

1940

Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine

Stefan A. Riesenfeld

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

 Part of the [Law Commons](#)

Recommended Citation

Riesenfeld, Stefan A., "Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine" (1940).
Minnesota Law Review. 2335.
<https://scholarship.law.umn.edu/mlr/2335>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME 25

DECEMBER, 1940

NUMBER 1

SOVEREIGN IMMUNITY OF FOREIGN VESSELS IN ANGLO-AMERICAN LAW: THE EVOLUTION OF A LEGAL DOCTRINE

By STEFAN A. RIESENFELD*

WHILE the following pages were written the world witnessed events which demonstrated with brutal clarity the complete collapse of the international community and its traditional legal order. It is almost impossible to imagine that international law in its classical sense, as the law regulating the relations among sixty odd members of a family of nations, can and ever will be revived and revitalized along the lines shaped during the past three centuries. Yet the American courts, at the present as well as in the future, will be confronted with questions involving foreign relations.

It might even be that in times like ours the treatment by the courts of legal issues which involve foreign relations has gained increasing importance in a country which wants to stay out of foreign embroilment without sacrificing its ideals of an administration of justice. One of the questions which has caused much headache to judges and lawyers in recent years is the jurisdictional immunity of foreign vessels. A host of new decisions have been rendered lately in this field, and the problem is likely to continue to occupy the American courts as a result of the present crisis. It is hoped therefore that a scrutiny of what the courts have done in these cases and an attempt to gather from their decisions the tendencies for the future development in this branch of the law will be of value to the admiralty and international lawyers in spite of the changing features of the globe.

The cases which have brought new life to this branch of the law are in England: the case of *Compania Naviera Vascongado*

*Assistant Professor of Law, University of Minnesota.

v. Steamship Cristina and Persons, finally decided by the House of Lords on March 3, 1938;¹ the case of *Government of the Republic of Spain v. Arantzazu Mendi*, likewise decided by the House of Lords on February 2, 1939;² the case of *The Abodi Mendi*, decided by the Court of Appeal on February 22, 1939;³ the case of *The Arraiz*, decided by the Admiralty Division on May 2, 1938;⁴ and the case of *El Neptuno*, decided by the Admiralty Division on July 29, 1938⁵ to which as a semi-comical interlude the case of *The Amazone*, decided by the Admiralty Division on May 8, 1939⁶ may be added. In the United States the decisions pertaining to our subject are the case of *Compania Espanola de Navigacion Maritima, S. A. v. The Navemar*, decided by the United States Supreme Court on January 31, 1938,⁷ and the case of *Erwin v. Quintanilla* decided by the circuit court of appeals for the fifth circuit on November 18, 1938,⁸ to which the case of *Yokohama Specie Bank v. Chengfing T. Wang*^{9a} may be added. Most of these cases have attracted the attention of commentators in various legal periodicals.⁹ Their observations

¹[1938] A. C. 485, 107 L. J. P. 1, affirming the decision of the Court of Appeal of Nov. 8, 1937, (1937) 59 Lloyd's L. Rep. 47, which in turn affirmed the judgment of the Admiralty Division rendered by Mr. Justice Bucknill on July 30, 1937, (1937) 59 Lloyd's L. Rep. 1.

²[1939] A. C. 256, 108 L. J. P. 55, affirming the decision of the Court of Appeal of Nov. 1, 1938, [1939] P. 37, 108 L. J. P. 2, affirming a judgment of the Admiralty Division rendered by Mr. Justice Bucknill on June 17, 1938 [1938] P. 233.

³[1939] P. 178, 108 L. J. P. 60.

⁴(1938) 61 Lloyd's L. Rep. 39.

⁵(1938) 62 Lloyd's L. Rep. 7.

⁶(1939) [1939] P. 322, 108 L. J. P. 150.

⁷(1938) 303 U. S. 68, 58 Sup. Ct. 432, 82 L. Ed. 667, rev'g (C.C.A. 2d Cir. 1937) 90 F. (2d) 673, which in turn reversed (E.D.N.Y. 1937) 18 F. Supp. 153. After the Supreme Court decision, the case again came before the district court, (E.D.N.Y. 1938) 24 F. Supp. 495, and its decision was reversed by the circuit court of appeals on March 6th, 1939, (C.C.A. 2d Cir. 1939) 102 F. (2d) 444. This decree was (after one more unsuccessful attempt) finally vacated (C.C.A. 2nd Cir. 1939) 103 F. (2d) 783.

⁸(C.C.A. 5th Cir. 1938) 99 F. (2d) 935.

^{9a}(C.C.A. 9th Cir. 1940) 113 F. (2d) 329.

⁹See particularly Lauterpacht, Note on *The Cristina*, (1938) 54 Law Q. Rev. 339; Lauterpacht, Recognition of Insurgents as a de Facto Government, (1939) 3 Modern L. Rev. 1 (dealing with *The Arantzazu Mendi*); Keith, The Jurisdiction of British Courts over Foreign Sovereigns, (1938) 50 Juridical Rev. 179; Mann, Notes on Immunity of Sovereign States, (1938) 2 Modern L. Rev. 57; Jennings, Recognition and Sovereign Immunities, (1939) 2 Modern L. Rev. 287; Note on Impleading a Foreign Sovereign, (1938) 186 L. T. 41; Note on Ships and States, (1938) 186 L. T. 440; Case note on *The Cristina*, (1939) 39 Col. L. Rev. 510; Hyde, Concerning the *Navemar*, (1939) 33 Am. J. Int. L. 530; Comments on the *Navemar* decisions in (1937) 50 Harv. L. Rev. 827; (1937) 37 Col. L. Rev. 655; (1938) 16 Tex. L. Rev. 582; and (1938) 6 Geo. Wash. L. Rev. 222, 542.

may furnish some further help for the understanding of the intricate topic.

I. NATURE AND SCOPE OF THE PROBLEM

At the outset it is necessary to emphasize that only the question of the immunity of *the ship itself* from the exercise of jurisdiction by the coastal state will be treated, not the immunities relating to certain persons on, or connected with the vessel, nor to acts occurring on board. In other words the discussion will be confined to the immunity with respect to the object itself.¹⁰

It is believed that this restriction has its good reason. To be sure, on the one hand the immunity of foreign vessels probably belongs to the great class of immunities from the exercise of jurisdiction by the territorial state which are enjoyed by foreign states, certain persons in their service, and certain instrumentalities in their use;¹¹ to be sure, furthermore, these immunities may all spring from one and the same rationale, namely that international comity, founded on the idea of a community of nations, requires that a state in these instances refrains from the normal exercise of its power.¹² On the other hand, however, in

¹⁰In continental literature this immunity of objects is sometimes designated with what could be translated as "objective extritoriality." Thus Van Praag uses the term "extritorialité réelle" in his monumental work, *Jurisdiction et Droit International* (1915) 140, note 340, p. 357 ff, 1935 Supp. p. 167 ff. Similarly German writers speak of "Real-extritorialität" e. g. Hübner, *Die Magistraturen des Völkerrechtlichen Verkehrs* (1900). Unfortunately Lord Atkin used the term "objective extritoriality" in quite a different sense in his opinion in the case of *Chung Chi Cheung v. The King* [1939] A. C. 160, 108 L. J. P. C. 17, namely to designate the most extreme form of the theory of extritoriality covering the immunity of the vessel itself as well as the immunities relating to persons on board of the same and to acts committed thereon.

¹¹The literature dealing with the different immunities is very copious; but apart from the general treatises of international law there exists only one monograph dealing with the *whole* field, Van Praag's, *Jurisdiction et Droit International* (1915), and 1935 Supplement. There are, however, important studies dealing with large sectors of the area. Mention should be made particularly of Miss Allen's book on *The Position of Foreign States before National Courts* (1933) and of the *Draft Convention on the Competence of Courts in Regard to Foreign States* by the Harvard Research in International Law, (1932) 26 *Am. J. Int. L.*, Supplement. Of articles, one by Fairman entitled *Some Disputed Applications of the Principle of State Immunity*, (1928) 22 *Am. J. Int. L.* 566 is especially illuminating.

¹²It is very difficult to give any more substantial rationalization for the doctrine of sovereign immunity than the reference to international comity. Stating that an exercise of jurisdiction in these cases would infringe upon the "equality," the "independence," or the "honor" of the foreign state is hardly more than using a *façon de parler*. All that can be said is that these exemptions have become a tradition whose disobedience would cause unnecessary international conflicts, and whose observance

hardly any other branch of international law have over-generalizations and the use of catchwords and formulae caused as great a confusion as in the field of immunities of foreign states.

This holds true particularly with regard to the notion of *extritoriality*, which has been employed to describe and circumscribe these immunities. It may be conceded that if all the persons, objects, and localities designated with this term would be treated in all respects and for all purposes as being outside of the territory of the state where they are located, the use of the term would have its good sense and would be even more than a mere fiction.¹³ But the truth is that international law and municipal law purporting to be in accordance with the international rules have not developed that way.¹⁴ Persons, objects, or localities qualified as extritorial are not considered in all respects and for all purposes as being outside the territory of the state of location, but only as being freed from the exercise of certain governmental functions in certain respects and under certain circumstances.¹⁵

is believed to promote and strengthen international intercourse. This seems to be the modern view of the courts. Thus the Supreme Court of the United States simply invoked comity in the case of *Guaranty Trust Co. v. United States* (1937) 304 U. S. 126, 134, 82 Sup. Ct. 1224, 58 L. Ed. 785, and Lord Maugham in his opinion in the *Cristina Case*, [1938] A. C. 485, 518, 107 L. J. P. 1, 17, said:

"In relation to such a rule as the one now under consideration the word comity, whatever may be its defects in regard to other rules of private international law, has a very powerful significance."

¹³For the reason that they would be freed from the incidents of territorial presence. Territory, after all, denotes the space within which a certain complex of legal effects and legal relations are normally materialized by the state. The line where territorial jurisdiction ends and extraterritorial jurisdiction begins is somewhat blurred. Nowhere can this be observed better than in the field of jurisdiction over territorial waters and persons and objects therein. As to the controversies concerning the legal nature of the territory see Kelsen, *Théorie Générale du Droit International Public*, (1932) 42 *Receuil des Cours*, Académie de Droit International 120, 204; Strupp, *Les Règles Générales du Droit de la Paix*, (1934) 47 *Receuil des Cours* 260, 540; Schönborn, *La Nature Juridique du Territoire*, (1929) 30 *Receuil des Cours* 81; Heinrich, *Theorie des Staatsgebiets* (1922); and (1928) 13 *Zeitschrift für Völkerrecht* 194, 325; Donato Donati, *Stato e Territorio* (1924); Schnitzer, *Staat und Gebiets-hoheit* (1925); Hamel, *Das Wesen des Staatsgebiets* (1933); Schade, *Wesen und Umfang des Staatsgebiets* (1934).

¹⁴The reasons for this development are evidently that the absolute doctrine is, as Lord Atkin phrased it in his opinion in the case of *Chung Chi Cheung v. The King*, [1939] A. C. 160; 108 L. J. P. C. 17 (P.C.), "quite impracticable when tested by the actualities of life" (at 174) and that "the result of any such doctrine would be not to promote the power and dignity of the foreign sovereign but to lower them." (at 175).

¹⁵Again the opinion of Lord Atkin in the *Chung Chi Cheung Case*, in which he tries to demonstrate where the doctrine of absolute extritoriality would lead to intolerable results, furnishes good examples of the differentiations between the various issues which must be made. Many

It is impossible to make any general statements. More and more distinctions and refinements have been worked out by the courts which make it necessary to deal separately with the different type-situations and the legal relations, persons, and objects involved.¹⁶

This view, which is in accord with the modern development,

of his hypothetical solutions are borne out by foreign decisions. Thus, e. g., in the case of the extritoriality of embassies the Supreme Court of Germany has twice decided that a crime committed in the building of a foreign legation is perpetrated in Germany and can be punished by the German courts, decision of November 26th, 1880, 3 R. G. St. 30, 9 *Journal du Droit Int.* 326; decision of November 4th, 1934, 69 R. G. St. 54, (1934) 64 *Journal du Droit Int.* 561. In France and Italy the same rule applies, case of Mikitschenkoff, *Cour de Cassation*, Oct. 10th, 1865 [1866] *Dalloz*, Pt. I, p. 233; case of Dominici, *Corte di Casazione di Roma*, April 13th, 1923 (1923) *Il Foro Italiano*, Pt. II, p. 294 (dictum only). But this does not necessarily imply that the building is for all purposes subject to the local jurisdiction. Thus it should not be subject to execution, even where the foreign state can be sued for private acts and where its property when used for private purposes is subject to execution. The Supreme Court of Czechoslovakia seems to have permitted execution in one instance for the purpose of enforcing an award of an international tribunal (cf. Deák, *Immunity of Foreign Mission Premises From Local Jurisdiction*, (1929) 23 *Am. J. Int. L.* 582), but it seems to have reversed its opinion later, *Decision of October 23d, 1930*, (1931) 58 *Jour. du Droit Int.* 719 (unfortunately only a summary is printed). If the premises are only bought for embassy purposes but not yet so used, the special immunities should not yet attach; but cf. the note *De la compétence des tribunaux français en cas de litige naissant à l'occasion de la vente à un gouvernement étranger d'un immeuble situé en France et devant servir d'ambassade*, (1925) 52 *Jour. du Droit Int.* 236. Accordingly it has been held that a tenant has the same rights against a foreign state which has bought a house to establish an embassy as against any other landlord, so long as the house is not used yet for such purpose, *Tribunal Civil de la Seine*, Oct. 30th, 1929, *Suède v. Petrochino*, (1932) 59 *Jour. du Droit Int.* 945.

¹⁶See the article by Fairman, *Some Disputed Applications of the Principle of State Immunity* (1928) 22 *Am. J. Int. L.* 566. A good example of the fine distinctions which have to be drawn is a decision of the tribunal of Geneva of March 29th, 1927, (54 *Journal du Droit International* 1179) holding that a man who is sued in Switzerland for support as the illegitimate father of a child and who at the time when he lived with the mother had the character of a Yugoslavian diplomatic agent in Switzerland, and at the time of the suit had the character of a Yugoslavian agent for Egypt cannot in that suit successfully claim exemption from jurisdiction in Switzerland. With respect to the question of the termination of the immunity from suit or execution see also *Suarez v. Suarez*, [1917] 2 *Ch.* 131, 86 *L. J. Ch.* 673 and, on appeal from subsequent proceeding, (1917) 34 *Times L. Rep.* 127, and the decision of the *Cour de Paris*, April 9th, 1925, *Laperdrix v. Kouzouboff*, (1926) 53 *Journal du Droit Int.* 64. With respect to criminal proceedings, conversely it is held in Italy that the immunity of ambassadors relates to the substantive penal law (i.e. the criminal responsibility) and not merely to the possibility of a prosecution during the time of the diplomatic character, see case of *Wohotich*, *Cassazione del Regno*, April 19th, 1933, (1933) *Il Foro Italiano*, Pt. II, p. 430. It is however, generally recognized that the immunity pertains also to the private affairs of the diplomatic agent, *De Meeüs v. Forzano*, *Cassazione del Regno* 1939 (1940) 32 *Rivista di diritto internazionale* 93.

recently has found a clear recognition by Lord Atkin in the opinion which he rendered per curiam in the Privy Council case of *Chung Chi Cheung v. The King*.¹⁷ It involved the question whether the British courts in Hong Kong had jurisdiction to try to convict a British subject who had killed the British captain of a Chinese maritime customs cruiser on board of the same while it was travelling inside British territorial waters, and who had been turned over to the British police. The Privy Council took the view that the Hong Kong court had jurisdiction under the circumstances of the case. Lord Atkin in his opinion considered the evolution of the doctrine of extritoriality and, discarding the theory of what he called "objective extritoriality," he stated:

"The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to the foreign sovereigns and their envoys, and public ships and the naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. . . ."¹⁸

Since, therefore, the exercise of jurisdiction in regard to the vessel as such follows its own rules which need by no means be coextensive with the principles regarding the exercise of jurisdiction over persons on the ship or connected with the same or over acts committed on board, it seems practicable not to consider these other immunities, even though they are quite frequently dealt with together with the immunity of the ship itself¹⁹ and to confine the discussion strictly to the treatment of the vessel as a thing. Again, it seems likewise to be advisable not to study the immunity of the ship as a thing in connection with the immunities of other instrumentalities or assets of foreign states.²⁰ The

¹⁷[1939] A. C. 160, 108 L. J. P. C. 17.

¹⁸[1939] A. C. 160, 175, 108 L. J. P. C. 17, 23.

¹⁹Of the literature dealing with the whole field of immunities pertaining to vessels, to acts committed thereon, to persons on board thereof and to their crews, see particularly the excellent discussions in 2 Gidel, *Le Droit Public de la Mer*, (1932) p. 77 ff., p. 253 ff.; Vol. 3 (1934) p. 212 ff.; 1 Fedozzi, *Trattato di Diritto Internazionale*, (3d ed. 1938), p. 381 ff.; Baldoni, *Il Mare Territoriale* (1934) p. 83 ff.

²⁰Recent cases in Anglo-American law dealing with the immunity of foreign states in respect to other assets or debts are *Haile Selassie v. Cable and Wireless Ltd.*, [1938] 1 Ch. 549, 107 L. J. Ch. 201; [1938] 1 Ch. 839, 107 L. J. Ch. 380; [1939] 1 Ch. 182, 194, 107 L. J. Ch. 419, 108 L. J. Ch. 190. *Guaranty Trust Co. of New York v. United States* (1938) 304 U. S. 126, 58 Sup. Ct. 785, 82 L. Ed. 1224; *Hannes v. Kingdom of Roumania Monopolies Institute*, (1938) 169 Misc. Rep. 544, 6 N. Y. S. (2d) 960; modified (1940) 260 App. Div. 189, 20 N. Y. S. (2d) 825;

particular nature and position of vessels which distinguishes them from other chattels, and the different traditions and procedures in admiralty makes it at least doubtful whether or not separate rules apply to them.²¹ Nevertheless it may be said as a matter of principle that except where the particular situation or the character of the ship demands otherwise, the treatment should be analogous.

Finally it should be observed that the scope of this article covers only the immunity which is accorded to a foreign vessel because of its connection with a foreign sovereign. Consequently the immunity which a foreign vessel enjoys regardless of its use or ownership by a foreign sovereign, merely because it is no more than passing the territorial waters of another state will not be treated.²²

II. THE ENGLISH CASES

Usually American and English law possess so many features in common that a topic needs no individual treatment for each of them. The precise scope of the sovereign immunity of foreign vessels is, however, as will appear, decisively determined by the

Lamont v. Travellers Insurance Co., (1939) 281 N. Y. 362, 24 N. E. (2d) 81 reversing (1938) 254 App. Div. 511, 5 N. Y. S. (2d) 295, criticised by Deák, *The Plea of Sovereign Immunity And The New York Court of Appeals*, (1940) 40 Col. L. Rev. 453, see also comments in (1940) 25 Cornell L. Quar. 459 and (1940) 26 Va. L. Rev. 824; *Bradford v. Chase Nat'l Bank*, (S.D. N.Y. 1938) 24 F. Supp. 28; *Auer v. Costa* (D. Mass. 1938) 23 F. Supp. 22.

²¹Such difference is asserted by Lord Wright in two dicta contained in his opinion in *The Cristina Case*, viz.: (1) "The appellants have contended that the rule that the sovereign cannot be impleaded is not absolute or universal and have instanced as possible exceptions cases in which title to real property in the jurisdictions [is tried?] or suits to administer a fund in court in which the foreign sovereign is interested, or representative actions such as debenture-holders' actions where the sovereign holds debentures. Whatever may be the position in such cases they are essentially different from, and afford no guidance for, the present case, and I do not need here to discuss them." [1938] A. C. 485, 506, 107 L. J. P. 1, 11; (2) "It must also be noted that *The Cristina*, even when in Cardiff docks, may have, as being a foreign merchant ship, a different status from an ordinary chattel on land." [1938] A. C. 485, 509, 107 L. J. P. 1, 12. Whether this difference exists because the object concerned is a vessel or because the admiralty proceedings are of a special nature and of peculiar effect is a question open to inquiry. The latter reason seems to have been assumed by Sir Wilfrid Greene in the case of *Haile Selassie*, [1938] 1 Ch. 839, 845, 107 L. J. Ch. 380, 382 (C.A.): "The phrase 'impleading indirectly' . . . refers to such proceedings as admiralty proceedings in rem where the action in form is an action against the ship."

²²Jessup, *Civil Jurisdiction Over Ships in Innocent Passage*, comment on the case of Panama, on behalf of *Compania de Navegación Nacional, v. The United States*, decided by the General Claims Commission, United States and Panama, June 29th, 1933. (1933) 27 Am. J. Int. L. 747.

nature and the methods of the exercise of the admiralty jurisdiction in rem. Since here American and English law show basic differences,²³ it seems advisable to deal with our problem separately for the two systems.

A. THE ENGLISH DECISIONS PRIOR TO THE CRISTINA CASE.²⁴

The recent case of *Compania Naviera Vascongado v. Steamship Cristina and Persons* was the first instance in which the House of Lords had to concern itself with the immunity of a foreign vessel from the jurisdiction of the British courts because of its connection with a foreign sovereign. But prior to that time the Admiralty Division and the Court of Appeal had a number of occasions to work out the different ramifications of the principle of exemption from jurisdiction, and had gone, as Lord Macmillan observed in his opinion, "a long way in extending the doctrine of immunity."²⁵ They did so in nineteen cases, of which seven were decided in the period between 1820²⁶ and the outbreak of the World War, and the remainder thereafter.²⁷ An analysis of

²³On the difference between American and English law with respect to the jurisdiction in rem in admiralty and the doctrine of maritime liens see Hebert, *The Origin and Nature of Maritime Liens*, (1930) 4 *Tulane L. Rev.* 381; Raymond, *Sovereign Immunity in Modern Admiralty Law*, (1931) 9 *Tex. L. Rev.* 519, 523, footnotes 10, 11; Robinson, *Admiralty Law* (1939) 363. A good and instructive summary of the English law is the section "Admiralty" by Lord Merrivale and Sir Philip Langton in 1 *Halsbury's Laws of England* (2d ed. 1931) 77 ff.; see also the statement by Lord Wright in *The Cristina Case*, [1938] A. C. 485, 504, 107 L. J. P. 1, 10 and in addition, *The Beldis*, [1936] P. 51, 106 L. J. P. 22; *The Tervaete*, [1922] P. 259, 91 L. J. P. 213; *The Zigurds*, [1932] P. 113, 101 L. J. P. 75.

²⁴Of the literature may be mentioned, apart from Raymond, *Sovereign Immunity in Modern Admiralty Law*, (1931) 9 *Tex. L. Rev.* 519, Roscoe, *La Condition Juridique des Navires Appartenant à l'Etat et l'Immunité des Etats au Point de Vue de Droit Maritime*, II, Angleterre, (1922) 34 *Revue International du Droit Maritime* 24 ff.; Hill, *Report to the Comité Maritime International*, *Bulletin* 57, p. 5; McNair, *The Judicial Recognition of Foreign States and Governments and the Immunity of Public Ships*, (1922) 2 *British Yearbook of Int. L.* 57.

²⁵[1938] A. C. 485, 498, 107 L. J. P. 1.

²⁶These cases are *The Prins Frederik*, (1820) 2 *Dods.* 451; *The Ticonderoga*, (1857) *Swabey (Adm.) Cas.* 215; *The Charkieh*, (1873) L. R. 8 Q. B. 197, 42 L. J. N. S. Q. B. 75 (on writ on prohibition), and (1873) 4 *Adm. & Eccl.* 59, 42 L. J. *Adm.* 17 (on the merits); *The Constitution*, (1879) 4 P. D. 39, 48 L. J. P. 13; *The Parlement Belge*, (1879) 4 P. D. 129, 48 L. J. P. 19, reversed on appeal, (1880) 5 P. D. 197; *The Newbattle*, (1885) 10 P. D. 33, 54 L. J. P. 16; *The Jassy*, [1905] P. 270, 75 L. J. P. 93.

²⁷*The Messicano*, (1916) 32 *Times L. Rep.* 519; *The Erissos*, (1917) 1917 *Lloyd's List Newspaper Report of Law Cases*, Oct. 24th, pp. 5, 7, 8; abstract in McNair, *The Judicial Recognition of Foreign States and Governments*, (1922) 2 *British Yearbook of Int. Law* 57, 71; *The Espo-*

these decisions is indispensable for a full understanding of the import of the *Cristina* decision.²⁸

I. CASES PRIOR TO WORLD WAR.—The pre-war cases were, generally speaking, less complicated than the twelve following ones because they involved no question of title or restoration of possession but merely the enforcement of maritime liens for collision or salvage. However, they illustrate neatly the growth of the doctrine. In the very first of all of them, *The Prins Frederik*,²⁹ extensive arguments pro and contra according immunity were made, but the issue finally remained undecided. The facts of the case were as follows. *The Prins Frederik*, a Dutch ship of war carrying a load of spices, suffered damages on a trip and was salvaged by a British boat. She later came to Plymouth, and was there arrested by the salvors. The person who took custody under the authority of the court was compelled by the captain to leave the vessel, and the matter came to trial. The captain appeared under protest. The case was argued before Sir William Scott (later Baron Stowell). The King's advocate and the advocate of the Admiralty took the side of the captain. Both law officers of the crown laid emphasis on the character of the vessel as a man-of-war, and argued that such ships were immune from private claims because of their particular destination.³⁰ Sir

sende, 1918 Lloyd's List Newspaper Report of Law Cases, Febr. 19th p. 5, Febr. 27th p. 6; abstract in McNair, *The Judicial Recognition of Foreign States and Governments*, (1922) 2 *British Yearbook of Int. Law*, 57, 70 note 1; *The Crimdon*, (1918) 35 *Times L. Rep.* 81; *The Neptune*, [1919] P. 17, 88 L. J. P. 94; *The Gagara*, (1919) 35 *Times L. Rep.* 243 (Adm.), [1919] P. 95, 88 L. J. P. 101 (C.A.); *The Annette and The Dora*, [1919] P. 105, 88 L. J. P. 107, *The Porto Alexandre*, (1919) 36 *Times L. Rep.* 28 (Adm.), [1920] P. 30, 91 L. J. P. 213 (C.A.); *The Tervaete*, [1922] P. 197 (Adm.), [1922] P. 259, 92 L. J. P. 23 (C.A.); *The Sylvan Arrow*, [1923] P. 220; *The Jupiter I* [1924] P. 236, 93 L. J. P. 156 (Adm. and C.A.) *The Jupiter II*, [1925] P. 69, L. J. P. 59 (C.A.); *The Jupiter III*, [1927] P. 122, 96 L. J. P. 62 (Adm.); [1927] P. 250, 97 L. J. P. 33 (C.A.); *The Meandros*, [1925] P. 61, 94 L. J. P. 61 (Adm.).

²⁸In addition thereto one Irish, one Scottish, one Canadian and one South-African case may be mentioned, namely *The Eolo*, [1918] 2 I. R. 78; *Owners of S. S. Victoria v. Owners of S. S. Quillwark*, 1922 *Scots Law Times Reports* 68; *Brown v. S. S. Indo-chine*, [1922] 21 *Canada Exch. Rep.* 406 and *De Howorth v. The S. S. India*, *South African Law Reports*, [1921] *Cape Prov. Div.* 451.

²⁹(1820) 2 *Dods.* 451 (Adm.).

³⁰In favor of their assertion they invoked: (a) the Roman law theory of "res extra commercium" as adopted by text-writers of international law; (b) two foreign precedents, namely a case, reported by Bynkershoek, of an attachment of Spanish war vessels attempted by Dutch creditors of the King of Spain, and the American Supreme Court case of the *Schooner Exchange v. McFaddon*, (1812) 7 *Cranch (U.S.)* 116, 3 *L. Ed.* 287. Counsels for the salvors argued that even war vessels were liable according to the law of nations for claims for services rendered to their benefit.

William, however, was in doubt whether the case was technically a salvage case, and "sufficient to justify the raising of a question as to the jurisdiction of the court upon a very nice and delicate subject."³¹ Therefore it was suggested that the salvors should first apply to the Dutch Government for compensation. Such an arrangement was made, and Sir William fixed later the compensation by award upon the request of the Dutch ambassador.³²

The next case which at least touched upon the issue was that of *The Ticonderoga*.³³ There a collision claim was made against a privately owned American boat, which at the time of the collision was chartered to the French Government and, by order of this government, was in tow of the steamer *Sea Nymph*. The court held that these circumstances did not relieve the ship from liability.³⁴ It may be observed that the owners claimed absence of liability not because of the use by a foreign government but on general principles of maritime law governing responsibility.

In the following case, where sovereign immunity was expressly asserted, the claim was likewise not successful. This was the case of *The Charkieh*.³⁵ There claims were made against a vessel of the Khedive of Egypt for a collision which occurred in the Thames river. *The Charkieh* had come to England for certain repairs. She carried cargo under a charter to a British subject and was entered at the Customs House like an ordinary merchant vessel, but flying the flag of the Imperial Ottoman Navy. After the Court of Queens Bench Division had denied the application by the Khedivé for a writ of prohibition,³⁶ the case

³¹(1820) 2 Dods. 451, 480.

³²In this award he laid down the proposition that "the first application for recompense, in the nature of salvage, ought, in the case of a ship of war belonging to a foreign state, to have been made to the representative of that state resident in this country." (1820) 2 Dods. 451, 484. It seems clear, in view of this statement, that Sir William did not intimate any final position on the immunity question, as sometimes is asserted erroneously.

³³(1857) Swabey (Adm.) 215.

³⁴The case was later explained in the case of *The Sylvan Arrow*, [1923] P. 220, 92 L. J. P. 23. The court there adverted to the fact that *The Ticonderoga* was merely in the service of the French Government, but that master and crew were apparently appointed and paid by the owners. The master was, however, according to the statement of the original report, "bound to employ the steamer in question, and to pursue such course as the French government thought most convenient." Swabey 215, 217.

³⁵(1873) 4 Adm. & Eccl. 59, 42 L. J. N. S. Adm. 17.

³⁶(1873) L. R. 8 Q. B. Cas. 197, 42 L. J. N. S. Q. B. 75. The court denied the writ because "the question was one on international law which was peculiarly in the province of the Court of Admiralty."

came to trial before the Admiralty Judge, Sir Robert Phillimore. The Khedive appeared under protest against the jurisdiction. Sir Robert overruled the protest and based his decision explicitly upon three different grounds, namely:

"First, that his highness the Khedive, however exalted his position and distinguished his rank, has failed to establish that he is entitled to the privileges of a sovereign prince, according to the criteria of sovereignty required by the reason of the thing and, by the usage and practice of nations. . . ;

Secondly, that, on the assumption he is entitled to such privilege, it would not oust the jurisdiction of this court in the particular proceeding which has been instituted against the ship;

"And, thirdly, that assuming the privilege to exist, it has been waived with reference to this ship by the conduct of the person who claims it."³⁷

Only the second and the third reasons given in the opinion merit particular attention in connection with this study. Sir Robert felt strongly the dilemma which exists in these cases between "respecting the personal dignity and convenience of the sovereign" and "the administration of justice to the subject." The way out, he thought, was offered by the procedural distinction between writs in rem and writs in personam. The former were, according to him, not absolutely in conflict with the immunity from suit accorded by international comity to foreign sovereigns.

"Proceedings of this kind, in rem, may in some cases at least be instituted without any violation of international law, though the owner of the res be in the category of persons privileged from personal suit."³⁸

He believed this to be true even with regard to war vessels in so far as suits in rem against them for salvage and collision are concerned. But he stated cautiously that it was not necessary to announce so broad a proposition in the instant case, as *The Charkieh* could not claim exemption as a war vessel.³⁹ It is interesting to note, however, that in spite of all this Sir Robert also rested the decision upon a waiver of the immunity by the Khedive, implied by his conduct.

It was only in the fourth case in this line, *The Constitution*, that immunity was for the first time actually granted to a foreign vessel.⁴⁰ This case involved an application for arrest to enforce claims for salvage services rendered to the United States frigate

³⁷(1873) 4 Adm. & Ecc. 59, 100, 42 L. J. Adm. 17.

³⁸(1873) 4 Adm. & Ecc. 59, 93, 42 L. J. Adm. 17.

³⁹(1873) 4 Adm. & Ecc. 59, 96, 42 L. J. Adm. 17.

⁴⁰(1879) L. R. 4 P. D. 39, 48 L. J. P. 13.

Constitution. Counsel for the United States and the Admiralty advocate moved that no warrant for arrest should issue. Sir Robert Phillimore accordingly denied the application, thus retreating from his position taken in *The Charkieh*, that a war vessel also might be liable for salvage claims. He distinguished *The Charkieh* expressly on the ground that there no war vessel was involved.

The following case of *The Parlement Belge*⁴¹ is the decision which has become the "leading authority"⁴² in England. The litigation arose out of a collision between the plaintiff's boat and *The Parlement Belge*, which was a vessel owned by the Belgian state and employed primarily in carrying the mails, but also in other commerce. The attorney general protested against the jurisdiction of the court and prayed for dismissal. Sir Robert Phillimore gave default judgment for the plaintiffs because *The Parlement Belge* did not belong "to that category of public vessels which are exempt from process of law and all private claims." On appeal his judgment was reversed in a lengthy opinion written by the (then) Lord Justice Brett. Even though the judgment is far from being clear in all parts it seems to lay down four propositions of law. The first one was that no state can exercise jurisdiction over the public property of any state which is destined to public use.⁴³ The second one was that a proceeding in rem indirectly impleads the owner, and that therefore a proceeding in rem against a foreign state vessel indirectly impleads the foreign state.⁴⁴ The third was that, after the ship was declared by the foreign sovereign "to be in his possession as sovereign and to be a public vessel of the state," it seemed "very difficult to say that any court can inquire by contentious testimony

⁴¹(1879) L. R. 4 P. D. 129, 48 L. J. P. 18, reversed by Court of Appeal, (1880) L. R. 5 P. D. 197.

⁴²Lord Maugham in *The Cristina*, [1938] A. C. 485, 518, 107 L. J. P. 1.

⁴³Cf. (1880) L. R. 5 P. D. 197, 214: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of international comity which induced every sovereign state to respect the independence and dignity of other sovereign states, each and every one declines to exercise by means of its courts any of its territorial jurisdiction . . . over the public property of any state which is destined to public use. . . ."

⁴⁴(1880) L. R. 5, P. D. 197, 217; see also at p. 220: "If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner."

whether that declaration is or is not correct."⁴⁵ The last proposition was that, even if there could be such inquiry, a ship used only subserviently for trading purposes did not lose its immunity.⁴⁶ It can easily be seen that these four propositions are not at all co-extensive in scope, and that particularly the second and the third one went far beyond the facts of the case.⁴⁷ But they influenced the growth of the law considerably.

The two remaining pre-war cases did not contribute anything essentially new to the development. One involved merely a point of statutory construction⁴⁸, the other was substantially on all fours with *The Parlement Belge*.⁴⁹

II. DURING AND AFTER THE WORLD WAR.—The cases arising after the beginning of the world war presented new and complicated issues to the courts. On the one hand the principle of sovereign immunity from money claims in rem for salvage, collision or wages had to undergo further elaboration, owing particularly to the use of privately owned ships by foreign governments either by charter or by requisition. On the other hand confiscation of private vessels by foreign governments led to attempts of obtaining their restitution in British courts. The problem of the position of an unrecognized government added to the difficulties. It is probably helpful to distinguish between the cases in which the enforcement of certain liabilities was attempted by in rem suits and those in which restoration was claimed.

(a). CASES INVOLVING THE ENFORCEMENT OF LIABILITY.—The scope and nature of the sovereign immunity from the enforcement

⁴⁵(1880) L. R. 5, P. D. 197, 219.

⁴⁶(1880) L. R. 5, P. D. 197, 220.

⁴⁷If a proceeding in rem impleads the owner and the owner cannot be impleaded, any property, not only property destined to public use would be exempt; and if the mere claim suffices, any property claimed by a foreign Government as its own would be free. In reality all that was necessary to decide the case was that a vessel used primarily as mail packet and subordinately as trading boat enjoyed sovereign immunity.

⁴⁸*The Newbottle*, (1885) L. R. 10 P. D. 33, 54 L. J. P. 16. The *Newbottle* collided with a mail packet of Belgium. The Belgian King sued in rem, and arrested the *Newbottle*. Her owners interposed a counterclaim and plaintiff's suit was stayed until he gave security to answer the counterclaim under section 34 of the Admiralty Court Act of 1861. *Held*: Such order was not in violation of the sovereign immunity of the plaintiff.

⁴⁹*The Jassy*, [1906] P. 270, 75 L. J. P. 93. Suit in rem and arrest of the steamship *Jassy* for collision. The Roumanian Chargé d'Affaires claimed sovereign immunity because the boat was employed for public purpose in connection with the national railroads of Roumania. The secretary of state for foreign affairs communicated this letter to the registrar of the Admiralty Court. Thereupon the action was dismissed.

against the ship of liability for wages, salvage and collision was further elaborated in a group of nine cases. One of the issues to be determined was the position of ships which were not owned by the foreign government but only temporarily used either pursuant to a requisition or to a time charter. Before the world war this question had been touched upon only once, in the above mentioned decision of *The Ticonderoga*.⁵⁰

The first case in this group was *The Messicano*.⁵¹ It involved the question as to whether an action in rem could be maintained for a collision which had occurred before the outbreak of the war against a vessel which at the time suit was brought and warrant for arrest sued out was requisitioned by the Italian Government and in actual use for carrying war material. The owners claimed immunity. The court set aside the warrant for arrest, but declared the service of the writ to be good, thus compelling the defendant owners either to appear or to suffer default judgment.⁵² The case therefore is important for two propositions. In the first place it established the rule that a foreign boat which is used for public purposes enjoys sovereign immunities even though it is not owned by the foreign government, but is merely in governmental service under requisition for the war time. Second, it applied to vessels requisitioned by foreign governments the distinction between *immunity from arrest* and *immunity from suit*, which had been worked out shortly before as to British privately owned vessels requisitioned by and in the service of the Crown in the case of *The Broadmayne*,⁵³ and had later been re-applied to foreign privately

⁵⁰(1857) Swabey (Adm.) 215, see supra text to note 33.

⁵¹(1916) 32 Times L. Rep. 519.

⁵²The court made the following order: "On the motion of the defendants it is ordered that the appearance entered under protest, the warrant of arrest and the arrest thereunder, and the undertaking to give bail given under protest, be struck out and set aside; that the time for entering appearance be extended for eight days from this date; and that all further proceedings in this action with a view to the arrest or the detention of the ship be stayed for so long as the ship shall remain under requisition in the service of the Italian Government."

⁵³[1916] P. 64, 85 L. J. P. 153. The case involved an action for salvage brought against a British private ship which was requisitioned by the British Government. The salvors had served a writ in rem on the vessel, and the owners entered an appearance. The treasury solicitor intervened on behalf of the crown, and moved to set the writ and all subsequent proceedings aside. The motion was denied by the Admiralty Division. The Court of Appeal allowed the appeal, and ordered "that all further proceedings in this action with a view to the arrest or detention of the ship be stayed for so long as the ship shall remain under requisition in the service of the crown." Two points should be noted. The court refused expressly to give any instructions with respect to the action itself, but all three

owned ships in requisition service of the British Crown in the case of *The Kursk*.⁵⁴ The effect of this distinction between the two immunities was that the action in rem against the owner could be maintained even though the arrest was unlawful and was either denied or set aside.⁵⁵

justices who delivered opinions intimated that apart from the arrest the action might be continued against the owners. The court furthermore did not even suggest whether or not, as a matter of substantive law, there would be any liability of the owners for salvage services rendered to the ship while being under the requisition.

⁵⁴1918 Lloyd's List (newspaper report of law cases) June 22d; abstract in McNair, *Judicial Recognition of States and Governments, and the Immunity of State Ships*, (1922) 2 *British Year Book of Int. Law*, 57, 71. The *Kursk* was one of a convoy of five vessels which travelled under the protection of a British warship in the Mediterranean. She went out of her course and collided with *The Clan Chisholm*, which thereupon on her part collided with *The Itria*. The owners of *The Clan Chisholm* sued in rem and moved for an arrest of *The Kursk*. The latter vessel was owned by the Russian Volunteer Fleet Association, but at the time of the suit (and apparently also at the moment of the collision) was in governmental service for Great Britain. The Crown claimed that the vessel was wholly under control and management of his Majesty's Government. The court thereupon refused the arrest, intimating, however, that plaintiffs had a maritime lien which they might be able to enforce later. The same incident gave rise also to two other actions, namely a suit by the owners of *The Itria* against *The Clan Chisholm*, and a suit by the same owners against *The Kursk*. The suits by the owners of *The Itria* against *The Clan Chisholm* and by the owners of *The Clan Chisholm* against *The Kursk* were consolidated and the House of Lords apportioned the liability holding that the blame should be attributed to *The Kursk* two thirds and to *The Clan Chisholm* one third; see (1920) 2 *Lloyd's List Law Rep.* 244. As a result of all proceedings the owners of *The Clan Chisholm* had a judgment against the Volunteer Fleet Association as owners of *The Kursk* for damages, and the latter a much smaller judgment for the costs of the appeal against the owner of *The Clan Chisholm*. The Admiralty Division stayed the execution of the judgment for costs upon the ground that otherwise the immunity of *The Kursk* and the doubtfulness of the possibility of an execution in other property of the Volunteer Fleet Association would put the Association in too advantageous a position. (1920) 4 *Lloyd's List Law Rep.* 85. *The Kursk* returned, however, later to England and being freed meanwhile from governmental service was lawfully arrested and condemned in the action by the owners of *The Itria* against *The Kursk* which was still pending; see [1923] P. 206, 92 L. J. P. 125 (Adm.); [1924] P. 140, 93 L. J. P. 72 (C.A.).

⁵⁵The distinction mentioned in the text is based in the last analysis upon the *procedural mechanics* of the British admiralty practice. In England, even in a suit in rem, the writ of summons and the warrant for arrest are separate court orders. It has been held that the service of the writ in rem upon a ship within the jurisdiction of the Admiralty Court constitutes sufficient notice to all the world of the claim, and suffices to give the court jurisdiction for a default judgment even though the ship was never arrested and has meanwhile left, *The Nautik*, [1895] P. 121, 54 L. J. P. 61; cf. 1 *Halsbury's Laws of England* (2d ed. 1931) Admiralty, 132. This case was cited in *The Messicano*. But this latter decision leaves many questions open: Can there be a valid service (which is also an exercise of jurisdiction) on a ship in the possession of a foreign Government? In *The Nautik* the service of the writ was undoubtedly good; all that happened was the departure of the vessel before the arrest. In *The Messicano*, as well as in

The principle of immunity in this group of cases was carried a small step further and extended to privately owned ships in the public service of foreign governments, without technical "requisition" by the same, in the two cases of *The Erissos*⁵⁶ and *The Crimdon*.⁵⁷ The former decision dealt with a claim for salvage services rendered to a Greek private vessel which was then and at the time of the suit in the service of the Italian Government for state purposes. She was chartered from the owners for war service by a British broker firm for the British Government and allotted by the latter to the Italian Government. No arrest had been made but the owners had given an undertaking to put up bail. Counsel appeared also for the Italian Government. Mr. Justice Hill, even though refraining purposely and explicitly from using the word "requisition" under the circumstances of the case, announced that nevertheless the principle of the requisition cases applied. Consequently he stayed "further proceedings with the view to detain the vessel as long as she is used for public purposes by the British or Italian Government," declaring that the writ in rem as such must stand; the undertaking to put up bail was discharged because of the impossibility of an arrest of the vessel in her present employment.

The case of *The Crimdon* involved a privately owned Swedish vessel that had collided with the ship of the plaintiffs while she

The *Broadmayne*, service was accepted by the defendants. Was this acceptance necessary or would the mere service of the writ on board of the vessel have sufficed? Apart from these doubts, what is the value of such proceedings without arrest? If the defendant appears, he might, according to the English practice, be condemned and execution be levied on other property as if a writ in personam had been issued, cf. the opinions by Lord Pickford and Lord Bankes in *The Broadmayne*, [1916] P. 64, 85 L. J. P. 153, see also *The Koursk*, (1920) 4 Lloyd's List Law Rep. 85, *The Joannis Vattis*, [1922] P. 213, 91 L. J. P. 182; 1 Halsbury's Laws of England (2d ed. (1931) Admiralty, 82). If he does not appear, default judgment might be rendered. This would have a twofold effect: (a) execution may issue thereon in England, if the ship should ever return freed from requisition; (b) it may be recognized by foreign jurisdictions. But are there any present means of execution? Could for instance, the property be sold, subject the government's rights (somehow like a reversionary interest)? Justice Hill in the case of *The Crimdon*, (1918) 35 Times L. Rep. 81, intimated a negative answer, cf. *infra* note 58. Would such execution on the proprietary interest in the vessel be possible against a requisitioned ship, if the judgment were in personam and the owner a resident of England? The author is not familiar enough with English execution process to suggest any answer.

⁵⁶(1917) Lloyd's List, (newspaper report of law cases), Oct. 24th, p. 5, 7, 8; abstract in McNair, *Judicial Recognition of States and Governments*, (1922) 2 British Yearbook of Int. Law 57, 71.

⁵⁷(1918) 35 Times L. Rep. 81.

was employed in the American Army transport service under a time charter to the United States Shipping Board Emergency Fleet Corporation. The solicitors for the plaintiffs sued out a writ in rem, and the solicitors for defendant accepted service but, requested for an undertaking to put in bail to avoid arrest, did so only under the condition that the ship was liable to arrest. Meanwhile the ship had sunk and the plaintiffs asked for an order for bail against defendants. Mr. Justice Hill refused this application. He took the view that the vessel was not liable to arrest under the circumstances of the case (which fact, as he stated, however did not affect the validity of the writ in rem against the owners), giving the following reasons:

"But when you come to arrest . . . the state which has the vessel in use for public purposes can claim to have the vessel released from the arrest of the court, and the method by which the vessel has been put in the service of the state is immaterial. She may be in the service of the state by requisition without a written agreement; she may be in the service of the state by charter party, but how she has come into the service of the state is, in my view, immaterial so long as she is at the time being used by the state for public purposes. Nor, to my mind is it material whether the flag of the vessel is the flag of the state applying to the court, or the flag of any other country, nor whether the vessel is one over which the state applying to the court can exercise compulsory powers of requisition or not."⁵⁸

In addition to this rule of the immunity from arrest of privately owned ships temporarily employed for public purposes by foreign governments in suits in rem for salvage, collision, etc., the problem of sovereign immunities of foreign vessels from the

⁵⁸(1918) 35 Times L. Rep. 81, 82. Justice Hill added an interesting comment on the question of value of a proceeding in rem without an arrest or bail (discussed supra, note 55). He said: "The party injured can compel the private owners to submit to the jurisdiction by a writ in rem, but unless he can enforce his maritime lien by effective arrest, his remedy is only a personal judgment, which against a foreign owner may be valueless, especially where, as in the present case, the vessel may be lost, while the action is pending. He can, of course, wait and enforce his maritime lien after the vessel has passed out of the service of the sovereign state, but again, in the interval, the vessel may be lost, or, if a foreign vessel, may never return to the plaintiff's country; and, in any case, in the meantime the plaintiff may lose touch with all his witnesses. . . ." He added: "I think it is well deserving of some consideration whether machinery cannot be devised whereby persons having claims against ships which, but for the privilege of the State, would be enforceable against the ships by arrest should be enabled to obtain some form of security which . . . should be as good as that which is given by arrest and holding bail." It is important to note that the judge did not consider the question whether the plaintiff would not fare better in suing in personam in the state where the owner is domiciled and thus minimize the hardships.

enforcement of liabilities, underwent in general some further elaboration in the post war period. Apart from two decisions, of which one was only a re-application of the rule laid down in *The Parlement Belge*⁵⁹ and the other no more than an interpretation of a procedural statute,⁶⁰ four cases must be mentioned in this connection. The first one is the case of *The Porto Alexandre*.⁶¹ This was a formerly German-owned steamship, which had been requisitioned by the Portuguese Government and later adjudged a lawful prize by the Portuguese Prize Court. She was engaged in ordinary trading voyages earning freight. A writ in rem was served for salvage services rendered. Solicitors for defendant appeared under protest and moved to set the writ aside. The Admiralty Division, upon a communication by the Portuguese Chargé d'Affaires to the effect that the Porto Alexandre belonged to the Portuguese Government, set aside the writ. The decision was affirmed by the Court of Appeal. All three judges agreed that the employment of the vessel for trading purposes did not deprive her of her immunity.⁶² While this case thus defined the *scope* of

⁵⁹The *Esposende*, (1918) Lloyd's List (newspaper report of law cases), Feb. 27th, 1918; abstract in McNair, *Judicial Recognition of States and Governments*, (1922) 2 *British Yearbook of Int. Law* 57, 70 note 1, cited in *The Crimdon*, (1918) 35 *Times L. Rep.* 81. A writ in rem, without warrant for arrest, was served on *The Esposende*, a former German steamer which was condemned by the Portuguese Government and employed to carry munitions. The Portuguese Chargé d'Affaires claimed that the boat was a public vessel belonging to the Republic of Portugal. This statement, which was transmitted to the court by the Foreign Office was considered to be conclusive as to ownership and use and the writ therefore dismissed, though not without a comment by the court on the inconveniences of this practice.

⁶⁰*The Neptune*, [1919] P. 17, 88 L. J. P. 94. The case concerned the converse situation of *The Newbattle*, (1885) 10 P. D. 33, 54 L. J. P. 16, discussed *supra*, note 48. Plaintiffs sued the owners of *The Neptune* for collision. A counterclaim was filed. Plaintiffs thereupon gave bail, and asked for an order against defendants to give likewise bail. The French Government claimed to be the owner of the vessel and to employ her in war service. The court held, that it could neither order bail nor stay defendant's counterclaim until bail was filed. Section 34 of the Admiralty Court Act (which had been applied to a sovereign plaintiff in *The Newbattle*) was held not applicable to a sovereign counterclaimant, because it referred only to actions and not to counterclaims. Cf. *The Rougemont*, [1893] P. 275, 62 L. J. P. 121.

⁶¹[1919] P. 30, 89 L. J. P. 97 (C.A.).

⁶²Lord Justice Bankes was not sure whether the vessel was not going to be restored after the conclusion of the peace, but he thought that *The Parlement Belge* covered the instant case, in spite of this fact and in spite of the employment of the vessel in ordinary trade; Lord Justice Warrington stated that, whatever the actual use may be to which the ship is put, the evidence showed that it was state property and destined to public use; and Lord Justice Scrutton drew the logical consequences from Lord Eshers' rule of indirectly impleading, and declared that as the arrest of any kind of governmental property would constitute impleading the foreign sovereign, it could not be permitted.

the immunity, the *nature* of it was determined in the next three cases, *The Tervaete*, *The Sylvan Arrow* and *The Meandros*.

The case of *The Tervaete*⁶³ involved a vessel which had been surrendered by Germany to the Allies under the Treaty of Versailles, and had been allotted to the Belgian Government. While employed by it, she had collided with the plaintiff's boat. Thereafter she had been transferred to a private corporation. The plaintiffs tried to enforce a maritime lien for the collision by a suit in rem; the defendant owners moved to set aside the writ. The Admiralty Division held that the immunity of foreign state vessels was of merely procedural character, and that consequently a lien could attach while the ship was operated by the foreign government, and be enforced when it passed into private hands. The Court of Appeal reversed the decision.⁶⁴ The three judges held (for various reasons) that a maritime lien could not attach upon a vessel in the hands of a foreign sovereign, and therefore the successor acquired her free from such encumbrance.⁶⁵

In the case of *The Sylvan Arrow* this principle was applied to requisitioned ships, and it was decided that a maritime lien could not be enforced against a private vessel for a collision occurring while the same was under requisition by a foreign government, even after her return to the owner. The litigation arose out of a collision of plaintiff's boat with an American oil tanker which then had been under a "Requisition Charter" to the American Government but meanwhile had been restored. The court held in the first place⁶⁶ that the question was not one of jurisdiction but one of liability, and second,⁶⁷ that no liability could be enforced against the vessel, as the owners were not responsible for acts

⁶³[1922] P. 197, 91 L. J. P. 151.

⁶⁴[1922] P. 259, 91 L. J. P. 213.

⁶⁵Lord Justice Bankes intimated that in a case of a lien which had attached while the ship was privately owned and which later became unenforceable when the ship passed into the hands of the government, enforceability might be revived after her return into private hands. But he thought that a lien could not attach for the first time while the boat was used by the government, in the first place, because it was only of procedural character, and second, because such dormant lien would decrease the value of the vessel in the hand of the foreign sovereign. Lord Justice Scrutton adopted a similar reasoning. Lord Atkin based his decision exclusively on the purely procedural character of the lien. "A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied." He did not accept the reason that it should be denied because it would impair the value.

⁶⁶*The Sylvan Arrow*, [1923] P. 14, 92 L. J. P. 23: motion by owners to set aside writ denied.

⁶⁷[1923] P. 220, 92 L. J. P. 119.

done by the American Government, which acquired the exclusive control of the vessel not by an ordinary commercial charter but by compulsory surrender. The case of *The Ticonderoga*⁶⁸ (where a lien was enforced against a boat for a collision occurring while it was under a charter to the French Government) was distinguished because "in that case it does not appear that the master or the crew were appointed or paid by the charterers."⁶⁹

The case of *The Meandros*⁷⁰ finally gave the Admiralty Division an opportunity to elaborate a further refinement in regard to the status of requisitioned vessels. There a privately owned Greek ship had been requisitioned by the Greek Government during the war between Greece and Turkey and had stranded while under requisition. The plaintiffs' salvage ship had saved the vessel from total loss. Plaintiffs arrested the vessel and began an action in rem for salvage services after her return to the owners. The owners denied liability because the vessel was under requisition while the salvage services were rendered. The court awarded £2500 to the plaintiffs. Sir Henry Duke pointed out that it was true that "the possession of the vessel and the control of her" had passed from the owners during the requisition but that this did not relieve the owners from liability for salvage, as the service was beneficial to the owners. He distinguished the case of *The Tervaete* and "other well known cases"⁷¹ (including probably *The Sylvan Arrow* which was cited by counsel for defendants) as involving liability for acts of the crew and not liability for beneficial services rendered by third persons. The court did not even discuss the problem by which the Court of Appeals had been troubled somewhat in *The Tervaete*,⁷² viz. how a lien for salvage could be enforced against the vessel if it could not be enforced at the time when the services were rendered. As a matter of fact the court did not pay any attention to the fact that the action was brought in rem and not merely in personam. But although English admiralty law knows of actions in rem against a vessel which are not

⁶⁸(1851) Swabey 215.

⁶⁹[1923] P. 220, 227, 92 L. J. P. 119, 121. It may be noted that the decision which is a logical result of the position taken in *The Tervaete* is of course, inconsistent with the intimation of Mr. Justice Hill in *The Kursk*, mentioned supra, note 54, that the lien attached and could later be enforced, but is in harmony with *The Broadmayne*, [1916] P. 64, 85 L. J. P. 153, where no intimation as to the liability of the owners was made, and with *The Messicano*, (1916) 32 Times L. Rep. 519, where the collision had occurred before the requisition.

⁷⁰[1925] P. 61, 94 L. J. P. 37.

⁷¹*The Meandros*, [1925] P. 61, 68, 94 L. J. P. 37, 41.

⁷²*The Tervaete*, [1922], 91 L. J. P. 213.

based upon a maritime lien,⁷³ and the decision could be explained on that ground⁷⁴ it seems to stand for the proposition that a maritime lien may attach against a privately owned vessel even though the same is at that time in governmental control, provided that the owners' liability, at least with respect to the vessel⁷⁵ is not excluded by reason of the fact that the ship was compulsorily surrendered to a foreign government and the crew controlled by the latter.

(b). CASES INVOLVING CLAIMS FOR RESTORATION.—The remaining group of cases decided after the world war deals not with the question of enforcing liability, but with the possibility of regaining possession, by means of possessory libel in English courts,⁷⁶ of vessels taken by foreign governments. The issue arose first in the case of *The Gagara*. There the West Russian Steamship Company sued out a writ in rem and a warrant of arrest against the steamship *Gagara*, claiming possession of the same. The Esthonian Government appeared under protest and moved to set the writ aside. Plaintiffs alleged that they were the owners of the vessel, that she had been seized by the Bolsheviks and later captured by the Esthonians. The Esthonian Government filed an affidavit to the effect that the vessel was condemned as a prize by a governmental decree and used for war purposes. Mr. Justice Hill inquired at the foreign office about the status of the Esthonian Government. As a result of the answer he set aside the writ.⁷⁷ On appeal his judgment was affirmed.⁷⁸ Lord Justice Bankes, writing the opinion, quoted with approval from the judgment below that the court had no jurisdiction because the Esthonian Government was in actual possession, and stated that

⁷³For instance actions for necessities or towage, see 1 Halsbury's Laws of England, (2d ed. 1931) Admiralty, p. 89 footnotes i and k, p. 90 footnote q.

⁷⁴The owners, having an interest in the preservation of the vessel according to the decision, are personally liable for salvage by virtue of a settled rule of English maritime law. Thus the action in rem might have been given by the court for the enforcement of this liability without the assumption of a maritime lien.

⁷⁵In English law it is not without doubt whether a maritime lien can exist without personal liability of the owner for the claim which is secured by the lien. Cf. Judge Hill's discussion of that problem in *The Sylvan Arrow*, [1923] P. 220, 224-228, 92 L. J. P. 119, 121.

⁷⁶Admiralty jurisdiction extended traditionally to possessory claims but not to questions of title. Since 1840 the High Court of Admiralty was, however, also competent to decide the issue of title upon which the right to possession is based. 1 Halsbury's Laws of England, (2d ed. 1931) Admiralty, 84 footnote b.

⁷⁷(1919) 35 Times L. Rep. 243.

⁷⁸*The Gagara*, [1919] P. 95, 88 L. J. P. 101.

the ship was used by it for public purposes. Three weeks later the same issue came up before Mr. Justice Hill in the cases of *The Annette* and *The Dora*.⁷⁹ Here two Esthonian subjects sued in rem for the possession of their ships which, they claimed, had been taken away from them by the Provisional Government of Northern Russia and transferred to the Polar Star Association, a co-operative labor association, for the purpose of trading. Counsel appearing under protest for the Provisional Government, the master and a person designated as manager, moved to set the writ aside. On inquiry by Mr. Justice Hill the Foreign Office stated the Government of Northern Russia was not formally recognized. Thereupon the motions were dismissed. The decision was based on two alternative grounds, namely (a) that the Government was not recognized and therefore not entitled to immunity, and (b) that even if it were a sovereign government it had parted with the possession and therefore was not impleaded in this suit.⁸⁰ This emphasis on the possession was in a certain way a new development.

The last case to be mentioned in this connection is *The Jupiter*. It occupied the courts several times in different stages. The facts were the following. The *Jupiter* had originally belonged to a fleet owned by a Russian corporation, known for short as "Ropit." The ships were registered at Odessa. The corporation was dissolved and expropriated by the famous Soviet decrees, but before the Soviets took possession of Odessa the vessel left the port. It went to France and stayed there during September. In France some persons carried on the business of the *Ropit* with its French assets. One Jacob Lépine was appointed master. He received his orders and salary from the management, which was later placed by French court orders under the direction of three administrators. In 1924, while the ship was in England, and after the English recognition of the U. S. S. R. the master handed the ships paper over to the representatives of the U. S. S. R. At that moment the French managers issued a writ in rem (without arrest), claiming possession of the *Jupiter*. The Soviet

⁷⁹The *Annette*; *The Dora*, [1919], P. 105, 88 L. J. P. 107 (Adm.).

⁸⁰ Cf. p. 111: "But even if I were satisfied that the Provisional Government of Northern Russia was a sovereign state, I should then have to consider whether the government is in possession of this vessel. If it is not in possession, the court interferes with no sovereign right of the government by arresting the vessel, nor does it, by arresting the vessel, compel the government to submit to the jurisdiction or to abandon its possession."

Government intervened and moved to set aside the writ because they were the owners of the vessel. Mr. Justice Hill granted the motion.⁸¹ He stated that, as the ship was of Russian registry, he was bound by the foreign government's allegation concerning the property. The question of the effect of the nationalization decree was not material. "Nor . . . is it material to consider whether the master, who was custodian for the plaintiffs rightfully or *effectively* transferred possession to the Union."⁸² It is noteworthy then that in this case he gave much less weight to the question of possession than he had done in *The Annette* and *The Dora*. The Court of Appeal affirmed the decision.⁸³ The three judges writing the opinions likewise did not lay any stress on the fact that the ship was in the actual possession of the U. S. S. R., but emphasized rather that any writ in rem by its very nature impleaded the foreign government.⁸⁴

The vessel was later sold through a British company to an Italian corporation. Thereupon the plaintiffs tried their luck again. The Italian corporation moved to set aside the writ because of lack of jurisdiction, and on other grounds. The Admiralty Division⁸⁵ denied the motion, and the Court of Appeal affirmed this decision, particularly stating that the U. S. S. R. was no longer impleaded.⁸⁶ The case therefore was finally tried upon the merits. The Admiralty Division rendered judgment for the plaintiffs.⁸⁷ Mr. Justice Hill stated that by virtue of the French court orders, of which one was made while the ship was in

⁸¹(1924) 40 Times L. Rep. 673 (Adm.).

⁸²Italics ours. The further statement is likewise worth quoting. "Mr. Jowitt contended that the plaintiffs for the purposes of this action were not concerned with the property in the ship—they only wanted to be put in actual possession of the ship of which they had never lost the right to possession. But they are seeking an order for possession by a writ in rem, a proceeding against the property. . . ." (1924) 40 Times L. Rep. 673, 676.

⁸³[1924] P. 236, 93 L. J. P. 156.

⁸⁴Lord Justice Bankes states: "It seems to me that the necessary result of these proceedings is to call upon the Soviet Government to assert its title, and then have the question of the ownership or the right to possession of this vessel, litigated in the courts of this country." Lord Justice Scrutton likewise stated that in a writ in rem the claim by the foreign government of having a right sufficed to deprive the court of jurisdiction. "It appears to me without going any further, without investigating whether the claim is good or bad, that the court, on having that statement made to it, must decline jurisdiction." Lord Atkin, finally, announced: "I decide it on the sole ground that this process by the very nature of it is an attempt to implead the Russian Soviet Government, and the court has no jurisdiction to do that."

⁸⁵(1925) 21 Lloyd's List Law Rep. 61.

⁸⁶[1925] P. 69, 94 L. J. P. 59, 78: "The Russian Government do not claim at the moment to be the owners or to have the right of possession."

⁸⁷The Jupiter III, [1927] P. 122, 96 L. J. P. 62 (Adm.).

France, the French administrator had the right to possession and, as the master was a mere custodian only,⁸⁸ had actual possession too. Consequently the surrender of the boat by the master to the Soviet authorities was *prima facie* wrongful, and the plaintiffs were entitled to restoration, unless the Italian company could show that the U. S. S. R. had a superior title.⁸⁹ As the Russian decrees did not have the effect of transferring property outside Russian territory to the U. S. S. R. the defendant failed to do so, and therefore the plaintiffs were entitled to restitution. The Court of Appeal affirmed the judgment on the grounds of the court below.⁹⁰

If we sum up the law as laid down by these nineteen English⁹¹ cases the following picture seems to result:

⁸⁸The *Jupiter III*, [1927] P. 122, 131, 96 L. J. P. 62, "In my judgment, Captain Lépine never was in possession of the *Jupiter* nor had he at any time the right to possession. He was a custodian merely. The person for whom he was custodian was in actual possession."

⁸⁹The *Jupiter III*, [1927] P. 122, 135, 96 L. J. P. 62: "The result of these considerations is that in March, 1924, when Lépine allowed the U. S. S. R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lépine may have acted as a loyal subject of the U. S. S. R. but he betrayed his trust to his employers. *Prima facie* the act of Lépine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession and right to possession, in England, and wrongful dispossession in England. . . . Judgment must be pronounced in his favour, unless the *Cantiere Olivo Società Anonima* can show that the U. S. S. R., who sold the ship to them, had superior title. . . ." See further p. 153: "The result is that, in my judgment, M. Bourgeois in March 1924, was wrongfully deprived of possession, and that no one has established title superior to that of M. Bourgeois."

⁹⁰The *Jupiter III* [1927] P. 250, 97 L. J. P. 33 (C.A.).

⁹¹In addition to these English cases, the four cases decided in other parts of the British Empire, mentioned *supra* note 28, case might be considered. In *The Eolo*, [1918] 2 Irish Rep. K. B. Div. 78 salvage was claimed against a privately owned ship which sailed under the orders of the Italian Ministry of the Marine, carrying war materials and manned by Italian gunners. On the Italian claim to immunity the ship was discharged. The court thought that it need not decide whether a mere claim to immunity would suffice, as there was ample evidence to support it. In *Owners of S. S. Victoria v. Owners of S. S. Quillwark*, [1922] Scots Law Times Reports 68, The Outer House of the Court of Sessions of Scotland held that a vessel owned by the United States and operated by the United States Shipping Board was not subject to "arrestment," for collision, although at the time of the accident and the suit she was "employed in ordinary trading voyages carrying cargoes for private individuals." In *Brown v. S. S. Indo-chine*, (1922) 21 Can. Exch. Rep. 406 the Quebec Admiralty Court dismissed a suit in rem for collision against a vessel which belonged to the Government of French Indo-China; the vessel had begun its voyage carrying convicts to Guiana, but at the time of the collision the vessel was under a charter party to proceed to Montreal for the purpose of taking a cargo on board destined for France, operated, however, by the governmental

A. No warrant for arrest will be issued against any vessel which is in the actual service (whether by virtue of ownership or under time-charter or requisition) of a recognized foreign government.

B. As far as the writ in rem is concerned claims for liability and possessory claims must be distinguished.

1. Where plaintiff sues in rem to establish liability,

(a) The writ will be dismissed, if a recognized foreign government is in possession and claims ownership; it is not clear whether mere claim of ownership without possession suffices, as for instance where the ship is chartered under a bare-boat charter to a private person and causes a collision or needs salvaging during this employment.

(b) The writ will not be dismissed, if the foreign government does not claim ownership, even though it is in the actual possession of the ship at the time the suit is brought. The private owner will, however, not be held liable for tort claims such as collision based on acts by the crew which happened while the boat was owned or compulsorily employed and controlled by a foreign government. But he is liable for quasi-contractual claims such as for salvage and apparently for all claims based on occurrences which happened either while the ship was used by him prior to the government's employment, or while it was used by another private owner prior to the governmental ownership, or while it was employed by the foreign government under a commercial time charter, particularly without appointment of a new crew.

2. Where the plaintiff sues for possession the writ will be dismissed, if a foreign recognized government claims the right to possession and is in the actual possession of the vessel, regardless of whether possession was rightfully or wrongfully obtained. There are dicta which seem to state that even a mere claim of ownership and right to possession without actual possession might suffice to a dismissal. But when the foreign government transfers its alleged title and possession or only possession, suit will lie against the grantee; and if the plaintiff proves wrongful dispossession the defendant must establish superior title or will be condemned.

crew. In *De Howorth v. The S. S. India*, South African Law Reports [1921] Cape Prov. Div. 451 the Supreme Court of South Africa refused to permit an attachment of *The India* which was a vessel owned by Portugal, operated by the *Transportes Maritimos do Estado* for trading and postal purposes and occasionally for military purposes.

B. THE CASE OF THE CRISTINA AND ITS SUCCESSORS

The rules of law thus established by the decisions of the Admiralty Division and the Court of Appeal mentioned in the previous section had to undergo their baptism of fire, when the House of Lords occupied itself for the first time with the claim to sovereign immunity by a foreign vessel in the case of *The Cristina*⁹² in 1938. The facts were the following.⁹³ *The Cristina* was a vessel registered at Bilbao. She belonged to a Spanish corporation, which at the time of the suit carried on its business in Marseilles and sailed its ships from Marseilles. *The Cristina* was on a trip outside the Spanish territorial waters, when on June 28th, 1937, the president of the Republic of Spain signed a decree at Valencia requisitioning all vessels registered at Bilbao. Without returning into Spanish waters the vessel reached Cardiff on July 8th of 1938. The Spanish consul at Cardiff to whom the captain presented himself on July 9th gave order to hand over the ship's papers for endorsement that the ship had been taken over by the Spanish Government. On the captain's refusal the consul dismissed him and all officers hostile to the government. The consul entered the boat on July 14th in the absence of the old captain, opened his cabin by force, and appointed a new captain and chief officer who held the ship at the government's disposal. Thereupon the owner sued out a writ of possession and a warrant for arrest. The Spanish Government moved to set aside the writ and all subsequent proceedings. Mr. Justice Bucknill set the writ aside.⁹⁴ The Court of Appeal affirmed this decision. All three lords justices⁹⁵ pointed out that the Spanish Government had actual possession, and could therefore not be ousted by an English court

⁹²[1938] A. C. 485, 107 L. J. P. 1.

⁹³Cf. the statement of the case by Lord Wright in the House of Lords Decision, [1938] A. C. 485, 498, 107 L. J. P. 1, 7, and by Lord Justice Greer in the Court of Appeal Decision, (1937) 59 Lloyds List Law Rep. 49.

⁹⁴. . . "The Spanish Government which has taken this action in the matter is an independent sovereign state recognized by this country and it is so admitted by the owners of the ship, and that being so I think it is impossible for this court to exercise jurisdiction over *The Cristina*, a ship which they—the Spanish Government—claim to have requisitioned, to have a right of possession in, and to have taken such steps as were available to the Government actually to be in possession of her, and I think that this writ should be set aside." (1937) 59 Lloyd's List Law Rep. 1 at 5.

⁹⁵Lord Justice Greer, Lord Justice Slesser and Lord Justice Scott, (1937) 59 Lloyd's List Law Rep. 47. Lord Justice Greer stated: "I cannot help thinking that the time has come when it is desirable that there should be some revision as to when and in what circumstances effect will be given to the usual rule that a foreign Government cannot be impleaded in this country." (P. 51).

regardless of how such possession was obtained. From this order an appeal was brought to the House of Lords. All five Lords giving an opinion (i.e. Lord Atkin, Lord Thankerton, Lord MacMillan, Lord Wright and Lord Maugham) agreed that the appeal should be dismissed. But even though they all agreed in the decision reached, their reasoning shows some interesting and perhaps important dissension about the ramifications of the principle of sovereign immunity.

Lord Atkin who delivered the first opinion started out with "two propositions of international law engrafted into our domestic law;" namely, first "that the courts of a country will not implead a foreign sovereign,"⁹⁶ and second "that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control." With respect to the latter principle he assumed that it was "well settled" in English law that it extended to property used for commercial purposes and to personal private property. He stated "that in a simple case of a writ in rem issued by our Admiralty Court in a claim for collision damage against the owners of a public ship of a sovereign state in which the ship is arrested, both principles are broken,"⁹⁷ and propounded the view that likewise in the instant case of a suit in rem for the recovery of possession both these principles were contravened. The first one was violated, he explained, because by the very fact that the writ was directed against all persons claiming an interest the Spanish Government was *directly*⁹⁸ impleaded, and this not only in fact but according to the intent of the parties;⁹⁹ the second principle was even more clearly violated because the arrest was undoubtedly within the international prohibition. Therefore

⁹⁶This means, as he defined more closely, that "they will not by their process make the foreign sovereign against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages." [1938] A. C. 485, 490, 107 L. J. P. 1, 3.

⁹⁷[1938] A. C. 485, 491, 107 L. J. P. 1, 3.

⁹⁸"When the plaintiffs issued a writ in which they constituted as defendants the steamship or vessel *Cristina* and all persons claiming an interest therein . . . they were *directly* impleading the Spanish Government, whom they knew to be the only persons interested in *The Cristina* other than themselves and from whom they desired that possession should be taken after it was adjudged to them." [1938] A. C. 485, 491, 107 L. J. P. 1, 4.

⁹⁹"I have no doubt not only that the government were in fact impleaded but were intended by the plaintiff to be impleaded." [1938] A. C. 485, 492, 107 L. J. P. 1, 4.

no further point needed to be discussed.¹⁰⁰ Lord Wright took much the same view.¹⁰¹

Similarly Lord Atkin stated that a foreign state could neither be impleaded nor its control or possession of a vessel be interfered with by the courts of another state, both rules flowing from the immunity of one state from the jurisdiction of another state; and that both rules demanded the dismissal of the appeal in the instant case.¹⁰² He likewise pointed out that a writ in rem impleaded the foreign state *directly*,¹⁰³ particularly in the instant case where a possessory action was brought and the foreign state had actual possession.¹⁰⁴ He added cautiously:

"It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondent here has established the necessary facts by evidence."¹⁰⁵

The mode by which the foreign government obtained possession was, according to him, not material. His Lordship then justified the decision also on the strength of the second rule that the courts could not interfere with the property of a foreign sovereign. He made the remarkable comment

"The rule is not limited to ownership. It applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but not even possessory."¹⁰⁶

This immunity attaches "even in respect of conduct in breach of the municipal law."¹⁰⁷ The control actually gained in the instant case sufficed to invest the government with the immunity. He thought further that the present case, because of the purpose for

¹⁰⁰"In the present case I find it unnecessary to decide many of the interesting points raised in the arguments for the appellants, as to whether the ship was rightly in the possession of the government, what was the extraterritorial effect of the Spanish decree, what implied restrictions in different circumstances might be attached to sovereign immunity, when if ever, the assertion of the sovereign as to his property or possession is conclusive." [1938] A. C. 485, 493, 107 L. J. P. 1, 4.

¹⁰¹[1938] A. C. 485, 498, 107 L. J. P. 1, 7.

¹⁰²"In my judgment both contentions are well founded, and the order of the Courts below may be sustained on either ground." [1938] A. C. 485, 502, 107 L. J. P. 1, 9.

¹⁰³"It may be said that it is indirectly impleaded, but I incline to think that it is more correct to say that it is directly impleaded." [1938] A. C. 485, 505, 107 L. J. P. 1, 11.

¹⁰⁴"The crucial fact in this connection is simply that the *de facto* possession was enjoyed by the Spanish Government." [1938] A. C. 485, 505, (1938) 107 L. J. P. 1, 11.

¹⁰⁵[1938] A. C. 485, 506, 107 L. J. P. 1, 11.

¹⁰⁶[1938] A. C. 485, 507, 107 L. J. P. 1, 11.

¹⁰⁷[1938] A. C. 485, 509, 107 L. J. P. 1, 12.

which the vessel was requisitioned, needed no decision on the question whether a mere trading vessel enjoyed the same immunity; but he added "as at present advised I am of opinion that these decisions . . . of the Court of Appeal correctly state the English law on this point."¹⁰⁸

The other three Lords struck a somewhat different tune. Lord Thankerton agreed with Lord Atkin "that in the present case not only were the Spanish Government in fact impleaded, but they were intended to be so impleaded."¹⁰⁹ He agreed also with Lord Atkin's view that the doctrine of immunity of the property of a foreign sovereign state dedicated to public uses included the case of actual possession for public use. But he expressed "some doubt whether the proposition that the foreign sovereign state cannot be impleaded is an absolute one; the real criterion being the nature of the remedy sought."¹¹⁰ He thought that *The Parlement Belge* did not necessarily lead to this result, and explicitly reserved therefor the liberty "to reconsider the decision of *The Porto Alexandre*."¹¹¹ It is important, furthermore, that he felt it necessary to point out specifically that the Spanish Government had obtained possession "without a breach of the peace."¹¹²

Lord Macmillan agreed with Lord Thankerton and emphasized:

"I confess that I should hesitate to lay down that it is part of the law of England that an ordinary trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign state."¹¹³

Lord Maugham finally took the view most opposite to Lord Atkin. His arguments are most interesting, but do not appear to be entirely consistent. Right at the outset he emphasized (like Lord Thankerton) that the possession of *The Cristina* was obtained without breach of the peace.¹¹⁴ Then, after setting out the claims made by the Spanish Government he felt it necessary to caution immediately against any extreme demands.

"It seems to me that the claim by the Spanish Government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had

¹⁰⁸[1938] A. C. 485, 512, 107 L. J. P. 1, 14.

¹⁰⁹[1938] A. C. 485, 493, 107 L. J. P. 1, 5.

¹¹⁰[1938] A. C. 485, 494, 107 L. J. P. 1, 5.

¹¹¹[1938] A. C. 485, 496, 107 L. J. P. 1, 6.

¹¹²[1938] A. C. 485, 493, 107 L. J. P. 1, 5.

¹¹³[1938] A. C. 485, 498, 107 L. J. P. 1, 7.

¹¹⁴[1938] A. C. 485, 514, 107 L. J. P. 1, 15.

been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions in rem against vessels belonging to a foreign government and employed in the ordinary operations of commerce. For my part I think such a claim ought to be scrutinized with the greatest of care."¹¹⁵

He distinguished thereupon between personal immunity and immunity as regards property. In the latter case a mere assertion of title by a foreign government would not impart any immunity to the property in the hands of third persons "except in such cases as ships of war or other notoriously public vessels or other public property belonging to the state." Only if it was itself, rightly or wrongly, in possession thereof, could no claim regarding it be brought.¹¹⁶ He then specifically turned to the question of ships lying in British waters and being in the possession of a foreign government. He proceeded first to explain *The Parlement Belge* as granting immunity only if such immunity was one universally recognized in foreign countries, and pointed out that this vital point was overlooked in *The Porto Alexandre*.¹¹⁷ He then eliminated the objection based on the fact that the writ in rem impleads the foreign government; he conceded this, but pointed out that no more than a remedy against the res could be obtained. In *The Cristina Case*, however, he was in favor of granting immunity because the ship was going to be used for public purposes.

It is very difficult to deduce from these five opinions any definite predictions for the scope of foreign immunity. All that the House of Lords decided was that the court had no power to take a ship from the possession of a recognized foreign government which had obtained such possession for public purposes and without breach of the peace. But the opinions of at least three of the Lords show that the immunity of purely commercial vessels has become doubtful, and all five seem to agree that jurisdictional immunity of the vessel requires at least something more than a mere claim, some sort of actual use. In so far the principle of

¹¹⁵[1938] A. C. 485, 515, 107 L. J. P. 1, 15.

¹¹⁶[1938] A. C. 485, 515, 516, 107 L. J. P. 1, 17. Consequently if the government is in possession then no suit can be brought, even though it had seized the property "without shadow of right." Is this consistent with his statement quoted in the text to note 115?

¹¹⁷[1938] A. C. 485, 519, 107 L. J. P. 1, 17, 18. See particularly his statement: "Almost every line of the judgment [in *The Parlement Belge*] would have been otiose, if the view of the court had been that all ships belonging to a foreign government even if used purely for commerce were entitled to immunity."

The Annette and *The Dora* seems to have won over that of *The Parlement Belge*.

The next case in the field was the case of *The Arraiz*.¹¹⁸ This ship was originally in a similar position to *The Cristina*, viz., requisitioned and taken over by the loyalist Spanish Government and arrested by her owners.¹¹⁹ She was released upon the basis of the decision of the House of Lords in *The Cristina Case*, but before she left England she was arrested again, this time by the Franco Government, which claimed possession of the boat under a requisition decree of March 2d, 1938. The writ was explicitly directed only against the ship and the master, in order to get around the criticism of Lord Atkin in *The Cristina Case* against interpleading "all parties interested." The Admiralty Division held, however, that the Republican Government, being "in fact in possession," was nevertheless directly impleaded, and ordered the release. It is worth while to note that the court was not troubled by the question, whether a government which was recognized only as de facto government could sue out a writ at all in an English court. The same situation¹²⁰ came up again in the case of *El Neptuno*.¹²¹ Counsel tried to distinguish the case because the Republican Government had not made any use of the vessel since its first release and only vessels put to active public use enjoyed the immunity. The court refused, however, to accept this argument.

The converse situation presented itself in the case of *The Arantzazu Mendi*.¹²² There the Republican Government sued for possession of a vessel, and the Nationalist Government claimed immunity. The facts deserve more detailed attention. The vessel had left Spain on May 1st, 1937. On June 28th the Republican Government requisitioned the ship. On August 11th, 1937,

¹¹⁸(1938) 61 Lloyd's List Law Rep. 39. (Adm.).

¹¹⁹*The Cristina* and other vessels, (1937) 59 Lloyd's List Law Rep. 1. (Adm.). Another case dealing with a similar set of facts except that the requisition took place in Spain, is *The Rita Garcia*, (1937) 59 Lloyd's List Law Rep. 140 (Adm.).

¹²⁰I. e. re-arrest by the Nationalist Government of a vessel in the hands of the Loyalist Government which was released from the first arrest by private persons (in the instant case by the crew for wages) on the strength of the decision in *The Cristina Case*.

¹²¹(1938) 62 Lloyd's List Law Rep. 7. (Adm.). (The court's appeal to the proverbial courtesy of the Spaniards for relief of the British courts from being burdened with their duties is worth reading.)

¹²²[1938] P. 233, 107 L. J. P. 128 (Adm.); [1939] P. 39, 108 L. J. P. 2 (C.A.); [1939] A. C. 256, 108 L. J. P. 55. The Court of Appeal entered a similar order in *The Alu Mendi*, (1938) 62 Lloyd's List Law Rep. 64.

The Arantzazu Mendi arrived in England and was arrested by her owners on August 24th, 1937. The Republican Government appeared under protest. The owners discontinued their suit on April 12th, 1938, but the arrest was not raised because of failure to pay the costs for the detention. On March 23d the Republican Government served a notice of requisition upon the owners, and on April 5th, 1938, the Nationalist Government served a similar notice under a decree of March 2d, 1938, upon the master, who accepted it and undertook to hold the vessel for the Nationalist Government. On the same date the owners were served with a similar notice, and on April 13th the managing director of the owners declared notarially to submit to the requisition. Thereupon the Republican Government issued a writ "to have possession adjudged to them," and arrested the boat. The Franco Government claimed immunity. The Admiralty Division set the writ and arrest aside after having inquired at the Foreign Office about the status of the Nationalist Government, and having received the information that "His Majesty's Government recognized the Nationalist Government as a government which at present exercised de facto administrative control over the larger portion of Spain." Mr. Justice Bucknill took the view that a government in such a position as described in the letter by the foreign office was entitled to sovereign immunity; that the Nationalist Government had done all it could do legally to obtain possession, considering that the ship was under arrest, and that it had in fact got a "limited possession;" that the writ—apart from being irregular in its form—therefore impleaded the Nationalist Government. The Court of Appeal affirmed the decision. Their Lordships Slesser, Finlay and Goddard agreed that the Nationalist Government had a status which entitled it to sovereign immunity, and that it could claim it in regard to the vessel, as it had a certain interest in the boat by virtue of the acceptance of the requisition by the master and the owners, even though it was technically not possession.¹²³ The House of Lords affirmed this de-

¹²³Lord Justice Slesser pointed out that the position of the Nationalist Government amounted to more than a mere claim, but was a lesser interest than ownership held for their benefit by master and owner; Lord Justice Finlay stated that there was an interest in the Spanish Nationalist Government being not a right of possession, but a proprietary right, and that it was therefore impleaded; Lord Justice Goddard likewise emphasized that the fact that the master and owner had consented to the requisition raised the claim of the Nationalist Government above the level of a bare assertion of right or mere claim, and therefore should not be affected by any exercise of jurisdiction. *The Arantzazu Mendi*; [1939] P. 39, 108 L. J. P. 2.

cision in its turn.¹²⁴ Lord Atkin took pains, however, to point out specifically that the arrest gave the marshal only custody and the National Government had possession at the material date.¹²⁵

Possession, then, was treated as a decisive, if not indispensable, factor for the claims of immunity in possessory actions. This led however to the result that the courts, even though they had declared that the question how possession was obtained was immaterial, at least as long as no breach of the peace was involved, could not help being dragged into the struggle for control. This happened in the case of *The Abodi Mendi*.¹²⁶ *The Abodi Mendi* was a Spanish ship lying in England with a crew of ten persons under a master, named Aguirre. On April 13th, 1938, the Republican Government issued a writ in rem for possession of the vessel which it had requisitioned, alleging that the old master had been dismissed by them and a new master appointed, the old master remaining on board. The Nationalist Government intervened. On October 14th, 1938, the plaintiffs asked to discontinue the arrest, because they had obtained possession of the vessel. The owners and the Nationalist Government consented. On October 15th, 1938, however, the crew refused Captain Aguirre, who had left the ship for a walk, access to the boat. Thereupon the owners withdrew their consent to the release and asked for re-instatement of the captain. The Admiralty Division refused to order re-instatement of the master, but refused also to grant a release from the arrest until the House of Lords had spoken in the case of *The Arantzazu Mendi*. The Court of Appeal reversed this decision. Lord Justice Scott stated that the action of the crew was a contempt of court which prejudiced the actual position of the defendant owner. The court ordered therefore that the ship should be released upon an affidavit that Captain Aguirre had

¹²⁴[1939] A. C. 256, 108 L. J. P. 55. The position of the House of Lords with regard to the legal status of governments recognized merely as de facto governments is commented upon by Professor Briggs in *De Facto and De Jure Recognition: The Arantzazu Mendi*, (1939) 33 Am. J. Int. L. 689, and by Professor Lauterpacht in *Recognition of Insurgents as a de Facto Government*, (1939) 3 Modern L. Rev. 1.

¹²⁵[1939] A. C. 256, 265, 266, 108 L. J. P. 55, 58. See also his statement: "As in my opinion, there is no doubt that the Nationalist Government was in fact in possession of the ship, the question does not arise that was discussed in *The Cristina*, whether on a writ framed in the ordinary form of a writ in rem and not having specific defendants the mere fact that a foreign sovereign State was claiming possession or to be entitled to possession was sufficient to show that the State was impleaded without proof that the claim was rightly or reasonably made." At p. 263.

¹²⁶[1939] P. 178, 180, 62 Lloyd's List Law Rep. 254 (Adm.); [1939] P. 178, 188, 108 L. J. P. 60 (C.A.).

been permitted to return on board and was on board, and granted the liberty to execute this release to both the plaintiffs and defendant owners.

The last case to be mentioned is *The Amazone*.¹²⁷ It involved a domestic controversy about the ownership of a yacht between a Belgian assistant military attaché and his wife. The wife issued a writ in rem and the husband asked to set the writ aside, invoking his diplomatic immunity. The court found that he was in possession and, under reference to the case of *The Cristina*, granted the motion.

The upshot of these cases does not add much to *The Cristina Case*. They all involved possessory claims. In all cases except in *The Abodi Mendi*, it was finally found that the defendant who claimed and obtained immunity in fact had possession. The only new feature is that the immunity rules are applicable also between contesting governments, provided that either of them is recognized, at least as a de facto government. The House of Lords left the question of mere claims to possession or ownership explicitly undecided. But one might discern among the lower courts a tendency in harmony with certain statements by some members of the House of Lords to the effect that at least in possessory actions a bare assertion would not suffice and that the showing of a certain power of direction over the vessel is necessary.¹²⁸ Thus an intermediate position between the statements in *The Annette* and *The Dora* on one side and *The Parlement Belge* on the other side seems to be the final result. Whether this will be true also in respect to suits in rem for the enforcement of money claims is hard to predict. The case of *The Abodi Mendi* shows that even in that way the courts cannot completely stay out of the intricate field of foreign relations.

III. THE AMERICAN CASES

A. THE DECISIONS PRIOR TO THE NAVEMAR

American law has developed on somewhat simpler lines than English law.

¹²⁷[1939] P. 322, 108 L. J. P. 150.

¹²⁸Professor Lauterpacht in his above mentioned article objects to these solutions, which make the decisions dependent upon the shifting accidents of possession: for instance a master may change his allegiance. But this is exactly what had also happened in *The Jupiter*. If a breach of the peace occurred, or a contempt of court, the status quo may be restored before immunity will be granted. It may be remembered, that such incident occurred even in the earliest English case, in *The Prins Frederik*, discussed supra text to note 29, where the master had ejected the court's custodian.

(1) BIRTH OF THE DOCTRINE WITH RESPECT TO CLAIMS FOR WRONGFUL TAKING AND RESTITUTION.—The first cases (it might be worthwhile noting) arose as in England in connection with war vessels, being libels in admiralty against the same either for damages suffered from illegal captures or for restoration of possession. The oldest case in point is apparently *The Cassius*.¹²⁹ Here a libel was brought in the district court of Pennsylvania against a French armed corvette, *The Cassius*, by the owner of an American vessel because of an alleged illegal capture of his boat. The captain of *The Cassius* moved for a writ of prohibition in the Supreme Court, and this court granted the motion, evidently without doubt that the French corvette was immune from suit under the circumstances of the case.¹³⁰ The next decision was the celebrated case of *The Schooner Exchange v. M'Faddon*.¹³¹ Here the Supreme Court for the first time announced the immunity of foreign public armed vessels in general terms. M'Faddon and another citizen of the United States had libeled *The Exchange*, claiming to be the owners. The attorney of the United States, at the instance of the executive department, filed a suggestion to the effect that the ship should be released because it was a public vessel of the Emperor of France. The district court dismissed the libel. The circuit court reversed this decision. Chief Justice Marshall reversed the circuit court and affirmed the dismissal. He stated that it was a principle of public law that national ships of war were exempted from the jurisdiction of other friendly powers while being in their ports.

The immunity of public armed vessels was extended to private armed vessels of duly commissioned privateers in the case of *The Invincible*.¹³² In *The Santissima Trinidad*¹³³ Mr. Justice

¹²⁹Reported under the name *United States v. Richard Peters*, (1795) 3 Dall. (U.S.) 121, 1 L. Ed. 535.

¹³⁰"And whereas by the said law of nations, and treaties aforesaid, the vessels of war belonging to the said French Republic . . . cannot and ought not, to be arrested, seized, attached, or detained, in the ports of the United States, by process of law, at the suit or instance of individuals to answer for any capture or captures, seizure or seizures, made on the high seas, and brought for legal adjudication into the ports of the French Republic, by the said vessel of war, while belonging to, and acting under the authority and in the immediate service of the said Republic. . . ." (1795) 3 Dall. (U.S.) 121, 129, 1 L. Ed. 535. The court thus did not say clearly whether it was the *nature of the vessel* or the *character of the claim* for which it was sought to be arrested that was the reason for the absence of jurisdiction. On the further history of *The Cassius* see *Ketland v. The Cassius*, (Circ. Ct. D. Pennsylvania 1796) 2 Dall. 365, Fed. Cas. 7743, the note at the end of *The Cassius* (1795) 3 Dall. (U.S.) 121, 132, 1 L. Ed. 535 and *L'Invincible* (1816) 1 Wheaton 238, 252, 4 L. Ed. 80.

¹³¹(1812) 7 Cranch (U.S.) 116, 3 L. Ed. 287.

Story had occasion to add two important refinements to these principles, and further to define their scope. He stated first that the sovereign immunities were applicable not only to recognized sovereigns but also to recognized belligerents,¹³⁴ and second, that even though foreign public ships and privateers are immune from suit for illegal captures on the high seas in violation of American neutrality, this immunity does not apply to the prizes brought into the American territory.¹³⁵

(2) CASES EXTENDING IT TO CLAIMS FOR THE ENFORCEMENT OF OTHER LIABILITY.—The immunity was extended to other claims in rem than those for wrongful capture or restoration of possession. It must, however, be observed that the law of governmental immunities (relating to vessels as well as to other property) was developed in the United States mainly with respect to the federal and state governments.¹³⁶ The law of sovereign immunity of

¹³²(1816) 1 Wheat. (U.S.) 238, 4 L. Ed. 80 (owners of a captured private vessel cannot interpose a claim in the prize proceedings against the capturer, a duly commissioned privateer, if the same is captured by another power).

¹³³(1822) 7 Wheat. (U.S.) 283, 5 L. Ed. 454 (libel of goods taken as prize).

¹³⁴"All the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each [belligerent]." (1822) 7 Wheat. (U.S.) 283, 337, 5 L. Ed. 454.

¹³⁵Mr. Justice Story discussed the cases of *The Cassius*, *The Exchange* and *L'Invincible*, in the instant case (1822) 7 Wheat. (U.S.) 283, 350-352, 5 L. Ed. 454. With respect to jurisdiction over the captured vessel see also the earlier case of *Talbot v. Janson* (1795) 3 Dall. (U.S.) 133, 1 L. Ed. 540.

¹³⁶See Raymond, *Sovereign Immunity in Modern Admiralty Law*, (1931) 9 Tex. L. Rev. 519, 528; Weston, *Actions against the Property of Sovereigns*, (1918) 32 Harv. L. Rev. 266. The oldest case in point is apparently *Moítez v. The South Carolina*, (Pa. Adm. 1781) Bee 422, Fed. Cas. 9,697 holding that mariners enlisting on a war vessel belonging seemingly either to the United States or to a state of the confederation could not libel the ship for wages. The more important pre-war cases concerning the immunity of the federal government are: *United States v. Barney*, (D. Md. before 1810) 3 Hughes 545, Fed. Cas. 14,525 (lien on horses for their livery cannot be enforced against the United States in respect to mail horses); *United States v. Wilder*, (C.C. Mass. 1838) 3 Sumner 308, Fed. Cas. 16,694 (lien for general average may be enforced against a cargo of slop clothing belonging to the federal government while on board of a private vessel); *The Thomas A. Scott*, (S.C. N.Y. 1864) 10 L. T. Rep. 726 (United States transport vessel not commissioned in navy is immune from libel for salvage); *Briggs v. Lightboats*, (1865) 11 Allen (Mass.) 157 (no attachment to enforce asserted builder's lien against light boats in the possession of the United States). The *Othello*, (E.D. N.Y. 1866) 5 Blatchf. 342, Fed. Cas. 10,611 (libel on bottomry bond against vessel chartered but not manned by the United States and on cargo belonging to the United States by capture was upheld against boat and dismissed against cargo; but see *Cartwright v. Othello*, (E.D. N.Y. 1866) 1 Benedict 43, Fed. Cas. 248 where lower court refused to vacate the libel both against boat and cargo on mere motion); *The Siren*, (1868) 7 Wall. (U.S.) 152, 19 L. Ed. 129 (ship in the possession of prize crew

foreign vessels¹³⁷ was nearly put at rest in the ninety years preceding the World War.

Only three cases seem to have arisen in this period. In the first one, reported under the name of *Walley v. Schooner Liberty*,¹³⁸ it was held that the new Republic of Texas, even before its independence was recognized, could claim immunity for one of its war vessels which was seized by creditors for supplies furnished, because Texas possessed belligerent rights.¹³⁹ The second one was the case of *Pizarro v. Mathias*.¹⁴⁰ There it was held expressly that the immunity of foreign public ships (in the instant case a Spanish war vessel) was not confined to questions of title, but extended to all maritime claims. The last one, the case of *Long v. Tampico*,¹⁴¹ involved a salvage claim in rem against *The Tampico*, which had just been built in the United States and was designed for Mexico to be used as a revenue cutter. The libel was answered by one De Rivera as agent for the Republic of Mexico, who pleaded to the jurisdiction. The court

might become liable for maritime tort and lien resulting therefrom might be enforced out of its proceeds); *The Davis*, (1869) 10 Wall. (U.S.) 15, 19 L. Ed. 875 (cotton belonging to the United States which is delivered to master of private vessel is subject to salvage lien). Cf. also *United States v. Peters*, (1809) 5 Cranch (U.S.) 115, 3 L. Ed. 38 (money held by treasurer of Pennsylvania was under the circumstances of the case not in possession of the state and therefore liable to attachment); *United States v. Lee*, (1882) 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171 (suit in ejectment possible against officers holding land for the United States, if sued in private capacity); *Stanley v. Schwalby*, (1893) 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259, and (1896) 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960: (Action of trespass to try title under Texas law against officers holding land for the United States cannot be concluded with judgment for plaintiff, so as to bind the United States claiming adversely). See further *Workman v. New York City*, (1900) 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314 (libel in personam possible for injury resulting from operation of city owned fire boat); *United States v. Cornell Steamboat Co.*, (1906) 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987 (salvage claim under Tucker Act). As to the modern statutes concerning maritime claims against the federal government see *Robinson, Admiralty Law* (1939) 265, 269.

¹³⁷With respect to property of foreign states other than vessels there exist a few pre-world war cases, all of which involve attachment suits: *Leavitt v. Dabney*, (N.Y. 1868) 37 How. Prac. 264; *Hassard v. United States of Mexico*, (N.Y. 1899) 29 Misc. Rep. 511, 61 N. Y. S. 939; *Mason v. Intercolonial Railway of Canada*, (1908) 197 Mass. 349, 83 N. E. 876. The first case involving a libel of a cargo belonging to a foreign government arose only during the world war: *The Johnson Lighterage No. 24*, (D. N.J. 1916) 231 Fed. 365, where the court upheld a seizure even with respect to foreign war materials on board of a private vessel.

¹³⁸(1838) 12 La. 98.

¹³⁹As the case was decided after recognition of Texas as an independent state, the court could have more easily relied on the relation back theory; instead, however, it chose to apply the dictum of *The Santissima Trinidad*, quoted supra note 134.

¹⁴⁰(S.D. N.Y. 1852) 10 N. Y. Leg. Obs. 97, Fed. Cas. 11, 199.

¹⁴¹(S.D. N.Y. 1883) 16 Fed. 491.

conceded that a duly authorized agent of a foreign government might raise the issue of immunity, but did not deem the authority sufficiently proved in the instant case. The court, however, did not rest the decision on this ground, but refused to dismiss the libel because the ship, though at the time of the accident being under the command of a captain hired by the Mexican agent, was neither a part of the Mexican public service nor in the possession of the government. This doctrine of the *necessity of possession* for claiming immunity was applied by the court in analogy to a doctrine developed by the United States Supreme Court with respect to property of the United States.¹⁴²

(3) NEW PROBLEMS ARISING OUT OF WORLD WAR.—The World War and its after-effects presented some new problems. In the first place—as in England—the problem arose as to the position of private ships requisitioned by foreign governments. The question never was passed upon by the Supreme Court,¹⁴³ and the lower federal courts disagreed. Some decisions denied immunity because the requisition did not give the foreign government sufficient possession,¹⁴⁴ others intimated or held that such ship partook of the immunity enjoyed by foreign public vessels.¹⁴⁵

¹⁴²Namely in the case of *The Davis*, (1869) 10 Wall. (U.S.) 15, 19 L. Ed. 875; see also *United States v. Wilder* (C.C. Mass. 1838) 3 Sumner 308, Fed. Cas. 16,694. But in these cases no vessels, but other property was concerned. In England the doctrine of possession as a prerequisite for the immunity of a vessel of the Crown was repudiated, at least by dictum, in *Young v. S. S. Scotia*, [1903] A. C. 501, 72 L. J. P. C. 115.

¹⁴³In *Ex parte Muir*, (1921) 254 U. S. 522, 41 Sup. Ct. 185, 65 L. Ed. 383, the question came before the Supreme Court on a petition for a writ of prohibition and a writ of mandamus, but the court dismissed the petition because the question of immunity was not properly raised; it conceded, however, that "no decision by this court up to this time can be said to answer it."

¹⁴⁴*The Attualità*, (C.C.A. 4th Cir. 1916) 238 Fed. 910 (libel for collision between plaintiff's vessel and *The Attualità*, a privately owned Italian vessel requisitioned by the Italian Government; on the suggestion of the attorney general to release the vessel the court held that the Italian Government had not such "actual possession, custody and control" as to be entitled to immunity, as the persons in charge were paid by the owners); *Maru Navigation Co. v. Società Commerciale Italiana di Navigation*, (D. Md. 1921) 271 Fed. 98 (foreign attachment of vessel in libel in personam, brought against owner for salvage services rendered to other vessel of defendant, was upheld, although the vessel was requisitioned by the Italian government and had an Italian officer on board to take command in certain contingencies. An alternative ground for upholding the attachment was that the claim to immunity was improperly made). In *Società Commerciale Italiana di Navigazione v. Maru Nav. Co.*, (C.C.A. 4th Cir. 1922) 280 Fed. 334, the circuit court of appeals affirmed the decision on the latter ground alone; certiorari denied by Supreme Court, (1922) 259 U. S. 584, 42 Sup. Ct. 586, 66 L. Ed. 1075.

¹⁴⁵*The Athanasios*, (S.D. N.Y. 1915) 228 Fed. 558 (foreign attachment in libel in personam for breach of charter. Held: libel dismissed on

It was further decided that a non-recognized de facto government could not bring a libel in rem in admiralty for the purpose of gaining the possession of a public vessel which was in the hands of persons who were still recognized as the representatives of the nation,¹⁴⁶ and that such vessel was likewise immune from seizure for wages.¹⁴⁷

(4) THE POST-WAR CASES AND THEIR ISSUES.—In the post-war period a number of cases relating to the immunity of foreign vessels came before the American courts. Among other questions they involved three main issues: (a) what kinds of governmental vessels are entitled to immunity; (b) does immunity mean exemption from liability; (c) what are the methods in which immunity must be asserted?

(a) With respect to the first problem the Supreme Court of the United States decided finally, after having dodged the question several times,¹⁴⁸ that “a ship owned and possessed by a foreign

the merits because non-performance was due to requisition by Greek Government; but dictum that the requisition prevents jurisdiction over the vessel); *The Luigi*, (E.D. Pa. 1916) 230 Fed. 492 (libel against ship requisitioned by Italian Government for breach of charter. Upon arrest bond was given by master and the vessel released. Upon suggestion by the attorney general that the ship was used by a foreign government for grain transport held that attachment and bond must stand because the vessel was no longer arrested and bond was given unconditionally; but court stated that otherwise the attachment would have been quashed); *The Roseric*, (D. N.J. 1918) 254 Fed. 154 (libel in rem for collision against *The Roseric* which was under requisition by British Government. Upon suggestion of the British ambassador the court stayed all proceedings to arrest or detain the ship during the requisition but did not quash the writ. This decision which follows the English practice discussed supra, notes 53 ff., seems somewhat questionable in view of the fact that Rule 10 of the Admiralty Rules, 28 U. S. C. A., p. 389, provides that in proceedings in rem “process shall be by warrant of arrest,” and thus does not adopt the English distinction between writ in rem and warrant of arrest, supra, note 55; see also *The Pesaro*, (1921) 255 U. S. 216, 217, 41 Sup. Ct. 308, 65 L. Ed. 592: “The decree holds for naught the process under which the ship was arrested, declares she is not subject to such process and directs her release—in other words dismisses her without day.” But the same distinction was made also in *The Gloria*, (S.D. N.Y. 1919) 267 Fed. 929, (see text to note 156. In *The Adriatic*, (E.D. Pa. 1918) 253 Fed. 489, affirmed (C.C.A. 3d Cir. 1919) 258 Fed. 902 the court dismissed a libel in rem and personam for breach of a charter party due to requisition on the suggestion of the British Embassy without prejudice because the *cause of action* stated was not justiciable in American courts; the jurisdiction over the res was not discussed.

¹⁴⁶*The Rogdai*, (N.D. Cal. 1920) 278 Fed. 130. The Court was not very clear whether it rested the decision on the immunity of the vessel or the lack of the capacity of the libelants to bring suit in an American court. The latter ground was adopted in *The Penza*, (E.D. N.Y. 1921) 277 Fed. 91.

¹⁴⁷*The Rogday* (N.D. Cal. 1920) 279 Fed. 130.

¹⁴⁸*The Pesaro*, (1921) 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. 592 (the claim of immunity was not properly presented; the court conceded

government and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel in rem by a private suitor."¹⁴⁹ It followed thereby the main trend of the lower federal courts.¹⁵⁰ The Supreme Court's decision concerned a vessel which was *owned and operated* by the government. Whether the immunity will be enjoyed also when the vessel is operated by a private company under a charter from the government was not discussed. Lower courts seem to have the tendency to extend the immunity even to such cases.¹⁵¹

(b) The question of the nature of the immunity was another important issue which was settled by the Supreme Court in the post-war period. Formerly the American courts seemed to have had little doubt that the immunity of governmental vessels was

that the issue as such was "as yet an open question"); *The Carlo Poma*, (1921) 255 U. S. 219, 41 Sup. Ct. 309, 65 L. Ed. 594 (decree of circuit court of appeals granting immunity vacated because of lack of appellate jurisdiction); *Ex parte Hussein Lutfi Bey*, (1921) 256 U. S. 616, 41 Sup. Ct. 609, 65 L. Ed. 1122 (writ of prohibition denied to representative of Ottoman Government claiming immunity of trading vessel, because jurisdiction was debatable owing to the fact that the question was "an open one and of uncertain solution.")

¹⁴⁹*Berizzi Bros. Co. v. S. S. Pesaro*, (1926) 271 U. S. 562, 570, 46 Sup. Ct. 611, 70 L. Ed. 1088.

¹⁵⁰*Cf. The Pampa*, (E.D. N.Y. 1917) 245 Fed. 137 (Argentine vessel belonging to the navy but carrying general cargo to port of destination held immune from arrest); *The Maipo*, (S.D. N.Y. 1918) 252 Fed. 627: Chilean governmental vessel chartered to private person for trading purposes held to be in the possession of the Chilean Government and immune from arrest); *The Maipo*, (S.D. N.Y. 1919) 259 Fed. 367 (other libel against the same vessel); *The Carlo Poma*, (C.C.A. 2d Cir. 1919) 259 F. 369 (immunity of Italian governmental vessel engaged in carrying cargo commercially; decree vacated by the Supreme Court on procedural grounds, *The Carlo Poma*, (1921) 255 U. S. 219, 41 Sup. Ct. 309, 65 L. Ed. 594); *The Pesaro*, (S.D. N.Y. 1926) 13 F. (2d) 468 (immunity granted to Italian trading vessel). *Contra: The Pesaro*, (S.D. N.Y. 1921) 277 Fed. 473 (immunity denied to Italian trading vessel. This decision was rendered by Judge Mack in the same suit which previously had come before the Supreme Court in (1921) 255 U. S. 216, 401 Sup. Ct. 308, 65 L. Ed. 595; it was later vacated by consent of the parties, and thereupon the court through Judge Augustus Hand made the above mentioned opposing decision in (S.D. N.Y. 1926) 13 F. (2d) 468. The decision of the Supreme Court in *Berizzi Bros. v. Pesaro*, (1926) 271 U. S. 562, 46 Sup. Ct. 611, 70 L. Ed. 1088 (discussed supra, text to note 149) was rendered in a separate suit arising out of the same facts.)

¹⁵¹*Cf. The Maipo*, (S.D. N.Y. 1918) 252 Fed. 627, (S.D. N.Y. 1919) 259 Fed. 367, mentioned supra note 150; *The Imperator*, (S.D. N.Y. 1924) [1924] 1 Am. Marit. Cases 596 (libel against *The Berengaria* for a collision, which occurred while *The Berengaria* (the former *Imperator*) was operated by the Cunard Company for the British Government on a commission basis. Later the Cunard Company bought the *Berengaria*. Libel dismissed on grounds of substantive law cf. infra text to notes 157 ff. but dictum that before the sale the British Government would have been entitled to immunity.)

a mere procedural matter.¹⁵² But in the two cases of *The Western Maid* and of *The Thekla* the Supreme Court through Mr. Justice Holmes reshaped this area of the law. In the former case¹⁵³ the issue was whether a maritime lien could be enforced against a vessel in the hands of a private owner for a tort committed while the vessel was employed by the United States for public¹⁵⁴ purposes. The court answered in the negative, mainly because of its aversion against rights without remedies expressed in the famous epigrammatic sentence: "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp." The question arose immediately whether this decision meant to deny the liability of a government-operated vessel under all circumstances.¹⁵⁵ Mrs. Justice Holmes soon had occasion to interpret his opinion. The lower federal courts had per-

¹⁵²The matter was considered as being alike in regard to the immunity of foreign governments and to the immunity of state or federal government. Of the cases which contained statements to the effect or decided that the immunity from arrest did not exclude liability of the vessel as a matter of substantive law, may be mentioned *The Siren*, (1868) 7 Wall. (U.S.) 152, 19 L. Ed. 129 (regarding tort liability of a vessel captured by the United States); *The Sapphire*, (1870) 11 Wall. (U.S.) 164, 20 L. Ed. 127 (libel by Emperor Napoleon against American vessel for collision between her and a French naval transport; held, both parties being at fault the damages ought to be divided); *The Florence H.*, (S.D. N.Y. 1918) 248 Fed. 1012 (libel against the *Florence H.*, which immediately after construction had been requisitioned by the United States Shipping Board Emergency Fleet Corporation; she had been chartered by the Board to the French Government for one trip, and during this trip, while being operated by a French crew had collided with the boat of the libelants. Held that the vessel was liable to arrest under the Shipping Act and that "a lien of collision arose against the ship at a time she was in the possession of the French republic and in charge of the French crew"); *The Roseric*, (D. N.J. 1918) 254 Fed. 154, cf. supra note 145: (Judge Rellstab intimated that a ship requisitioned by the British Government but manned by the owners crew might be "ultimately" (i.e. after the requisition has ceased) liable for maritime torts done while under requisition, and refused to dismiss the suit staying only the arrest); *The City of Philadelphia*, (E.D. Pa. 1920) 263 Fed. 234; *The Ceylon Maru*, *The Jeannette Skinner*, (D. Md. 1920) 266 Fed. 396; *The Gloria*, *The Freedom*, (S.D. N.Y. 1919) 267 Fed. 929; *The F. I. Luckenbach*, (S.D. N.Y. 1920) 267 Fed. 931; *The Carolinian*, (D. Md. 1011) 270 Fed. 1011 all announcing the rule that a maritime lien attaches on vessels operated by the United States and may be enforced after the vessel comes into private hands.

¹⁵³*The Western Maid*, (1922) 257 U. S. 419, 42 Sup. Ct. 159, 66 L. Ed. 299.

¹⁵⁴With respect to requisitioned vessels operated solely as merchant vessels the Shipping Act of 1916 permitted liability in rem, *The Lake Monroe*, (1919) 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962. This rule was however changed by Act of March 9th, 1920, ch. 95, 41 Stat. at L. 525, 46 U. S. C. A. sec. 741; cf. *Robinson*, Admiralty 271.

¹⁵⁵Of course, the case did not affect the personal liability of the master, cf. *The Pizarro v. Matthias*, (S.D. N.Y. 1852) 10 N. Y. Leg. Obs. 97, Fed. Cas. No. 11,199 and *Percival v. Hickey*, (1820) 18 Johns. (N.Y.) 257.

mitted cross-libels when the United States had come into court as a libellant.¹⁵⁶ Was this ruled out by *The Western Maid*? In *The Thekla*¹⁵⁷ it was decided that when the government itself came into court as suitor it thereby consented that justice should be done with regard to the subject matter.¹⁵⁸

It must be observed that the case of *The Western Maid* as well as that of *The Thekla* involved vessels in the public service of the United States. The reasoning of both decisions is, however, applicable also to the vessels in the service of foreign governments.¹⁵⁹ The lower courts have drawn this conclusion.¹⁶⁰ In the case of *The Imperator*,¹⁶¹ the City of New York filed a libel against *The Berengaria* (the former Imperator) because of damages done to a city boat in 1920. *The Berengaria*, which at the time of the libel was owned by the Cunard Steamship Company, had at the time of the incident been owned by the British Government, but operated by the Cunard Line on a commission basis for the government in the freight and passenger business. The district court held that the libel should be dismissed on the strength of *The Western Maid*, stating that the defense was "not procedural but substantive." Another instance is the case of *The Nevada, ex Rogday*.¹⁶² *The Rogday* was a vessel which originally belonged to Russia. As has been mentioned before¹⁶³ an attempt to libel her was made in 1920 by her crew for wages, but the libel was dismissed because the representative of the Kerensky Government,

¹⁵⁶*The Gloria*, (S.D. N.Y. 1919) 267 Fed. 929; *The Luckenbach*, (S.D. N.Y. 1920) 267 Fed. 931; *The Gloria, The Thekla, The Luckenbach*, (S.D. N.Y. 1923) 286 Fed. 188.

¹⁵⁷*United States v. Norwegian Barque "Thekla,"* (1924) 266 U. S. 328, 45 Sup. Ct. 112, 69 L. Ed. 313.

¹⁵⁸This rule was later embodied in the statute of March 3d, 1925, 46 U. S. C. A. sec. 783; cf. *The Bertie E. Tull*, (D. Del. 1935) 10 F. Supp. 492). The statute permits only cross-libels in personam. On the question of interest in such cases see *The Wright*, (C.C.A. 2d Cir. 1940) 109 F. (2d) 699. The rule of *The Thekla* recently has been restricted by the Supreme Court to the "relationship characteristic of claims for collision in admiralty" in *United States v. Shaw*, (1940) 309 U. S. 495, 60 Sup. Ct. 659, 84 L. Ed. 610.

¹⁵⁹Upon the reasoning of *The Thekla*, (1924) 266 U. S. 328, 45 Sup. Ct. 112, 69 L. Ed. 313, consequently the rule of *The Sapphire*, 1870 11 Wall. (U.S.) 164, 20 L. Ed. 127, is still the law. Strangely enough Mr. Justice Holmes did not cite the latter case in his opinion.

¹⁶⁰It might be mentioned that the rule of *The Western Maid* was also applied to state governments in *The Charlotte*, (W.D. N.Y. 1922) 285 Fed. 84.

¹⁶¹*The Imperator-Scow D. S. C. 5*, (S.D. N.Y. 1924) [1924] 1 Am. Maritime Cas. 596.

¹⁶²*Nevada, ex Rogday*, (C.C.A. 9th Cir. 1926) [1926] 1 Am. Maritime Cas. 531.

¹⁶³Supra text to note 147.

which was still recognized, had claimed immunity. Later the vessel was sold to private persons and called *The Nevada*. Thereupon the crew attempted another libel. It was again dismissed; this time for the reason that no lien had ever attached, as a result of the rule of *The Western Maid*.

These two cases, *The Nevada* and *The Imperator* are noteworthy for two reasons. First they seem to establish the principle that with respect to foreign governmental vessels the procedural and substantive exemption from liability are co-extensive in American law. Secondly they prove quite distinctly the difficulties in defining the exact scope of these exemptions.

In regard to the first proposition, i.e. coextensiveness of procedural and substantive immunity, consequently an important difference seems to exist from the English rule as laid down in case of *The Meandros*, where liability of a vessel was predicated on salvage services rendered to a privately owned vessel while it was under requisition. To be sure, the case of *The Western Maid* had dealt with a claim for a tort committed by privately owned vessel while under governmental requisition by the United States. The case of *The Nevada* extended its rule quite logically to a non-tortious claim (for wages), accrued while the vessel was operated by a foreign government. But the foreign government was at that time also the owner. From the reasoning employed in these two cases, however, it seems to follow, that no liability in rem can be forced for any lien claim which otherwise would have accrued had the vessel not been controlled at that time by a foreign government though without being owned by it.¹⁶⁴

In regard to the second proposition it might be mentioned that *The Western Maid* announced its rule for vessels which were owned "absolutely or pro hac vice" by the federal government. The three vessels involved in the case, (*The Western Maid*, *The Liberty* and *The Carolinian*) were apparently operated by navy crews. In the case of *The Imperator* the rule was, however, applied to a vessel operated by private company in private business on a commission basis. Does that mean that government owner-

¹⁶⁴In *The Gaelic Prince*, (S.D. N.Y. 1922) 11 F. (2d) 426 the rule of *The Western Maid* was applied to claims against privately owned ships for salvage services rendered while the vessels were under requisition by the federal government. There is no reason why requisition by a foreign government would be treated differently. This case can, of course, hardly be reconciled with *The Davis*, (1869) 10 Wall. (U.S.) 15, 19 L. Ed. 15 which held that a salvage lien attached upon cargo owned by the United States, provided that *The Davis* was not impliedly overruled in so far by *The Western Maid*. The rule of *The Gaelic Prince* was apparently approved in *Luckenbach S. S. Co. v. United States*, (C.C.A. 2d Cir. 1930) 49 F. (2d) 156.

ship suffices to make the ship immune, even if a private company has rented the vessel on a bare-boat charter, and vice versa, would any private vessel chartered to a government on such a charter be immune?¹⁶⁵

The application of the rule of *The Thekla* to foreign vessels presents likewise certain problems. Suppose that a foreign government brings a libel for a collision. Can its vessel be seized under a cross libel? *The Thekla* did not deal with this specific point. But the answer, it seems, should on principle be a negative one.¹⁶⁶

An interesting related problem was presented in the case of *United States of Mexico v. Rask*.¹⁶⁷ In this case the United States of Mexico brought an action in claim and delivery for the recovery of one of its patrol boats. The defendant alleged that he was a shipwright to whom the boat was delivered for repair, and that he was entitled to a lien upon the vessel and its possession until he was paid for work and materials furnished. The United States of Mexico objected to the jurisdiction of the court over any claim asserted by the defendant, and maintained that none but its claim could be adjudged. The California superior court directed the return of the patrol boat to defendant. On appeal the judgment was affirmed by the California district court of appeal. In the decision Judge Marks pointed out:

"A marked distinction between the doctrine of sovereign immunity as adopted in England and in the United States clearly appears from the decisions of the courts of the two countries. In England the exemption has been universally held to apply where the vessel was the property of a sovereign and in use as an instrument of sovereignty. In the United States the further condition must exist, except in direct actions against the government, that the vessel or property was not only the property of and

¹⁶⁵An ordinary charter would not make the government "owner pro hac vice." *The Charlotte*, (W.D. N.Y. 1922) 285 Fed. 84, 87.

¹⁶⁶The above (note 152) mentioned statute of March 3d, 1925, regulating cross-libel and counterclaims against the United States where the government files a libel for damages permits explicitly only cross-libels in personam. 46 U. S. C. A., sec. 783; see also 46 U. S. C. A., sec. 788 safeguarding against any recognition of a lien. In the case of *The Gloria and The Freedom*, (S.D. N.Y. 1919) 267 Fed. 929, Judge Learned Hand granted the motion of the United States to declare its ship which had been seized under a cross-libel to be immune. See also the dictum in *Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen*, (C.C.A. 2d Cir. 1930) 43 F. (2d) 705, 708: "The courts have been reluctant to seize property of a foreign government even where the government has consented to the jurisdiction for the purpose of litigating a claim" (the case dealt with the question of the enforcement of a judgment by execution).

¹⁶⁷(1931) 119 Cal. App. 21, 4 P. (2d) 981.

an instrumentality of sovereignty of the government, but that it was in its possession at the time of the seizure."

He therefore concluded that under the circumstances of the case the shipwrights' lien attached and that it could be asserted in court against the objections, because (a) the United States of Mexico consented to the rendition of an affirmative judgment against it by invoking the aid of an American court; and (b) the claim of sovereign immunity was made by a private attorney without a showing of any authority on his part to do so. It is surprising that the court did not mention *The Thekla Case*,¹⁶⁸ but it would seem that the decision is in accord therewith. It has been said that *The Thekla Case* does not authorize the seizure of a governmental vessel under a cross-libel,¹⁶⁹ but in the instant case the lien was asserted not against a vessel different from that involved in the original suit but against the very one claimed by the government.¹⁷⁰ In so far the situation resembles much more the case of *The Siren* as explained by the case of *The Western Maid*.¹⁷¹ It would seem therefore that the decision is in accord with the rules developed by the courts in the course of time, even though the result reached is not free from doubts.¹⁷²

¹⁶⁸(1924) 266 U. S. 328, 45 Sup. Ct. 112, 69 L. Ed. 313.

¹⁶⁹Supra, text to note 166.

¹⁷⁰This distinction was pointed out by Justice Holmes in *The Thekla*: "The doubt in this case arises not from the absence of a maritime lien, but from the fact that the counterclaim is not against the *Thekla* libelled by the United States but for affirmative relief against a different vessel."

¹⁷¹(1922) 257 U. S. 419, 433, 42 Sup. Ct. 159, 66 L. Ed. 299: "The leading authority relied upon is *The Siren*, (1868) 7 Wall. (U.S.) 152, 19 L. Ed. 129. The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject matter."

¹⁷²No former case is precisely in point. In *United States v. Barney*, (D. Md. before 1810) 3 Hughes 545, Fed. Cas. 14,525, where the enforcement of a lien for livery was denied, the United States had not come into court to claim the property, but had resumed possession and use of the chattels. The situation was similar in *Briggs v. Lightboats*, (1865) 11 Allen (Mass.) 157, where the enforcement of a builder's lien was denied. These cases are therefore easily distinguishable. In the *Briggs Case* the Massachusetts court itself pointed to this distinction by differentiating clearly between enforcement of a lien by process and by mere detention (at 184) and by stating explicitly that not the existence of the lien but merely its enforcement was in question (at 161), citing a decision in the same case *Briggs v. Lightboat*, (1863) 7 Allen (Mass.) 287. But on the other hand in the latter case the court emphasized also that the lien, being a builders lien, attached *before* the United States got title and that the situation might be different, if a repairman's lien were in question. 7 Allen (Mass.) 287, 297. A doubt concerning the existence of a repairman's lien on a public vessel was expressed also by Mr. Justice Story in *United States v. Wilder*, (C.C. Mass. 1838) 3 Sumner 308, Fed. Cas. 16,694: "Thus, for example, it may be true that no lien exists for repairs of a public ship." In the light of these dicta the main case appears, therefore, not entirely free from doubt.

(c) The last of the three issues clarified by the Supreme Court in the post-war period concerns the method of claiming immunity.¹⁷³ While in England the question seems to have presented little difficulty, in the United States the practice grew haphazardly and different modes were employed.¹⁷⁴ Disagreement existed about the propriety of certain practices. Moreover the courts were hopelessly split as to the binding force and conclusiveness of such claims.¹⁷⁵

In a series of decisions the Supreme Court set out to clear up the confusion. The first case of this kind was *Ex parte Muir*, decided in 1921.¹⁷⁶ A libel suit for collision was brought against a British private vessel. Counsel for the British embassy acting as *amicus curiae* suggested immunity because the vessel was under requisition. The court overruled the petition, and thereupon the master of the vessel petitioned for a writ of prohibition preventing the district court from proceeding with the suit, and for a writ of mandamus directing the release of the vessel. The Supreme Court refused to grant either writ and dismissed the petition. In the opinion Mr. Justice Van Devanter took occasion to disapprove of the practice of raising the question of immunity through private counsel appearing as *amicus curiae* "as a marked

¹⁷³Cf. Feller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, (1931) 25 *Am. J. Int. L.* 83, 86; Stinson, *Diplomatic Procedure and the Jurisdiction in Admiralty Over Vessels Under Requisition to Foreign Powers*, (1921) 55 *Am. L. Rev.* 116; Angell, *Sovereign Immunity, The Modern Trend*, (1925) 35 *Yale L. J.* 150, 164.

¹⁷⁴Of the different practices indicated by the cases we may mention the following: (1) an attorney of the foreign embassy appears as *amicus curiae*, cf. *Mason v. Intercolonial Railway of Canada*, (1908) 197 *Mass.* 349, 83 *N. E.* 876. *The Johnson Lighterage*, (D. N.J. 1916) 231 *Fed.* 365; *The Adriatic*, (E.D. Pa. 1918) 253 *Fed.* 489 (not strictly an immunity case); *The Roseric*, (D. N.J. 1918) 254 *Fed.* 154; but contra, *The Luigi*, (E.D. Pa. 1916) 230 *Fed.* 493, see also *The Florence H.*, (S.D. N.Y. 1918) 248 *Fed.* 1012, 1017; (2) the foreign ambassador himself acts as *amicus curiae*, *The Claveresk*, (C.C.A. 2d Cir. 1920) 264 *Fed.* 276 (not strictly an immunity case); (3) the foreign diplomatic representative, his diplomatic status being certified by the state department, submits a "suggestion" of immunity, either directly or through a consul, *The Maipo*, (S.D. N.Y. 1918) 245 *Fed.* 627; *The Rogday*, (N.D. Cal. 1920) 279 *Fed.* 130; (4) the foreign diplomatic representative submits such suggestion and appears specially through counsel, *The Carlo Poma*, (C.C.A. 2d Cir. 1919) 259 *Fed.* 369; (5) the foreign government appears specially through counsel, *The Pampa*, (E.D. N.Y. 1917) 245 *Fed.* 137; (6) the foreign government applies to the department of state, which has a suggestion of immunity submitted by the attorney general. *The Attualità*, (C.C.A. 4th Cir. 1916) 238 *Fed.* 909.

¹⁷⁵The suggestion was considered to be binding in *The Rogday* (N.D. Cal. 1920) 279 *Fed.* 130 and *The Carlo Poma*, (C.C.A. 2d Cir. 1919) 259 *Fed.* 369.

¹⁷⁶(1921) 254 *U.S.* 522, 41 *Sup. Ct.* 185, 65 *L. Ed.* 383.

departure from what theretofore had been recognized as the correct practice." Three ways, the court suggested, were the proper methods:

"As of right the British Government was entitled to appear in the suit, to propound its claim to the vessel and to raise the jurisdictional question *The Sapphire* . . . ; *The Santissima Trinidad* . . . ; *Columbia v. Cauca Co.* . . . Or, with its sanction, its accredited and recognized representative might have appeared and have taken the same steps in its interest. *The Anne*. . . And, if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representations to the end that, if that claim was recognized by the executive department of this government, it might be set forth and supported in an appropriate suggestion to the court by the attorney general, or some law officer acting under his direction. . . .¹⁷⁷

In the case of *The Pesaro*,¹⁷⁸ the court could elevate this very forceful dictum to a square holding. There the Italian ambassador had made a suggestion of immunity directly to the court on the occasion of a libel in rem against an Italian vessel. The department of state had merely certified his diplomatic status without sanctioning the suggestion. The court held that the issue of immunity was not properly raised. The same rule was applied in *The Carlo Poma*.¹⁷⁹ The possibility of a "suggestion" submitted either by a private counsel as "amicus curiae" or by the foreign diplomatic representative directly thus being eliminated, the next question was as to who was authorized to represent the foreign government "as a suitor" in court and to claim immunity. In *The Sao Vicente*¹⁸⁰ the court decided that a consul general was not so qualified merely by virtue of his office without special authorization,¹⁸¹ and in *The Gul Djemal*¹⁸² this power was

¹⁷⁷Ex parte Muir, (1921) 254 U. S. 522, 532, 41 Sup. Ct. 185, 65 L. Ed. 383.

¹⁷⁸(1921) 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. 592.

¹⁷⁹(1921) 255 U. S. 219, 41 Sup. Ct. 309, 65 L. Ed. 594. In this case, however, the decision rested on a ground of federal procedure.

¹⁸⁰(1922) 260 U. S. 151, 43 Sup. Ct. 75, 67 L. Ed. 179. In the case immunity was claimed for vessels allegedly owned and operated by the Transportes Maritimos de Estado, purporting to be a department of the Government of Portugal. The same litigation came again before the Supreme Court on writ of prohibition by the Portuguese Minister, who after the first decision had filed a "formal suggestion" which had been stricken from the files; the writ was denied, Ex parte Transportes Maritimos, (1924) 264 U. S. 105, 44 Sup. Ct. 236, 68 L. Ed. 580. See also *The Sao Vicente* (another litigation arising out of the same set of facts), (C.C.A. 3d Cir. 1924) 295 Fed. 829, holding that the conduct of the claimant constituted a waiver.

¹⁸¹The court cited *The Anne*, (1818) 3 Wheat. (U.S.) 435, 4 L. Ed. 428, which involved the right of a consul to assert in American prize proceedings that the capture was made in the neutral waters of his country.

denied also to the master of a Turkish vessel, even though he was an officer of the Turkish navy but not performing a naval or military duty.

While the Supreme Court thus settled some of the conflicts among the lower courts about the methods of claiming sovereign immunity and prescribed certain courses of action which must be chosen for this purpose,¹⁸² one great problem remained open: that of the binding force of a claim properly presented. This was one of the issues in *The Navemar Case*, to be discussed in the next chapter.

B. THE CASE OF THE NAVEMAR AND THEREAFTER

The latest case in which the Supreme Court has spoken in regard to the subject of sovereign immunity of foreign vessels is *Compania Espanola De Navegacion Maritima v. The Navemar*.¹⁸⁴ Like *The Cristina* it arose out of the Spanish civil war. The *Navemar* was a Spanish ship which was libeled in the district court of New York by the *Compania Espanola De Navigacion* under the claim of ownership. She had arrived in New York on a trip from Argentina. On October 10th, 1936, while lying in the harbor of Buenos Aires, she became the object of an expropriation decree by the (loyalist) Government of Spain published in the *Gaceta de*

¹⁸²(1924) 264 U. S. 90, 44 Sup. Ct. 244, 68 L. Ed. 574. The same case previously had been before the Supreme Court on petition for a writ of prohibition and writ of mandamus which was denied, *Ex parte Hussein Lutfi Bey*, (1921) 256 U. S. 616, 41 Sup. Ct. 609, 66 L. Ed. 1122, and was then decided by the district court, (S.D. N.Y. 1921) 296 F. 563, 567. The reason for choosing that procedure for raising the issue of immunity through the master was evidently the rupture of the diplomatic relations between Turkey and the United States.

¹⁸³An improper presentation of the claim by "suggestion" through the consul does not constitute a waiver of immunity. *The Secundus*, (E.D. N.Y. 1926) 13 F. (2d) 469. There several libels were filed, for supplies, on a bottomry bond, and for breach of affreightment contracts. The court permitted to raise the immunity issue again "through diplomatic channels." The *Chargé d'Affaires* thereupon filed a claim of immunity, which was accompanied by a certificate of his diplomatic status by the state department; the latter, however, refused expressly to assume responsibility for the claim. The court held that this action was not a proper suggestion "through diplomatic channels." (E.D. N.Y. 1926) 15 F. (2d) 711. It is somewhat strange that the court failed to consider whether the new claim was good as an independent intervention by the foreign government as a suitor as it is purported to be by its terms. Yet, as there was no allegation of possession or control, the decision would nevertheless seem to be correct. The ship was held liable and ordered to be sold, even though later the Republic of France claimed to have a first lien. (E.D. N.Y. 1926) 15 F. (2d) 711. The case shows the difficulties which foreign governments have to comply with the requirements by the Supreme Court. See also *infra* note 192.

¹⁸⁴(1938) 303 U. S. 68, 58 Sup. Ct. 432, 82 L. Ed. 667.

Madrid. This decree was communicated by cablegram to the master on October 16th. On the same day the ship sailed to Rosario, Argentina, which she reached on October 18th. There the ship's roll was handed over to the Spanish Consul, who indorsed on it that the ship had become the property of the state. In this condition the paper was returned to the master after the ship had gone back to Buenos Aires. This port was left on October 28th, and the vessel arrived at New York on November 25th. There the trouble began. The Spanish Consul in New York notified the master to be at the disposition of the government. The master evidently did not accept the consul's orders, and at the same time got into quarrels with his crew. While he went ashore the crew seized the vessel. On December 7th the Spanish Consul removed the master and appointed a member of the crew as successor. On the same day the owners filed their libel. On December 14th a default decree was entered, adjudging the libelants to be entitled to possession. When the chief deputy marshal read the court's decree to the crew, the spokesman for the latter declared that they refused to recognize the old master, and thereupon contempt proceedings were brought. The district court, however, denied the motion because the alleged facts would constitute the basis of proceedings for criminal and not for civil contempt and because in the absence of violence no criminal contempt was committed.¹⁸⁵ After the default decree the ambassador of Spain made a suggestion to the court that the ship was owned by the Republic of Spain and taken in possession by its consul at Rosario. The reason that he had not acted any earlier was that he had presented the claim to the department of state, but that the latter had declined to act. The court refused to set aside the default because the suggestion failed to show that the ship was in the possession of and owned by the government, but granted leave to renew.¹⁸⁶ Thereupon the ambassador filed a new application. The district court found¹⁸⁷ on the facts that "prior to the seizure of the steamship *Navemar* in territorial waters by the committee of the crew, the steamship *Navemar* was never in the possession of the Republic of Spain." With respect to the question of the seizure in New York the court announced:¹⁸⁸

"Now the case for the Republic of Spain is certainly no better

¹⁸⁵(E.D. N.Y. 1936) 17 F. Supp. 495.

¹⁸⁶(E.D. N.Y. 1936) 17 F. Supp. 647.

¹⁸⁷(E.D. N.Y. 1937) 18 F. Supp. 153.

¹⁸⁸(E.D. N.Y. 1937) 18 F. Supp. 153, 158.

than that of the Russian Government. On the contrary, its position is if anything not nearly so tenable, for the facts disclose that disregarding the orderly process of local law, an attempt was made forcibly to seize property within the domain of the United States. It is extremely difficult to believe that the claim of immunity set up herein by the Spanish Consul General appearing for the Spanish Ambassador can stem from such acts. . . . Baldly the question presented is whether a foreign nation can by edict confiscate property not within its sovereign domain nor otherwise within its possession or control, seize such property within the sovereign domain of another power, and claim immunity from suit in the courts of the latter nation. In all reason the answer to such question must be in the negative."

The circuit court of appeals reversed the decision.¹⁸⁹ It took the view that the Spanish Government, by reason of its various acts, was, at least, in constructive possession, which for purposes of immunity is "as efficacious as actual possession." It stated furthermore that "the allegations of the suggestion we are bound to accept as conclusive."

The Supreme Court granted certiorari,¹⁹⁰ and on hearing remanded the cause.¹⁹¹ Mr. Justice Stone, in his opinion, started with the proposition that court of appeals had taken "a mistaken view of the force and the effect of the suggestion" made by the Spanish ambassador. He pointed out that there existed two ways of setting up the claim to sovereign immunity, namely either through diplomatic channels or by appearance as a claimant. Only if the first method is chosen and the claim is recognized and allowed by the executive department the courts are bound, whereas otherwise the claim is an "appropriate subject for judicial inquiry." In the instant case the latter course was adopted. Therefore the court below had erred in accepting the claim as binding:

"The filed suggestion, though sufficient as a statement of the contentions made was not proof of its allegation. This court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government."¹⁹²

¹⁸⁹(C.C.A. 2d Cir. 1937) 90 F. (2d) 673.

¹⁹⁰(1937) 302 U. S. 669, 58 Sup. Ct. 35, 82 L. Ed. 516.

¹⁹¹(1938) 303 U. S. 68, 58 Sup. Ct. 432, 82 L. Ed. 667.

¹⁹²(1938) 303 U. S. 68, 75, 58 Sup. Ct. 432, 82 L. Ed. 667.

The application of the rules laid down by the Supreme Court in *Ex parte Muir* and *The Navemar* has caused certain difficulties to the lower courts and the foreign governments which try to comply with the Supreme Courts requirements. The case of *The Secundus* (E.D. N.Y. 1926) 13 F. (2d) 469, 15 F. (2d) 711 (discussed supra note 183) is one of such instances. Others are the recent cases of *Lamont v. Travelers Ins. Co.*,

On the merits the court agreed with the district court that there was no evidence at hand to support the claim that the *Navemar* had been in possession of the Spanish Government. It missed further "support for any contention that the vessel was in fact employed in public service."¹⁹³ The troublesome question of the acquisition of control by the seizure through the crew on American soil the justice dodged acrimoniously with a pleading point "there was no averment that the alleged seizure by the members of the crew was an act of or in behalf of the Spanish Government."¹⁹⁴

Consequently the immunity was denied and the case tried on the merits, whether or not the Spanish Government had acquired a right to possession as against the owner. The district court¹⁹⁵ heard additional evidence and concluded that the additional proof did not support any claim to immunity.¹⁹⁶ The court further held that the decree of October 10th, 1936, was in effect a penal statute,

(1939) 281 N. Y. 362, 20 N. E. (2d) 81 and *Hannes v. Kingdom of Roumania Monopolies Institute*, (1940) 260 App. Div. 189, 20 N. Y. S. 825. In the *Lamont Case* the Committee of Bankers on Mexico asked to be instructed how to distribute certain funds. The Mexican Government claimed ownership in these moneys and appeared specially to assert sovereign immunity. The United States attorney "presented" a suggestion of immunity at the request of the secretary of state through the attorney general "for such consideration as the court may deem necessary and proper." The court of appeals of New York held that this suggestion did not indicate that the executive branch had admitted the claim and remanded the cause for trial on the merits. In the *Hannes Case* a plea of immunity made by the Kingdom of Roumania to the secretary of state was transmitted in similar fashion to the supreme court of New York by the United States attorney in an attachment of a bank account of a Roumanian governmental corporation. The court consequently felt free to inquire into the merits of the claim. It seems that the difficulties arise mainly on account of an elusive practice of the state department, which pursues a threefold course by either (a) refusing to act or (b) by suggesting itself immunity or (c) by merely transmitting a claim for proper consideration by the court as a matter of comity without taking a stand on it. This latter procedure being not within the purview of the rule laid down by the Supreme Court might be diplomatically wise, but creates the difficulties. Professor Deák seems to have overlooked this aspect of the question in *The Plea of Sovereign Immunity*, (1940) 40 Col. L. Rev. 453. The English evasive practice with respect to the question of recognition has caused similar complaints. See Lauterpacht, *The Form of Foreign Office Certificates*, (1939) 20 Brit. Yearbook of International Law 125.

¹⁹³(1938) 303 U. S. 68, 76, 58 Sup. Ct. 432, 82 L. Ed. 667.

¹⁹⁴(1938) 303 U. S. 68, 72, 58 Sup. Ct. 432, 82 L. Ed. 667.

¹⁹⁵(E.D. N.Y. 1938) 24 F. Supp. 495.

¹⁹⁶"The additional evidence fails to support the contention that prior to the arrival in the territorial waters of the United States *The Navemar* had been in the possession of the Spanish Government, nor do I find proof of recognition by the ship's officers that they were controlling the vessel and crew in behalf of their government." (E.D. N.Y. 1938) 24 F. Supp. 495, 499. "And there is an entire absence of proof that the vessel was employed in the public service." (E.D. N.Y. 1938) 24 F. Supp. 495, 500.

and consequently did not convey a right to possession to the Spanish Republic which the American courts could recognize. The order dismissing the intervention was reversed by the circuit court of appeals.¹⁹⁷ Judge Augustus Hand pointed out that the Supreme Court had referred back only the question of title and right to possession, and not the question whether the *Navemar* was immune from judicial process.¹⁹⁸ He took the view that the Spanish Republic had established title and right to possession by virtue of the decree of October 11th, 1936. This decree, he pointed out, became operative at the latest when *The Navemar* had reached the high seas after her departure from Argentina, and the American courts had no reason to refuse to give effect thereto.¹⁹⁹ The possession of the ship was therefore decreed to the Spanish consul at New York. There the controversy ended because on the defeat of the old Spanish Government, the ship was released after one more procedural mishap²⁰⁰ and sailed on April 22d, 1939.²⁰¹

The next reported decision directly in point is *Ervin v. Quintanilla*.²⁰² This case likewise involved a libel in rem for possession arising out of an expropriation decree. The steamship *San Ricardo* belonging to the *Compania Naviera San Ricardo*, a Mexican corporation, arrived on March 9th, 1938, in the port of Mobile, Alabama, for the purpose of repairs. On March 18th the boat was expropriated by decree of the Mexican Government. This decree was communicated to the Mexican consul at New Orleans, who thereupon and in accordance with specific instructions proceeded to Mobile. Master and crew as well as the Alabama Drydock Company accepted the vessel as being from then on in the possession of the foreign government. On April 2d, 1938, the temporary receiver for the assets in Alabama of the *Compania Naviera San Ricardo* libeled the boat and the Mexican Chargé d'Affaires appeared specially to claim immunity. The district court granted the motion, which on appeal the circuit court of appeals upheld. Judge Hutcheson, in a well reasoned opinion, pointed out that it was not material that the taking of

¹⁹⁷(C.C.A. 2d Cir. 1939) 102 F. (2d) 444.

¹⁹⁸(C.C.A. 2d Cir. 1939) 102 F. (2d) 444, 446.

¹⁹⁹The same view with respect to the effect of the expropriation decrees was adopted in *Linea Sud-Americana v. 7,295.40 Tons of Linseed*, (S.D. N.Y. 1939) 29 F. Supp. 210.

²⁰⁰*The Navemar*, (C.C.A. 2d. Cir. 1939) 103 F. (2d) 873.

²⁰¹*New York Times*, April 23, 1939, p. 22.

²⁰²(C.C.A. 5th Cir. 1938) 99 F. (2d) 935, certiorari denied, (1939) 306 U. S. 635.

possession had occurred within American jurisdiction, since it was peaceful without any invasion of American sovereignty.²⁰³ He emphasized that the object taken was a vessel in navigable waters, not an ordinary chattel on land. He confined the issue decided very carefully:

"All that is here for decision is whether the Republic of Mexico may have immunity as to this ship, a Mexican ship, owned by a Mexican company, documented in Mexico and flying the Mexican flag when as here, she has taken peaceably possession of it in our waters through her lawful agents and representatives, and properly presents and presses her claim based upon that possession."²⁰⁴

The court evidently did not worry about the other prerequisite for immunity which was re-emphasized in the *Navemar* decision of the Supreme Court, i.e. "support for any contention that the vessel was in fact employed in public service." It seemed to imply that the purpose for which the vessel was expropriated in connection with the gaining of actual possession while the ship was still in repair sufficed. But here is a point where future cases may bring some new difficulties in spite of the rule of *Berizzi Brothers v. Pesaro*.²⁰⁵

The latest decision bearing on the question is the case of *Yokohama Specie Bank v. Chengting T. Wang*.²⁰⁶ It involved a curious situation created by the doctrine of sovereign immunity. The Chinese Yung Yuan Steamship company had entered into a charter party with a Japanese concern for the transportation of melting scrap to Japan. For the performance of this contract the Chinese company bought the steamship *Edna Christensen* in the United States. The American registry of the vessel was cancelled, her name changed into *Kuang-Juan* and provisional registry was issued by the Chinese consul general. When the

²⁰³"The taking of possession in this case was not an act of sovereignty in the sense the appellant means, the exertion of superior force, in order, without our consent, to violate our sovereignty or override the operation of our laws. It was merely a series of physical acts done by the consular representative of Mexico in its behalf, and of acceptance of those acts by the master and the crew and by the ship building company, all of this accomplished peaceably, completely without disorder and entirely in subordination to the sovereignty and laws of the United States. . . . Since the right and title of the government is not in issue, but merely its possession, we think it clear that the possession taken here, pursuant to an expropriation in Mexico is no different in incidents, quality and effect from one taken pursuant to a voluntary transfer." (C.C.A. 5th Cir. 1938) 99 F. (2d) 935, 940.

²⁰⁴(C.C.A. 5th Cir. 1938) 99 F. (2d) 935, 941.

²⁰⁵(1926) 271 U. S. 562, 46 Sup. Ct. 611, 70 L. Ed. 1088.

²⁰⁶(C.C.A. 9th Cir. 1940) 113 F. (2d) 329.

scrap was placed upon the vessel the consul general refused to deliver the registry to the master and as a result the vessel could not sail. Thereupon plaintiff, the holder of the bill of lading for the scrap, filed a possessory action against the cargo. The relief sought in the libel was

“that process issued against the scrap and that all persons claiming any interest therein be cited to appear; that the libellant given possession of the cargo upon surrender of the bills of lading and that the court made an appropriate order as to the movement of the ship, to facilitate the discharge of the cargo.”²⁰⁷

The United States marshal went on board of the vessel, had the monition read to the crew and attached a copy to the bulkhead of the saloon of the vessel. Four days later the Chinese government expropriated the vessel and the following day the Chinese consul general took possession of the vessel. The Chinese ambassador then intervened and claimed that the court had no jurisdiction over the vessel. The district court dismissed the libel, and on appeal the decree was affirmed. The libellant had contended in the first place that the court had acquired jurisdiction and that the subsequent expropriation could not divest the court thereof, and in the second place that according the immunity would be tantamount to permitting belligerent seizure in neutral territory. The Court of Appeals speaking through Judge Healy answered the first argument by pointing out that there had been no libel against the vessel and no arrest of it, and that in addition the arrest of the cargo itself was not valid for lack of an effective seizure of the cargo itself as required by the admiralty practice. In refutation of the second argument the court said that China was not formally a belligerent and that the Chinese government was entitled to immunity as “the expropriation was accomplished peaceably and involved no breach of American neutrality.” Therefore the lower court was “right in refusing a decree directing the movements of the vessel or the use of its gear.”

It is submitted that the reasons given for the decision are rather confusing. The court failed to distinguish between lack of jurisdiction because of defective service and lack of jurisdiction because of sovereign immunity. It really wished to dodge the delicate question whether sovereign immunity could still be acquired by a foreign state with respect to the vessel once the court had assumed jurisdiction in favor of a private party. Yet, if no

²⁰⁷(C.C.A. 9th Cir. 1940) 113 F. (2d) 329, 330.

proper arrest was accomplished, then the whole question of immunity was really obiter and irrelevant.

Furthermore the court seemed somewhat hazy on the distinction between jurisdiction over the cargo and jurisdiction over the vessel. In this connection very intricate questions suggest themselves. Can there be a valid arrest of non-exempt cargo on board of an immune vessel? In the instant case the court would not have had to answer this question even if the expropriation had anteceded the arrest, because the relief prayed was that the court direct the movements of the vessel. The court refused to grant it because the vessel as such was not arrested and because she was immune. If we disregard the first ground, this means that immunity implies that the vessel is liberated from any interference with her movement through judicial order. Even if that be accepted, however, it does not necessarily follow therefrom that no jurisdictional act could be exercised on board.²⁰⁸ It only follows that any seizure not succeeded by removal of the cargo can be made illusory by the sailing of the immune vessel. And the question might arise whether this will not always be so even though the vessel is a private one and not immune.²⁰⁹

Perhaps the most interesting feature of *The Navemar* and *The Ervin* decisions and also of *The Kuang Juan Case* consists in their shedding new light on the necessity of possession as prerequisite to the sovereign immunity. Sufficient possession must be established to the satisfaction of either the department of state or the courts. What is and what is not sufficient possession is not an easy question. On the one hand it need not be "lawful" possession. The opinions in the *Ervin* and the *Kuang*

²⁰⁸We wish to say no more than that no lack of jurisdiction for seizures on board follows necessarily from the lack of jurisdiction to control the movement of the vessel. Whether immunity of vessels is accompanied by an immunity of the cargo on the vessel is a question which we have purposely left outside the scope of this article as was said above in the first section.

²⁰⁹Cargo on a vessel owned by a third person can, probably, be seized the same way as property in the house of a third person (see 25 Am. Dec. 167; 57 A.L.R. 210.) If the seized cargo is left on board a removal of the boat might constitute a contempt of court (as does a removal of the boat, if the boat is arrested, *The Victor Pretot*, (1898) 14 Times L. R. 244, *The Seraglio*, (1885) L. R. 10 P. D. 120, (1885) 54 L. J. P. 261.) But this is a dubious proposition. Even more open to question is whether the fact of a maritime lien on the cargo would entitle the lienor to an arrest of, or a court order directed against, the vessel. It is strange that there seems to be no direct authority on these points. But cf. *Spoor v. Spooner* (1847) 12 Met. (Mass.) 281, holding that removal of a boat after notice constitutes no unlawful imprisonment of an officer who came on board for the purpose of making an arrest.

Juan Cases state that the possession might be gained in American territorial waters by acts which constitute a tort against the owner, at least in case the acquiring state is the state of registry, provided that the act of transfer does not constitute a breach of the peace, a contempt of court or a violation of the local sovereignty or neutrality; otherwise the privilege of immunity might be forfeited. On the other hand the possession probably need not amount to "legal" possession.²¹⁰ The courts in *The Imperator*²¹¹ as well as in the *Ervin Case* have shown a tendency to relax the strict view, once expressed by the Supreme Court with respect to United States property in *The Davis*.²¹² In the *Imperator Case* the Cunard Line, and in the *Ervin Case* the shipbuilder in all likelihood had "legal possession." Yet the fact that in the former case the ship was operated on a commission basis for the foreign sovereign owner, and that in the latter case the shipbuilder agreed to hold it for the foreign government, was deemed to establish sufficient "possession." In *The Rask*²¹³ case the shipbuilder held adversely, which constituted a radical difference.²¹⁴

The most important problem which the American Supreme Court will have to decide in the future is as to whether any form of governmental operation and management will be within the privilege of sovereign immunity of a foreign state or whether the setup of separate agencies will destroy it. So far it has dodged the question skillfully.²¹⁵

²¹⁰On the significance of "legal possession" see Shartel, *Meanings of Possession*, (1932) 16 MINNESOTA LAW REVIEW 611.

²¹¹(S.D. N.Y. 1924) [1924] 1 Am. Maritime Cas. 596.

²¹²(1869) 10 Wall. (U.S.) 15, 19 L. Ed. 875.

²¹³(1931) 119 Cal. App. 21, 4 P. (2d) 981.

²¹⁴See also *The Maipo*, (S.D. N.Y. 1918) 252 Fed. 627. The decision in *The Attualità*, (C.C.A. 4th Cir. 1916) 238 Fed. 910, seems to be clearly wrong under the modern view.

²¹⁵See *The Sao Vicente*, (1922) 260 U. S. 151, 67 Sup. Ct. 179, 43 L. Ed. 15; *Ex parte Transportes Maritimos*, (1924) 264 U. S. 105, 44 Sup. Ct. 236, 68 L. Ed. 580; *Transportes Maritimos Do Estado v. Almeida*, (1924) 265 U. S. 104, 44 Sup. Ct. 449, 68 L. Ed. 932. An interesting and well considered state court decision on the point but not dealing with vessels is *Hannes v. Kingdom of Roumania Monopolies Institute* (1940) 260 App. Div. 189, 20 N. Y. S. (2d) 825. The legal forms in which a state can own and operate a vessel are multifold. It may be the sole owner of all the stock of an ordinary private corporation; it may incorporate specifically for that purpose, but the corporate structure being similar to an ordinary corporation; it may set up completely new forms of "public corporations" for that purpose; finally it may create just "separate governmental agencies or departments." Should, and how far should, the position of these instrumentalities under their own domestic law be decisive for their treatment in a foreign court? It may be remembered that the United States, waiving certain aspects of its immunity in domestic courts, explicitly reserved its foreign immunity. 46 U. S. C. A. sec. 747.

IV. SOME COMPARATIVE REMARKS

Space forbids giving any detailed account of the non-Anglo-American practices.²¹⁶ Only a few remarks may be permitted. As in Anglo-American law, the scope of the immunity of foreign government vessels in other jurisdictions depends on two basic factors, namely: in the first place upon the policies and notions underlying the accordances of immunity to foreign states in general; and second, no less upon the legal concepts and procedural mechanics of foreign admiralty law and practice. Differences in that respect have, as is well known, caused not infrequent difficulties to Anglo-American courts.²¹⁷

Above all it is to be noted that on April 10th, 1926, at Brussels eighteen states signed a convention on the immunity of government vessels.²¹⁸ The convention was supplemented by a Protocol of May 24th, 1934.²¹⁹ The convention and protocol which are ratified now by thirteen states,²²⁰ went into force on January 8th, 1937. The convention establishes immunity from proceedings in rem, seizure, arrest and detention for vessels owned or operated by a foreign government, and used at the time the cause of action arises in Governmental and non-commercial service.²²¹ The protocol extends the immunity from seizure, attachment and detention to vessels chartered by the foreign government for such

On the question of domestic immunity of governmental instrumentalities see *Keifer & Keifer v. Reconstruction Finance Corp.*, (1939) 306 U. S. 381, 59 Sup. Ct. 516, 83 L. Ed. 784.

²¹⁶The best survey is probably in 2 Gidel, *Le Droit International Public de la Mer* (1932) 337 ff., with an excellent bibliography on p. 338. A series of surveys of the different national practices was published in 34 *Revue International de Droit Maritime* (Germany, United States, France, Great Britain) and in Nos. 50, 52, 54 of the *Bulletin du Comité Maritime International* (Denmark, Italy, Japan, Norway, Netherlands, Sweden). See also the report of Professors Magalhaes and Brierly, Subcommittee of the Committee of Experts for the Progressive Codification of International Law, *Legal Status of Government Ships Employed in Commerce*, League of Nations 1926 V. 9, C. 52, M. 29. See also Baldoni, *Il Mare Territoriale* (1934) pp. 110, 114; Van Praag, *Jurisdiction et Droit International Public* (1915), Supplement 1935, who discusses the problems on various places; Fedozzi, *La Condition Juridique des Navires de Commerce*, (1925) 10 *Recueil des Cours, Académie de droit international* 1; Fairman, *Some Disputed Applications of The Principle of State Immunity*, (1928) 22 *Am. J. Int. Law* 566, 579.

²¹⁷See e.g. *The Colorado*, [1923] P. 102, 92 L. J. P. 100, *The Zigurds*, [1932] P. 113, 101 L. J. P. 75.

²¹⁸176 League of Nations Treaty Series 200. The convention was signed a few days later by Portugal as the nineteenth state.

²¹⁹176 League of Nations Treaty Series 214.

²²⁰Belgium, Brazil, Chile, Estonia, Hungary, Poland, Germany, Italy, Netherlands, Roumania, Portugal, Sweden and Norway.

²²¹Art. 3, sec. 1.

use and to vessels acquired or operated by them at the time of the proceedings and used for non-commercial purposes.²²² The convention (which is in Germany applicable also to non-signatory powers)²²³ has found an interesting construction by the German Supreme Court in a judgment of May 16th, 1938.²²⁴ The decision involved a collision between plaintiff's and defendant's vessels. The defendant was a foreign private corporation under the control of the foreign state. That state had transferred the vessel in question to the defendant, to be equipped and operated by the corporation in governmental interest. It was registered in the name of the corporation. The vessel was chartered by the government for a period of twelve months to carry coal for the navy. Plaintiff obtained a warrant for arrest, and sued defendant for the enforcement of his maritime lien or damages. The defendant claimed immunity from this suit. The Supreme Court refused to grant the motion. It pointed out that according to the issue before the court it was not concerned with the freedom of the ship from arrest or seizure, but merely with the suit in rem and in personam. In the opinion of the court the ship was neither owned nor operated by the foreign government, but merely chartered. As the Protocol does not forbid proceedings in rem against a private owner, but only arrest and detention, a judgment for the enforcement of the lien as well as for damages could be rendered against the private corporation. The fact that the state had transferred the ship to the corporation for the state's own use was held to be immaterial.

Apart from the convention customary international law applies. In Germany it had been held before the Brussels convention changed the law that no suit in personam against a foreign government was possible for a collision with a vessel owned by the same and used for trading purposes.²²⁵ It had also been held that a vessel which was owned by the United States but operated in commercial service by a private corporation as mere agent for the foreign government was not liable to seizure against the objections of the United States.²²⁶ But an arrest was upheld

²²²Articles I and II.

²²³See German Supreme Court (1938) 157 R.G.Z. 389, 394.

²²⁴(1938) 157 R. G. Z. 389. The decision is translated into French in (1939) 39 *Revue de Droit Maritime Comparé* 51, with comment at 61.

²²⁵The case of *The Ice King*, Supreme Court of Germany, Dec. 10th, 1921, 103 R. G. Z. 274. The Supreme Court observed that the instant suit was a claim in personam, but intimated that the same immunity would also apply to a judgment for the enforcement of a lien.

²²⁶The case of *The West Chatala*, Supreme Court of Germany, Dec.

in a case where the Portuguese Government had transferred a vessel to the management of a private corporation for the latter's account and only the corporation had claimed immunity.²²⁷

In France the Court of Cassation established in a famous decision of January 22d, 1849, that foreign states were immune from suit in French courts even with respect of causes of actions arising out of ordinary contracts.²²⁸ The immunity extends also to preliminary attachments (*saisie conservatoire* or *saisie revendication*) of and execution upon property of foreign states, even when it is in the hands of third persons.²²⁹ In consequence of this rule it has been held that ships owned by foreign governments cannot be subjected to seizure.²³⁰ This is true even though the ship is only confiscated by the foreign state as a result of war and operated by a private corporation for private purposes.²³¹ On the other hand the mere fact that a privately owned vessel renders certain public services to the foreign government is apparently *per se* not regarded as sufficient ground for immunity.²³²

10th, 1921, 103 R. G. Z. 280. The court gave decisive weight to the fact that the private corporation, the American Line, did not act as "operator for its own account" in the sense of art. 510 of the German Commercial Code.

²²⁷The case of *The Coimbra*, Appellate Tribunal of Hamburg, May 30th, 1923, (1923) 54 *Hanseatische Gerichtszeitung* 178. The court stated that the Portuguese Government could not have claimed immunity successfully under the circumstances of the case, because the defendant operated the vessel for its own account within the meaning of article 510 of the German Commercial Code. It therefore did not come within the rule of the *West Chatala*. The mere ownership by a foreign government was held not to be sufficient to make the vessel an "extraterritorial thing."

²²⁸*Gouvernement Espagnol c. Lambègue et Pujol*, Cour de Cassation, Jan. 22d, 1849, (1849) *Dalloz, Jurisprudence Générale*, pt. 1, p. 5. This rule has been frequently re-iterated; see, for instance, *Humbert c. Etat russe*, Cour d'appel, Paris, Apris 30th, 1912, (1913) *Dalloz, Jurisprudence Générale*, pt. 2, p. 201 with note by Prof. Gidel; *Hanukiev c. Etat Afghan*, Cour de Cassation, Jan. 23d, 1933, (1933) 1 *Gazette du Palais* 505; *Laurans c. Gouvernement impérial chérifien du Maroc*, Cour de Cassation, Nov. 20th, 1934, (1934) 2 *Gazette du Palais* 886.

²²⁹*Veuve Carratier c. Chemin de fer d'Alsace-Lorraine*, Cour de Cassation, May 5th, 1885, (1885) 2 *Gazette du Palais* 33; see notes, (1937) 2 *Gazette du Palais*, 673 and (1933) *Dalloz, Recueil Périodique*, pt. 1, p. 197.

²³⁰*Navire Englewood*, Tribunal civil de Bordeaux, April 27th, 1920, (1920) 47 *Jour. du Droit Int.* 621 (*United States Shipping Board vessel, operated by Cosmopolitan line*); *Navire Balosaro*, Trib. du commerce du Havre, Sept. 17th, 1919, (1920) 2 *Gazette des Tribunaux* 93 (*United States Shipping Board vessel, operated by the Emergency Fleet Corporation*); *Navire Glenridge*, Tribunal du commerce du Havre, July 17th, 1920, (1921) 32 *Revue International du Droit Maritime* 599; cf. Allen, *The Position of Foreign States Before National Courts* (1933) 179.

²³¹*Navire Campos*, Tribunal du commerce du Havre, May 19th, 1919, (1919) 46 *Journal du Droit Int.* 747 (quashing an attachment of a former German vessel, confiscated by Brazil and operated by Brazilian Lloyd, for debts owed to the latter corporation with respect to the boat.)

²³²See the *Solunto Case*, Cour d'appel d'Aix, August 3d, 1885, (1885) 12 *Jour. du Droit Int.* 554, in which immunity was granted to a private

Recently the French courts have shown a tendency to restrict the immunity of foreign states to causes of actions arising from acts of sovereignty, particularly (but not exclusively) in cases involving the Russian Commercial Representations;²³³ however no analogous restriction has been applied²³⁴ to the immunity from seizure of foreign governmental property, and quite recently a Russian trading vessel has been held immune from attachment.²³⁵ France has signed but not ratified the Brussels Convention.

In Belgium the Brussels Convention is in force. Before that time the situation was somewhat different. Belgian law clearly restricts the immunities of foreign states from suits to causes of action arising from acts of sovereignty,²³⁶ but apparently it does not permit a seizure of foreign governmental property of any kind.²³⁷ At any rate the Appellate Court of Brussels quashed an attachment of the loading vessels *Pangim* and *Lima*, two former German boats, which were requisitioned by Portugal while lying in Portuguese waters and operated by the *Transportos Maritimos do Estado*. The court held that the *Transportos Maritimos* were a mere department of the State of Portugal and that the vessels were attached to a public use by the latter.²³⁸ Another interesting

vessel used as mail packet for Italy because of a French Italian treaty. The judgment, whose enforcement was attempted that way, arose out of the collision between *The Ortigia* and *The Uncle Joseph*, a cause célèbre of international law. See also 6 *Lyon Caen et Renault, Traité de Droit Commercial* (1932) 818, 2 *Gidel, Le Droit International Public de la Mer* (1932) 328 ff.

²³³*Union des Républiques Socialistes Soviétiques c. Association France-Export* Cour de Cassation, Feb. 19th, 1929, (1929) 1 *Gazette du Palais* 450 and note by Savatier, (1929) *Dalloz, Recueil Périodique*, pt. 1, p. 73; see also notes, (1933) *Dalloz, Recueil Périodique*, pt. 1, p. 197; (1937) 2 *Gazette du Palais* 673; 2 *Gidel, Le Droit International Public de la Mer* (1932) 355.

²³⁴*Aget v. Etat Francais et Etat Espagnol, Tribunal civil de Perpignan*, April 7th, 1939, (1939) 2 *Gazette du Palais* 90; *Officina del Aceite c. Domenech, Cour d'appel d'Aix*, Dec. 9th, 1938, (1939) 66 *Jour. du Droit Int.* 596.

²³⁵*Socifros c. URSS, Cour d'appel d'Aix*, Nov. 23, 1938, (1939) 1 *Gazette du Palais* 519.

²³⁶*Société anonyme des Chemins de Fer liégoies-luxenbourgeois c. Etat néerlandais, Cour de Cassation (of Belgium)* June 11th, 1903, (1904) 31 *Jour. du Droit Int.* 417.

²³⁷See *Tribunal civil d'Anvers*, Nov. 11th, 1876, (1877) *Pasicrisis Belge*, pt. 3, p. 28; *Mahieu c. République Hellénique, Tribunal civil d'Anvers*, July 8th, 1932, (1932) 59 *Jour. du Droit Int.* 1088; see also Allen, *The Position of Foreign States Before National Courts* (1933) 211.

²³⁸*Steamers Lima and Pangim, Cour d'appel de Bruxelles*, June 27th, 1921, (1922) 49 *Jour. du Droit Int.* 739; *Steamer Cunston Hall, Tribunal du commerce d'Anvers*, Feb. 8th, 1924, (1926) 7 *Revue de Droit Maritime Comparé* 88.

case is the matter of the steamer *Youlan*,²³⁹ the Belgian "pendant" to *The Gagara Case*. The *Youlan* belonged originally to the West Russian Steamship Company. In 1918 she was seized by Finland, condemned as prize and used to transport foodstuffs for the account of the government when the vessel arrived in Belgian waters; the former owners demanded her return to them and attached her. The court quashed the attachment and dismissed the action for want of jurisdiction. The court stated that the question of title was irrelevant, as Finland was in the actual possession of the vessel, and had not obtained the same through seizure in Belgian waters. Furthermore, Finland's allegation that the ship was used for public purposes needed no proof because such requirement would signify an exercise of jurisdiction.

Italy adheres to the "Belgian doctrine" that a foreign state enjoys immunity only for acts of sovereignty. This has been laid down very distinctly by the Supreme Court of Italy.²⁴⁰ But in Italy the courts have gone one step further than in Belgium, and permitted also attachment of and execution on property owned by the foreign state on Italian territory, except in so far as it falls within the class of so-called "extraterritorial things" as e.g. war-vessels.²⁴¹ State owned commercial vessels thus seem to have been considered liable to seizure.²⁴² In 1925 a decree was enacted which made preliminary attachment of and execution upon immovables and movables, ships, credits, negotiable instruments and other values belonging to a foreign state dependent upon authorization of the Minister of Justice, provided that reciprocity existed.²⁴³ Since 1937 the Brussels Convention has become operative.²⁴⁴

²³⁹Tribunal du commerce d'Anvers, Feb. 9th, 1920, (1923) 50 Jour. du Droit Int. 376.

²⁴⁰Five cases of the Italian Supreme Court can be cited for this proposition, namely four decisions involving the Russian Commercial Representations of June 12th, 1925, (1925) II Foro Italiano, pt. 1, p. 830; of July 28th, 1932, (1932) II Foro Italiano, Repertorio, sub voce Competenza 38; of January 18th, 1933, (1933) II Foro Italiano, pt. 1, p. 1521; of August 3d, 1935, (1935) II Foro Italiano, pt. 1, p. 1387; and State of Roumania v. Trutta, March 13th, 1926, (1926) II Foro Italiano, pt. 1, p. 584. For lower court decisions see for instance Court of Appeals, Genoa, Jan. 22d, 1937, (1937) Monitore Dei Tribunali p. 563.

²⁴¹Roumania v. Trutta, March 13th, 1926, (1926) II Foro Italiano, pt. 1, p. 584.

²⁴²The lower courts and the Supreme Court permitted actions in personam against the United States Shipping Board. Cf. Allen, The Position of Foreign States Before National Courts (1933) 258, Fairman, Some Disputed Applications of the Principle of State Immunity, (1928) 22 Am. J. Int. Law, 566, 581 note 85.

²⁴³Decree of August 10th, 1925, no. 1621, converted into statute by act of July 15th, 1926, no. 1263.

²⁴⁴The Brussels convention was made executory by decree of Jan. 6th,

The last group of decisions to be mentioned in this connection are the cases involving the sovereign immunity of foreign ships which arose out of the Spanish Civil War. Not only the English and American courts but also the tribunals of many other countries had to deal with this problem.²⁴⁵ These cases concerned in general the claim of immunity made by the Spanish loyalist government against attachments levied in connection with suits for restoration of possession by the former owners of the requisitioned or confiscated vessels. Cases involving the enforcement of ordinary maritime liens against such ships have not been found. In the first place, the rule laid down by the English courts was followed also by the courts in Scotland²⁴⁶ and Northern

1928, no. 1958, converted into a statute by act of June 19th, 1929, no. 1633, setting the date of entrance into operation at the date when the convention would come into force, provided that Italy deposited ratification. This occurred in 1927.

²⁴⁵Cf. Jaenicke, *Die Frage der Immunität in der Rechtsprechung zum Spanischen Bürgerkrieg*, (1939) 9 *Brunns Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 354; Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939) 22. It may be mentioned that the Spanish Civil War confronted the French courts with many intricate problems of state immunity apart from the immunity of vessels, particularly with that of the immunity of the goods which were "evacuated" by the government and transported to France or kept on vessels in French waters; see the case of *Etat espagnol, Banque d'Espagne c. Banco de Bilbao*, Cour d'appel de Rouen, Dec. 7th, 1937, (1937) 2 *Gazette du Palais* 965, reversing Tribunal civil du Havre of Oct. 29th, 1937, (1937) 2 *Gazette du Palais* 670, and holding evacuated art treasures on board of the English boat *Mydol* to be immune; and the cases of *Rousse et Maber c. Banque d'Espagne*, Cour d'appel de Poitiers, July 26th, 1937, (1937) 2 *Gazette du Palais* 417 and *Rousse et Etat Espagnol v. Sté. Sota y Aznar*, Cour d'appel de Poitiers, Dec. 20th, 1937, (1938) 1 *Gazette du Palais* 167, both arising out of the same transaction. The first case upheld an attachment (*saisie-revendication*) by the owners of valuables evacuated by the Basque Government, which was levied when these goods were unloaded from one vessel and loaded upon another vessel, *The Aspe Mendi*, in French waters, on the ground that the Basque Government was not a recognized independent government and the Spanish Government had not acted before the seizure. The second case, however, quashed an attachment of the cargo on board of *The Aspe Mendi* made for the purpose of securing a freight claim, because the writ was issued by the commercial court and a contract of affreightment by a state for public purposes is not an act of commerce which justifies such attachment. Cf. *Battifol*, *A propos des Evacuations de Biens Privés d'Espagne en France*, (1938) 1 *Gazette du Palais*, *Doctrine*, p. 43; *Gros*, *Les Evacuations de Biens Espagnols*, (1938) 1 *Gazette du Palais*, *Doctrine* 47.

²⁴⁶Case of *El Condado*, *Greenock Sheriff Court*, (1937) 59 *Lloyd's List Law Reports* 119: (recall of an order of interim edict against the master of a Spanish vessel, granted to their owners. The ship was requisitioned in Scotland by the Spanish Consul. The court declared that the claim of the Spanish Government to a right of possession deprived the court of its jurisdiction); Case of *The Alona Mendi*, reported in *London Times*, May 13th, 1938, p. 9, col. e (4th ed.). It may be mentioned that in the *Condado Case* a subsequent action for wrongful detention brought by the Spanish Government failed because the requisition in Scotland was held not to be sufficient to give a possessory title (1939) 63 *Lloyd's List Law Rep.* 83, 330. See note (1939) 51 *Juridical Review* 365.

Ireland.²⁴⁷ In France the Court of Appeals of Poitiers²⁴⁸ and the Court of Appeals of Bordeaux²⁴⁹ held that the immunity of governmental property could be claimed successfully against attachment by the owners in a suit for restoration of possession.²⁵⁰ Similarly the owners failed in two such cases in Belgium.²⁵¹ The same is true for the Dutch courts, which in two cases did not grant restoration to the owners, and refused attachments.²⁵² In

²⁴⁷Case of The Cobetas and other vessels, see London Times, Feb. 11th, 1938, p. 7, col. e; March 31st, 1938, p. 9, col. d.

²⁴⁸*Société Cimentos Resola v. Larrasquitu et Etat Espagnol*, Cour d'appel de Poitiers, (1938) 2 Gazette du Palais 169, affirming the order of the presiding judge of the Tribunal civil de la Rochelle, Oct. 18th, 1937, (1937) 2 Gazette du Palais 672. *Held* that the boat Ixtas-Zuri which was requisitioned by a decree of July 17th, 1937, was immune from attachment by her owners. The court emphasized that the captain was notified of the requisition while he was in Santander, that the requisition did not amount to confiscation without compensation, and that the requisition decree stated that the boat was to be used for public purposes. On the same day the court vacated an attachment of the requisitioned vessel Juan Artaza granted by the Tribunal de commerce de la Rochelle to the owners on October 8th, 1937, *Capt. Urrutia et Etat Espagnol c. Société Artaza y Compania*, (1938) 1 Gazette du Palais 168; the reason was, however, that the commerce court instead of the civil court had acted and not that there was an infringement on immunity.

²⁴⁹*Angel Lafuente et Etat Espagnol c. de Llaguno y Duranona*, Cour d'appel de Bordeaux, March 28th, 1938, (1938) 1 Gazette du Palais 714 (*held*, that the steamship Saturno which was requisitioned by wire while being on the high seas could not be attached in France in a suit for restoration). It may be mentioned that the lower tribunal, the Tribunal civil de Bordeaux, upheld an attachment in another suit because the Spanish Consul had failed to appear, and the captain was not authorized to act for the Government, and because the requisition was inserted on the ship's paper only in the French port, *Francisco Agusquiza et Gouvernement espagnol c. Sté. Sota y Aznar*, (1937) 2 Gazette du Palais 419.

²⁵⁰Similarly *Tribunal de Bayonne*, Nov. 18th, 1937, (1937) 16 *Revue de Droit Maritime Français* p. 119.

²⁵¹*Court d'appel de Bruxelles*, July 7th, 1937, *Urrutia et Amollobieta c. Martierena*, reprinted in the French (1937) 2 Gazette du Palais 674 (action by the owners against the master of a vessel who had taken possession and command in Spain, *held*: attachment quashed and action dismissed. The court emphasized that the requisition was no confiscation and that it had occurred in Spanish waters). Similarly *Matter of ship Vasco*, Cour d'appel de Bruxelles, Jan. 17th, 1938, 1938 *Rechtskundig Weekblad* Nr. 20, 818 and (1938) 65 *Revue de Droit International et de Legislation Comparée* 332 (the captain had entered the port for repairs as captain of a state ship).

²⁵²But, conversely, the tribunal of Haarlem in *The Sendeja* (1937) 1937 *Weekblad van het Recht* nr. 863 refused a possessory attachment to the loyalist government. The vessel which was registered in Bilbao had been requisitioned by decree after the fall of Bilbao. The master first indicated he would follow the orders of the Spanish (loyalist) consul in the Netherlands. Later he intended to go back to Bilbao and thereupon the loyalist government petitioned for attachment. The court declared it to be against public policy to recognize a requisition decree issued after the home port had fallen into the hands of the insurgents. The loyalist part of the crew also had attached the ship for wages. The court declared that the Spanish consul could not object to a release of this attachment by reason

one of these cases, that of *The Cabo Quintres*, later called *Baurdo*, the Spanish Government had requisitioned the vessel and later the Basque Government had chartered the ship to a Russian Government corporation. While lying in a Dutch port the former owners tried to attach the vessel in connection with a claim to restoration. The court held that the requisition was a valid exercise of sovereignty in times of war and civil strife, and that the use made by the Basque Government, as an autonomous subdivision of the Republic of Spain, could not be questioned. Consequently the attachment was refused.²⁵³ In the other case, that of *The Vasco*, later called *Garbi*, the attachment was first granted to the owners, but, on a later hearing, quashed. The court pointed out that though immunity was not accorded by Dutch law to foreign governments in actions based on other than sovereign acts there was no restriction on sovereign immunity where it related to a question of property. Hence it lacked jurisdiction for an attachment.²⁵⁴ The Supreme Court of Argentina, in the case of *The Ibai, ex Cabo Quilatos*, likewise dismissed a suit by the former owner for lack of jurisdiction because the ship was put into auxiliary service for the navy, and acts of foreign sovereigns could not be questioned in Argentine courts.²⁵⁵ Finally the Supreme Court of Norway refused to take jurisdiction in a contest of the rival governments for the possession of a vessel in the case of *The Guernica*.²⁵⁶

of his immunity, 1937 *Weekblad van het Recht* nr. 864. The court declined also to enforce an order of the consul in favor of the loyalist crew. 1937 *Weekblad van het Recht* nr. 865.

²⁵³(Rotterdam 1937) 1937 *Weekblad van het Recht* nr. 913. The court furthermore refused to release an attachment obtained against the *Baurdo* by the Russian charterer. 1937 *Weekblad van het Recht* nr. 912. It finally ordered the insurgent part of the crew to leave the vessel. (1937) 1937 *Weekblad van het Recht*, nr. 914.

²⁵⁴(Middleburg 1938). 1939 *Weekblad van het Recht* nr. 96, 1939 *Grotius, Annuaire International* 118. The vessel had been taken over by the loyalist government in Spain pursuant to a requisition decree. She sailed for Belgium. There the former owners tried to attach her, cf. *supra* note 251. They failed and tried it again in the Netherlands in the instant case.

²⁵⁵July 16th, 1937, (1938) 38 *Revue de Droit Maritime Comparée* 50 ff.

²⁵⁶See *London Times*, June 29th, 1938, p. 13, col. f; July 9th, 1938, p. 11, col. a, Oct. 6th, 1938, p. 11. (Because the vessel was permitted to sail under a loyalist crew, General Franco declared a boycott of all Norwegian merchant vessels which was called off in October). The Supreme Court of Norway assumed, however, jurisdiction in a contest for the possession of property belonging to the Spanish legation in Norway, *Rep. of Spain v. Campuzano*, Nov. 2d, 1938, (1939) 33 *Am. J. Int. Law* 609.

CONCLUSION

The foregoing survey shows that the problem of sovereign immunity of foreign vessels, even if confined to the ship itself, has a somewhat complex nature. In its strict sense it is of a procedural character: the judicial process must not be directed against a foreign government and must not affect its operation of the ship. But in close connection with it two principles of substantive law not infrequently come into operation under appropriate circumstances, namely, that ordinarily²⁵⁷ effect should be given by the national courts to the acts of a foreign government, and that a foreign state does not incur liability in the operation of its instrumentalities and does not subject them to liens which ordinarily result from such liability.

How far the precise scope of this immunity reaches, varies somewhat in the different national practices. The essential problem is neither to sacrifice the basic national principles of an administration of justice nor to endanger the conduct of international relations by an undue judicial interference with foreign governmental instrumentalities. In troubled times the emphasis upon the latter horn of the dilemma may become more pronounced. In general the American practice seems satisfactory in both respects.

²⁵⁷While in the United States a confiscation without compensation will be recognized, if executed in foreign territory, *Shapleigh v. Mier*, (1937) 299 U. S. 468, 57 Sup. Ct. 261, 81 L. Ed. 355, or even on the high seas, *The Navemar*, (C.C.A. 2d Cir. 1939) 102 F. (2d) 444, 450, the French Supreme Court seems not to give any effect to such confiscation, regardless of the place of execution, *Société anonyme Potasas Ibericas c. Bloch*, March 14th, 1939, (1939) 1 *Gazette du Palais* 726. The qualification made by the Dutch court in the case of *The Sendeja* (Haarlem 1937) 1937 *Weekblad van het Recht* nr. 863, viz. that in case of expropriation of vessel the port of registry must be in actual control of the recognized government (see supra note 252), seems not to have occurred to the other tribunals.