The Immunity of Merchant Vessels When Owned by Foreign Governments

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WORDS are flexible"—so says the most epigrammatic of the Justices of the Supreme Court of the United States, and it may be added that there is magic in words.

In no field is the magic flexibility of words more apparent than in the decisions which have to do with sovereign immunities. In the American decisions on this subject it sometimes appears that this magic flexibility is accompanied by vagueness of thought and by the attraction of striking but inapplicable analogies based on a situation which has no counterpart in the American mise-en-scène.

The theory of sovereign immunity is composed of very ancient constituents. In the foundation lies the Roman principle of the imperial omnipotence of a personal despot, as shortly summarized in the statement quod principi placuit, legis habet vigorem, which was of course based upon the idea of a personal ruler whose powers were absolute, and not subject to constraint by any other human being. In the Middle Ages every ruler accepted this statement of the despotic power of a sovereign as a justification for attempting its exercise. It had a logical corollary, and the common law of England made explicit what had been implicit in Constantinople by the maxim, “the King can do no wrong.” From

1 International Stevedoring Co. v. Haverty, No. 236, October Term, 1926, decided October 18, 1926, by Mr. Justice Holmes.
2 Dig. 1.4.1; Inst. 1.2.1.
the first this maxim was interpreted narrowly in the field of private rights, whatever its political implications may have been, and the Tudor and Stuart monarchs made available to the subject more extended powers of relief against the Crown. In France the political development of the concept of the absolute sovereignty of an individual person reached its logical and complete culmination when Louis XIV identified the State with himself. In England the political principle never went so far, and with respect to private rights no claim to absolute immunity appears ever to have been set up by the King.

As Professor Holdsworth has shown us, remedies have been granted against the Crown since the thirteenth century by various means, especially by a petition of right, and the principle which has governed these remedies is that they should be available against the Crown in any case where a subject would have a cause of action against a fellow-subject.

"Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution." Such immunity might perhaps be granted to the personal acts of a sovereign individual, but to extend this personal immunity to the entire machinery of government and to make it an attribute of sovereignty in a broad sense is extremely illogical.

In the United States it is difficult to locate the spot where the sovereign power reposes. The Federal government was in its inception a government whose powers were not only strictly limited but were parcelled out among three separate and co-ordinate branches. The State governments, leaving out of consideration

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5 Ib., 38 L. Q. Rev., 141, 280.
6 Ib., 292.
7 Borchard, Government Liability In Tort (1925), 34 Yale L. J., 4.
8 Munroe Smith, Jurisprudence, p. 32. "* * * limited powers may properly be attributed to any organ of government, and our public rights are in fact a combination of definite public interests with limited governmental powers. The possible developments of this line of thought in private and in public law are as yet imperfectly realized." In Truax v. Corrigan, 257 U. S. 312 (1921), Mr. Justice Holmes, at p. 344, in his dissenting opinion refers to the States as "quasi-sovereign."
the limitations placed upon them by the State constitutions, lack almost all the powers which the Federal government possesses. Even the people of the various States are not sovereign, as the Civil War and certain of the constitutional amendments attest. If there be any ultimate sovereign power it must rest collectively with the entire people of the United States.

Nevertheless the old common law maxim has been taken over, with the substitution of “State” and “United States” for “King,” and it has been given a broader scope than it was ever given in England, while the petition of right, by which the practical consequences of this misunderstood theory were held in check, has been forgotten. This has been done indirectly and in spite of the fact that the English common law as such has never applied in the United States, and in the face of two square decisions of the United States Supreme Court which most properly hold that the old maxim, as now understood, has no place in our system of government. In spite of such decisions, however, there is no legal proposition where the American courts are more at one than that the government is not liable for torts, and the reason given in support is usually the same one which supported the mediæval maxim, that it would be absurd for the sovereign to compel himself to appear in the courts which he himself has established and perhaps later to enforce a judgment against himself, rendered by his own subordinates at the request of a non-sovereign.

8 Wheaton and Donaldson v. Peters, 8 Pet. 591, 659 (1834).
10 “Praecipe Henrico Rege Angliae ut, etc.”
11 Brooke’s Abridgment, Petition, pl. 12 “car le roye ne poet escrier ne contermaunde luy mesme.”
12 The Western Maid, 257 U. S. 419, 432-433 (1922). * * * Also we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld. * * * The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, at least when employed in carrying on the operations of the Government,—specifically appropriated to national objects, in the language of Buchanan v. Alexander, 4 How. 20,—yet if that property passes into other hands, perhaps of an innocent purchaser,
Not only is this principle of immunity applied to the activities of the State and National governments, but it is equally applied to those of foreign republics and constitutional monarchies whose ultimate sources of sovereignty may be as elusive as are our own, so that in republican America today there is a far greater governmental immunity from liability for tort than exists anywhere in Europe, and one of the absurdities to which such an immunity leads is the subject of the present article.

Whatever mediæval theories might have been, the better opinion since the time of Montesquieu and Rousseau has been that the State is the legal organization of the interests of a community and not an extra-legal political force imposed from without by physical power. As Professor Duguit has said, 13

"* * * le droit existe comme règle impérative au-dessus et indépendamment de l'État, que la règle de droit est une création spontanée du milieu social, de la conscience sociale ou, si l'on préfère, de la somme des consciences individuelles, qu'elle s'applique telle quelle à tous les individus, aussi bien aux gouvernants qu'aux gouvernés, * * *"

The State, therefore, should be as subject to the law as is the individual, for the government officials are the representatives or servants of the community, 13a and the tort of one of them, it is submitted, must shock the collective conscience of the community as it may be seized upon a claim that had no existence before. * * *" But compare the statement of the Supreme Court in Chalentis v. Luckenbach S.S. Co., 247 U. S. 372, 384 (1918). "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. * * *" Compare also the opinion of the Supreme Court, written by Mr. Justice Holmes, in United States v. The Thelda, 266 U. S. 328, 340 (1924), "* * * The absence of legal liability in a case where but for its [the government's] sovereignty it would be liable does not destroy the justice of the claim against it. * * *

13 2 Droit Constitutionnel, 90 (1923).

13a Professor Moreau has pointed this out with the greatest of clarity, from a slightly different viewpoint, saying, Manuel de Droit Administratif, 1080-1081 (1909):

"Entre les personnes physiques, le conflit est dénoué par un jugement, par l'intervention d'une juridiction qui dit et impose le droit aux prétentions rivales.

"Il en est de même lorsque l'un des adversaires est une personne administrative. On a souvent admis que l'État se soumit à une juridiction; on y a même vu des difficultés juridiques, l'État-Administration étant difficilement séparable et justiciable de l'État-Juridiction.
much as the tort of any other individual. The modern trend of enlightened legal opinion\textsuperscript{14} appears to be in favor of holding the government liable for the torts committed by its agents, even though in the exercise of the customary governmental functions. There is a growing stream of Anglo-American legislation which is achieving the same result piecemeal.\textsuperscript{15} \textit{A fortiori}, when a government engages in what has always hitherto been considered to be a business enterprise it would seem that it ought to be held to the same standards of responsibility as a private individual.

I.

Since the war the question has become of considerable importance, because many governments have been quite active in a commercial way. With the growth of government owned and operated merchant ships the matter has come up in the maritime law a number of times, and a series of decisions has resulted in a modern statement of the law, both as to the extent of the im-

\textsuperscript{14}Col. L. Rev. 467; 30 Harv. L. Rev. 20; 32 Harv. L. Rev. 447; 34 Harv. L. Rev. 165; 34 Yale L. J. 1; 38 L. Q. Rev. 295; 3 Maitland, Collected Papers, 263; Pound, The Spirit Of The Common Law (1921), 189.

munity which is to be granted and also as to the proper method of claiming that immunity.

Before the war the American decisions only went so far as to say that the person of an individual sovereign, the ambassador of a sovereign, foreign military forces entering the country by agreement, and vessels of war or other vessels and property affected with a public use were exempt from our territorial jurisdiction. Bearing this in mind it is interesting to examine the authorities in Moore's International Law Digest, which was published in 1906. No cases are given which relate to merchantmen, and Moore states the following as the general principle:

"The judicial authorities, as thus disclosed, uniformly place the exemption of a foreign man-of-war from the local jurisdiction on the ground of its being the public property of a sovereign, engaged in public business. This principle has been applied to other property. * * * 16

Moore rightly makes the test of immunity the use of public property in the public business. The earlier American cases are in accordance with this principle.

In The Schooner Exchange v. McFaddon (1812), 7 Cranch, 112, the question of the exemption of a ship of a friendly sovereign first arose in our courts, and it was held by Chief Justice Marshall that a public armed vessel was not subject to the jurisdiction of the American courts.

The general proposition that the sovereign could not be sued and that his property could not be seized was a practical support for the proposition that the sovereign was not liable for tort, as no such liability could be enforced in any practical way. Nevertheless the courts were not insensible to the consequent hardship and injustice and began to nibble away in derogation of this principle.

In United States v. Wilder, 3 Sumn. 308 (1838) Fed. Cas. No. 16,694, Mr. Justice Story held that when government owned cargoes were not in the possession of the government they could be

15a Ex Parte Muir, 254 U. S. 522 (1920); The Pesaro, 255 U. S. 216 (1921); Ex Parte Hussein Lutfi Bey, 256 U. S. 616 (1921); The Sao Vicente, 260 U. S. 151 (1922); The Gul Djemal, 264 U. S. 90 (1924); Ex Parte Transportes Marittimos, 264 U. S. 105 (1924).

16 2 Moore, Digest of International Law (1906), p. 591.
withheld until a maritime lien arising from the obligation of the cargo to contribute in general average was satisfied.

In The Siren, 7 Wall. 152 (1868), the United States Supreme Court went somewhat further. The Siren, having been captured in Charleston harbor, was on the way to Boston for adjudication as prize when she collided with another vessel. On arrival at Boston she was condemned as lawful prize. The owners of the sunken vessel intervened against the proceeds in the registry of the prize court and the Siren was held at fault for the collision. The Supreme Court allowed the owners of the sunken vessel to have their damages assessed and paid out of the proceeds of the Siren before any distribution was made to the captors. The Government had to seek the adjudication of a prize court in order to condemn the vessel, which was put into the possession of the court, and which was sold by its officers. Under these circumstances the court felt that it could enforce a lien which had attached to the vessel before the government's rights had been made complete by the prize adjudication.

In The Davis, 10 Wall. 15 (1869), the Supreme Court went a step further in the same direction. In this case salvors sought to enforce their lien for services against a ship and its cargo, which belonged to the government. The cargo was retained by the shipowner, pending the determination of the suit. The court held that the salvage lien could be enforced against the cargo which belonged to the government, under these circumstances. The court pointed out that such a lien could not be enforced by a suit against the United States, nor by seizing property which was in its possession, but that where property did not have to be taken out of the possession of the government the lien could be enforced, and the government, being thus compelled to appear in court to assert its claim, would be compelled to discharge the lien before the court would order that the property be delivered to it.

As far as the Supreme Court was concerned, there the matter rested until 1922, when there were decided the cases of The Western Maid, The Liberty and The Carolinian, 257 U. S. 419. The Western Maid was owned by the United States and had been assigned by the United States Shipping Board to the War Department. She was manned with a Navy crew, and, early in 1919, while loaded with foodstuffs destined for civilian relief in Central
Europe, she was in collision in New York Harbor. She was libelled after she had been returned to the Shipping Board. The Liberty and the Carolinian were privately owned but had been chartered to the government on a bare-boat basis, and while under charter were in collision. Suit was brought against them after they had been returned to their private owners. In each case the Supreme Court held in an opinion written by Mr. Justice Holmes that because the government could not have been sued at the time the collisions took place no maritime liens attached which could be enforced when the vessels were no longer in the possession of the government. This decision may have been a logical extension of the principle of sovereign immunity, but as a practical matter it was unfortunate, and there was much disagreement with it in the legal periodicals.

In United States v. The Thekla, 266 U. S. 328 (1924), Mr. Justice Holmes again delivered the opinion of the court, and in doing so his opinion certainly modified some of the extreme Austinian theories which he had enunciated in The Western Maid as to the position of the sovereign, although the decision itself in The Thekla does not appear to modify that of The Western Maid. Indeed the Supreme Court expressly said in The Thekla that it did not modify The Western Maid. The Thekla case holds that when the government has libelled a second vessel for a collision with a government ship, the second ship may cross-libel the government ship, and that the court may then give judgment for either side as the justice of the cause may dictate. This is placed on the ground that the subject matter of the suit is the collision, and that when the United States comes into court as a suitor it impliedly consents that justice may be done as to the subject matter of the suit.

In L. Littlejohn & Co. v. United States, 270 U. S. 215 (1926), the facts were that the Antigone and the Gaelic Prince had collided, and it was alleged that the Antigone was at fault. The Antigone had formerly been a privately-owned German merchantman named the Neckar, which had taken refuge in the United States prior to our declaration of war with Germany. By the Joint Resolution of May 12, 1917, the President was authorized to take over for the United States the immediate possession and title

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of all enemy-owned vessels. This was done and before the time of
the collision she had been transferred to the Army Transport
Service. The government, of course, claimed immunity under The
Western Maid decision, while the appellants claimed that the gov-
ernment could not obtain lawful possession and title save by a prize
adjudication, and that to grant immunity in the present case would
be to extend the theory of immunity beyond any previous de-
cision. The Supreme Court held that the Joint Resolution was
within the power of Congress, and as the government had obtained
the possession and title by the seizure no prize adjudication was
required. No liability, therefore, attached to the government for
the collision.

In The Pesaro \(^{18}\) the Supreme Court has now rounded out the
doctrine of governmental immunity. The Pesaro was libelled in
rem for failure to deliver cargo which she had accepted in Italy
for delivery at New York. It was stipulated that she was owned
by the Italian Government, that she was not connected with its
military or naval forces and that she was employed in the carriage
of merchandise for hire. The Italian Government claimed that she
was immune from judicial process. The Supreme Court applied
the test which has been set forth above—whether the vessel was
a public vessel devoted to a public purpose—and came to the fol-
lowing conclusion:

"We think the principles are applicable alike to all ships
held and used by a government for a public purpose, and
that when, for the purpose of advancing the trade of its
people or providing revenue for its treasury, a government
acquires, mans and operates ships in the carrying trade,
they are public ships in the same sense that war ships are.
We know of no international usage which regards the main-
tenance and advancement of the economic welfare of a peo-
ple in time of peace as any less a public purpose than the
maintenance and training of a naval force."

If it can be said that in the decision of The Pesaro the doc-
trine of governmental immunity has been rounded out, it can also
be said that by this decision that same doctrine has been pushed
to a logical extreme, and that it is now near to the breaking point.
It may be that the decision carries to a logical conclusion the
principles set forth in the earlier cases, but this is controvertible,

and in the modern, work-a-day world, where the law is thought of
as social engineering, and as a tool whereby the community
achieves the results of social purposes, it is believed that there will
be few who will conceive that an unbending adherence to the logical
canons of St. Thomas Aquinas is the fairest jewel set in the crown
of justice.

Certainly the decision will lead to results at once absurd and
unfortunate.

II.

An unfortunate result of the decision is that it has created a
large class of vessels which are entirely irresponsible in the eyes
of the American law. It is certain that no contractual claims
against them can now be made in our courts, and it seems probable
that they will enjoy an equal exemption for claims based on col-
losion, death, or any other personal injury.

This result is most probably contrary to the opinion of the
entire civilized community of vessel owners, vessel operators, in-
surance underwriters and cargo shippers on the subject. It is their
opinion that while the sovereign should not be disturbed in the
physical enjoyment of its property, the pecuniary responsibility of
a government-owned merchant vessel ought to be the same as that
of a private person who operates the vessel. 19

The opinion of the commercial world is very plainly shown
by a resolution unanimously passed at the meeting of the Interna-
tional Maritime Committee held at Gothenburg, Sweden, in August,
1923. It was there agreed that the general or international scheme
of treatment of public vessels would be expressed by the following
convention:

"ART. 1. Vessels owned or operated by States, cargoes
owned by them and cargo and passengers carried on such
vessels, and the States owning or operating such vessels,
shall be subjected, in respect of claims relating to the opera-
tion of such vessels or to such cargoes, to the same rules of
liability and to the same obligations as those applicable to
private vessels, persons or cargoes.

19 Testimony of Judge Hough, May 21, 1924, p. 8 of the printed Hearing
Before the Committee on the Judiciary, House of Representatives, Sixty-
Eight Congress, First Session, on H. R. 9075.
"Art. 2. Except in the case of the ships and cargoes mentioned in paragraph 3, such liabilities shall be enforceable by the tribunals having jurisdiction over and by the procedure applicable to a privately owned ship or cargo or the owner thereof.

"Art. 3. In the case of—

(a) Ships of war and other vessels owned or operated by the State and employed only in governmental non-commercial work,

(b) State-owned cargo carried only for the purpose of governmental non-commercial work on vessels owned or operated by the State, such liabilities shall be enforceable only by action before the competent tribunals of the State owning or operating the vessel in respect of which the claim arises.

"Art. 4. The provisions of this convention will be applied in every contracting State in all cases where the claimant is a citizen of one of the contracting States, provided always that nothing in this convention shall prevent any of the contracting States from settling by its own laws the rights allowed to its own citizens before its own courts."

It will also probably be an accurate prediction to say that the result will be contrary to the opinion of the Admiralty Bar. In 1922 the International Conference on Maritime Law at Brussels adopted a resolution whose phraseology differs but slightly from the one set forth above, and whose purport is the same, and this resolution was approved of and printed by the Committee on Admiralty and Maritime Law in the 1923 Report of the American Bar Association.

III.

The decision has also an absurd result. In an earlier decision on the merits in the District Court, which is to be found reported, it appeared that the Pesaro would have been subject to arrest and to suit in Italy. The practical result of the decision is, therefore, that an American citizen enjoys a liberty of suit in the

20 Pages 8-9, Hearing Before the Committee on the Judiciary, House of Representatives, Sixty-eighth Congress, First Session, on H. R. 9075. In 40 Harv. L. Rev. 126, disagreement with the decision is expressed.

Italian courts against an Italian government merchant vessel which is denied to him in the courts of his own country! The consequence flowing from this is that the Supreme Court has compelled American citizens to sue in the Italian courts for the relief which is denied them here! *Summun jus, summa injuria.*

Judge Mack, in his excellent and full discussion of the case on the merits, covered both of these aspects, saying:

"But the fact that the steamship *Pesaro* itself is subject to the ordinary processes of the Italian court would seem to be vital and decisive. There is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States. In *Bank of U. S. v. Planters' Bank of Georgia*, 9 Wheat. 904, Chief Justice Marshall said: ‘The State of Georgia, by giving to the bank its capacity to sue and be sued, voluntarily strips itself of sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. * * * We think * * * that the Planters' Bank of Georgia is not exempted from being sued in the federal courts, by the circumstance that the state is a corporator.'

"So it may be said here that the Italian government, by giving to the *Pesaro* the capacity to be sued in the Italian courts, voluntarily strips the *Pesaro* of its sovereign character and waives all privileges of that character; and that therefore the *Pesaro* is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship *Pesaro* in the courts of Italy, it is difficult to see why our tribunals should decline jurisdiction; there is less reason therefor in a case of this sort than in *The Belgeland*, 114 U.S. 355." ²²

"* * * But the enforcement of such judgments against foreign governments only through resort to distant foreign lands or through the delicate medium of diplomatic representations would fail adequately to serve the needs of modern economic life. These should indeed yield to the greater need of peaceful and harmonious international relations, but it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the *Pesaro*..." ²²

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would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed, it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern." 23

IV.

There were many grounds open to the Supreme Court on which it might have refused to decide in the Pesaro as it did.

Even if it felt that the logic of what it took to be the underlying principle governing international law was strong, it was not compelled to follow the rule. It is axiomatic that foreign law or international law does not bind a national tribunal *ex proprio vigore*, but only because the *lex fori* adopts it for its own and enforces it as the equivalent of the national law. Mr. Justice Holmes, in The Western Maid, where the Supreme Court refused to enforce a principle of the general maritime law, pointed this out, saying:

"In deciding this question we must realize that however ancient may be the traditions of maritime law, * * * 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 over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. * * *" 24

If by international law one means the Roman equivalent of *ius gentium*, the law common to all nations, then no such principle of governmental immunity is known to international law.

In England recovery may be had even for collisions where public war vessels are at fault.25 It is true that there is no direct

24 The Western Maid, 257 U. S. 419, 432 (1922).
25 The Athol, 1 W. Rob. 374 (1842); The Volcano, 2 W. Rob. 337 (1844); H. M. S. Swallow, Swa. 30 (1856); H. M. S. Inflexible, Swa. 33
legal remedy available against the Crown, but for over a century suits have been brought against the officer in command of the vessel, and in every case the Admiralty has defended the suit and paid whatever damages may have been assessed.\textsuperscript{26}

In France recovery may be had even against war vessels by direct suit against the Minister of the Marine, brought in the Council of State, which is the supreme administrative court of France. The question of liability is considered as though it were that of a private vessel.\textsuperscript{27}

The practice in Germany is particularly simple, for the ordinary courts take jurisdiction of such an action, and it is treated in every respect as if it were a suit between private parties.\textsuperscript{28}

The rule which governs in Italy has already been stated, and from these instances it will be seen that the principal maritime powers of Europe have granted such liberal remedies that if there could be said to be a general international rule it would be quite the opposite of the law laid down in the \textit{Pesaro}.

Indeed in years past the American government has sought redress in foreign chancelleries for injuries done to American vessels by public foreign vessels. The United States held that the Venezuelan government was responsible when a public vessel belonging to it sank an American vessel,\textsuperscript{29} and a similar liability was asserted against Mexico when a Mexican gunboat sank an American schooner.\textsuperscript{30}

Even more appropriately might the Supreme Court have refused to give its sanction to the doctrine of immunity on the

\begin{footnotes}
\textsuperscript{26} Robertson, Civil Proceedings Against The Crown, p. 525; Matsunami, Collisions Between Warships And Merchant Vessels, p. 260.
\textsuperscript{27} 34 Revue Internationale du Droit Maritime, pp. 5, 6, 133; 1 Revue de Droit Maritime Comparé, pp. 50-52, 244, 400, 508; 2 Le Droit Maritime Français, p. 248.
\textsuperscript{28} 3 Von Ronne, Das Staatsrecht der Preussischen Monarchie, pp. 583-584; 2 Bornhak, Preussisches Staatsrecht, p. 47; 2 Goodnow, Comparative Administrative Law, pp. 161-162.
\textsuperscript{29} 6 Moore, International Law Digest, p. 757.
\textsuperscript{30} Ib., 679.
\end{footnotes}
ground that it was contrary to the public policy of the United States. This is a principle common to all jurisprudence, and in a recent case in which it refused to give effect to a Russian Soviet decree of nationalization the Tribunal of Commerce of Marseilles stated most aptly this general rule of all courts, saying:

"Attendu qu'il est de doctrine et de jurisprudence, en matière de droit public, que la justice doit écarter l'application des dispositions d'une loi étrangère, qui sont contraires à l'ordre public français * * * que, si le fait de la reconnaissance * jure * ne permet plus aux tribunaux français d'ignorer la législation du Gouvernement des Soviets, il laisse aux juges leur droit souverain d'apprécier dans les espèces qui leur sont soumises, si les dispositions légales dont il s'agirait de faire application sont contraires à l'ordre public; que tel est le cas du décret, * * * 31"

It has certainly been the public policy of the United States during recent years to assume the liability of an ordinary citizen when it has engaged in private business, and the courts do not seem to have had much difficulty in drawing the distinction between the two capacities of the government. This policy has been further emphasized by a number of recent statutes.

V.

The distinction between the two capacities was seen by Chief Justice Marshall, who, in The Schooner Exchange v. McFaddon, 7 Cranch, 112 (1812), said as follows, at page 145:

"Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern."

3 État Russe Ropit et autres (1925), Le Droit Maritime Français. 460, 465.
In United States v. Wilder, 3 Sumn. 308 (1838), Fed. Cas. No. 16,694, Justice Story referred to the decision in The Schooner Exchange, and said concerning it:

"* * * But it was not decided, that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to a similar exemption. * * *"

Earlier in the same opinion Justice Story discussed the sovereign immunity which has always been accorded to war vessels, and he then made this observation:

"* * * That distinction might well apply to property like public ships of war, held by the sovereign jure corona, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce. * * *"

By the test of dedication to the public service, to which reference has been made above, and which the Supreme Court made the criterion in the Pesaro, the courts of Massachusetts held that no lien could be enforced against lightships, the title to which had vested in the United States. The court said at page 164:

"* * * these light boats were built and held for public objects only, and were unsuitable for any other. They were, in the precise and emphatic language of the plea to the jurisdiction, 'held and owned by the United States for public uses, and as instruments for the execution of their sovereign and constitutional powers.' * * *"

The same general test for ascertaining whether immunity should be accorded to a government vessel was then laid down by the court at page 165:

"* * * The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted. * * *"

The eminent Lord Stowell in The Swift, 1 Dod. 320 (1813), expressed himself to the same effect as Justice Story, saying, at page 339:

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The utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operations of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffic on the common principle that other traders traffic; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffic to the general rules by which all trade is regulated. But the present question is,—Is this distribution of the public stores for the public use, a trading within the view of the statute? Looking to authority, as well as principle, and to the public convenience, I conceive, it is not. * * *"

The distinction between the public, or true governmental, capacity, and the private, or commercial, capacity is well known to the law. These separate capacities have been fused by the Supreme Court in the *Pesaro*, and this fusion is effected whenever any foreign government chooses to assert it. The Supreme Court has said in so many words that to advance the trade of its people and to maintain its economic welfare by entering the shipping business is a proper public function of any government. This may be true, but it begs the question as to whether it is expedient, under modern conditions, to extend to these "public" business activities of governments the immunity which has heretofore been granted only to their public administrative activities. Moreover, if it is advantageous that the national trade shall be extended by the use of ships flying the national flag, it is a purely fortuitous fact that a government happens to own some of the ships and that private persons own others: the one important fact is that the trade shall be extended in the ships. Yet if the latter should be the avowed public policy and public purpose of a foreign government there are few who would contend that the private ships should enjoy an equal exemption with the government ships, based on the avowed public purpose.

VI.

It has always been the public policy and the law of the United States that when the Government engages in business it shall do so on the same basis as any private citizen.
In Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 904 (1824), Chief Justice Marshall said at page 907:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * *

Similarly, in a recent unreported case in which the Alien Property Custodian attempted to claim governmental immunity, the court said:

"It would seem unthinkable, as it would be both unreasonable and intolerable to assume that Congress contemplated or intended to clothe the Alien Property Custodian with full power and authority to engage in business, but with immunity from obligation of any kind whatever in respect thereof to those with whom he might happen to do business; since that must be the logical consequence of an asserted immunity from suit."

In Cooke v. United States, 91 U. S. 389 (1875), the Supreme Court said, at page 398:

"* * * Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. * * *"

In Rosenberg Brothers & Co. v. United States Shipping Board Emergency Fleet Corporation, the court said at page 380:

"* * * In every way possible, therefore, American ships must be made attractive to American cargoes, and American cargoes made profitable for American ships. It would be but a poor means to that end, if the courts were to strain the statutes under which merchant vessels operated by an agency of the government itself should be held free

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of liability for the loss of goods intrusted to their care.

"In a recent case (Director General of Railroads v. Kastenbaum, 263 U. S. 25) the Supreme Court had occasion to consider whether the government could be held for damages for false imprisonment for an arrest made on the demand of the detective force of a railroad while under federal control. The court, speaking through the Chief Justice, quotes from Missouri Pac. R. Co. v. Ault, 256 U. S. 563, 41 Sup. Ct. 593, 65 L. Ed. 1087, that 'the government undertook as a carrier to observe all existing laws,' and points out that the action for false imprisonment is 'in the nature of a trespass for a wrong or illegal act,' and therefore holds the government responsible.

"[2] So, throughout our judicial history, the tendency is to restrict, rather than to enlarge, the immunity of the government from suit—to hold it more and more to the same liability as a private corporation, when it engages in a private business, in competition with private enterprise. That this is a sound development no one would deny. That it should apply to admiralty with peculiar force seems to me in the very nature of things to be apparent."

In the case of The Gul Djemal,35 which involved a merchant vessel owned and operated by the Government of Turkey, the general situation was very similar to that in the Pesaro, and the court came to the same conclusion as Judge Mack in the Pesaro. In The Gul Djemal, the court said at page 569:

"* * * I will, however, observe that in my judgment a government which makes it possible, as here, for an individual, who is hedged about with no special immunities or prerogatives, to use sovereign property for purposes of trade and commerce, and in competition with that of private owners, has brought itself squarely within the declaration of the Supreme Court in Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244, * * *.*

"The existing immunities and prerogatives of governments are all but too extensive, and the one here claimed should not be permitted to destroy, as it would, the basic principle that in trade and commerce there should be for the persons engaged therein a fair field and no favors. * * *"

35 296 Fed. 567 (D. C. S. D. N. Y. 1922); affirmed, on the manner of claiming immunity, in 264 U. S. 90.
In United States v. Certain Subfreights Due The Neponset, in the court permitted interest on a judgment to be awarded against the United States in a suit under the Suits in Admiralty Act, and, in so deciding, the court said at page 133:

"* * * In Standard Oil Co. v. U. S., 267 U. S. 76, also referred to as The Llama, decided on February 2, 1925, the Supreme Court allowed interest in a suit on a policy of war risk insurance. Mr. Justice Holmes in delivering the opinion of the court uses the following language toward the end of the decision:

"'When the United States went into the insurance business, issued policies in familiar form, and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.'

"These remarks are applicable to the present suit, and lend force to the contention that Congress intended to place the United States on the same footing as private parties, when it undertook to operate ships as merchant vessels."

It is, of course, quite well settled that when the government enters into a contract with an individual or a corporation it divests itself of its sovereign character so far as concerns the particular transaction, and takes that of an ordinary citizen. The United States Supreme Court has held that when the State of Georgia operated a railroad in the State of Tennessee its enterprise was a private undertaking, so that it occupied the same position in Tennessee as would a private corporation authorized to own and operate a railroad; and that, as to that property, it could not claim sovereign privilege or immunity.

VII.

Congress, in many Acts, has recognized the liability of the United States for claims made against it. All claims arising out of contracts, whether express or implied, may be sued on in the


Court of Claims, and this privilege was granted in 1855.\textsuperscript{30}

The Federal Employees' Compensation Act, 1916, recognizes the responsibility and the obligation of the Federal Government to its employees who are injured in its service.\textsuperscript{40}

Earlier statutes recognized the validity of claims for collision caused by public vessels, up to certain amounts. The Secretary of the Navy was authorized to adjust claims,\textsuperscript{41} and this same authority was given to the Secretary of Commerce with reference to vessels of the Light House service.\textsuperscript{42} More recently the right has been given to every Federal Department to adjust, determine and settle claims made upon it for wrongs committed by its servants, up to a certain sum.\textsuperscript{42a}

At the last session of Congress there was pending a bill known as the Federal Tort Claims Act,\textsuperscript{43} which would have given every citizen the right to sue the government for the torts of its servants.

This general policy of the United States, as shown in the Acts of Congress, has been followed in the shipping business, where government owned merchant ships have been subjected to the same laws, regulations and liabilities as privately owned ships.

When the government first went into the shipping business in 1916 it made itself liable in the original Act,\textsuperscript{44} which provided as follows in Section 9:

"Every vessel purchased, chartered or leased from the board * * * while employed solely as [merchant vessels] shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

The foregoing provisions of Section 9 were carried over without

\textsuperscript{29} Act of February 24, 1855; 10 Stat. L. 612.
\textsuperscript{42a} Act of December 28, 1922; 42 Stat. L. 1066.
\textsuperscript{43} S. 1912, Sixty-ninth Congress, First Session.
\textsuperscript{44} Act of September 7, 1916; 39 Stat. L. 728.
alteration into the 1918 Act and also into the Merchant Marine Act of 1920.

This broad liability was not impaired by the Suits in Admiralty Act of 1920, which, while taking away the right to attach vessels belonging to the government, gave to suitors the explicit right to bring a pure in personam suit against the government. It is true that the lower courts are not in entire accord as to this, but the legislative history of the Act shows plainly that this was intended, and the provisions of Section 3 of the Act also prove it by the plainest inference.

Finally, in 1925, Congress rounded out the legislation relating to vessels owned by the American Government by providing that

Act of March 9, 1920; 41 Stat. L. 525.
Ib. Sec. 2. "That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. * * *

After the preparation of this article the Supreme Court passed upon the question and held unanimously, in the case of Eastern Transportation Co. v. United States, No. 57, October Term, 1926, decided January 3, 1927, that under the act the government can be sued on pure in personam claims. This decision is in entire accord with the text and the purpose of the act, as shown in its legislative history.

59 Cong. Rec. p. 1687, part 2 (1920). "Mr. Walsh [in supporting bill].— * * * with respect to merchant ships we have said in the shipping act, and we say by this bill, that the Government is operating vessels which it owns or controls as a business enterprise, and when the Government goes into that business enterprise, it ought to go upon the same footing as a private individual or a private corporation, and it ought to be subject to the same liabilities for any act of Government officials in carrying out that particular business enterprise. In carrying on the operation of these ships we are operating them in commerce, in competition with privately owned vessels and ships, and we ought to be put upon the same footing as those others; * * *"

"If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem whenever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit." Act of March 9, 1920, Section 3.
suit might be brought to recover for the maritime torts of vessels having a public, as distinguished from a commercial, nature.\(^{51}\)

Such is the history of the legislative policy of the United States, and it may be said that, so far as Congress is concerned, it intends that the liability of the United States with respect both to its war vessels and its merchant vessels shall be equal to that of the private owner of a merchantman. This result is quite as it should be, and it is in accord with the best modern thought,\(^{52}\) for it is absurd that the government should be less moral or less honest than its citizens are required to be. Over two hundred and fifty years ago, during the subservient period of the Restoration, it was most properly said by Baron Atkyns\(^{22a}\) that

"* * * the party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed, that he will be defective in either. And it would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him. * * *"

A century later Vattel stated what Justice Story called "this deep and solid principle of justice,"\(^{53}\) saying;\(^{54}\)

"Les Promesses, les Conventions, tous les Contrats privés du Souverain sont naturellement soumis aux mêmes règles, que ceux des particuliers. S'il s'élève quelques difficultés à ce sujet, il est également conforme à la bienséance, à la délicatesse des sentiments, qui doit briller particulièrement dans un Souverain, & à l'amour de la justice, de les faire décider par les Tribunaux de l'Etat: C'est aussi la pratique de tous les États policiés, & gouvernés par les Loix."

By the decision in the Pesaro, however, foreign governments enjoy privileges in respect to their merchant vessels which they do not claim at home and of which the United States Government has stripped itself by statute.


\(^{52}\) "It is a wholesome sight to see 'the Crown' sued and answering for its torts." 3 Maitland, Collected Papers, p. 263.

\(^{22a}\) Pawlett v. Attorney-General, Hardres 465, 469 (1668).

\(^{54}\) United States v. Wilder, 3 Sumn. 308, 317 (1838), Fed. Cas. No. 16,694.

\(^{54}\) 2 Vattel, Le Droit Des Gens (1758), Sec. 213.
Lest it should be said that “discussion is rather academic than useful in the face of superior authority,” the author hastens to point out that in this field the highest authority has not yet spoken. In The Schooner Exchange Chief Justice Marshall pointed out the way in which the difficulty can be solved. At page 141, he said:

“If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of friendly foreign powers, the conclusion seems irresistible, that they may enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.”

Chief Justice Marshall then goes on to develop this principle that the exemption of public war vessels is by an implied assent of the territorial sovereign, saying, at page 145:

“It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

“Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.

It is submitted that Congress should pass a law declaring that from and after a named date all foreign government owned merchant vessels entering the waters of the United States shall be conclusively presumed to have consented to be subject to the same laws, regulations and liabilities governing privately owned merchant vessels, and that such vessels shall for all legal purposes be deemed to have the status of privately owned vessels.

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55 7 Cranch 112.
56 Compare the decision of the Supreme Court in Patterson v. The Bark Eudora, 190 U. S. 169, 178 (1903): "Indeed, the implied consent to permit [foreign merchant vessels] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose."
Three centuries ago, while the Law Merchant was being incorporated piecemeal into the common law, in order to recover against the drawer of a bill of exchange it was necessary to plead the custom of the merchants, and that the drawer of such a bill was a merchant. Ultimately a case arose where the defendant pleaded in reply that he was a gentleman and not a merchant or a trader. Chief Justice Holt broke one of the fetters of the Law Merchant in holding him liable, nevertheless, saying:56

"But this drawing a bill must surely make him a trader for that purpose, * * * ."

And so now in this twentieth century the time is ripe for Congress to decree that foreign governments shall no longer be heard to say that they are gentlemen, but that when they engage in trade as traders they shall be treated.

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56Witherley v. Sarsfield, 1 Show. K. B. 125, 127 (1690).