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Note and Comment

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NOTE AND COMMENT

CONSTITUTIONALITY OF THE LA FOLLETTE AMENDMENT TO THE INTERNAL REVENUE LAW OF 1921.—The United States Senate on November 5, 1921, inserted in the Revenue Act, then before the Senate, a provision that taxpayers in their income tax returns must specify what state and municipal bonds they hold, or else be subject to a penalty of five per cent. That provision was dropped out in conference, but it will come up again, and it is well to look at its constitutionality under the Fourth Amendment to the Constitution prohibiting unreasonable searches.

Doubtless any reasonable requirements in a tax report, so as to show what tax shall be paid, may be enacted by Congress. Thus the supreme court of Connecticut has held (*Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47, affirmed 254 U. S. 113, but not involving this point) that a state in levying an income tax on foreign corporations doing business in the state may require them to file with the state tax authorities a copy of their federal income tax returns.

But that is an entirely different proposition from a requirement that shall give information as to matters not bearing on the tax. Income from state or municipal bonds is not taxable by the federal government, and hence the federal income tax reports have nothing whatsoever to do with income

from state or municipal bonds. The inquiry is not pertinent, and hence the proposed requirement looks like an impertinent prying into private affairs. Constitutional law will not tolerate that. The Supreme Court in the case of *Kilbourn* v. *Thompson,* 103 U. S. 168, said (page 190): "We are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." Even in an investigation by the United States Senate as to whether any Senators had speculated in stocks, the value of which would be affected by pending legislation, the Supreme Court, while holding that a witness must answer questions (*Re Chapman,* 166 U. S. 661, 667), said that the Act of Congress relative to compelling witnesses to answer "refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon." The Supreme Court in *Interstate Com. Com.* v. *Brimson,* 154 U. S. 447, 478, approved the *Kilbourn* decision to the effect that "Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen." The court also approved the statement of law of Mr. Justice Field in *Re Pacific Railway Commission,* 32 Fed. Rep. 241, 250, that "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." In the *Matter of Barnes,* 204 N. Y. 108, where a witness before a legislative committee refused to answer questions in regard to his holdings of stock in a certain corporation, the court pointed out that the New York Code of Civil Procedure provision limited the questions to those which were "pertinent." When the Interstate Commerce Commission asked Mr. Harriman about his purchases of stock, and he refused to answer, the Supreme Court upheld him, and said in regard to the power of investigation claimed by the Commission, "No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court." *Harriman* v. *Interstate Com. Com.,* 211 U. S. 407. The latest decision of the Supreme Court as to an individual's private papers is *Gouled* v. *United States,* 255 U. S. 298, decided February 28, 1921. There the court held that the private papers obtained by a government representative from the office of a person under pretense of a friendly call during his absence is an unreasonable search under the Fourth Amendment, and such papers cannot under the Fifth Amendment be used to convict him of a crime. The court further held that a search warrant is proper only to obtain papers to prevent injury to the public from their use and not merely to obtain them as evidence against a defendant. The court said

(page 304): "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." The act of a man's wife in allowing government officers to enter his home without a warrant, but on their demand for admission, to make a search for liquor held in violation of the revenue laws, is unconstitutional, under both the Fourth and Fifth Amendments. *Amos* v. *United States,* 255 U. S. 313 (1921). It is true that recently the Supreme Court has held that the government might retain and use books and papers seized by private detectives and turned over to the government as evidence, in a prosecution for fraudulent use of the mails, this not being a search and seizure by the government itself, but two Justices dissented and pointed out that this mode of procedure would not encourage respect for the law and the government. *Burdeau* v. *McDowell,* 41 Sup. Ct. Rep. 574.

Now if the income from state and municipal bonds is constitutionally exempt from federal taxation (as it is), what right has Congress to demand a statement of how much that income is? How is such a statement pertinent to the federal tax? Constitutional law does not sanction inquisitorial invasions of the right to privacy in personal affairs, especially where the information demanded cannot change or aid congressional or executive or judicial action. The inquiry is for some extraneous purpose, apparently curiosity. Even a stockholder cannot examine corporate papers "to gratify idle curiosity." *Guthrie* v. *Harkness,* 199 U. S. 148.

A side light is thrown on this subject by the decisions under the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself." While the limits of search warrants and subpoenas *duces tecum* are not yet clearly defined, yet illegal practices in searches and seizures have been emphatically condemned by the courts of last resort. The search and seizure of a man's private papers to obtain evidence to recover a penalty or forfeit his property or convict him of a crime is unconstitutional. So also is an Act of Congress authorizing United States courts in revenue cases to require the production in court of such private books and papers. *Boyd* v. *United States,* 116 U. S. 616, involving a proceeding *in rem* to forfeit certain goods alleged to have been fraudulently imported without paying duties. The seizure of the letters and correspondence of an accused person in his house during his absence and without his authority by a United States marshal, holding no warrant for his arrest or for the search of his premises, is unconstitutional and the court will order such letters and papers to be returned. *Weeks* v. *United States,* 232 U. S. 383. Furthermore, such books and papers cannot be subpoenaed before a grand jury, nor copies or photographs of them used as evidence against the accused person. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. In New York it is held that a statute which authorizes state officials to enter the place of business of an individual and examine all of his books and papers, to ascertain whether he has attached state stamps on transfers of stock,

violates the constitutional provision that an individual in a criminal case cannot be compelled to be a witness against himself. *People* v. *Reardon,* 197 N. Y. 236.

Cooley on Constitutional Limitations, 5th ed., p. 369, *304, says (note 1):

> "The scope of this work does not call for any discussion of the searches of private premises, and seizures of books and papers, which are made under the authority, or claim of authority, of the revenue laws of the United States. Perhaps, under no other laws are such liberties taken by ministerial officers; and it would be surprising to find oppressive action on their part so often submitted to without legal contest, if the facilities they possess to embarrass, annoy and obstruct the merchant in his business were not borne in mind. The federal decisions, however, go very far to establish the doctrine that, in matters of revenue, the regulations Congress sees fit to establish, however unreasonable they may seem, must prevail."

If Judge Cooley were now alive he would see the law vindicated and its violations rebuked, as shown by the above decisions.

Hence it may well be questioned whether the La Follette amendment would have been constitutional. It was not to get information for legislation, inasmuch as Congress cannot levy an income tax on interest from state or municipal bonds. It has too remote a bearing upon a possible constitutional amendment, especially as the states will not voluntarily by such an amendment increase the rate of interest on their bonds and make the federal government a present of that increase; neither will they vote for such an amendment unless it is reciprocal and allows them to tax the income from federal bonds.

The mere fiat of Congress that such information must be given would, of course, not be conclusive. In the tax case of *Eisner* v. *Macomber,* 252 U. S. 189, the court said (page 206): "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

EVIDENCE—PROOF REQUIRED TO ADMIT BOOKS OF ACCOUNT.—"Now they [negotiable instruments] are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes." Lord Mansfield in *Miller* v. *Race,* 1 Burrows 452. By a process something like that by which the negotiability of promissory notes and bills of exchange became recognized in the law of contracts, the rules of evidence seem to be accommodating themselves to the necessities and customs of trade.

"A shop-book was allowed in evidence in indebitatus assumpsit, in a taylor's bill, it being proved that the servant that writ the book was dead, and this was his hand, and he accustomed to make the entries, and no proof was

required of the delivery of the goods." 12 VIN. ABR. 89. This of course applies when the one making the entry had personal knowledge of the transaction. The same rule is followed in *Sovereign Camp W. O. W.* v. *Bass,* 204 Ala. 28.

It is when the one making the entry had no personal knowledge of the truth of the transactions recorded, but made them from the reports of other employees who delivered the goods or performed the services, that the courts have experienced difficulties, leading to various rules as to when such accounts are admissible. "Evidence of beer delivered was this, the draymen came every night to the clerk of the brewhouse, and gave him account of the beer they had delivered out, to which the draymen set their hands, and that the drayman was dead, but that his hand was set to the book. And that was held good evidence of a delivery." *Price* v. *Torrington,* 2 Ld. Raym. 873. If the transactor is unavailable, dead, insane, or, in some jurisdictions, permanently in another jurisdiction, the entries are admissible if the entrant is able to testify that the entries were made by him in the regular course of business, and that they are correct reproductions of the reports made. There is agreement that these extra-judicial statements are admissible because the circumstances of necessity and the guaranty of trustworthiness entitle them to be received in evidence as exceptions to the hearsay rule. *Nichols* v. *Webb,* 8 Wheat. 326; *Poole* v. *Dicas,* 1 Bing. N. C. 649.

There is a type of unavailability which the nature of modern business has created. It is that where an entry is made only after a series of transactions, each perhaps requiring the attention of a different employee of the party who desires to put the final record, which constitutes the original entry, in evidence. The unavailability of those having personal knowledge of the several transactions culminating in the items may be said roughly to spring from these causes: (1) the transactors are unknown; (2) the transactors are a transient class, often gone when the record is produced in court; (3) there is impracticability in taking a number of employees from their shop duties to be witnesses.

In *Kent* v. *Garvin,* 1 Gray (Mass.) 148, the clerk who kept the book testified that it was a book of original entries, that the one who delivered the goods habitually reported to him from memoranda made at the time, and that the witness copied these reports into the book offered in evidence. The transactor was absent from the jurisdiction. For the want of his testimony, the books were held inadmissible, the court using this language: "It is manifest that an important link in the chain of evidence is wanting. The clerk who made the entries had no knowledge of the correctness of any charge on the book. The case therefore rests on the mere unsupported evidence of a third person, whose fidelity and accuracy there are no means of ascertaining and testing. It is in its nature mere hearsay testimony." It is not enough, then, in the opinion of the Massachusetts court, to show that the record was fairly kept under circumstances which naturally would make it accurate. This rule is again applied in *Delaney* v. *Framingham Gas, Fuel and Power Co.,* 202 Mass. 359; *Atlas Shoe Co.* v. *Bloom,* 209

Mass. 563; *Kaplan* v. *Gross,* 223 Mass. 152. It should be noticed that there was not a strong case of unavailability presented in *Kent* v. *Garvin, supra,* for apparently there were but two employees; also a deposition could have been gotten from the absent person. This was not true of *Kaplan* v. *Gross, supra,* yet the court refused to depart from the precedent. See, too, *Mansfield* v. *Gushee* (Me., 1921), 114 Atl. 296.

The usual practical impossibility of bringing those persons into court from whose personal knowledge and reports another, whose duty it was, wrote them in the book of original entries, has induced other courts to lay down a still different rule of admissibility for book accounts. It is enough in such jurisdictions to show that the account book offered was made in the regular course of business, if the system of making the entries was explained and it appeared that accuracy would probably follow from it. The elements of necessity and trustworthiness—always to be found before extra-judicial statements are admissible—were deemed to be present.

Among the pioneer cases in which this more liberal rule was adopted was *Givens* v. *Pierson's Admx.,* 167 Ky. 574. The bookkeeper of a large establishment testified that as a clerk made a sale he entered it on a ticket, from which the witness would copy the transaction on the books. The bookkeeper had no other knowledge of the transactions; he could say nothing as to the correctness of the items made on the tickets by the clerks. To admit the books as evidence of the transaction, no other proof was required than to show the method used in making them, and to identify them. It was immaterial, the court said, whether or not those who made the memoranda on the tickets could be brought into court to testify. The demands of modern business for such a rule were expressly stated as causing this decision. "And so this change in business methods has made necessary the broadening of the rule admitting book entries as substantive evidence, and now the test of the admissibility of this class of evidence does not depend so much on whether the entry offered in evidence was made on a permanent book at the time the transaction actually occurred by the clerk who attended to it as it does on the fact that it was made in the usual manner in which the business is conducted, although the entry may be made by a person whose only information is gained from the tickets furnished him by the clerks or other persons who actually attended to the business," said the court. See also, *White Sewing Machine Co.* v. *Gilmore Furniture Co.,* 128 Va. 630; *Seaboard Air Line Ry. Co.* v. *R. R. Commissioners,* 86 S. C. 91; *Loveman, Joseph & Loeb* v. *McQueen,* 203 Ala. 280; *Bush* v. *Taylor,* 136 Ark. 554; *Montgomery & Mullen Lumber Co.* v. *Ocean Park Scenic Ry.,* 32 Cal. App. 32. In the last case, the books were allowed in evidence when one who was familiar with the method of keeping them testified as to that, and identified the books. In *Gallatin Co. Farmers' Alliance* v. *Flannery,* 59 Mont. 534, this was held to be error, since the bookkeeper was available as a witness. The former holding is undoubtedly correct; anyone with knowledge of these facts should be allowed to testify to them.

What may be considered a further liberalization of the rule is found in

the late case of *Billingsley* v. *U. S.* (C. C. A., 1921), 274 Fed. 86. The books were identified by the witness Levy, who assisted in keeping them; this witness also acted as a salesman and testified that he had sold goods to the defendants. But it does not appear that he had any personal knowledge that the goods entered in the books had been delivered to the defendant. He also said that the books were kept in the regular course of business. The court said: "These books were properly kept * * * in the regular course of business by a person employed for that purpose. It was wholly unimportant whether the witness Levy made any or all the entries therein or not, and equally unimportant whether or not he had any recollection in reference to particular sales." The requirement here is less than that of cases following *Givens* v. *Pierson's Admx., supra,* in that no description of the method of keeping the books was required. This should be demanded by the courts. There is a possibility that under such a lenient rule of admissibility as in the *Billingsley* case self-serving documents may be introduced in evidence. Compelling the party offering the book to explain the system by which it is kept places no unreasonable burden upon him and at the same time affords the court a fair opportunity of deciding upon the trustworthiness of the book.

The courts in the main have met a changed situation well, and in changing a rule of evidence to meet altered circumstances have made a concrete application of the words of Chief Justice Shaw in *Norway Plains Co.* v. *B. & M. R. R. Co.,* 1 Gray (Mass.) 263: "It is one of the great merits and advantages of the common law that instead of a series of detailed practical rules *** the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. * * * When new practices spring up, new combinations of fact arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of these circumstances." G. E. L.

MARITIME LAW—PERSONALITY OF SHIP—IMMUNITY OF GOVERNMENT PROPERTY.—The recent opinions of the Supreme Court in the three cases of the *Western Maid, Liberty,* and *Carolinian* (U. S. Sup. Ct., January 3, 1922) emphasize the non-liability of national ships in cases of collision. The *Western Maid,* owned by the United States and manned by the navy, was in collision in New York harbor. The *Liberty* was a pilot boat under charter to the government and had a collision in the harbor of Boston. The *Carolinian,* also a chartered ship, had done similar damage in Brest, France. The two latter had been re-delivered to the owners, and the former to the U. S. Shipping Board, when the libels were filed, so that the process in no way interfered with the possession of the sovereign. In each case the Supreme Court issued its extraordinary writ of prohibition to prevent district courts from exercising jurisdiction.

It had been the general opinion that ships of the government incurred the same liabilty as those of individuals on account of maritime transactions, although that liability might not be enforced where it would be necessary to take the *res* out of the possession of the government by any writ or process of the court. *Davis,* 10 Wall. 15. The practice prevailed, to some extent at least, of filing a libel *in rem,* without the prayer for process, and requesting an appearance on behalf of the United States, in analogy with the English practice described in *The Siren,* 7 Wall. 152, 154. The existence of the maritime lien was assumed and suits *in rem* have been frequent, subject to the rule that property of the government might not be attached unless it could be done without disturbing the possession of the United States. Thus the books contain suits for general average, *U. S.* v. *Wilder,* 3 Sumner 308; salvage, *U. S.* v. *Morgan,* 99 Fed. 572; sailor's wages, *St. Jago de Cuba,* 9 Wheat 409; and material-men's claims, *Rev. Cutter No. 1,* Brown's Admiralty 76. All cases of this nature pre-suppose the existence of a maritime lien, inherent in the *res* itself. If the government consented to the suit, or if the suit could be prosecuted without disturbing its possession, the lien was enforced as in ordinary cases. The present cases, however, proceed on the negation of the lien itself, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp." The result would seem to be that henceforward there can be no proceeding *in rem* against property which was in the possession of the United States at the time the cause of action accrued. Unless a maritime lien arises out of the transaction itself, admiralty jurisdiction *in rem* is unthinkable, for such liens are not created by subsequent agreements. Nothing subsequent may supply an original lack of vitality. It is difficult to reconcile the decision with the *Siren, supra,* the *Davis,* 10 Wall 15, and *U. S.* v. *Lee,* 106 U. S. 196.

The brilliant writer of the majority opinion, Mr. Justice Holmes, answered the fundamental question, What constitutes the law? by "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (Collected Legal Papers, 173). In the same address, the body of reports, treatises and statutes are called "the sybilline leaves in which are gathered the scattered prophecies of the past upon the cases in which the axe will fall." The metaphor is a striking one; according to Vergil (*Æneid,* III, 452), the Sibyl wrote her prophecies on the leaves of trees and so arranged them within the cave that the approach of inquirers blew them into such confusion that their meaning became incomprehensible, —*inconsulti abeunt sedemque odere Sibyllae.* The line will fit more than one admiralty practitioner whose clients are asking opinions about cargoes, for instance, lost in a collision between a car-ferry operated by the Director-General of Railroads and a Navy transport allocated to the Shipping Board. The goal of the law is stability in fundamentals and the maritime law has enough reports and treatises and statutes to furnish a more substantial foundation than foliage, but its students are finding more truth than poetry in the metaphor. This will be more evident if the decision indicates a modi-

fication of the underlying doctrine of the personality of the ship. The minority of the court, in a vigorous dissent, would seem apprehensive of this result. Such a consequence would be unfortunate. The basis of admiralty jurisdiction, and the only reason for not blending it with the common law, is its proceeding *in rem*, and that proceeding depends on the theory of maritime liens, which, in itself, rests upon the individuality of the ship. From the standpoint of business, the ship cannot sail without credit and it cannot have credit without maritime liens. These are familiar platitudes, but they are derived from the inherent nature of the business itself. Another is that capital cannot be secured for the business unless the investor can be assured of a definite limitation of liability, and this ultimately depends upon the personification of the ship. Tradesmen will not furnish a ship with supplies nor salvors aid her in peril unless they have the assurance of the lien. The importance of the lien is quite as important in matters of tort, although not as conspicuous, since, for example, it is one of the elements of the underwriter's rate of premium for the running-down clause in the marine policy. At a time when we are making a colossal effort to establish a mercantile marine, with ships publicly, and not privately, owned, it will be unfortunate to impair their credit and segregate them further from the settled channels of the general maritime law. The majority opinion, it is true, warns us that "we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow." There is, however, a very plain and definite law, to which even the United States must bow if it is to succeed in maritime affairs, and that is the general maritime law, or common law of the sea, and the established practices and requirements of the business. G. L. C.

MARITIME LAW—SHIP UNDER CONSTRUCTION—WORKMAN'S COMPENSATION. —In *Ship Company* v. *Rhode* (U. S. Sup. Ct., January 3, 1922) the Supreme Court reaffirms the rule that locality is the test of admiralty jurisdiction in matters of tort, even if the injury was received upon a ship in the process of construction, so long as it was afloat. The tort was consummated upon navigable waters; that satisfies the criterion. The fact that the ship was not yet within the jurisdiction (because of the ship-building dogma) is immaterial; locality controls.

The second question was whether the exclusive features of the Oregon Workmen's Compensation Act abrogated the right to recover damages in admiralty. That act entitles the injured workman to receive specific payments and provides that "the right to receive such sums shall be in lieu of all claims against his employer." In the present case the workman had sued the employer in admiralty, and the Oregon statute is held to preclude the suit because it prescribes an exclusive remedy for the injury involved. It is generally held that what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere, and that where an obligation

ex delicto to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. *Phillips* v. *Eyre,* L. R. 6 Q. B. 1. Under this rule, the state statute would control in all non-maritime transactions, because the parties had contracted with reference to it. The construction of a ship is no different from the construction of a house, so far as the Compensation Act is concerned, and where the injured party comes into a court of another jurisdiction his rights are measured by the *lex locus delicti.* G. L. C.

THE "HOT TRAIL" INTO MEXICO AND EXTRADITION ANALOGIES.—The recent decision of the Texas Court of Criminal Appeals in *Dominguez* v. *State,* 234 S. W. 79, has given us an important precedent and also a valuable example of the solution of novel problems by means of analogies. A detachment of the military forces of the United States had been authorized by the War Department to enter Mexico on the "hot trail" in pursuit of bandits. While following a "hot trail" this detachment arrested Dominguez, a native citizen and resident of Mexico, and returned with him to the United States. It developed later that he was not one of the bandits who made the "hot trail." Dominguez was thereupon turned over, without his consent, to the authorities of Texas, and was indicted and convicted for a murder previously committed in Texas. It was held upon appeal that the prisoner might resist trial for the offense charged in the indictment until such time as he should voluntarily subject himself to the jurisdiction of the United States or until the consent of the Mexican government to his trial should be obtained.

There was no precedent in the decided cases. Counsel argued for the application by analogy of the principles which control in the decision of extradition cases. In reliance upon the extradition analogies the case was decided.

In general, apart from treaty, independent states are said to be under no international obligation to surrender fugitives from justice. HYDE, INT. LAW, I, § 311; MOORE, DIGEST, IV, 245; MOORE, EXTRADITION, I, 21 ff. The facility with which criminals may find asylum in other countries has led most states to conclude treaties in which provision is made for the extradition of fugitives charged with any one or more of an enumerated list of crimes. See the Extradition Treaty with Mexico of 1899, art. 2, and the Supplementary Extradition Convention of 1903, MALLOY, TREATIES, I, 1184, 1193. See also HYDE, I, §§ 313 ff. The extradition of fugitives is thus a concession and compromise defined in treaties, a mitigation of strict right in the common interest of all civilized states. Comity and good faith among nations require that the concession should not be overtaxed or abused. It follows, according to the rule generally approved, and expressly affirmed by the Supreme Court of the United States, that "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given

him, after his release or trial upon such charge, to return to the country from whose asylum he has been forcibly taken under those proceedings." *United States* v. *Rauscher,* 119 U. S. 407, 430. See HYDE, I, § 322; MOORE, EXTRADITION, I, 219 ff. See also *Johnson* v. *Browne,* 205 U. S. 309. Compare *Collins* v. *O'Neil,* 214 U. S. 113.

While the rule of the *Rauscher* case has frequently been so stated as to emphasize the extradited prisoner's *right* to resist trial upon any other charge than the one upon which he was extradited, it is submitted that the prisoner's right is only incidental and a convenient safeguard against the possibility that the confidence of the state of asylum may be abused. See *United States* v. *Rauscher,* 119 U. S. 407, 419-22; *Ker* v. *Illinois,* 119 U. S. 436, 443; MOORE, EXTRADITION, II, 1042. This analysis finds strong support in the circumstance that the rule of the *Rauscher* case does not apply between the several states of the United States where considerations of international comity and good faith are not involved. *Lascelles* v. *Georgia,* 148 U. S. 537; MOORE, EXTRADITION, II, 1035 ff. See 20 MICH. L. REV. 449. It is further supported by the circumstance that the rule does not apply where the prisoner has been abducted or kidnapped from the state of asylum. See *Ker* v. *Illinois,* 119 U. S. 436, decided at the same time as the *Rauscher* case. HYDE, I, § 321; MOORE, EXTRADITION, I, 294 ff. The abduction or kidnapping, as in the *Ker case,* is a violation of jurisdiction of which the asylum state may justly complain; but it seems clear that the recognition of a right in the prisoner to resist trial, so far from operating to prevent a breach of faith between nations or to afford the affronted state adequate satisfaction, would only add insult to injury.

If the prisoner is regularly extradited, therefore, as in the *Rauscher* case, he may be tried only for the offense for which he is extradited; but if he is kidnapped, as in the *Ker* case, considerations of international comity and good faith afford him no protection. Of these two rules, entirely consistent if the reasons therefor are understood, which is the better suited to the novel situation presented in *Dominguez* v. *State?* Viewing the situation superficially, an analogy with the *Ker* case would have been more plausible. Inasmuch, however, as the pursuit and arrest of bandits in Mexico without the consent of the Mexican government would have been a gross violation of Mexican jurisdiction, the Court indulged the presumption—with entire propriety, it is submitted—that instructions from the War Department to follow the "hot trail" were issued pursuant to some kind of agreement with Mexico. This presumption brought the case within the reason and hence within the rule of *United States* v. *Rauscher.* Considerations of international comity and good faith are quite as important in case of the pursuit and capture of bandits pursuant to agreement as in case of extradition under treaty. Had one of the bandits pursued been captured, he should not have been tried for any other offense than that which started the "hot trail." No greater right was acquired as regards Dominguez, who was wrongly arrested on the mistaken assumption that he was one of the bandits pursued.

E. D. D.