1939

The Act of State

Charles B. Hagan

THE ACT OF STATE

By CHARLES B. HAGAN*

I. IN BRITISH LAW

THE phrase Act of State has appeared from time to time in the opinions of the courts of the various parts of the British Empire. It comprehends a limited category of cases which usually involves an exercise of authority by the Crown or its agents. Sometimes the phrase is employed to designate a wide range of governmental actions, and at other times it is employed to describe a particular type of governmental act. In the former classification, the matters at issue involve the residual powers of the prerogative. In the latter, or narrower classification, the matters at issue involve particular problems of administrative law, international law and diplomacy.

I

Some writers have treated the phrase as limited to a narrow field of acts performed by subordinate governmental agents, and others have considered a wider meaning which adds an executive discretion. The most comprehensive treatment of the doctrine is that of Mr. W. Harrison Moore.[1] His view is that the doctrine is related by lineal descent with certain notions of the prerogative that developed in the constitutional struggles of the seventeenth century and involves a troublesome borderland of law and politics. Consequently he has chapters dealing with martial law, privileges of the exchequer when the interests of the Crown are involved, the enforcement of treaties, civil discord in foreign states, state succession, the relation of dependencies to the Crown, foreign relations of the Crown, and the liabilities of Crown agents.

The narrow treatment of the doctrine is exemplified in the definition of Sir James Stephen,

"I understand by an Act of State an act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty; which act is done by any representative of Her Majesty's authority, civil or military, and is

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[1]Moore, The Act of State in English Law (1906).

either previously sanctioned or subsequently ratified by Her Majesty.

"In order to avoid misconception it is necessary to observe that the doctrine as to Acts of State can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an Act of State."[2]

It is clear that there are two distinct conceptions that are involved in such wide discrepancy of views. Some of the writers distinguish between the "wider sense" of the doctrine which comprehends "an act of the executive as a matter of policy performed in the course of its relations with another state," and a "narrower sense" of the doctrine which makes the principle a plea of defense,

"to an action brought against a servant of the Crown by a subject of a foreign State for an injury done to him or his property, provided that (1) the act of which the foreign plaintiff complains was committed on foreign territory; (2) he is not an alien enemy; and (3) the act was authorized or subsequently ratified by the Crown. The use of the term in such a case is in the nature of a special defence qualifying the rule of municipal law which normally prevents a wrongdoer setting up that his tortious act was done at the command of the Crown."[3]

The above expositions illustrate the usual methods of handling the doctrine. Justification for each of them may be found in the opinions of the courts. Summary treatment, in this article, will be given to the "wider sense" of the doctrine and a more extended treatment will be given to the "narrower sense."[4]

The "wider sense" of the phrase includes the authority of the Crown to determine the relations of the government with foreign states. The courts in Great Britain do not attempt to pass judgment upon the wisdom or the expediency of the Crown's recognition of any foreign government. They give effect to the act that the Crown has performed. Early in the nineteenth century there was some disposition on the part of the courts to question the power of the Crown in the exercise of this privilege, but

[2] 2 Stephen, A History of Criminal Law (1883) 61, 64.

[3] Wade, and Phillips, Constitutional Law (1933) 76-77.

[4] Other references to the writers: 23 Halsbury, The Laws of England, (1912) 304-312; 9 Holdsworth, A History of English Law, (1926) 98; Keir, and Lawson, Cases in Constitutional Law, (1928) 295 ff.; Keith, The Constitution, Administration and Laws of the Empire, (1924) 142; Pollock, The Law of Torts (13th ed. 1929) 115, 119-120; Wade, The Act of State in English Law, (1934) British Yearbook of International Law 98.

there was never in fact any difference in the conclusions reached by the courts and the act of the Crown.[5]

Likewise the Crown has the authority to determine whether the relations of Great Britain with a foreign country are peaceful or belligerent. The courts have not infrequently declared that "a declaration of war is an Act of State, a political act" which binds the court.[6] The "force" of such a declaration "is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an Act of State, done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law."[7]

The Crown also has the power to determine whether a particular territory is hostile,[8] and, apparently, whether particular persons are enemy aliens.[9] Of a like character is the power of the Crown to determine whether particular territory is British or not, and to determine the boundaries of such territory.[10]

The Crown in making a treaty acts in its discretion, and the process has been described as "high act of state." The Crown is free in the negotiating, and "as in the making, so in performing the treaty, she [the Queen] is beyond the control of municipal law, and her acts are not to be examined in her own Courts."[11] A corollary of this rule is that subjects may not claim as against

[5]Thompson v. Powles, (1828) 2 Simons 194; Taylor v. Barclay, (1828) 2 Simons 213; Charkieh, (1873) 4 Adm. and Ecc. 59, 28 L. J. 513, 1 Asp. M. L. C. 581; Mighell v. Sultan of Johore, [1894] 1 Q. B. 149, 63 L. J. Q. B. 573, 70 L. J. 64; Foster v. Globe Venture Syndicate Co., [1900] 1 Ch. 811, 69 L. J. Ch. 375, 82 L. J. 253; The Gagara, [1919] P. 95, 88 L. J. P. 101, 122 L. J. 498, 63 Sol. J. 301; The Annette, The Dora, [1919] P. 105, 88 L. J. P. 107; Duff Development Co. v. Government of Kelantan, [1924] A. C. 797. This list is not exhaustive.

[6]Sanday and Co. v. British and Foreign Marine Insurance Co., [1915] 2 K. B. 781, 824, 84 L. J. K. B. 1625, on appeal [1916] 1 A. C. 650. See also The Hoop, (1799) 1 C. Robinson 196.

[7]Esposito v. Bowden, (1857) 7 E. & B. 763, 781. See also Reid and Reid v. Hoskins, (1855) 4 E. & B. 979.

[8]The Pelican, (1809) 1 Edwards Adm. Appendix D; Blackburne v. Thompson, (1812) 15 East 81; Hagedorn v. Bell, (1813) 1 Maule & Selwyn 450.

[9]Wells v. Williams, (1697) 1 Lord Raymond 282 or 1 Salkeld 46; In re Maharanee of Lahore, Taylor Supreme Court Rpts. (Bengal 1848) 428.

[10]Hemchand Devchand v. Azam Sakarlal Chhomtamlal, [1906] A. C. 212, L. R. 33 Ind. App. 1; North Charterland Exploration Co. v. The King, (1910) 99 L. J. Ch. 483; The Fagernes, [1927] P. 311; see also Foster v. Globe Venture Syndicate Co., [1900] 1 Ch. 811, 69 L. J. Ch. 375.

[11]Rustomjee v. The Queen, (1876) 2 Q. B. 69, 46 L. J. Q. B. 238. See also for similar rulings; Baron de Bode v. The Queen, (1851) 3 H. of L. 449; Civilian War Claimants v. The King, [1932] A. C. 14; Administrator of German Property v. Knoop, [1933] 1 Ch. 439, 102 L. J. Ch. 156, 148 L. J. 468.

the Crown on the terms of a treaty, for the treaty gives no right to the subject. The Crown may not, it is now established, rely upon the terms of a treaty to deprive the subjects of a right. Thus the mere making of a treaty does not grant to the Crown the power to invade the property of a subject to enforce the terms of a treaty.[12]

The rules concerning annexation grant to the Crown an equally wide range of discretion. The acquisition of territory may be accomplished in a variety of ways, by treaty, by a series of acts which in fact constitute annexation, by formal proclamation, and perhaps by usage. Whatever the manner, the discretion of the Crown as to the disposal of the rights and titles is not to be limited by the municipal courts. The process has been described as an "act of sovereignty which is an Act of State" or simply as an Act of State. The extension of jurisdiction is "unchallengeable in any British court."[13]

II

The questions that have thus far received consideration have dealt with the discretion and power of the Crown in matters that concern foreign relations. The matter that will now be surveyed is the "narrower sense" of the doctrine of the Act of State, and the use of the principle as a defense of subordinate agents of government.

[12]Walker v. Baird, [1892] A. C. 491, 61 L. J. P. C. 92. See also the first hearing of Parlement Belge, (1879) 4 P. D. 129. See the comment of Keith, Act of State in British Dominions, (1921) 3 Jour. of Comp. Leg. and Int. L. (3d ser.) III, 312.

There are several cases in which related issues are discussed which arose in the seventeenth century. Weymberg v. Touch, (1669) 1 Cas. in Ch. 123; Troner v. Hassold, (1670) 1 Cas. in Ch. 173; Blad v. Bamfield, (1674) 3 Swans. 604; Rex v. Carew, (1682) 3 Swans. 669.

[13]Sobhuza v. Miller, [1926] A. C. 518; Campbell v. Hall, (1774) 1 Cowper 204; Doss v. Secretary of State for India in Council, (1875) 19 Eq. 509; Wi Parata v. Bishop of Wellington, (1877) 3 New Zealand Jurist Rpts., N. S. 72; Cook v. Sprigg, [1899] A. C. 572, 68 L. J. P. C. 144; West Rand Central Gold Mining Co. Ltd. v. The King, [1905] 2 K. B. 391, 74 L. J. K. B. 753; In re Southern Rhodesia, [1919] A. C. 211, 88 L. J. P. C. 1. See also Attorney-General of Southern Nigeria v. Holt, [1915] A. C. 599; Amodu Tijani v. The Secretary, Southern Nigeria, [1921] 2 A. C. 399, 90 L. J. P. C. 236. Wade, E. C. S., "The Act of State in English Law," British Yearbook of International Law (1934) 98.

Attention may also be directed to two New Zealand cases which were brought to the Privy Council. The latter body did not utilize the doctrine in disposing of the cases, but the courts in New Zealand referred to it in their opinions. Nireaha Tamaki v. Baker, (1894) 12 N. Z. L. R. 483, and [1901] A. C. 561; Teira Te Paea v. Roera Tareha, (1896) 15 N. Z. L. R. 91, and [1902] A. C. 56.

In three cases involving the Lord-Lieutenant of Ireland the plea of Act of State has been accepted as a complete defense. The first case arose from an effort on the part of the plaintiff, Tandy, to secure the appearance of the Lord-Lieutenant, Westmoreland, in defense of an action. The latter failed to appear. Tandy refused to state whether his action was against the officer in his politic capacity, and this failure was accepted by the court as tantamount to the admission of the political character of the cause. Upon this admission the question, in the opinion of the court, was not the general one, "whether a Lord-Lieutenant in his government may be sued for an act of power" but "whether he may be sued for an Act of State?" The court reached a negative conclusion to the latter question upon two grounds, (1), that to hold that the executive was amenable to court process would permit the destruction of government, and (2), that the acts of the Lord-Lieutenant were countersigned by responsible ministers.[14]

The second case was tried in 1865, and the issue was raised by the invasion of the plaintiff's house and the seizure of papers. The plaintiff then instituted an action of treason against the Lord-lieutenant. The charge was dismissed on the ground that the action was done by the Lord-Lieutenant in his official character and not in his personal character as a private individual; and that whether the act was wrong or not made no difference to the court. The court did not concern itself with the distinction between an act of power and an act of state.[15]

In the third, *Sullivan v. Earl of Spencer,* the charge was one of assault and battery which arose out of the interference in a political meeting in which the plaintiff was taking part and which the defendant had broken up. The distinction between an act of power and an act of state was urged by the counsel for the defendant. The court dismissed this point with the statement that it was "not disposed to involve myself in subtleties regarding such distinctions." In its disposition of the case, the court held that the deeds of the defendant were official and beyond the court's competence. The following language was used:

"What we now decide is, that for an act done by the Lord-Lieutenant as viceroy in this Kingdom, in his official capacity, no action can be maintained against him in this country, where he exercises the supreme authority vested in him by the Crown, and while he bears that authority."[16]

[14]Tandy v. Westmoreland, (1792) 27 Howell State Trials 1246.
[15]Luby v. Wodehouse, (1865) 17 Irish Common L. R. 618.
[16]Sullivan v. Earl of Spencer, (1872) Ir. Rep. 6 Common Law 173, 177.

In a lengthy list of cases, beginning with *Wytham v. Dutton* in 1688, and continuing for two centuries, it has consistently been held that the governor of a colony could not use the Act of State as a defense to acts performed by him.[17] The general rule that is applicable was stated in *Hill v. Bigge* as follows:

"If it be said that the Governor of a Colony is quasi Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him."[18]

In none of these cases has the question of the alien character of the plaintiff been of importance. The rules that were laid down would have applied equally to subjects and non-nationals. In *Musgrove v. Toy,* the appellant attempted to rely upon the Act of State as a defense for his refusal to accept the fee required by law of each Chinese who entered Australia. Musgrove was one of the port officials. Toy was brought to Australia on a boat that had more Chinese than were permitted entry; that is, the number of Chinese who could enter the dominion from a boat was determined by the tonnage of the boat. Musgrove had refused to accept the fee and Toy had sought to enforce the acceptance. The court of Australia had found for Musgrove, and on appeal to the Privy Council the decision had been affirmed without any reference to the special defense put in. The Council had not thought that any alien had an enforcible right of entry.[19]

The rule of this case was elaborated in *Poll v. Lord-Advocate.* The latter case brought into issue the question whether a German, fishing in the North Sea in conformity with the treaties, could land fish in Scotland in contravention of a statute of Scotland. The officers who refused him that right had their action approved by the Lord-Advocate acting for Her Majesty. The court did not

[17]Wytham v. Dutton, (1688) 3 Modern 159; Dutton v. Howell, Showers Parl. Cas. (1693) 24; Lord Bellamont's Case, (1700) 2 Salk. 625; Way v. Yally, (1700) 6 Modern 195, reference to this case may also be found in Mostyn v. Fabrigas, (1774) 1 Cowper 161, 175, both are incomplete and the name seems uncertain; Mostyn v. Fabrigas, (1774) 1 Cowper 161; Sutherland v. Murray, (1783) 1 Durn. & E. 538; Cameron v. Kyte, (1835) 3 Knapp 332; Musgrave v. Pulido, (1879) 5 A. C. 102, 49 L. J. P. C. 20; Phillips v. Eyre, (1869) 4 Q. B. 225; and (1870) 6 Q. B. 1.

[18]Hill v. Bigge, (1841) 3 Moore P. C. 465, 476.

[19]Musgrove v. Toy, [1891] A. C. 272. See the comment in the two articles: Craies, The Right of Aliens to Enter British Territory, (1890) 6 L. Quart. Rev. 27-41; and Haycraft, Alien Legislation and the Prerogative of the Crown, (1897) 13 L. Quart. Rev. 165-186. An account of the general problem of oriental immigration: Wilkinson, The World's Population Problems and a White Australia (1930) ch. XIII; Willard, History of the White Australia Policy (1923) 81-88.

examine whether an alien could raise and try the question as to whether agents, admittedly acting officially, were duly authorized by the head of the state. *Musgrove v. Toy,* on which the court refused to express any doubt, was "weighty authority in the negative." It was considered sufficient to stop the inquiry of Poll that the Lord-Advocate appeared in the process and asserted that the act of the officials was duly authorized. The statement so made had to be accepted as true by the court. The court added the dictum that the ratification and adoption of the acts by Her Majesty's Advocate were sufficient.

Such being the circumstances, the complainant's case rested upon the ground that an alien could contest an act ordered by the head of the state and in the national interest. There was no authority for such a rule. To sustain such a rule it would have to be assumed that the act of the Sovereign was contrary to international law. International wrongs, however, have to be redressed through diplomacy or as a last resort by war. The supreme executive of every state must be held to be absolute. Its acts are, till disavowed, the acts of the state and must be treated as such.[20]

It has been pointed out previously that a treaty affords no justification for an action against subjects, and a wider range is sometimes given to that rule so as to prevent the use of the principle of the Act of State against subjects. A more definite statement of the prohibition of the use of the doctrine as against subjects appears in *Johnstone v. Pedlar.*

In this case, Pedlar, an Irishman by birth and an American by naturalization, was arrested and sentenced. Upon completion of his sentence he sought to recover certain funds that had been taken from him at the time of his arrest. Johnstone, in answer to the claim, asserted that the taking was an act approved by the Crown and therefore was an Act of State which was beyond the ability of the courts to remedy. This defense was unanimously refused by the court. Acts of State they considered as normally taking place outside of the realm, and further, an alien within the realm,

"is normally regarded as a British subject for the time being in virtue of local allegiance, and it is for this reason that in dealing with the defence of 'Act of State' it is often said that the act must have been abroad as well as against a foreigner, in order that the defence should succeed."[21]

[20](1899) 1 Fraser (Scot.) 823.
[21]Johnstone v. Pedlar, [1921] 2 A. C. 262, 272, 90 L. J. P. C. 181.

It seems likely that a ship flying a British flag would be considered as British territory for certain types of causes. This conclusion is reached from the rules laid down in two cases. The case of *Regina v. Lesley* involved an action for false imprisonment which was instituted against the master of a British ship which was carrying certain persons whom the master had contracted to transport from Chile to Liverpool. He had contracted with the successful leaders of a revolution in Chile to carry the persons to England, and upon arrival there an action for false arrest was begun. The court did not consider the master's justification based on the contract with Chilean leaders to be sufficient defense after the vessel had passed beyond the line of Chilean jurisdiction, and "persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on British soil."[22] The same rule was applied by the courts of British Columbia (Canada) in a like case arising in Hawaii during a disturbed civil condition in 1892.[23]

In some of the cases in which the doctrine of the Act of State has been the defense of the defendant, the act has been performed prior to any authorization by superior authorities. A series of cases have supported the rule that if the act is later approved, that is sufficient to defeat the plaintiff's action. One of the earliest of these occurred in the case of the *Rolla*. Sir Home Popham while on duty near Montevideo proclaimed a blockade of the port without orders from Great Britain. The *Rolla* was captured when it attempted to run the blockade, and in the prize proceeding this absence of authority was set up as a sufficient basis for its release.

Sir William Scott had declared in the *Heinrick and Maria* that "A declaration of a blockade is a high act of sovereignty; and a commander of a king's ship is not to extend it."[24] In the opinion on the case of the *Rolla,* the strict application of that ruling was modified to the extent that a commander on distant stations "may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him, as may be necessary to provide for the exigencies of the service on which he is employed." Therefore, it followed that,

"However irregularly he may have acted towards his own government, the subsequent conduct of government, in adopting that

[22]Regina v. Lesley, (1860) Bell C. C. 220.
[23]Cranstoun v. Bird, (1896) 4 B. C. (Can.) 569.
[24]Heinrick and Maria, (1799) 1 C. Rob. 146.

enterprise, by directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned."[25]

The leading case upon this point is *Buron v. Denman.* The suit arose out of an action instituted by a Spaniard against a British naval officer in which the former sought to recover damages from the officer because of the destruction of property. Buron, the Spaniard, was engaged in the slave trade off the coast of Africa. Denman had been ordered by the British governor of Sierra Leone to release two British subjects, negroes, who were held as slaves by Buron.

In the execution of the order Denman made a treaty with the local chieftan, Siacca, which granted to Denman the right to abolish the trade. In pursuance of the treaty, Denman destroyed several barracoons and released a number of slaves belonging to Buron. Slave trade was not illegal. The correspondence relating to the act indicates full approval of the whole matter by the Foreign Office, the Lord Commissioners of the Admiralty, and the Colonial Office. The Advocate General's office, however, doubted the legality of the proceedings.

The principal question for the court was simply whether the subsequent ratification of the naval officer's act was sufficient in law to provide an adequate defense to the action. On this question of fact the jury found for the officer. Baron Parke in summing up for the jury pointed out that the ordinary rule of law of agency as between private individuals provided that subsequent approval was equivalent to prior authorization. There was a distinction between cases between private individuals and the instant case, because the act remains the same between private individuals and an action would still lie against the principal, but if one party is the Crown the situation is different, for

"Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore, you have to take it as the direction of the Court, that if the Crown, with knowledge of

[25]The Rolla, (1807) 6 C. Rob. 364. The ruling was approved in The Franciska, (1855) 2 Spinks Ecc. and Adm. 113.

what has been done, ratified the defendant's act by the secretaries of state or the Lord of Admiralty, this action cannot be maintained."[26]

The effect of the ratification is demonstrated by the decision of an earlier case involving similar facts but with the difference that there was no approval by the Crown officers. The officer was held liable for the damages resulting from his act.[27]

These cases have proceeded upon the assumption that there was an Act of State which is beyond the court's jurisdiction and have dealt with subsidiary questions which are sometimes raised in the trial of the issue. There remains the field in which the Act of State is allowed to operate, the tests which are to be applied, and the duty of the courts when the defense is entered.

In the above mentioned case of *Johnstone v. Pedlar,* Lord Sumner with reference to municipal courts stated,

"Municipal courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign. They do not control the acts of a foreign State done within its own territory in the execution of sovereign powers, so as to criticize their legality or to require their justification. What the Crown does to foreigners by its agents without the realm is State action also, and is beyond the scope of domestic jurisdiction."[28]

In a later case, Lord Atkin said,

"A suggestion was made by one of the learned judges that the order in this case was an act of state. This phrase is capable of being misunderstood. As applied to an act of sovereign power directed against another sovereign power, or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act."[29]

In Lord Sumner's analysis the operation of the Act of State includes three classes of disputes; first dealings of state with state; second, acts of a foreign state done within its own territory in the execution of sovereign powers; and third, acts of the Crown's agents without the realm and against aliens. In Lord Atkin's analysis, the principle is not capable of covering actions

[26]Buron v. Denman, (1848) 2 Ex. 167.
[27]Madrazo v. Willes, (1820) 3 Barn. & Ald. 353.
[28]Johnstone v. Pedlar, [1921] 2 A. C. 262, 290, 90 L. J. P. C. 181.
[29]Eshugbayi Eleko v. Officer Administering the Government of Nigeria, [1931] A. C. 662, 671, 100 L. J. P. C. 152.

of the executive directed to subjects within the territorial jurisdiction, and he would allow the operation of the principle to cover an "act of sovereign power directed against another sovereign power or subject of another sovereign power not owing temporary allegiance in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad."

The third category of Lord Sumner, that is, the acts of the Crown's agents without the realm and against aliens, presents at the outset some difficulty. Most of the cases that have relied upon the doctrine have involved the East India Company, and the courts in solving the issues have raised the company from a person in English law to the character of a foreign state. The company seems clearly to have been an agent of Great Britain, with some characteristics of a State, and it would seem not improbable that the actions of the company should be under the same liabilities as a natural person, so that the disabilities of a natural person and of the company would be the same in the same circumstances.[30] In later years, the liability of Crown agents has come into question and raised the matter of its application in protectorates.

The first case in which the doctrine came clearly into issue was that of the *Nabob of the Carnatic v. The East India Co.*[31] The plaintiff, whose estates were being managed by the defendants, sought an accounting. The company answered the complaint by denying the jurisdiction of the court. Lord Thurlow, for the court, thought that the defense was "perfectly new" since it denied jurisdiction without setting up another jurisdiction competent to try the issue. This defense was not admitted upon the first hearing but upon a rehearing and a recital of the complete facts, it was allowed. The agreement between the Nabob and the company was considered to be a treaty between "states independent of each other." In a later case arising in the same territory but concerned with private rights, the company escaped the juris-

[30]On the two-fold character of the East India Company see the following cases: Moodalay v. Morton, (1785) 1 Brown C. C. 469; Gibson v. East India Co., (1839) 5 Bing. N. C. 262 where it is stated, ". . . It is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other; namely, power to carry on trade as merchants, and (subject only to the prerogative of the Crown to be exercised by the board of commissioners for the affairs of India) power to acquire, retain, and govern territory, to raise and maintain armed forces by sea and land and to make peace and war with the native powers of India;" and Ex parte Napier, (1852) 21 L. J. Q. B. 332.

[31](1791) 1 Vesey Jr. 371; (1793) 2 Vesey Jr. 56. It is also reported in 3 Brown C. C. 292 and 4 Brown C. C. 180.

diction of the court by virtue of the political character of the treaty between the company and the Carnatic government.[32]

In the leading case on the matter, that of *Secretary of State in Council of India v. Kamachee Boye Sahaba,* the cause of the action arose out of the taking of property by one Forbes, an agent of the East India Company, which property, it was claimed by the respondent, belonged to the Rajah in his private capacity as distinct from his public capacity. No distinction had been made in the order of seizure. The distinction would have made no difference in the courts, for it was considered a clear proposition of law that,

"The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."[33]

As for the seizure of property,

"The result, in their lordships' opinion, is, that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of state over which the Supreme Court of Madras has no jurisdiction."[34]

In this case the Privy Council laid down the rules which should be applied by the courts to determine whether a particular act is one such as to avoid the jurisdiction,

"The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighboring state, an act not affecting to justify itself on grounds of municipal law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title. . . ."[35]

The Privy Council in deciding *Musgrave v. Pulido* considered the function of a municipal court when the plea of Act of State is entered by the defendant. The case arose on an action of trespass for damages by Pulido, an alien, whose ship had been detained by Musgrove as governor of Jamaica. Musgrove's defense was solely that his action was an Act of State and within

[32]East India Company v. Syed Ally, (1827) 7 Moore Ind. App. 555.

[33]Secretary of State in Council of India v. Kamachee Boye Sahaba, (1859) 13 Moore P. C. 22, 77.

[34](1859) 13 Moore P. C. 86. See also Elphinstone v. Beedreechund, (1830) 2 State Trials, N. S. 278, where it was held that no action would lie against an army officer to recover gold taken by him in the course of a military campaign.

[35](1859) 13 Moore P. C. 77.

his powers as an agent of the Crown. The Judicial Committee refused his declaration stating,

"When questions of this kind arise it must necessarily be within the province of municipal courts to determine the true character of the acts done by a governor, though it may be that, when it is established that the particular act in question really is an act of state policy done under the authority of the Crown, the defense is complete, and the courts can take no further cognizance of it."

The Court further commented on the cases involving the East India Company,

"As far as their Lordships are aware, it will be found that in all the suits brought against the Government of *India,* whether in this country or in *India,* the pleas and answers of the government have shown, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the courts."[36]

The courts have rather wide powers in determining the character of the particular action out of which the complaint may arise, and the mere assertion by governmental agents is not conclusive as to the rights of the parties. Support for this conclusion may be found in two cases that arose in India and involved the rights of the British Government as a successor state. In *Mills v. Modee Peston-jee Khoorsed-jee,* the respondent had sued to recover a village which the British Government had claimed as successor to the Tax Farmer. The latter held the village for failure of the respondent to pay the proper taxes. The court refused the defense of Act of State, declaring the original taking the wrongful taking of an individual.[37] The second case involved an effort on the part of the secretary of state to regain a grant before its term had expired. The court held the matter to be legal in character and subject to law, despite the assertion of the defense that the matter was Act of State.[38]

Promissory notes coming into the possession of the British Government in the course of a war constitute an exercise of sovereign power and the act is therefore beyond the jurisdiction of the courts.[39] The distinction between this and the two immediately preceding cases is, apparently, the character of the par-

[36]Musgrave v. Pulido, (1879) 5 A. C. 102, 49 L. J. P. C. 20.

[37]Mills v. Modee Peston-jee Koorsed-jee, (1838) 2 Moore's Ind. App. 37.

[38]Forester v. Secretary of State for India in Council, (1872) L. R. Ind. App. Supp. 10.

[39]Ex-rajah of Coorg v. East India Co., (1861) 29 Beav. 300.

ties. In the latter case the plaintiff was an ex-Rajah whose possessions were public whereas in the former, the plaintiffs were private persons without regal character. In line with the ex-Rajah's case is the decision in *Rajah Salig Ram v. Secretary of State.*[40] The matter in dispute was liability for bonds issued by the King of Delhi, responsibility for which had been accepted generally by Britain but was refused in this particular case since it was a privilege of the government to grant or withhold it at pleasure. The same principle applied in the situation where the holdings in an annexed area were abolished upon annexation and regranted at the pleasure of the government.[41] The general rule that private rights may not be established upon agreements between sovereign princes of India and the East India Company was stated in 1906 as follows,

"The acts of the East India Company done in the execution of such powers are Acts of State, and are not subject to control by the Courts either of India or of Great Britain."[42]

Fletcher Moulton, L. J., in the case last cited remarked,

"The true view of an Act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure; and its power and its duty to adjudicate upon, and enforce rights of individuals, or of the Government, in the future, appear to me to be precisely the same whether the origin of such rights be an act of state or not."[43]

The most extended use of the doctrine has been in the developments that arose from British action in India. In later years it has appeared in a few cases arising in protectorates. In the case of *King v. Earl of Crewe, (Ex parte Sekgome),* which arose on a petition for a writ of habeas corpus, it was shown that Sekgome, a native ex-chief in Bechuanaland, was arrested and imprisoned on a proclamation of the governor. The defense contended that the territory was not annexed and consequently that the ordinary rights of British subjects were not involved. Further, it was claimed that the proclamation under which the arrest was made was an Act of State. The affidavit of the secretary of

[40](1872) L. R. Ind. App. Supp. 119.
[41]Sirdar Bhagwan Singh v. Secretary of State, (1874) L. R. 2 Ind. App. 38.
[42]Salaman v. Secretary of State, [1906] 1 K. B. 613, 75 L. J. K. B. 418, 94 L. J. 858.
[43]Salaman v. Secretary of State, [1906] 1 K. B. 613, 640, 75 L. J. K. B. 418, 94 L. J. 858.

state that the territory was not annexed was regarded by the court as conclusive that the territory was not British territory. The result was that the Act of State was a good defense "assuming that the Protectorate of Bechuanaland is a country which has never been annexed."[44]

The rule of this case was followed in *Masai Tribe v. Attorney-General of the Protectorate.* The question arose in Mombasi. It appeared that there were two agreements between the tribe as one party and the Crown as the other. The agreements were executed in a manner which the tribe considered not to be in pursuance of the agreements. The defense contended that the agreements were treaties, not a contractual arrangement which could be enforced by the courts, and thus an Act of State. The court accepted this view asserting,

"As to the alleged losses incurred by the plaintiffs they themselves plead that defendants 20 and 21 were the agents of the government acting in pursuance of orders of the government or secretary of state in carrying out the second agreement, which pleading is accepted by both these defendants as their defense. Such an action as against them is founded on tort and will not lie, and their acts in carrying out the terms of a treaty having been on instruction from and adopted by the government are as much acts of state as the treaty itself."[45]

It would appear that the acts of British officials in the territory of the Mandates is equally beyond the competence of the British municipal courts.[46]

III

There is another type of cause in which the doctrine of the Act of State appears. The situation occurs when a plaintiff attempts to compel a foreign state or state agent to appear and defend a claim resting upon the acts of the state or its agents when such acts are done by virtue of authority issued from the foreign state. The question is sometimes complicated by the fact that a British subject is the agent of the foreign government.

It is clear that a foreign government is not answerable in British courts for acts done by it,[47] and that the courts would

[44]King v. Earl of Crewe, [1910] 2 K. B. 576.

[45]Masai Tribe v. Attorney-General of the Protectorate, (Mombasi, 1912) Cmd. 6939 (1913); reprinted in 8 Am. J. of Int. L. 380.

[46]Jerusalem-Jaffa District Governor v. Murra, [1926] A. C. 321. See also Wright, Mandates Under the League of Nations, (1930) 417-421; and Wade, and Phillips, Constitutional Law, (1933) 376-378.

[47]Barclay v. Russell, (1797) 3 Vesey Jr. 424; Wadsworth v. Queen of

clearly refuse to take jurisdiction in a dispute which would require it to compel a state to act or not to act in a given manner,[48] nor would the municipal courts sit in judgment upon the legality of an act performed by a sovereign within its territory.[49]

In the causes involving state agents, the rule seems equally clear when the acts occur within the territory of the other nation and the act can be shown to be in fact the act of the government through the agent. Thus in the case of *Hart v. Gumpach,* the latter was unable to recover from Hart for Gumpach's discharge as an employee of the Chinese Government. Hart, an English subject, was an officer of the Chinese Government and in the course of his duties had employed Gumpach and later discharged him prior to the termination of the contract of employment. Hart's defense in part rested upon a plea of Act of State. The court dismissed the case upon other grounds, but in the course of its opinion, the court stated what would have been its position if the issue had been in point,

"If the power to dismiss had been delegated by the Chinese Government to the appellant, and he had from whatever motives, discharged the respondent by virtue of that authority, it may be that his act should be regarded as the act of the government."[50]

In the case of *Dobree v. Napier,* the issue was similar in its outline but quite different in the set of facts. Napier, a British subject, had enrolled in the navy of Portugal and was placed in charge of a blockade. The plaintiff's vessel was captured trying to run the blockade and was later condemned in a Portuguese prize court proceeding. The enlistment of Napier was a violation of the laws of Great Britain, and that fact was thought by the plaintiff to invalidate the action of Napier and to give rise to damages. The court admitted the illegality of the enlistment, but denied the contention that it gave rise to damages, for,

"We cannot consider the law to be, that where the act of the principal is lawful in the country where it is done, and the au-

Spain, De Haber v. Queen of Portugal, (1851) 17 Q. B. 171; Duke of Brunswick v. King of Hanover, (1848) 2 H. L. Cas. 1; Twycross v. Dreyfus, (1877) 5 Ch. D. 605, 46 L. J. Ch. 510; Vavasseur v. Krupp, (1878) 9 Ch. D. 351; National Bolivian Navigation Co. v. Wilson, (1880) 5 A. C. 176.

[48]Gladstone v. Ottoman Bank, (1863) 1 Hemming and Miller 505; Potter v. Broken Hill Proprietary Co., (Aus. 1906) 3 Commonwealth L. R. 479.

[49]Luther v. Sagor, [1921] 3 K. B. 532; Princess Paley Olga v. Weisz, [1929] 1 K. B. 719; Duke of Brunswick v. King of Hanover, (1848) 2 H. L. Cas. 1.

[50]Hart v. Gumpach, (1872) 9 Moore's P. C., N. S., 241.

thority under which such act is done is complete, binding, and unquestionable there, the servant who does the act can be made responsible in the courts of this country for the consequence of such act, to the same extent as if it were originally unlawful, merely by reason of a personal disability imposed by the law of this country upon him, for contracting such engagement."[51]

In a much later case the same principle was followed and again the facts were similar. In this instance, an officer of the British navy was proceeded against for damages resulting from his seizure of a vessel belonging to the plaintiff. A British subject, Carr, the officer, had been ordered by the Admiralty to patrol the waters of Muscat. With the approval of the British Government and the Sultan of Muscat he had seized the vessel and cargo of the respondent, Fracis Times and Company. The cargo of munitions was seized in accordance with the laws of Muscat. The officer showed the court a commission from the Sultan and the approval of the act by the courts of Muscat.

The latter fact alone would appear to have been sufficient defense since the matter had been adjudicated in a court of competent jurisdiction. The British court declared,

"The broad and simple proposition is that the Sultan has authority to declare that the thing done was lawful, and the thing done was an act of state. It is not an act as between a person and person; it is an act of state which the Sultan says authoritatively is lawful; and I cannot doubt, that under such circumstances, the act done is an act which is done with complete authority and cannot be made the subject of an action here."[52]

To complete the account of this type of case, it is necessary to recall the limitations which the British courts have placed upon such authorizations in *Regina v. Lesley* and *Cranstoun v. Bird*.[53]

[51]Dobree v. Napier, (1836) 2 Bing. N. C. 781.

[52]Carr v. Fracis Times and Co., [1902] A. C. 176.

[53]Regina v. Lesley, (1860) Bell C. C. 220; Cranstoun v. Bird, (1896) 4 B. C. (Can.) 569. Attention may also be directed to a series of cases that arose in South Africa. The situation developed when many of the British subjects joined the republican forces. Following the British victory, several of the subjects were prosecuted for murder, the alleged crimes having occurred in the prosecution of the armed insurrection. While the courts were of the opinion that the subjects were guilty of treason in joining the rebellious forces, nevertheless they, the courts, considered that the individuals could not be prosecuted for murder, and that they were not "civilly liable for acts of legitimate warfare committed by the enemy for the due prosecution of the war and not for his personal benefit." Watson v. Bradley, (1903) 20 Sup. Ct. (Cape of Good Hope) 349. See also Queen v. Smit, (1900) 17 Sup. Ct. (Cape of Good Hope) 274; Du Toit v. Kruger, (1905) 22 Sup. Ct. (Cape of Good Hope) 234.

IV

Lord Thurlow commented during the hearing on the case of the *Nabob of the Carnatic v. East India Company*,[54] that if the allegations of the defendant were true their defense would properly rest upon the principle ex tali facto actio non oritur. This seems to be an accurate characterization of the rule, but it is true only if the rule is related to municipal law. It seems clear that the doctrine would not be an adequate defense in a proceeding before an international tribunal.[55]

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[54](1793) 2 Vesey Jr. 56.

[55]An act of State as a successful defense of a state agent will end the claims of the plaintiff in so far as the municipal courts are concerned, and the resources of the plaintiff then are either an act of grace on the part of the Crown, or resort to his sovereign who may press the claim on his behalf. The mere fact that in municipal law the courts accept the identification of the agent with his state so as to prevent such courts from adjudicating does not preclude international responsibility of the state for whom the agent has acted.

The particular act of a state agent may not be a violation of international law and obviously in such instances no international legal question arises. It may be, however, that the act is a violation of international law in which case a possibility of international reclamation may arise. It would seem that Baron Parke in Buron v. Denman, (1848) 2 Ex. 167, recognized that the officer had violated international law in freeing the slaves of the plaintiff.

In some international arbitrations the question has been raised as to the responsibility of states for acts of their agents. Moses' Case, decided under the American-Mexican Mixed Claims Convention of 1868, involved the question of Mexico's liability for the seizure of property by an officer of the latter government. In making the award, the Umpire declared, "An officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority." (3 Moore, Arbitrations 3187).

A clearer statement of the international responsibility of a state for acts of its agents may be found in The Jessie, a case involving the action of certain officers of the United States who entered upon a ship flying the British flag and placed under seal certain arms found on board the British vessel. The action was performed to effectuate a regulation of seal fishing which was regularized in a subsequent convention between Great Britain and the United States. In awarding damages to Great Britain, the commission stated, "It is unquestionable that the United Staes naval authorities acted bona fide, but though their bona fides might be invoked by the officers in explanation of their conduct to their own government, its effect is merely to show that their conduct constituted an error in judgment, and any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands." (1923) 16 Am. J. of Int. L. 115.

The conclusion seems warranted that a state would be responsible for acts which it had approved. In a case before the court of claims of the United States, the court had to determine the liability of the United States under international law for the detention of the Zeelandia, a Netherland vessel. The court pointed out that the rights of the plaintiffs, "When considered in the light of the principles of the law of nations are very different than those of a plaintiff relying wholly upon the municipal laws of the United States. . . . We [the Court] have already pointed out that the United States

The doctrine in its widest aspect appears to be part of the prerogative rights of the Crown. This would include all facets that have been examined above. Recognition, status of war and peace, annexation, treaties are all matters relating to foreign relations, and in this category may be placed state agents when they are acting beyond the territory and against aliens.

It would seem clear that Cabinet members could shelter themselves behind the doctrine should they be proceeded against directly for a declaration of war because of its effects upon a private person's rights.[56] A similar conclusion appears applicable in proceedings based upon the act of the ministers in extending or refusing recognition, negotiation of treaties, and annexation. In the same manner the doctrine would be a complete defense for the acts of soldiers done in the pursuance of war. The absence of cases upon these points would indicate that the view was too well settled for suits to have been instituted.

This proposition leads to a non sequitur, however, if it be understood that the doctrine of the Act of State is never an adequate defense as against a subject, for it is clear that subjects have no right in the determination of recognition by the Crown, and that the action of that organ is as conclusive against subjects as against aliens. The protection of the subjects is not a legal one provided by the courts. It is political protection resulting from the responsibility of the ministers of the Crown to Parliament.[57]

It is not altogether clear what is the meaning of the courts when, in cases of annexation, they assert that it is a matter between sovereign states, for in many of these cases the sovereign

does not admit by its own statutes, any responsibility for the tortious or unauthorized acts of its officers. But in its relations with foreign nations, the United States bears what has been described as a 'wide, unrestricted, and vicarious responsibility' for the acts of its administrative officials and its military and naval officers." (Royal Holland Lloyd v. United States, (1931) 73 Ct. Cl. 722.

On the general point advanced in this note see, Dickinson, Recognition Cases, 1925-1930, (1931) 25 Am. J. of Int. L. 214, 235.

This point was not considered in the work of the Preparatory Committee of the Conference for the Codification of International Law. The work was limited to responsibility within the territory of the state. (C. 75. M. 69. 1929. V.)

[56]See the unusual case of Finck v. Minister of Interior decided by the Mixed Courts of Egypt and reported in the (1925) British Yearbook of International Law, 219. In this case it was held that the Minister could not be held liable in damages for taking part in the decision of the Egyptian Cabinet to go to war against the Central Powers in the Great War.

[57]Dicey, Introduction to the Study of the Law of the Constitution (8th ed. 1915) 419 ff. 1 Lowell, The Government of England (1908) 37.

of the annexed territory has been annihilated or reduced in status. Consequently there is no other sovereign to prosecute the rights of the damaged persons through diplomatic channels against the British Government.

Finally, the application of the rule to protect Crown agents against suits instituted by aliens for some tortious or criminal act performed in the course of the agent's duties is in the nature of a special qualification of the general principle of the rule of law. The infrequency of its use in the past has not created any special difficulty in the ordinary operation of international relations. It is perhaps significant that the doctrine developed along with the imperialism of the last century, and it would appear that the operation of the doctrine permitted the accomplishment of deeds which otherwise could only have been done by virtue of an Act of Parliament. The unusual quality of the doctrine is now approved by the principle enacted in the Foreign Jurisdiction Act of 1890 which regularized the procedure in foreign areas and gave statutory basis to any authority secured by the Crown in foreign areas and over foreign peoples.

II. In American Law

In English law there is a fairly exact conception of the doctrine comprehended in the phrase "Act of State." The doctrine has two distinct connotations. One refers to executive, or Crown, discretion in foreign affairs and includes the power of recognition, negotiation of treaties, annexation, and the declaration of war and peace. The other is a more restricted connotation which asserts a rule of administrative law that is a special defense of state agents for acts which otherwise might be considered as torts or crimes. This defense is available only for acts which are done abroad and against foreigners. It has been suggested and even flatly declared that this doctrine is now incorporated into American law.[1]

[1]Borchard, The Diplomatic Protection of Citizens Abroad (1915) 174. Burdick, The Law of Torts, (3d ed. 1913) 41. Kingsbury, The "Act of State" Doctrine, (1910) 4 Am. J. Int. L. 359. Watkins, The State as Party Litigant, Johns Hopkins University Studies in Historical and Political Sciences, Ser. 45, No. 1, (1927) 46. 3 Willoughby, Constitutional Law of the United States (1929) 1427.

For a Statement of the rule in British Law, Moore, The Act of State in English Law (1906) passim. See also Wade, and Phillips, Constitutional Law (1933) 76-77.

There is not much difficulty connected with what may be termed the wider sense of the doctrine. Recognition of foreign governments is clearly a privilege attaching to the office of president.[2] Likewise the president seems to be free in the *negotiation* of treaties. This power of the president has been interpreted so as to permit the negotiation of agreements other than treaties without the consent of the Senate.[3] Executive determination of the limits of territory is less clear in the United States, perhaps, than it is in Britain. The decisions of the political departments are accepted by the courts, but it is not clear as to whether the decision of the president or that of Congress would prevail in the event of a conflict between them.[4] In the United States authority for annexation of territory has been exercised by the president alone and by joint resolution of Congress.[5] The power to declare war is vested in Congress. However, the president can so conduct foreign affairs as to leave Congress little choice in the declaration of war. Furthermore, the president alone may in some instances bring about a state of war, as by a declaration of blockade.[6]

The cases which deal with the narrow or restricted conception seem to begin with two suits which arose out of Congressional legislation relative to non-intercourse with France. In the first of these, that of *Little v. Barreme,* Little, the commander of a frigate, had been instructed by the president to seize United States vessels bound *to* and *from* French ports, whereas the statute provided only for the seizure of ships bound *to* French ports. In pursuance of the orders, Little brought in a vessel belonging to a neutral. The

[2]United States v. Palmer, (1818) 3 Wheat. (U.S.) 610, 4 L. Ed. 471; Jones v. United States, (1890) 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Underhill v. Hernandez, (1897) 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; Oetjen v. Central Leather Co., (1917) 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., (1917) 246 U. S. 304. Hervey, The Legal Effects of Recognition of International Law (1928) ch. III.

[3]Field v. Clark, (1892) 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Altman v. United States, (1912) 224 U. S. 583, 32 Sup. Ct. 593, 56 L. Ed. 894. See also 1 Miller, Treaties and Other International Acts of the United States of America, (1930) (short print) p. 9.

[4]Foster v. Neilson, (1829) 2 Pet. (U.S.) 253, 7 L. Ed. 415; United States v. Arredondo, (1832) 6 Pet. (U.S.) 691, 8 L. Ed. 547; Garcia v. Lee, (1838) 12 Pet. (U.S.) 511, 9 L. Ed. 1176; Ex parte Cooper, (1891) 143 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232.

[5]1 Willoughby, Constitutional Law of the United States (1929) 407-430.

[6]For a discussion of the discretion of the president relative to the beginning of hostilities, see Tansill, The War Powers of the President with special reference to the Beginning of Hostilities, (1930) 45 Pol. Sci. Quart. 1-55; Berdahl, War Powers of the Executive in the United States, 9 University of Illinois Studies in the Social Sciences, No. 1, chs. 2-5.

district court held that this capture did not come within the scope of the *Act*, and, therefore, ordered the release of the vessel but refused to award damages for the detention. The circuit court sustained the order of release but awarded damages to the complainant.

The Supreme Court upheld the decision of the circuit court, stating through Chief Justice Marshall,

"I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."[7]

In the second of these cases, that of *Murray v. Charming Betsy*, the naval officer, Murray, was relieved of punitive and speculative damages for bringing in a vessel which did not come within the purview of the act of Congress. There seems to have been probable cause for the bringing in since the court went so far as to say that if the officer brought in a vessel in the exercise of a judgment "not warranted by the testimony presented to him," an award of damages would be made.[8]

The rule that flows from these cases would seem to be that an officer could not justify his act by the mere assertion of authority from the President of the United States, unless the basis of the order was in an act of Congress. A further requirement would seem to be that reasonable judgment by the officer must be exercised and that he is responsible for an unreasonable decision.

[7]Little v. Barreme, (1804) 2 Cranch (U.S.) 170, 2 L. Ed. 243.
[8]Murray v. Charming Betsy, (1804) 2 Cranch (U.S.) 64, 2 L. Ed. 208.

Several cases growing out of the bombardment of Greytown, Nicaragua have raised questions relating to the operation of the principle of Act of State. There was one action against the naval officer who directed the bombardment which was in execution of presidential orders to protect United States citizens and their property. Durand, the plaintiff, sued Hollins, the naval commander, in trespass to recover the amount of damages done to the former's property. It is not clear from the report whether the plaintiff was an alien or a citizen of the United States, and that fact does not seem to have been necessary to a determination of the issue.

The circuit court found for the defendant in the following terms,

"I have said that, the interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion; and it is quite clear that, in all cases where a public act or order rests in executive discretion neither he nor his authorized agent is personally or civilly responsible for the consequences."

The Court returned to *Marbury v. Madison* for the wider and "sound principle" which "governs the present case,"

"By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and, whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being instructed to the executive, the decision of the executive is conclusive."[9]

The second of the cases, *Wiggins v. United States,* was heard before the court of claims. Wiggins, a citizen of the United States, sought to recover damages for powder which, though belonging to him, had been destroyed by the United States' troops acting under orders from Hollins. The defense of the government rested upon the absence of specific instructions to the officer and the contention that the deed was a tort for which the officer was responsible. The court of claims refused to accept the answer of the govern-

[9]Durand v. Hollins, (S.D. N.Y. 1860) 4 Blatchf. 451, Fed. Cas. 4,186; Marbury v. Madison, (1803) 1 Cranch (U.S.) 137, 165-166, 2 L. Ed. 60. For a summary of the correspondence and an account of this incident see 2 Moore, Digest of International Law 414-418, Vol. 6 926-940; 2 Wharton, Digest of the International Law of the United States, sec. 224.

ment as being sufficient to avoid liability. It was shown that the incident had been reported by the officer, and that the president in his annual message to Congress had commended the officer for his accomplishments at Greytown. As to the general principle involved, the Court stated,

"It is true that any agent or officer of the United States who, without any just cause or lawful authority, takes or destroys the property of a citizen, though he act by color of his office, it will not shield him from damages at the suit of the injured party. And in such cases the government is not liable, for it does not insure against the mistakes or wilful misconduct of its officers. Sometimes an officer is compelled, like Commander Hollins in the case before us, in carrying out his general instructions to act upon his own judgment, and to exercise his discretion as to how far it may be essential for him to interfere with individual rights. In all such cases his conduct will be viewed with great liberality, wherever it is apparent that he acted with a view to the faithful execution of his trust committed to him. And although there may have been no precedent authority for the particular act, yet its adoption by his government makes it an act of state, and for which the nation alone is responsible."[10]

In the third case, a Frenchman, Perrin, sued in the court of claims to recover damages for injuries to his property resulting from the same bombardment. The claim was dismissed. The court expressed the opinion that if the claim had been permitted, it would have been on the ground that the bombardment was in violation of international law,

"And hinging upon that, it will be readily seen that the questions raised are such as can only be determined between the United States and the governments whose citizens it is alleged have been injured by the injurious acts of this government. They are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide. They grew out of and relate to peace and war, and to the relations and intercourse between this country and foreign nations. They are political in their nature and character, and under our system belong to the political departments of the government to define, arrange, and determine. And when the questions arise incidentally in our courts the judiciary follow and adopt the action of the executive and legislative departments whatever they may be."[11]

[10]Wiggins v. United States, (1867) 3 Ct. Cl. 412. No reference is made in this case to the earlier one of Durand v. Hollins, supra note 9. The court of claims cited the English case of Buron v. Denman, (1848) 2 Ex. 167, as directly in point. There the action was instituted by a Spaniard against an English naval officer because the latter had destroyed slaves belonging to the former. The actions of the naval officer were subsequently approved by the ministers. The claim was dismissed.

[11]Perrin v. United States, (1868) 4 Ct. Cl. 543.

These three cases taken as a whole indicate the extent to which an agent may be excused from liability for acts which might otherwise be considered tortious. The decision in the first of these cases established a rule of non-liability of state agents for acts ordered by the president when that action occurs without the United States. The second case allows a citizen to recover damages from the United States government for such an action and refuses to the government the privilege of defending itself on the ground of tort by an officer. The third case refuses to an alien the right of collecting damages from the government for a similar act and further declares that the alien's recourse, if any, was through diplomatic channels.

The Civil War in the United States gave rise to a number of cases which apply the same principles. In *Ford v. Surget,* the Supreme Court of the United States had to consider the question of the liability of officers of the Confederate Government. Ford, a citizen of New York, was residing in Mississippi. He possessed a supply of cotton which was destroyed by Surget, a Confederate officer, to prevent its falling into the hands of the Union troops. The court took the position that the members of the Confederate forces were conceded belligerent rights, and that concession placed the soldiers and officers of that army, as to all matters directly connected with the mode of prosecuting the war on the footing of those engaged in lawful war, and exempted "them 'from liability for acts of legitimate warfare.'" As a consequence, "the person executing such military orders was relieved from civil responsibility at the suit of the owner voluntarily residing at the time within the lines of the insurrection." The Court also ruled in other cases that officers of the federal forces were not liable in suits brought in courts of the Confederate states, even though those suits were brought in federal courts that were reopened by the army.[12]

[12]Ford v. Surget, (1878) 97 U. S. 594, 24 L. Ed. 1018. Dow v. Johnson, (1879) 100 U. S. 158, 25 L. Ed. 632, involved a suit instituted against Johnson, a Union officer, in the courts in New Orleans following the occupation by General Butler and a reopening of the courts. The suit arose out of the seizure of property of Dow. In Coleman v. Tennessee, (1878) 97 U. S. 509, 24 L. Ed. 1118, the Supreme Court thought it would be "incongruous and absurd" for a member of an invading army to be tried in the courts of the invaded territory. In Coolidge v. Guthrie, (S.D. Ohio 1868) 1 Flip. 97, Fed. Cas. 3,185, it was held that no municipal court could judge of the "propriety or impropriety of the seizure" by the army in the enemy country. See also Freeland v. Williams, (1889) 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193, as to state laws and constitutional provisions denying to members of the Confederate forces the right to set up that agency to the Confederate Government as a defense to their acts. There is a large number of these cases in the courts of the Southern States.

In 1875, the Supreme Court of the United States had before it another question involving the issues of the doctrine of the Act of State. Lamar, a citizen of Georgia, had adhered to the Confederate cause, but he had taken the oath of allegiance to the United States on January 6, 1865. In August of the same year, some cotton belonging to him was seized by the military forces of the Union and was turned over to one Brown, an agent of the United States Treasury. Lamar instituted suit against Brown to recover the value of the cotton. The Supreme Court refused to approve the claim of Lamar on the following reasoning. The seizure must be considered as good in law since it had been taken by the military forces, and their actions were based on appearances and not upon testimony. If the parties were damaged, their recourse was to the proper tribunal, which in such cases was the court of claims. The agents of the Treasury "were a part of the machinery by which the government executed the trust it assumed at the time of the capture in favor of its loyal citizens." The seizers and agents were protected so long as they acted within their authority.[13]

There is an early case in the courts of South Carolina that applies the ruling that seems to be clearly portrayed in the cases before the United States Courts. The facts arose out of an insurgent movement in Florida. At the time, the treaty ceding the area to the United States had been made and signed, but ratifications had not been exchanged. A foreigner to both Spain and the United States had brought slaves into Florida and detained them there temporarily. They broke out into a rebellion and threatened the peace of Georgia. An officer of the United States army went into Florida with troops and subdued the outbreak. Spain entered no objection to the action. The officer in charge of the troops was subsequently sued in trover to recover damages for his detention of the negroes. The court held that the defendant was not required to answer the suit. They found authorization for the act of the officer. In conclusion the court announced the principle,

"A government can only act by its agents and the agents of the United States in Florida were the army; the army therefore was bound to afford the protection required. It certainly did not lie with the plaintiff, who was a foreigner to both the governments, to dispute an authority sanctioned by both."[14]

[13]Lamar v. Brown, (1875) 92 U. S. 187, 23 L. Ed. 650.

[14]Payne v. Robertson, (1824) Harper (S.C.) 279.

The reasoning in this case is almost identical with that of the leading English case of *Buron v. Denman.*[15] The elements of the suit are those usually found in the cases where the doctrine is applicable according to the British usage, that is, the action is performed outside the territory of the country of which the agent is an officer and the injury is done to an alien. If the act is approved by the proper authorities, it is an Act of State for which the officer incurs no personal liability. Some of the cases before the Supreme Court have had similar conditions. If the members of the Confederate forces be considered as non-nationals, as they were considered, and if the territory of the Confederacy be considered as foreign territory, as it was, then the acts performed by the Union officers against the members of the Confederacy were acts performed against aliens abroad, and if those acts were approved they are Acts of State which are beyond the jurisdiction of the national courts. Upon a strict construction it would seem that the earlier cases of *Little v. Barreme* and *Murray v. Charming Betsy* are not in point. It is not indicated in those cases that the specific acts of the naval officers were approved.[16]

Later cases approve the points that have been made. Two cases arising out of events in the Spanish-American war have aroused comment in recent years.[17] The first of these is the famous case of the *Paquete Habana.*[18] The seizure of this smack and others had been held invalid in international law. Later, suits were instituted against the United States for damages due to the seizure. The government of the United States tried to set up the liability of the officers making the capture in the place of the liability

[15](1848) 2 Ex. 167, supra note 10.

[16]There are two other cases in the circuit courts in which the question of executive orders and their legal consequences have been discussed in this connection. In Masonaire v. Keating, (D. Mass. 1815) 1 Gall. 325, Fed. Cas. 8,978, Justice Story remarked in the course of his opinion, "If, for instance, the sovereign should, by special order, authorize the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt, that it would afford a complete justification of the captors in all tribunals of prize. The acts of subjects, lawfully done under the orders of their sovereign, are not cognizable by foreign courts. If such acts be a violation of neutral rights, the only remedy lies by an appeal to the sovereign, or by a resort to arms."

In Davison v. Sealskins, (D. Conn. 1835) 2 Paine 324, Fed. Cas. 3,661, the circuit court ruled that a subordinate officer "could have no right without express directions from his government to enter into the territorial jurisdiction of a country at peace with the United States, and forcibly seize upon property found there and claimed by citizens of the United States."

[17]Kingsbury, The "Act of State" Doctrine, (1910) 4 Am. J. of Int. L. 359.

[18](1900) 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

of the government.[19] The court overruled this plea, asserting that decree could not be made against the captors since they were not parties to the suit, and that, as to the matter of "whether a decree can be made against the United States or not, it has so far adopted the acts of the capture that it would be hard to say that under the circumstances of these cases it has not made these acts its own." It added further,

"But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued."[20]

In this case, as in that of *Wiggins v. United States,* an effort was made by the government as defendant to set up its non-liability in tort in order to transfer the liability to state agents. The courts in both instances refused to permit the transfer and based their refusal upon the fact of approval of the agent's act by the state. The result of the decisions is to transfer the burden to the state. The conclusions, therefore, to be reached are different in form from those of the British cases. In the latter, alternative remedies to the complainant are an act of grace on the part of the Crown, or recourse by the alien to his government for diplomatic intercession. In the former, the complainant, if a citizen, receives his remedy by virtue of the grant of the privilege by the United States to institute suits in the court of claims, but an alien, seemingly, must rely upon diplomacy or an act of Congress.

In the case of *O'Reilly de Camara v. Brooke,* the action was instituted against the officer personally. The case, therefore, is the same as the cases in Britain. Brooke, an officer in the United States Army, had been in charge of Havana during the period of occupation. During the period of his control, he abolished some

[19]In the Emma, (S.D. N.Y. 1863) Blatch Pr. Cas. 561, Fed. Cas. 4,461, the question had been raised as to whether the seizure of a vessel by a transport ship which was not commissioned as a ship-of-war was a duly authorized seizure. The court declared, "Such ratification of the arrest of the prize was equivalent to an original seizure by authority of the government, and the affirmance of the capture by the United States is authenticated by instituting this suit thereon." The ratification referred to was the beginning of the libel action.

[20]The Paquete Habana, (1903) 189 U. S. 453, 465, 20 Sup. Ct. 290, 44 L. Ed. 320. The court cited in support of this last statement: Lamar v. Brown, (1875) 92 U. S. 187, 23 L. Ed. 650; Buron v. Denman, (1848) 2 Ex. 167, and The Rajah of Tanjore's Case, (1859) 13 Moore P. C. 22. The last case dealt with the lack of responsibility of the East India Company in the courts for acts performed in its political capacity. The Supreme Court also considered that the case of Wiggins v. United States, (1867) 3 Ct. Cl. 412, had adopted the principle of Buron v. Denman.

offices of the local government and, with the abolition, the perquisites which went with the offices. The plaintiff in the present suit was the heir of the original holder of an abolished office, which, it was shown, would have descended to the plaintiff. The plaintiff was a Spanish subject whose property had been destroyed by the defendant in his capacity as an officer of the United States and the action was done abroad. The evidence further showed that Congress had approved the acts of the United States Army while it was in Cuba. There was further evidence that the treaty between the United States and Spain had approved the acts of the military forces of the United States, and finally there was an order of the secretary of war ordering the officer to perform the action of which the plaintiff was complaining.

The Court, in denying the petition of the plaintiff, quoted with approval the above cited statement of the *Paquete Habana*. Attention was turned to the question of the limits of the principle there stated,

"It is not necessary to consider what limits there may be to the doctrine, for we think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the executive, Congress, and the treaty-making power all have adopted the act. We see no reason to doubt that the ratification extended to the conduct of General Brooke."[21]

Another case, frequently discussed in connection with the applicability of the principle of the Act of State in the United States, is that of *Tiaco v. Forbes*. Tiaco, a Chinese, sued the governor of the Philippines for illegal deportation. It seems that Governor Forbes had ordered his deportation, and that the action was later approved by an act of the Philippine legislature which also denied the courts the right to take jurisdiction in the suit. The act of the legislature was sustained by the United States Supreme Court as a valid exercise of power. The effect of the legislative act was thus to approve an accomplished act and as a consequence,—the deportation was to be considered as ordered. "Furthermore, the very ground of the power in the necessities of public welfare shows that it may have to be exercised in a summary way through executive officers." It was declared that since

[21]O'Reilly de Camara v. Brooke, (1908) 209 U. S. 45, 52, 28 Sup. Ct. 439, 52 L. Ed. 676. See also Sanchez v. United States, (1909) 216 U. S. 167, 30 Sup. Ct. 361, 58 L. Ed. 432, where the abolition of a purchased office was approved by Congress so as to deny the plaintiff any damages.

the bill of rights of the national constitution did not prevent deportation from the United States, a similar bill of rights in the basic law of the Philippines would not prevent deportation. It was further stated,

"The local government has all civil and judicial power necessary to govern the islands. The forms are different, but as in Hawaii the proximate source of private rights is local, whether they spring by inheritance from Spain or are created by Philippine legislation."

Such a power as was exercised in the instant case is an incident of the self-determination granted by the United States, however limited it might be. There had been no express disapproval by Congress.

The reasoning thus far would seem to be ample to dispose of all the issues raised in the case. Mr. Justice Holmes, for the Court, however, added that in England an Act of State is not cognizable in any municipal court. He then remarks,

"And that was the purport of the Philippine act declaring the deportation not subject to question or review. As the Bill of Rights did not stand in the way and the implied powers of the government sanctioned by Congress permitted it, there is no reason why the statute should not have full effect. It protected the subordinates as well as the governor-general and took jurisdiction from the court that attempted to try the case.[22]

It should be noted in connection with this case that the act was performed within the territory, and thus one of the requisites of the doctrine in British law is absent. Second, there is action by a legislative body in addition to that of the executive. Third, there is difference of opinion as to the significance of this case for the adoption of the principle of Act of State in American law.[23]

[22]Tiaco v. Forbes, (1913) 228 U. S. 549, 33 Sup. Ct. 585, 57 L. Ed. 960. The following cases were cited in support of the ruling as to the effect of subsequent approval: O'Reilly de Camara v. Brooke, (1908) 209 U. S. 45, 28 Sup. Ct. 439, 52 L. Ed. 676, The Paquete Habana, (1903) 189 U. S. 453, 23 Sup. Ct. 593, 47 L. Ed. 900, Phillips v. Eyre, (1869) L. R. 6 Q. B. 1, and the Rajah of Tanjore's Case, (1859) 13 Moore P. C. 22. In support of the quotation, Mr. Justice Holmes relied upon the English case of Musgrave v. Pulido, (1879) 5 A. C. 102. The issue involved there was the sufficiency of Musgrave's statement, he was a colonial governor, as a defense of his seizure of Pulido's ship. Pulido was an alien. The court refused to accept the declaration of the governor without an independent investigation to determine for their own satisfaction that the act which he, Musgrave, claimed was an Act of State was, in fact, an Act of State. The court did not find that the action was such and refused validity to the seizure.

[23]3 Willoughby, The Constitutional Law of the United States (2d ed. 1929) 1427. This case does not, in his opinion, import the doctrine into American law, but it does raise doubts as to whether it is excluded. On the other hand, Watkins, The State as Party Litigant, Johns Hopkins Univer-

The dispute is not of much importance, for it seems clear that the earlier cases above discussed adopted the principle of the Act of State much earlier than this case, and in fact, Mr. Justice Holmes, in the cases of *The Paquete Habana* and *O'Reilly de Camara v. Brooke* seems to have held the latter view.

III

Closely related to the principle which has been under consideration is that rule of law which provides that the agents of another state shall not be held liable in the courts of the United States for acts done in the course of their duties in other States. In some instances, it seems, the courts of the United States will not take jurisdiction even though the acts were performed outside the boundaries of the other state. In support of the former rule there is a series of cases dating from the beginning of the United States.[24] The rule is stated in *Underhill v. Hernandez* in the following manner,

"Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails, that is, where a people of a country are divided into two hostile parties, who take up arms and oppose one another by military force, generally speaking foreign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability."[25]

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sity Studies, (1927) Ser. 45, No. 1, pp. 115, 113, thinks that this case "recognized in unequivocal language" and incorporated the principle into American law.

[24]Waters v. Collot, (1796) 2 Dall. (U.S.) 247, 1 L. Ed. 367; Collot's Case, (1794) 1 Op. Att. Gen. 45; Sinclair's Case, (1797) 1 Op. Att. Gen. 81; United States v. Peters, (1795) 3 Dall. 121, 1 L. Ed. 535; L' Invincible, (1816) 1 Wheat. (U.S.) 238, 4 L. Ed. 80; The Schooner Exchange, (1812) 7 Cranch (U.S.) 116, 3 L. Ed. 287; United States v. Palmer, (1818) 3 Wheat. (U.S.) 610, 4 L. Ed. 471; Santissima Trinidad, (1822) 7 Wheat. (U.S.) 283, 5 L. Ed. 454; Amiable Isabella, (1821) 6 Wheat. (U.S.) 1, 5 L. Ed. 191; Carrington v. Merchant's Insurance, (1834) 8 Pet. (U.S.) 495, 8 L. Ed. 1021; Hatch v. Baez, (1876) 7 Hun (N.Y.) 596.

[25]Underhill v. Hernandez, (1897) 168 U. S. 250, 18 Sup. Ct. 83, 42 L.

The previous cases have had under consideration the legal consequences of acts of agents performed by authority of government in the territory of that government or on the high seas. The conclusion of the courts has been that such acts are beyond the jurisdiction of the courts of states other than the state of the agent. The *Schooner Exchange* is not an exception to this rule since the acts complained of occurred without the jurisdiction of the United States. There is yet another type of case that may arise. State agents have infrequently performed acts at the behest of their government within the territory of another state.[26] If the agents are apprehended in the second state and placed on trial for the execution of such acts, what is the validity of the defense that they, the agents, were acting in accordance with the orders of their government? Probably the *Caroline* incident is the outstanding example of this situation, although there have been a few others in municipal courts. The facts are relatively simple. A Canadian force entered American territory on the night of December 29, 1837. The force went on board the *Caroline,* loosed it from its moorings, and set fire to the vessel. In the fracas, one Durfee was killed. The United States in a note dated January 5, 1838 stated that "It, [the incident] will necessarily form the subject of a demand for redress upon Her Majesty's Government."[27]

In 1841, Alexander McLeod was being held in the state of New York for the murder of Durfee. At this time, Mr. Fox for Great Britain in a note to Mr. Webster, United States Secretary of State, requested the release of McLeod on the following grounds,

Ed. 456. A similar rule is followed in the cases of Hewitt v. Speyer, (C.C.A. 2d Cir. 1918) 250 Fed. 367; Oetjen v. Central Leather Co., (1917) 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., (1917) 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 703.

[26]Consideration in the remainder of this paper will be limited to the effect of acts performed by state agents in a second state in regard to such agents. However, attention should be called to American Banana Co. v. United Fruit Co., (1909) 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, in which the plaintiff sought to recover damages from the defendant for persuading the Costa Rican Government to enter into the territory of Panama with armed forces and there seize certain lands belonging to the plaintiff by virtue of purchases from Panama. Following the seizure, Costa Rica granted the same lands to the defendant. The Court pointed out that it could not adjudicate issues involving foreign States. As to the action of the soldiers and officials of Costa Rica, it was asserted, "the acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government and must be taken to have been done by its order. It ratified them, at all events, and adopted and keeps the possession taken by them. . . . The injuries to the plantation and supplies seem to have been the direct effects of the acts of the Costa Rican government, which is holding them under an adverse claim of right."

[27](1837-38) 26 British and Foreign State Papers 1377.

"The grounds upon which the British Government make this demand upon the government of the United States are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by Her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defense of Her Majesty's subjects; and that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country.

"It would be contrary to the universal practice of civilized nations to fix individual responsibility upon persons who with the sanction or by the orders of the constituted authorities of a state engaged in military or naval enterprises in their country's cause; and it is obvious that the introduction of such a principle would frightfully increase the demoralizing effects of war, by mixing up with national exasperation the ferocity of personal passions, and the cruelty and bitterness of individual revenge."[28]

The reply of the United States is dated April 24, 1841, and it includes the following acceptance of principle,

"The communication of the fact that the destruction of the *Caroline* was an act of public force, by the British authorities, being formally made to the government of the United States, by Mr. Fox's note, the case assumes a decided aspect.

"The Government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law, and the general usage of civilized states, to be holden personally responsible in the ordinary tribunals of the law, for their participation in it."[29]

The legal question involved in the *Caroline* incident and the

[28](1840-41) 29 British and Foreign State Papers 1127.

[29](1840-41) 29 British and Foreign State Papers 1131. For the correspondence closing the matter see (1841-42) 30 British and Foreign State Papers 193-202. For the denial of damages to McLeod in the claims convention between Great Britain and the United States, 3 Moore, International Arbitrations 2419 et seq.

The case raised some important questions of constitutional law in the United States. The Government of the United States provided lawyers for the defendant, but they were unable to secure McLeod's release on a habeas corpus proceeding. People v. McLeod, (1841) 1 Hill (N.Y.) 377, also reported (1841) 25 Wend. (N.Y.) 483. See the scathing comment on Justice Cowen's opinion in 37 Am. Dec. 365. The federal courts at this time did not have statutory authority to issue the writ of habeas corpus directed to the release of prisoners held on national charges. The defect was remedied in the statute of 1842. 5 Stat. at L. 539.

McLeod was tried for the murder and released upon the proving of an alibi. Latane, A History of American Foreign Policy, (1927) 206.

acceptance of the principle between the United States and Great Britain were the basis of extended comment in *Commonwealth v. Blodgett.* Blodgett and others were prosecuted in Massachusetts. They were members of the militia of Rhode Island, and in the course of their activities in subduing Dorr's rebellion, they entered upon the territory of Massachusetts and captured certain persons asleep in an inn. It was asserted that these captured persons were active in aiding the rebellious movement. It was further shown that Blodgett and his aides had orders from his immediate superiors to make a search within fifty miles of headquarters and that the inn was within that area. The order of the commanding officer was repudiated by the governor of Rhode Island.

The defendants relied upon their orders and the principle accepted by Mr. Webster in his correspondence. This was an attempt to raise the matter to one of warlike acts between sovereign states. To this argument the court replied that the states were not sovereign in the international sense, and that they had specifically given up to the national government the war power. If it was assumed that the defendants were parties to an international incident, it would be necessary to show authority from the sovereign, and this was impossible in the face of the action of the governor of Rhode Island. Moreover, it was added, the right of a state to protect the inviolability of its territory was absolute. The court added as an explanation of the ruling in the present case the following observations,

"We do not mean to be understood as holding that soldiers and subordinate military officers, who are ordered by their sovereign to enter the territory of another state to pursue an enemy, and for any other purpose, may not rightfully claim impunity from the animadversion of the criminal laws of the country invaded. Such an invasion, however, must be deemed to be made *flagrante bello*, whether war have been declared or not; because it is in itself an act of war. But this could not be justified by an order of the subordinate military authorities of a state, in the exercise of their ordinary functions in the defense of a state. Nothing but the sovereign power of the state, by a previous order, directing such invasion, or by a subsequent ratification, when done in its name, will warrant such invasion, and excuse the subordinates engaged in it; because it emanates from the sovereign authority having the power to make war. The wrong done by such an invasion then becomes a question of negotiation between sovereigns, and the subordinate agents are entitled to immunity."[30]

[30]Commonwealth v. Blodgett, (1846) 12 Metc. (Mass.) 56, 83-84.

It is to be noted that the Massachusetts court restricted the authority to absolve agents from the liability for their acts to the agency possessing the power to make war. This is an unwarranted limitation in the light of the cases previously discussed, particularly in the light of those arising out of the Greytown bombardment. Those decisions were later than this case in Massachusetts. In this connection, it should be recognized that the court of claims has given rather wide construction to acts of foreign naval officers. In the case of *Straughan v. United States,* a claim was presented by the widow of an American sailor for compensation for the period of Straughan's detention by Britain. The action grew out of the circumstances of Straughan's capture from the United States ship, *Chesapeake,* by the British frigate, *Leonard,* in 1807. The British Government disavowed the acts of the *Leonard,* and counsel for the United States pointed to this fact as making the act one of private wrong on the part of the British officers against Straughan. The Court, in its opinion, declared,

"The acts of a naval commander, so far as other nations are concerned, are the acts of his government. His government is responsible for them, must answer for them, and must atone for them. There is no book or decision which calls such acts a private wrong, and the officer a wrongdoer, or which interposes the common law rule that a principal shall not be held for the tortious acts of his agent. Neither the United States nor the injured seaman could have prosecuted the captain and crew of the *Leonard* in criminal tribunals, nor have recovered damages from them in the courts of law."[31]

Straughan's Case is of doubtful value as precedent for the application of the doctrine of the Act of State. It is in the first place the trial of the effects of an unauthorized act of British forces against an American ship on the high seas. Second, the only issue before the court of claims was the terms of the statute and the application of that statute to the facts before the court. It is to be noted, however, the court of claims was willing to attach significance to the relationship existing between Britain and the officers committing the acts.

[31]Straughan v. United States, (1868) 1 Ct. Cl. 324. See the case of The Florida, (1879) 101 U. S. 37, in which an officer filed a libel for the vessel which was under water near Hampton Roads. The officer had captured the vessel within the territorial waters of Brazil. The capture was disavowed by the United States Government, and settlement was made between the two governments. The court seems to have thought the executive was competent to destroy the officer's rights. The court also seems to have considered the entire incident a political question. The opinion includes the statement, "When the capture was disavowed by our government, it became for all the purposes of this case as if it had not happened."

There are two other cases that need to be taken into consideration in the treatment of this aspect of the Act of State. In a case in the Texas courts, *Arce v. State,* Arce and some companions, members of a Mexican armed force, had appealed a conviction for murder. The facts were that the Mexicans, members of the Carranza forces, were captured by Texas authorities following an attack on American troops. The latter were camping in United States territory. During the fray, one American trooper was killed and for this death the Mexicans had been convicted. The appellate court reversed the decision of the lower court, and the Mexicans were released.

The appellate court reasoned that the relations between the United States and Mexico were "in the nature of an incomplete state of war," and since Texas had no power to declare war, "this must be done by our general government at Washington by the special delegated authority in the constitution of the United States." Therefore,

"Whatever may have been the right of these Mexicans, the authority to punish, the writer feels, is within the jurisdiction of the United States and not the courts of Texas. If there was a state of war between the two countries, actual and complete, or inchoate and incomplete, then it became an international or federal question and not a state matter."

The court inferred that the ordinary rules of discipline under which soldiers operate might offer some justification. It was, in addition noted judicially, that "this battle at San Ygnacio was never disavowed by the de facto government of Mexico." It was also known that the incident was under the command of three generals, three colonels, and "others, and these were officers of the constitutionalists or de facto Carranza government." Further the court pointed to the practices which were followed when American troops engaged in "battles" on Mexican territory and were captured by Mexican authorities. In such instances, the American troops were returned to the United States without trial in Mexico.[32]

The principle of immunity of officers for acts in pursuance of orders of their sovereign was introduced in the brief of counsel for Horne in the case of *Horne v. Mitchell.* Horne, the original defendant, petitioned for a writ of habeas corpus directed to the United States marshal, Mitchell, who had him in custody. Horne was being held under an indictment for illegal transportation of

[32]Arce v. State, (1918) 83 Texas Cr. R. 292, 202 S. W. 951.

explosives by common carriers in interstate commerce. He set up in his own defense a commission, dated 1908, as a First Lieutenant in the Landwehr, (Second Reserve) Pioneers, a part of the German military forces. Horne further asserted that the alleged transportation was an inseparable part of the act of blowing up a bridge in Canada, an act for which he had been accused, and that the blowing up of the bridge was an act of war against Great Britain.

The court refused the motion for the writ. The decision was based on several grounds. In the first place, it was not asserted that he, Horne, blew up the bridge. Second, the transportation was not an inseparable act even if the destruction of the bridge be regarded as an act of war. The statute under which the prosecution began was aimed at the transportation in common carriers and not at mere interstate transportation. A conviction for that offense would not involve punishment for an act occurring in British territory, since the punishment would be for "the intent to carry, irrespective of any intent to use."

Finally, "there is no allegation that what he did in the United States or in Canada was specifically authorized or avowed by the appellant's government." The military commission, dated 1908, "is insufficient to show that he had been called into active service, or had become a part of an armed force. Surely his government, upon the mere ground that it has issued such a commission, cannot as a nation, be presumed to have authorized his acts either here or in Canada." The court did not answer directly the question as to whether "implied authority is sufficient." This was unnecessary in the circumstances, for the "holding of a commission of this kind is no evidence of authority to do any acts as a belligerent within the United States."

Such a commission, in the opinion of the court, was "insufficient to show authorization of an attack upon Great Britain or Canada." Even if it did, such a commission "affords no implication of authority for a violation of the laws of a neutral nation in a matter having so remote a relation to the proximate act of exploding an explosive substance in hostile territory." Consequently, no national authority, express or implied, having been shown, no question of international law was involved, and the district court had full jurisdiction to try the indictment.[33]

[33] (C.C.A. 1st Cir. 1916) 232 Fed. 819. The Supreme Court refused to review the case for lack of jurisdiction. (1916) 243 U. S. 247, 37 Sup. Ct. 293, 61 L. Ed. 700.

IV

In conclusion, it may be said that there has been explicit recognition and acceptance in the courts of the United States of the substance of the doctrine incorporated in the phrase Act of State. The doctrine developed in Britain after 1790 to fix the status of its agents being sued in Britain by aliens for acts done in the plaintiff's country and was first formulated with regard to the East India Company. It was later extended to individuals. In the United States courts there seems to have been some hesitancy prior to the Greytown bombardment in 1854. In the suits that arose from that incident, the courts clearly accepted the principle that had been formulated for similar situations in the British courts. The South Carolina court had accepted both the reasoning and the principle in its decision in 1824.

The scope of the principle and the limits within which it must operate have not been as precisely formulated here as they have been in British law. The instances in which the courts have allowed the principle to prevail here have, however, approximated the conditions required in British law. The failure of the courts to determine the limits of the operation of the principle may be attributed, at least in part, to the infrequency with which they have had to deal with such cases.

Finally there has been no disposition on the part of the United States courts to question the principle that agents of other states may not be held liable in the courts of the United States for acts performed in an official capacity either in their own country, in other countries, or on the high seas.