Supreme Court says that "the existence of the rule of public policy not the ultimate causes upon which it may depend is the criterion" and intimates that these stipulations are not enforceable in the forum under any circumstances. For a more liberal interpretation of *The Kensington*, see *Railroad Co. v. Druien, supra* note 15.

A few state courts refuse to enforce such provisions, although the contract was made and to be performed elsewhere. *Fox v. Postal Telegraph Co.* (1909) 138 Wis. 648, 120 N. W. 399; *Chicago B. & Q. Ry. v. Gardiner* (1897) 51 Neb. 70, 70 N. W. 508 (where state constitution prohibited such stipulations); *contra*: *Railroad Co. v. Druien, supra* note 15 (enforced, notwithstanding constitutional provision to the contrary); *O'Regan v. Cunard S. S. Co.* (1894) 160 Mass. 356, 35 N. E. 1070 (holding such stipulations neither illegal nor immoral, notwithstanding that they would be void as against public policy if made in Massachusetts); *Forepaugh v. Railroad Co.* (1889) 128 Pa. 217, 18 Atl. 503 (criticising the attitude of the federal courts).

[24] The federal courts refuse to enforce these provisions although the parties expressly stipulate that foreign law shall govern. *The Kensington, supra* note 5 (baggage); *The New England* (1901, D. Mass.) 110 Fed. 415 (baggage); *Lewisohn v. National S. S. Co.* (1893, E. D. N. Y.) 56 Fed. 602 (cargo, prior to Harter Act); *The Iowa* (1892, D. Mass.) 50 Fed. 561 (cargo, prior to Harter Act); *The Glenmavis* (1895, E. D. Pa.) 69 Fed.

legislation on this subject, treated the matter as one of general commercial law and refused to be bound by the law of the several states.[25]

The Supreme Court has assigned two reasons why contracts exempting carriers from liability for negligence are contrary to our public policy—(1) because they are unjust and unreasonable and wanting in the requirement of voluntary assent; in other words, because they contain an element of coercion or oppression which renders the *making* of these contracts prejudicial to the public interest; (2) because they tend to increase negligence and to cheapen human life.[26] In a number of lower federal court decisions, however, effect has been given to a stipulation of this sort where it related to transportation of property on a foreign vessel on a voyage which did not include a port of the United States and where the contract was made outside the United States.[27] It is submitted that these decisions are sound and that, where the contract is neither made nor to be performed within the jurisdiction of the United States, its *enforcement* in our courts violates no public policy of this country.

So in the instant American case it seems to the writer that no sound American public policy demands that our courts should control the operation of English common carriers between Canada and England.[28] The English law is presumably better equipped to deal with English conditions and to do justice between the parties. It is submitted that what the court in this case really decided, regardless of the formula assigned as the basis of their decision, was that the *making* of such a contract in the United States violated our public policy.[29] The court does not talk this

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472 (where the court intimates such a stipulation will not be enforced irrespective of the place of contract); *Botany Worsted Mills v. Knott* (1897, C. C. A. 2d) 82 Fed. 471, *affirmed* in 179 U. S. 69, 21 Sup. Ct. 30 (cargo, where the stipulation was rendered void by the Harter Act); *contra: The Oranmore* (1885, Md.) 24 Fed. 922, *affirmed,* (1885, C. C. Md.) 92 Fed. 396 (this case is no longer followed).

[25] *New York Central R. R. Co. v. Lockwood* (1873, U. S.) 17 Wall. 357 (drover travelling on a freight train with a shipment of cattle); *contra: Central of Ga. Ry. Co. v. Kavanaugh* (1899, C. C. A. 5th) 92 Fed. 56; *Northern Pac. Ry. v. Kempton* (1905, C. C. A. 9th) 138 Fed. 992 (where there was a state statute on the subject).

[26] *New York Central R. R. Co. v. Lockwood, supra* note 25.

[27] *The Miguel di Larrinaga* (1914, S. D. N. Y.) 217 Fed. 678; see *The Fri* (1907, C. C. A. 2d) 154 Fed. 333. Such stipulations were also enforced in a federal forum in *The Trinacria* and *Baetjer v. La Compagnie Generale Transatlantique, supra* note 15.

[28] *Cf. Railroad Co. v. Druien, supra* note 15 (where the court says that the public policy of a state is confined to the regulation of its own affairs and transactions occurring within its sovereignty).

[29] *Cf. The Glenmavis, supra* note 24 (where the court expressed the view that these stipulations affect injuriously not only the immediate parties but the public at large).

language, however, but falls back on a mechanical use of the *lex loci contractus* rule, after attempting to support its decision by citing two United States Supreme Court cases,[30] neither of which is in accord as to theory with the instant case or conclusive on the facts.

The English case, on the other hand, follows the "intention theory," which seems to be the settled law in England. The court assumes that such a contract made in the United States between an English subject, resident in England, and an English carrier for transportation on an English ship would violate no law of the United States. If our policy is to protect the public against entering into such contracts, undoubtedly our courts would extend the same protection to an alien within our borders. But in the absence of a statute or an authoritative determination of an American court upon this precise point, there seems no reason why an English court should hold the contract contrary to American public policy.

## IS THE FEDERAL GIFT TAX A DIRECT TAX?[1]

The perplexing question of what constitutes a direct tax within the meaning of the Constitution has been raised once more by the recent federal gift tax[2] which imposed on all transfers by gift a tax identical in rates with those of the accompanying inheritance tax[3]—no tax below $50,000, 1 per cent on $50,000 graduating to 40 per cent on $10,000,000. In the recent case of *McNeir v. Anderson*,[4] an action by a tax-payer to recover a tax assessed under this statute and paid under protest, District Judge Augustus N. Hand declared the tax "direct," hence unconstitutional because not apportioned.[5] He based his decision squarely on the authority of *Pollock v. Farmers' Loan & Trust Co.*[6] It must be admitted that if the Supreme Court religiously follows that case, a gift tax is necessarily a direct tax. But, for a number of reasons this does not seem probable.

Seven times in the period from 1796 to 1894, the Supreme Court was confronted with the contention that an unapportioned tax

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[30] *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, *supra* note 9; *The Kensington*, *supra* note 5.

[1] Subsequent to the completion of this comment, the case of *Blodgett v. Holden* (1926, W. D. Mich.) 11 Fed. (2d) 180, was handed down, upholding the constitutionality of the gift tax much along the lines suggested herein.

[2] Act of June 2, 1924 (43 Stat. at L. 253, 313).

[3] *Supra* note 2, at 303.

[4] (1926, S. D. N. Y.) 10 Fed. (2d) 813.

[5] U. S. Const., Art. 1, sec. 2, cl. 3; Art. 1, sec. 9, cl. 4.

[6] (1894) 157 U. S. 429, 15 Sup. Ct. 673; 158 U. S. 601, 15 Sup. Ct. 912.

was "direct" and the contention was on each occasion rejected.[7] In so doing the court consistently relied upon Alexander Hamilton's definition,[8] which restricted "direct" taxes to poll taxes and taxes on land. This pragmatic definition, admittedly unsound economically, seemed the only practical solution of the difficulty. For as the *Hylton* case pointed out,[9] the reason for the existence of the clause in the Constitution was that the southern representatives to the Constitutional Convention, fearful lest their large slave population should be taxed at the same rate as the free population of the North, and that their vast, undeveloped acreage be taxed at the same rate as the scant developed acreage of the North, insisted on some provision in the Constitution which would prevent the imposition of such unequal burdens. The clause providing for the apportionment of "direct" taxes was the ultimate concession to this demand and the record of the debates shows that the delegates had an extremely vague notion as to what was meant by "direct." [10] Since any other definition would have seriously crippled the taxing power of Congress, and since it seemed logical that in ordering an apportionment of "direct" taxes, the Convention must have had in mind such taxes as could be apportioned,[11] Hamilton's definition was accepted unhesitatingly by the courts, and also by the leading jurists of the period.[12]

The *Pollock*[13] case, a five to four decision, upset this sensible solution of the problem and embraced the economic definition of a "direct" tax—a tax on property because of its ownership. But in so doing the court further weakened the force of its decision by attempting to distinguish, not overrule, all of the seven prior cases. The result is that all but the *Springer*[14] case have since been cited with approval by the Supreme Court in a number of

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[7] *Hylton v. United States* (1796, U. S.) 3 Dall. 171 (a tax on carriages); *License Tax Cases* (1866) 72 U. S. 462 (a tax on the sale of liquor and lottery tickets); *Pacific Insurance Co. v. Soule* (1868) 74 U. S. 433 (a tax on the gross income of insurance companies); *Veazie Bank v. Fenno* (1869) 75 U. S. 533 (a 10 per cent tax on bank notes issued by state banks); *Collector v. Hubbard* (1870) 79 U. S. 1 (income tax); *Scholey v. Rew* (1874) 90 U. S. 331 (a succession tax on real estate); *Springer v. United States* (1880) 102 U. S. 586 (income tax).

[8] 7 Hamilton's Works 845.

[9] *Supra* note 7, at 177, (Paterson, J. and Wilson, J. who sat on this case were both prominent members of the convention, and were heartily in accord with Hamilton's definition).

[10] Riddle, *The Supreme Court's Theory of a Direct Tax* (1917) 15 MICH. L. REV. 566, note 5.

[11] *Supra* note 7, at 181.

[12] Cooley, *Constitutional Limitations* (7th ed. 1903) 680; 1 Kent. *Commentaries* (13th ed. 1884) 282; 1 Story, *The Constitution* (5th ed. 1891) sec. 954 *et seq.*

[13] *Supra* note 6.

[14] *Supra* note 7.

cases involving the same problem,[15] and only one case[16] since 1894 has given comfort to the followers of the *Pollock* case, and there the decision depended solely upon the construction of the word "property" in a clause of the Kentucky Constitution which forbids "property" taxes unless uniform in operation. The numerous other cases involving the "direct" tax problem[17] although avoiding the issue of the *Pollock* case by declaring the taxes involved to be not on property but on the privilege of using property, or of doing business, have so whittled it down as to make it seem probably that the Supreme Court will soon be able virtually to ignore its authority.[18]

In the instant case, Judge Hand attempted to distinguish these decisions on the ground that the taxes involved were treated as excises for historical reasons, pointing out that the classification of subjects of taxation is largely historical, not scientific. Such an argument is in effect an acknowledgment of the soundness of Hamilton's definition, and a confession that the logical application of the economic definition of a "direct" tax would under our constitution virtually prevent the introduction of new taxes, so vitally necessary to the successful conduct of the complex, extensive governmental structure of today.

Recognizing this fact, yet unwilling to overrule the *Pollock* case, the Supreme Court has been forced to the afore-mentioned evasions in order to permit Congress to introduce new theories of taxation to meet the rapidly changing economic conditions. The extent of these evasions is apparent when it is considered that the court has been willing to hold that the following are not taxes on property but are taxes on the privilege of doing or of using: inheritance taxes;[19] sales taxes evidenced by stamps on all sales of stocks, bonds and merchandise on any exchange or board of

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[15] *Nicol v. Ames* (1898) 173 U. S. 509, 19 Sup. Ct. 522; *Knowlton v. Moore* (1899) 178 U. S. 41, 20 Sup. Ct. 747; *Patton v. Brady* (1901) 184 U. S. 608, 22 Sup. Ct. 493; *Thomas v. United States* (1903) 192 U. S. 363, 24 Sup. Ct. 305; *Spreckels Sugar Refining Co. v. McClain* (1903) 192 U. S. 397, 24 Sup. Ct. 376; *Flint v. Stone-Tracy Co.* (1910) 220 U. S. 107, 31 Sup. Ct. 342; *Brushaber v. Union Pacific Railroad Co.* (1915) 240 U. S. 1, 36 Sup. Ct. 236.

[16] *Dawson v. Kentucky Distilleries Co.* (1920) 255 U. S. 288, 41 Sup. Ct. 272. (A Kentucky statute sought to impose a tax of 50 cents a gallon upon whiskey withdrawn from bond within the state, or transferred in bond from the state elsewhere. The tax was clearly not a tax on the business of warehousing, for the whiskey could go through any number of bonded warehouses within the state without being taxed. Nor was it a tax on the privilege of storing, for the whiskey could be stored indefinitely without being taxed).

[17] *Infra*, notes 19–24.

[18] Riddle, *op. cit. supra* note 10, at 577.

[19] *Magoun v. Illinois Trust and Savings Bank* (1898) 170 U. S. 283, 18 Sup. Ct. 594; *Knowlton v. Moore*, *supra* note 15.

trade;[20] an additional tax on tobacco after the original tax had been paid and the tobacco stamped;[21] a tax on the gross annual receipts of a corporation in excess of $250,000;[22] a tax on the net income over $5,000 of all corporations;[23] a tonnage tax on foreign-built yachts owned by United States citizens.[24] The analogy of some of these cases to the instant one is almost perfect. For the only distinction between a gift and a devise is that the latter is a statutory, not a common law privilege, and surely no such technical argument should prevail to overthrow so important a tax. But even if this were a valid distinction, it seems obvious that the privilege of purchase and sale is based no less on custom and common law than the privilege of giving,[25] yet it is subject to taxation on the ground that such a privilege is the creation of law and dependent upon government for its existence.[26] And if it is argued that a tax on sales is one which can be shifted, while that on a gift cannot, that is begging the question. For such an argument assumes that the tax is one on property, whereas it is merely a tax on a privilege connected with the property. That this distinction is recognized by the Supreme Court as a valid one necessarily follows from the decisions upholding inheritance taxes, taxes on corporate income, and taxes on private yachts, for obviously none of these can be shifted.

This line of decisions coupled with the fact that the gift tax is necessary in order to prevent the annual loss of millions of dollars to the government in income tax and inheritance tax payments now so easily avoided,[27] seems to make it an almost inevitable conclusion that the Supreme Court will hold that a gift tax is not a "direct" tax, but is a tax on the privilege of giving. For as said by Mr. Justice Peckham in the course of his opinion upholding a stamp tax on the sale of merchandise,[28] "As a mere abstract, scientific or economic problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect."

[20] *Nicol v. Ames, supra* note 15; *Thomas v. United States, supra* note 15.

[21] *Patton v. Brady, supra* note 15.

[22] *Spreckels Sugar Refining Co. v. McClain, supra* note 15.

[23] *Flint v. Stone-Tracy Co., supra* note 15.

[24] *Billings v. United States* (1913) 232 U. S. 261, 34 Sup. Ct. 421.

[25] Gleason & Otis, *Inheritance Taxation* (4th ed. 1925) 182.

[26] *Nicol v. Ames, supra* note 15, at 518.

[27] As the Congressional debates prior to enactment of this tax so clearly pointed out (1924) 65 Cong. Rec. 8353.

[28] *Nicol v. Ames, supra* note 15, at 516.