NOTES

DEPORTATION OF ALIEN SEAMEN OWING ALLEGIANCE TO GOVERNMENTS-IN-EXILE*

THE threat to the Allied shipping program arising from desertion of alien seamen in United States ports[1] has occasioned more vigorous enforcement of the Immigration Laws. Since desertion is often motivated by the attractiveness of employment in United States defense industries,[2] deportation for surreptitious entry into the country is one method of discouraging it.[3] From the legal standpoint, it is normally a simple matter to deport an alien unlawfully in this country. For the statute specifies that deportation of aliens shall "at the option of the Attorney General, be to the country whence they came or to the foreign port at which such aliens embarked for the United States"; and if the Attorney General chooses to deport the alien to the "country whence he came" and that country refuses him, the deportee may then be sent to the state of which he is a citizen.[4] But a difficult problem of statutory construction arises when, as in the case of many deserting seamen, the alien was last

* Delany v. Moraitis, 136 F. (2d) 129 (C. C. A. 4th, 1943).

1. These desertions have, through consequent crew shortages, seriously threatened the Allied shipping program by delaying sailings and preventing the efficient transportation of supplies. Desertions have reached a peak of four hundred monthly. See War Shipping Administration, Recruitment and Manning Organization, Information Circular No. 15 (1943). The situation is particularly grave in view of manpower shortage and the irreplaceability of the present crew supply of most of the United Nations owing to enemy occupation of their territory.

2. See Report of the Special Interdepartmental Committee on Maritime Labor (1942) 2-3; War Shipping Administration, Recruitment and Manning Organization, Information Circular No. 4 (1942) 1.

3. See affidavit submitted by Marshall E. Dimock, Director, Recruitment and Manning Organization, War Shipping Administration, in the case of Delany v. Moraitis, 46 F. Supp. 425 (D. Md. 1942).

4. The statute reads: "The deportation of aliens . . . shall, at the option of the Attorney General, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; . . . or, if such aliens are held by the country from which they entered . . . not to be subjects or citizens of such country, and such country refuses to permit their reentry, . . . then to the country of which such aliens are subjects or citizens . . . ." 32 STAT. 1218, 1221 (1903), 34 STAT. 904, 905, 908 (1907), 8 U. S. C. § 156 (1941).

The administrator's discretion to deport to the "country whence he came" or to the port of embarkation is subject to judicial control only if abused. McDonough v. Tillinghast, 56 F. (2d) 156 (C. C. A. 1st, 1932); United States v. Testolini, 4 F. (2d) 76 (C. C. A. 5th, 1925). But the courts have insisted that the "country whence [he] came" must refuse the deportee before he can be sent to the country of his allegiance. Gorcevich v. Zurbrick, 48 F. (2d) 1054, 1055 (C. C. A. 6th, 1931); United States *ex rel.* Natali v. Day, 45 F. (2d) 112 (C. C. A. 2d, 1930).

domiciled in what is now an enemy occupied country with an exiled government functioning in London and he is rejected by the country whence he embarked for the United States.

Presented with this problem in the recent case of *Delany v. Moraitis*,[5] the Court of Appeals for the Fourth Circuit ruled that a deserting Greek seaman could be deported to England, and thus placed under the jurisdiction of the Greek government-in-exile, on the theory that "country whence [he] came" means the government exercising sovereign power over the deportee. The court also thought that a refusal to satisfy the requests of the Greek government-in-exile for deportation to England would, in view of its recognition by the United States, amount to denial of that government's right to exercise jurisdiction over absent nationals.[6] But the right of another government over an absent national would seem irrelevant, since deportation, unlike extradition, is the exercise of an absolute power of a state.[7] In the United States, where the exercise of the deportation power is controlled by statute, the alien has an absolute right to be deported only to one of the places authorized therein.

The court's decision would, therefore, seem to rest on its interpretation of "country whence [an alien] came" as the government to which he owes allegiance rather than the territory from which he came. In the single Supreme Court decision involving the phrase, *Mensevich v. Tod*,[8] it was held that if the part of the territory of a state from which the alien came is acquired by another state, he is deportable to the acquiring state. The full significance of this holding would appear to depend largely on whether the deportee was at the time of deportation a citizen of the acquiring or of the ceding state. For if the deportee had become a citizen of the acquiring state, the case would support a personal sovereignty interpretation. It appears, however, that in this case the alien was deported to the acquiring state even though he had retained the nationality of the ceding state, because he was resident abroad during the cession and the nationality of a successor state is generally acquired only by habitual residents who continue to reside in the ceded territory.[9] It

5. 136 F. (2d) 129 (C. C. A. 4th, 1943).

6. *Id.* at 131.

7. See (1942) 51 YALE L. J. 1358, 1363 note 25.

8. 264 U. S. 134 (1924).

9. ". . . subjects of the ceding state who are born on the ceded territory but have their domicile abroad do not become *ipso facto* by the cession subjects of the acquiring state." 1 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) 436, n. 3; see also 1 FAUCHILLE, DROIT INTERNATIONAL PUBLIC (1922) 427; FOOTE, PRIVATE INTERNATIONAL LAW (4th ed. 1925) 11; 2 HALLECK, INTERNATIONAL LAW (4th ed. 1908) 509-10; HARVARD LAW SCHOOL, RESEARCH IN INTERNATIONAL LAW (1929) art. 18; KEITH, THE THEORY OF STATE SUCCESSION (1907) 92; Treaty of Riga (1921) art. 6; Treaty of Versailles (1919) arts. 84, 85, 105; Engel v. Zurbrick, 51 F. (2d) 632, 633 (C. C. A. 6th, 1931) (". . . since, on March 18, 1921, they were not residing in the formerly Russian territory which became Poland, thus ipso facto then becoming Polish citizens, and since they

may be, however, that the Court did not consider the question of the deportee's nationality, since its only proffered rationale was the vague statement that " 'country' means the state which, at the time of deportation, includes the place from which the alien came."

Apart from the *Mensevich* case, there are strong indications that "country whence [an alien] came" means country territorially rather than governmentally. The statute itself authorizes deportation to the place of the alien's citizenship only after he has been refused by the "country whence [he] came." [10] In the past, moreover, courts have generally held domicile rather than nationality determinative of "country whence [an alien] came." [11] While it is true that in some instances the alien has actually been sent to the state of which he was a citizen, in those cases the state of nationality either coincided with the deportee's last domicile or he had been refused by the "country whence [he] came." [12] Whenever nationality and domicile differed, however, the alien was held deportable to the latter.[13]

Nor would the cases in which aliens were not in fact deported to countries with unrecognized governments seem to support the identification of "country whence they came" with state of citizenship. For in those cases, the alien was specifically held deportable to the territory of last domicile even though the government there had not been recognized by the United States

did not file their option for Polish citizenship before September 24, 1924, they lost their right—until then continued—to acquire that status."). But see HALL, INTERNATIONAL LAW (8th ed. 1924) 688; Treaty of Trianon (1920) art. 61; Treaty of St. Germain (1919) art. 70.

10. See United States *ex rel.* Boraca v. Schlotfeldt, 109 F. (2d) 110 (C. C. A. 7th, 1940); Gorcevich v. Zurbrick, 48 F. (2d) 1054, 1055 (C. C. A. 6th, 1931); United States *ex rel.* Natali v. Day, 45 F. (2d) 112 (C. C. A. 2d, 1930); see note 4 *supra.*

11. See cases cited notes 12 and 13 *infra.*

12. United States *ex rel.* Boraca v. Schlotfeldt, 109 F. (2d) 105, 109 (C. C. A. 7th, 1940); United States *ex rel.* Di Paola v. Reiner, 102 F. (2d) 40 (C. C. A. 2d, 1939); Schenck *ex rel.* Capodilupo v. Ward, 80 F. (2d) 422, 426 (C. C. A. 1st, 1935); Seif v. Nagle, 14 F. (2d) 416, 417 (C. C. A. 9th, 1926); Lazzaro v. Weedin, 4 F. (2d) 704 (C. C. A. 9th, 1925); Singh v. United States, 243 Fed. 557 (C. C. A. 9th, 1917); *cf.* Frick v. Lewis, 195 Fed. 693, 700 (C. C. A. 6th, 1912); Thack v. Zurbrick, 51 F. (2d) 634 (C. C. A. 6th, 1931). But see United States *ex rel.* Hudack v. Uhl, 20 F. Supp. 928, 930 (N. D. N. Y. 1937), *aff'd,* 96 F. (2d) 1023 (C. C. A. 2d, 1938), Blumen v. Haff, 78 F. (2d) 833 (C. C. A. 9th, 1935), *cert. denied,* 296 U. S. 644 (1935).

The domicile of origin is retained until one of choice is acquired elsewhere. See 1 BEALE, CONFLICT OF LAWS (1935) § 14.1.

13. United States *ex rel.* Mazur v. Commissioner of Immigration, 101 F. (2d) 707, 709 (C. C. A. 2d, 1939); McDonough v. Tillinghast, 56 F. (2d) 156, 158 (C. C. A. 1st, 1932); Gorcevich v. Zurbrick, 48 F. (2d) 1054 (C. C. A. 6th, 1931); *Ex parte* Guest, 287 Fed. 884, 891 (D. R. I. 1923); United States v. Sisson, 230 Fed. 974 (C. C. A. 2d, 1916); *Ex parte* Gytl, 210 Fed. 918, 923 (D. N. D. 1914); *cf.* Wenglinsky v. Zurbrick, 38 F. (2d) 985 (C. C. A. 6th, 1930), *rev'd per curiam,* 282 U. S. 798 (1930); *Ex parte* Mathews, 277 Fed. 857 (W. D. Wash. 1921). But see (1942) 42 COL. L. REV. 1343, 1344-45.

and could not be deemed to have jurisdiction over them;[14] and actual deportation was precluded only by the impossibility of executing a deportation warrant in the absence of diplomatic relations through which to secure the necessary passports.[15] Moreover, if deportation to an exiled government in England is not permitted by the statute, it cannot be justified as a first step in the ultimate deportation to the place of last domicile, because the United States would lose control of the alien upon his arrival in England.[16] Finally, it might be argued, on policy grounds, that a governmental interpretation of the phrase is undesirable. For since the statute does not differentiate between different kinds of aliens, all aliens similarly situated, whether seamen or not, would have to be deported to England,[17] and this would create serious administrative problems and work substantial injustice.

Although it would seem that these seamen are not deportable to their exiled governments, the same purpose may be effectuated by their detention pending actual deportation and release on condition that they reship foreign. For a deportee may be detained for a "reasonable time" pending deportation, the length of the period varying with the circumstances.[18] Present enemy occupation of the territories to which these seamen are deportable, a temporary war exigency expected to continue for a limited time only, would appear to warrant an extension of the period during which they can be held.[19] Moreover, the seaman would not have to be released on bail pending deportation. For departmental bail, pending administrative hearings,[20] may be granted at the discre-

14. Saksagansky v. Weedin, 53 F. (2d) 13, 16 (C. C. A. 9th, 1931); Wenglinsky v. Zurbrick, 38 F. (2d) 985, 986 (C. C. A. 6th, 1930); *Ex parte* Mathews, 277 Fed. 857 (W. D. Wash. 1921). But see (1942) 42 COL. L. REV. 1343, 1344.

15. Saksagansky v. Weedin, 53 F. (2d) 13, 16 (C. C. A. 9th, 1931); Wenglinsky v. Zurbrick, 38 F. (2d) 985, 986 (C. C. A. 6th, 1930); *Ex parte* Mathews, 277 Fed. 857 (W. D. Wash. 1921); see CLARK, DEPORTATION OF ALIENS (1931) 407-08.

16. Saksagansky v. Weedin, 53 F. (2d) 13, 16 (C. C. A. 9th, 1931); United States *ex rel.* Hudak v. Uhl, 20 F. Supp. 938, 930 (N. D. N. Y. 1937); *cf.* Wolck v. Weedin, 58 F. (2d) 928 (C. C. A. 9th, 1932).

17. The exiled governments could not then refuse to accept aliens not seamen, since in international law a state is under a duty to accept its nationals deported from another state. See HARVARD LAW SCHOOL, *op. cit. supra* note 9, art 20.

18. Compare Seif v. Nagle, 14 F. (2d) 416 (C. C. A. 9th, 1926); United States *ex rel.* Lisafield v. Smith, 2 F. (2d) 90 (W. D. N. Y. 1924); United States *ex rel.* Ross v. Wallis, 279 Fed. 401 (C. C. A. 2d, 1922); *In re* Kosopud, 272 Fed. 330 (N. D. Ohio 1920). Under normal conditions this period does not exceed a few months. See Caranica v. Nagle, 28 F. (2d) 955, 957 (C. C. A. 9th, 1928); United States *ex rel.* Ross v. Wallis, 279 Fed. 401 (C. C. A. 2d, 1922).

19. Compare Saksagansky v. Weedin, 53 F. (2d) 13, 16 (C. C. A. 9th, 1931); Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920), *rev'd on other grounds,* Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st, 1922).

20. 39 STAT. 891 (1917), 8 U. S. C. § 156 (1941), reads: "Pending the final disposal of the case of any alien . . ., he may be released under a bond in the penalty of not less than $500 . . . conditioned that such alien shall be produced when required for a hearing . . . and for deportation if he shall be found to be unlawfully within the United States."

tion [21] of the Department of Justice. And court bail pending habeas corpus proceedings and execution of the warrant is likewise discretionary.[22] The fact that these seamen are deserters from an allied nation would seem to be sufficient reason for refusing them bail.[23] And the wisdom of such a refusal is apparent in the light of the fact that these men may, at the discretion of the Department, be released on condition that they reship foreign [24] and that detention would, therefore, probably induce return to sea. Return would not be encouraged, of course, if on reshipping foreign the seaman were to be prosecuted for desertion.[25] But it seems likely that exiled governments, faced with

21. The great majority of courts have held that departmental bail is discretionary and that the deportee has no right to it. United States *ex rel.* Zapp v. Director, 120 F. (2d) 762 (C. C. A. 2d, 1941); *Ex parte* Perkov, 45 F. Supp. 864, 866 (S. D. Cal. 1942); United States *ex rel.* Pappis v. Tomlinson, 45 F. Supp. 447 (N. D. Ohio 1942); United States *ex rel.* Ioannis v. Garfinkel, 44 F. Supp. 518 (W. D. Pa. 1942); United States v. Pizzarusso, 28 F. Supp. 158, 160 (D. Conn. 1939).

A few courts have considered departmental bail mandatory. Prentis v. Manoogian, 16 F. (2d) 422 (C. C. A. 6th, 1926); see (1941) 10 INT. JURID. ASS'N BULL. 15, 16.

The exercise of this discretionary power has been subjected to judicial alteration only when abused. United States *ex rel.* Pappis v. Tomlinson, 45 F. Supp. 447 (W. D. Ohio 1942); Colyer v. Skeffington, 265 Fed. 17, 77 (D. Mass. 1920), *rev'd on other grounds*, Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st, 1922).

22. United States *ex rel.* Carapa v. Curran, 297 Fed. 946, 952 (C. C. A. 2d, 1924), 36 A. L. R. 877, 887; *In re* Hanoff, 39 F. Supp. 169, 171 (N. D. Cal. 1941); Ng Hen v. Sisson, 220 Fed. 538, 540 (S. D. N. Y. 1914).

Some courts deem the power to bail inherent in the court. *In re* Lum Poy, 128 Fed. 974 (C. C. D. Mont. 1904); United States v. Fah Chung, 132 Fed. 109 (S. D. Ga. 1904); see Wright v. Henkel, 190 U. S. 40, 63 (1903); (1941) 10 INT. JUR. ASS'N BULL. 15, 16.

The United States Supreme Court and the circuit courts of appeal are specifically authorized by statute to grant bail pending appeals from decisions refusing a writ of habeas corpus. REV. STAT. 765 (1875), 43 STAT. 940 (1925), 28 U. S. C. §§ 464, 463 (1941).

23. Compare *In re* Hanoff, 39 F. Supp. 169 (N. D. Calif. 1941).

24. Although not specifically authorized by statute, the courts have sanctioned the practice of the immigration authorities of allowing the deportable alien to depart voluntarily, and will review the administrative determination only in case of abuse. *Ex parte* Panagopoulos, 3 F. Supp. 222 (S. D. Cal. 1933); *cf.* United States *ex rel.* Mazur v. Commissioner, 101 F. (2d) 707 (C. C. A. 2d, 1939); Hajdamacha v. Karnuth, 23 F. (2d) 956 (W. D. N. Y. 1927); see Fafalios v. Doak, 50 F. (2d) 640 (App. D. C. 1931), *cert. denied*, 284 U. S. 651 (1931); CLARK, DEPORTATION OF ALIENS (1931) 469-70, 12. The practice of allowing voluntary departure would seem to be recognized by section 180(b) of the Immigration Laws. 45 STAT. 1552 (1929), 8 U. S. C. § 180(b) (1941). But see United States *ex rel.* Janavaris v. Nicolls, 47 F. Supp. 201, 203 (D. Mass. 1942). Many of the deserting seamen arrested returned to sea voluntarily. See affidavit submitted by Dimock, note 3 *supra*.

25. Since most United Nations consider seamen members of the armed forces, they could be prosecuted for desertion in the special maritime courts of the exiled governments set up in British territory. Allied Forces Act, 1940, 3 & 4 GEO. VI, c. 51; Allied Powers Act, 1941, 4 & 5 GEO. VI, c. 21. Although detention would involve some delay and expense, the same objection could be made against deportation proceedings.

a grave shortage of seamen, would refrain from inflicting punishment which would delay return to work. In view, however, of the low wages, poor food, maltreatment, unsanitary living quarters, and inadequate safety equipment aboard foreign ships,[26] many seamen may prefer detention in this country to reshipping foreign. Alleviation of these conditions would, then, seem necessary if those who have deserted are to be induced to return to sea and if desertions are to be prevented in the future.

LIABILITY OF THE UNITED STATES AND CANADIAN GOVERNMENTS FOR TORTIOUS CONDUCT OF THEIR MILITARY PERSONNEL

ALTHOUGH sovereign immunities to suit derived from national [1] and international [2] law absolve the United States and Canadian Governments from liability for the torts of their military personnel except upon a consensual basis, these Governments have found it politically expedient to provide compensation

26. See War Shipping Administration, Recruitment and Manning Organization, Information Circular No. 4 (1942) 1-3; (1942) 11 INT. JURID. ASS'N BULL. 44. The efforts of foreign consuls to persuade some detained seamen "to take employment on foreign-flag ships . . . were unsuccessful principally because of (1) extremely poor food served on foreign-flag ships; (2) low wages, bad conditions, and inadequate safety equipment on foreign-flag vessels; and (3) extremely unsanitary and unhealthy living conditions . . . ." AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN, MEMORANDUM ON MANNING OF FOREIGN-FLAG SHIPS (1942) 2. Since on American ships pay is approximately $300 monthly as compared to an average of $100 on foreign ships, an unjustified disparity in view of substantially equal earnings, many seamen have in the past deserted to join American ships. *Id.* at 2; Report of Interdepartmental Committee on Maritime Labor, note 1 *supra*. This situation has been stopped by the War Shipping Administrator's order forbidding further employment of foreign seamen in American and Panamanian boats. Immigration and Naturalization Service Rule 75, 7 FED. REG. 2761-62 (1942).

1. The rule of sovereign immunity to suit is prevalent throughout Anglo-American municipal law. See Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 1-19. For application of the rule in United States courts, see Bigby v. United States, 188 U. S. 400 (1902); German Bank of Memphis v. United States, 148 U. S. 573 (1893); Gibbons v. United States, 8 Wall. 269 (U. S. 1868). See as examples of English interpretation, Hutton v. Secretary of State for War, 43 T. L. R. 106 (Ch. 1926); Raleigh v. Goschen, [1898] 1 Ch. 73; Macgregor v. Lord Advocate, [1921] Sess. Cas. 847. In the *Macgregor* case an action against the War Department to recover for the negligent driving of a sergeant was dismissed, because an action does not lie against the Crown in respect of a wrongful act committed by one of its servants.

2. For a discussion of the immunity of a foreign sovereign from the territorial jurisdiction of another, see 2 MOORE, INTERNATIONAL LAW DIGEST (1906) §§ 250-58; see also 1 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) § 144.

to civilians injured by the tortious conduct of their armed forces. For suits against members of the military services as individual citizens [3] are inherently unsatisfactory. In the United States, for example, courts have discretion to stay the proceedings under provisions of the Soldiers and Sailors Relief Act;[4] any soldier has the privilege of removing a suit against him to a federal court;[5] and, once in court, he may protect himself by the sanction of any order from a superior which falls within the vague characterization "not palpably illegal." [6] Moreover, even this theoretical possibility of suit does not exist without diplomatic adjustment when the military personnel are present in a foreign state, for as members of the armed forces they share the immunity of the sovereign.[7] And although in the case of injury to property, the 105th Article of War [8] provides for collection of damages from the pay of the offender, this provision is applicable only when his action can be characterized as "depredation, wilful misconduct or such reckless disregard of property rights as to carry an implication of guilty intent." [9] Systems of state responsibility have, therefore, evolved, in both Canada and the United States. The present United States system is an expansion of administrative methods developed under legislation which creates a limited state liability for damage resulting from Government activities, while the Canadian system is a synthesis of Canada's experience with similar legislation and of methods developed during the first World War for handling the torts of soldiers abroad.

3. This opportunity to sue the offending individual as an ordinary citizen is the practical justification proffered for the non-liability of the State in Anglo-American law. See Borchard, *supra* note 1, at 2, criticizing the theory.

4. 54 STAT. 1181 (1940), 50 U. S. C. § 521 (1940). The English Army Act provides that no soldier shall be liable to be taken out of forces or compelled to appear in person before any court except where he is charged or convicted of a crime, or the debt or damages are over thirty pounds. Though the petitioner may proceed to judgment in such action after due notice to the soldier, he may not have recourse against the person, pay, arms, ammunition, equipment, and regimental necessities, or clothing of the soldier. 44 & 45 VICT., c. 58, § 144 (1881).

5. 39 STAT. 650, 669, Art. 117 (1916), 10 U. S. C. § 1589 (1940).

6. See McCall v. McDowell, 15 Fed. Cas. 1235 (C. C. Cal. 1867); Despan v. Olney, 7 Fed. Cas. 534 (C. C. R. I. 1852); Turney, *Civil and Criminal Accountability of Members of the Army and Navy* (1918) 24 CASE & COMM. 297; Ackerly, *Legal Responsibility of Obedient Soldier or Militiaman* (1917) 22 CASE & COMM. 739; Brown, *Military Orders as a Defense in Civil Courts* (1918) 3 VIRG. LAW REG. (N.S.) 641; (1942) 55 HARV. L. REV. 651.

7. See Tucker v. Alexandroff, 183 U. S. 424, 431-35 (1902); The Exchange, 7 Cranch 116 (U. S. 1812); 2 MOORE, *op. cit. supra* note 2, § 251; 1 OPPENHEIM, *op. cit. supra* note 2, §§ 443-46. The immunity remains, however, only so long as the soldiers are on duty or within the place where the force is stationed.

8. 41 STAT. 808, art. 105 (1920), 10 U. S. C. § 1577 (1941).

9. See 8 FED. REG. 15813 (1943), interpreting article 105 to include damage caused by "riotous, violent, or disorderly conduct," and removing from its scope those claims falling under the recent act. 57 STAT. 372 (1943), 31 U. S. C. A. § 224 (Curr. Serv. 1943) as interpreted by 8 FED. REG. 14655 (1943). See page 192 *infra*.

In the early years of the last war, Canada, following the practice in the United Kingdom, defended individual officers in civil suits and paid judgments against them when the state would have been liable, except for the rule of immunity, as any other master, for the torts of its servants.[10] Similarly, the United States in France permitted a judicial determination of such claims by waiver of its sovereign immunity to suit.[11] In 1917, however, when the independent status of Canadian troops in England was established,[12] Canada, still admitting no legal liability, adopted an administrative system of compensation.[13] "Compassionate grants" were made, by the legal authorities at the military headquarters in London, to those claimants whose injuries were occasioned by the negligence of any officer acting within the scope of his authority.[14] When a claim was denied, the claimant was informed that he might seek relief against the individual in court, but that the Crown would pay neither the costs of the suit nor the judgment.[15] Claims from insurance companies were disallowed on the theory that they could anticipate such accidents in the cost of their policies.[16] While the United States authorized in 1918 an administrative settlement of claims "under Regulations made by the Secretary of State," [17] it, like Canada, developed no principle of legal liability, since the claims were payable "according to the law or practice governing the military forces of the country" in which they arose.

10. See *Canadian Military Law Overseas* (1920) 56 CAN. L. J. 121, 122.

11. *Id.* at 121. England refused to waive its immunity and claims were settled by British commissioners. *Ibid.* For criticism of this immunity from jurisdiction of French courts by English commentator, see (1915) 139 L. T. 547.

12. *Canadian Military Law Overseas* (1920) 56 CAN. L. J. 41 and 121.

13. *Id.* at 123.

14. *Ibid.*

15. *Ibid.*

16. *Id.* at 123-24.

17. 40 STAT. 532 (1918), 10 U. S. C. (Supp. II, 1942), § 223a, repealed by 57 STAT. 66 (1943) § 5. See English Indemnity Act, 1920, 10 & 11 GEO. V, c. 48, § 1(d). This section permitted the institution of civil proceedings in England with the consent of the Attorney General (or in Scotland of the Lord Advocate) in "respect of damage to person or property in any foreign country." Consent was authorized only if the person would have had a remedy had the act been done in the United Kingdom and if no other provision for the settlement of the claim had been made by treaty or convention.

Today England retains the fiction of absolute sovereign immunity, but certain extra-legal compensation practices have developed. A commission in the Army Department, for example, makes payments to civilians injured by military vehicles if the act of the individual concerned was one in respect to which the ordinary master would have been liable for the torts of his servant. See mention of this commission in 367 PARL. DEB. (5th ser. 1940) 375; 372 PARL. DEB. (5th ser. 1941) 962 (payment to be made on master-servant principles); 372 PARL. DEB. (5th ser. 1941) 474 (discussion of case of a civilian killed by an army lorry driven without lights and on wrong side of road during air raid in Portsmouth; liability was denied). The English governmental departments also retain the practice of paying costs and judgments in suits against employees as individuals for acts done within the scope of authority. See (1941) 91 L. J. 145 (taken from debates in House of Lords); see also the statement of the Lord Chancellor that "it has been the invariable practice of all Government Departments to provide the funds required

Today, almost all payments made to claimants by the United States and Canada have a statutory and legal basis.[18] In Canada, the Exchequer Court has had, since 1927, jurisdiction to hear every claim arising from injury caused by any officer or servant of the Crown acting within the scope of his duty or employment;[19] and in the case of automobile accidents, this general liability has been replaced by a recent Order In Council which expressly provides that civilians may recover up to $200 for injuries to person or to property "resulting from the alleged negligence of any officer or servant of the Crown in the maintenance or operation of a motor vehicle while acting . . . within the scope of his duties or employment." [20] Still another order authorizes compensation regardless of negligence for injury suffered because of falling aircraft.[21]

In the United States, several statutes render the Government liable, irrespective of negligence, for damage to property up to $500 or $1,000 caused by various army activities,[22] and, also, for injury to person or property to the extent of $250 arising from the operation of aircraft.[23] Until recently, claims

to satisfy any judgment obtained against the driver" of a service vehicle, who was on duty at the time the accident occurred. *Ibid.* The departments will not provide such funds, however, in cases of the driver's own "frolic." See also (1941) L. J. 6 and 12, and *Canadian Military Law Overseas* (1920) 56 CAN. L. J. 121, 122, for discussion of the same practice during the last war.

18. Thus, the fiction of sovereign immunity from liability has been dispelled.

19. Exchequer Court Act, 1 CAN. REV. STAT. c. 34 (1927). See the administrative procedure authorized by Order in Council P. C. 80/1045 (Mar. 19, 1940).

20. Order in Council P. C. 59/7305, 5 PROCLAMATIONS & ORDERS IN COUNCIL RELATING TO THE WAR (1942) 167 (hereafter cited as PROC. & ORDERS IN COUNCIL). See also Order in Council P. C. 49/11590, 13 CAN. WAR ORDERS & REGULATIONS (1942) 757. These orders are applicable only to injuries "in Canada." The statutory authority for all Orders in Council regulating claims because of acts committed by Canadian military personnel is found in the War Measures Act, 4 CAN. REV. STAT. c. 206 (1927). An administrative procedure has also been established to handle claims arising out of damage caused by manoeuvres. See Order in Council P. C. 5134, 5 PROC. & ORDERS IN COUNCIL (1941) 39. And a recent order establishes a similar mechanism for handling claims arising out of the normal training of small bodies of troops. Order in Council P. C. 57/897, 5 CAN. WAR ORDERS & REGULATIONS (1943) 293.

21. Order in Council P. C. 67/2980, 4 PROC. & ORDERS IN COUNCIL (1941) 122, revoked and replaced by Order in Council P. C. 46/3017, 7 PROC. & ORDERS IN COUNCIL (1942) 29 (to include claims of "governments").

22. 56 STAT. 615 (1942), 31 U. S. C. § 223 (1940) (damage incident to training practice operation or maintenance of Army); 54 STAT. 23 (1940) (damage occasioned by field exercises); 50 STAT. 461 (1937), 31 U. S. C. § 215 (1941) (for damages incident to operations of National Guard); 41 STAT. 1015 (1920), 31 U. S. C. § 564 (1940) (damage incident to construction and improvements on rivers and harbors works), repealed by 57 STAT. 372 (1943) § 5; 37 STAT. 586 (1912) (compensation for damage caused by heavy gun fire and target practice, manoeuvres or other military operations), repealed by 57 STAT. 372 (1943).

23. 56 STAT. 620 (1942), 31 U. S. C. § 224 (Supp. II, 1942). See 7 FED. REG. 3583 (1942). For interpretation and application of this provision, see also 2 BULL. J. ADV. GEN. No. 5, at 195 (1943).

for tortious conduct of the forces were handled under a statute enacted in 1922, which made the "negligence" of any officer or employee of the Government acting within the scope of his employment the basis of claims for property damage up to $1,000.[24] But this statute has been rendered inapplicable by an act passed in July, 1943,[25] which consolidates the majority of claims against the War Department into a cohesive system of administration. It allows recovery up to $1,000 for damage to person[26] or property caused either by military personnel or civilian employees acting within the scope of their employment as well as for damage otherwise incident to non-combatant activities. Unlike the Canadian system, where recoupment on a graduated scale is made from the pay of the offender if the negligent act involved is not of a "minor character,"[27] liability of the United States for negligent acts of personnel committed within the scope of authority entails total responsibility for payment of compensation.

Administrative procedure employed by the United States for hearing claims is comprehensive though cumbersome.[28] After the claimant has submitted a sworn statement covering the essential elements of his claim, a Board of officers investigates the incident which caused the loss, hearing witnesses and permitting cross-examination. If the Board recommends the claim, it is sent to the appropriate statutorily designated officer for further consideration; and, if the claim is eventually paid, the award must be accepted in entire satisfaction of the legal claim.[29]

24. 42 STAT. 1066 (1922), 31 U. S. C. § 215 (1941). For administrative interpretation of the act of 1922, see 10 CODE FED. REG. (Supp. 1939) § 36.146(b). See also DIG. OPS. J. ADV. GEN. 1912-40, § 713(1) using as criterion for "scope of employment" the rule laid down in Conchin v. El Paso & S. W. R. R., 13 Ariz. 259, 108 Pac. 260 (1910). The act was rendered inapplicable to army injuries by 57 STAT. 372 (1943).

25. 57 STAT. 372 (1943), 31 U. S. C. A. § 224j. (Curr. Serv. 1943). For interpretation and application of this statute see 2 BULL. J. ADV. GEN. No. 7 at 274-75, No. 8 at 314-15, No. 9 at 346-48 (1943).

26. Formerly only 56 STAT. 620 (1940), 31 U. S. C. § 224 (1940) (operation of aircraft) allowed a recovery for damage to the person.

27. Order in Council P. C. 80/1045 (Mar. 19, 1940); Order in Council P. C. 59/7305, 5 PROC. & ORDERS IN COUNCIL (1942) 166. See Order in Council P. C. 49/11590, 13 CAN. WAR ORDERS & REGULATIONS (1942) 757 (establishing a lower scale of reimbursement for women). The same principle of recoupment is applied to acts committed abroad. See Order in Council P. C. 29/2544 § 4(b), 4 PROC. & ORDERS IN COUNCIL (1941) 111; Order in Council P. C. 59/7305, 5 PROC. & ORDERS IN COUNCIL (1942) 167; Order in Council P. C. 54/5095, 7 PROC. & ORDERS IN COUNCIL (1942) 152 (no reimbursement for claims arising from accidents, collisions in which Canadian ships are involved. But see Order in Council P. C. 62/11160, 10 CAN. WAR ORDERS & REGULATIONS (1942) 599 (amending P. C. 29/2544, 4 PROC. & ORDERS IN COUNCIL (1941)—acts abroad —to limit reimbursement to those cases involving recklessness, undue carelessness or intentional wrongdoing).

28. For the most recent statement of this procedure, see 8 FED. REG. 7213 (1943), as amended by 8 FED. REG. 14655 (1943); see also (1942) 10 GEO. WASH. L. REV. 473.

29. See 8 FED. REG. 7213 (1943); (1942) 10 GEO. WASH. L. REV. 473.

Claims for injuries caused by military personnel outside of Canada and the United States are handled under recent Canadian Orders in Council [30] and a United States statute.[31] The Canadian order authorizes civilians in the United Kingdom injured in person or property through the negligent and tortious acts of Canadian military, naval, and air force personnel to recover up to $1,000 from the Canadian Government on claims which would lie against the Crown in the "Right of the Dominion of Canada." [32] This constitutes an express admission that the Crown is legally liable at least for those acts of its soldiers in a foreign country which are committed within the scope of their authority;[33] and it establishes a mechanism for applying in a modified form the rule of the Fourth Hague Convention which states that a belligerent "shall be responsible for all acts committed by persons forming a part of its armed forces." [34]

The procedure first created by these orders was substantially the same as that employed in the last war,[35] but the course of administration has necessi-

30. Order in Council P. C. 5299, 3 PROC. & ORDERS IN COUNCIL (1940) 104 (army and air force and civilian personnel employed by Department of National Defence), rescinded and replaced by Order in Council P. C. 29/2544, 4 PROC. & ORDERS IN COUNCIL (1941) 110 (establishing Claims Commission), as amended by Order in Council P. C. 11/3550, 4 PROC. & ORDERS IN COUNCIL (1941) 149 (to include naval personnel). Order in Council P. C. 50/6954, 5 PROC. & ORDERS IN COUNCIL (1942) 147 (construction of P. C. 29/2544 where United Kingdom military vehicles also involved), Order in Council P. C. 40/8600, 5 PROC. & ORDERS IN COUNCIL (1942) 167 (extending construction authorized by P. C. 50/6954, *supra*, to Naval and Air Force vehicles); Order in Council P. C. 52/8600, 5 PROC. & ORDERS IN COUNCIL (1942) 274 (exempting accidents, collisions and like incidents occurring within the territorial waters of Great Britain and the continent of Europe from application of P. C. 11/3550, *supra*, and subjecting them to Admiralty practice), Order in Council P. C. 25/1249, 6 PROC. & ORDERS IN COUNCIL (1942) 116; Order in Council P. C. 62/11160, 11 CAN. WAR ORDERS & REGULATIONS (1942) 599; and Order in Council P. C. 40/1050, 6 CAN. WAR ORDERS & REGULATIONS (1943) 372.

31. 55 STAT. 880 (1942), 31 U. S. C. § 224(d) (Supp. II, 1942), as amended by 57 STAT. 66 (1943), 31 U. S. C. A. §§ 224(d) (e) (f) (g) (h) (i) (Curr. Serv. 1943) (excluding claims of enemy nationals, etc.).

32. Order in Council P. C. 5299, 3 PROC. & ORDERS IN COUNCIL (1941) 104; Order in Council P. C. 29/2544, 4 PROC. & ORDERS IN COUNCIL (1941) 111.

33. The Commission may, however, assume a responsibility broader than the master-servant principle through its power to settle claims on an *ex gratia* basis, if "such a claim should in the interests of the service be entertained." Order in Council P. C. 29/2544, 4 PROC. & ORDERS IN COUNCIL (1941) 111. Similarly damage claims incident to "billeting or quartering," "training or manoeuvres," or "alleged by any person, corporation or authority to have been caused by such personnel" may be considered "whether or not [the personnel were] engaged within the scope of their duties or employment." Order in Council P. C. 25/1249, 6 PROC. & ORDERS IN COUNCIL (1942) 116.

34. Second Hague Conference, Convention IV, art. 3. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) § 99; *cf.* 2 OPPENHEIM, INTERNATIONAL LAW (6th ed. 1940) §§ 259a, b; 1 OPPENHEIM, *op. cit. supra* note 2, § 163.

35. See Order in Council P. C. 5299, 3 PROC. & ORDERS IN COUNCIL (1941) 104.

tated modifications. The handling of claims has been centralized in one commission—composed of a Deputy Judge Advocate General, the Deputy Adjutant General, and the Assistant Judge Advocate General—at the military headquarters in the United Kingdom.[36] Since many of the claims are submitted by insurance companies, the Commission has been given power to work out forebearance agreements with these companies.[37]

The United States statute vests in the Secretaries of War and the Navy power to appoint claims commissions in foreign countries or their possessions to handle claims up to $5,000 for damages to property both public and private incident to the movement of the Army, Navy, and Marine Corps forces.[38] Negligence is not a prerequisite to recovery under the statute, but contributory negligence on the part of the claimant, his agent, or employees will bar a claim.[39] The responsibility of the United States is not limited to the official acts of its agents, for all bona fide claims are within the statute,[40] notwithstanding the fact that the particular damage may have been caused by officers or employees acting outside the scope of their employment. Thus, the dimensions of both legal and financial liability are broader than the Canadian.

The effectiveness of the various administrative systems remains as yet to be ascertained. Limitations as to the amount of recovery and the legal liability for which the governments will hold themselves responsible circumscribe the effectiveness of both the United States and Canadian systems. Nevertheless, an administrative determination allowing, as it does, for adjustment to the rhythm of army discipline and routine, would seem preferable to any method of private litigation.

36. Order in Council P. C. 29/2544, 4 PROC. & ORDERS IN COUNCIL (1941) 111.

37. *Ibid.*

38. The Coast Guard is also included when acting for the Army. See 55 STAT. 880 (1942), 31 U. S. C. § 224d (Supp. II, 1942), as amended by 57 STAT. 66 (1943), 31 U. S. C. A. § 224d, e, f, g, h, i (Curr. Serv. 1943). For administrative interpretation, see 8 FED. REG. 8247 (1943). The statute authorizing compensation for damage caused by aircraft was, also, applicable to damage caused abroad. See 56 STAT. 620 (1942), 31 U. S. C. § 224 (Supp. II, 1942).

39. 8 FED. REG. 8047 (1943).

40. *Ibid.* This is substantially the rule of the Second Hague Conference, Convention IV, art. 3. See note 34 *supra.*