ANNOUNCEMENT

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NOTES

THE CONSTITUTIONALITY OF PROTECTIVE TARIFFS—In the Flexible Tariff Case the Supreme Court of the United States was called upon to consider for the first time the constitutionality of a tariff which was avowedly imposed for the purpose of protecting American industry. What the decision would be upon that point was a foregone conclusion, for such tariffs had been imposed too long to be challenged successfully. The only room for uncertainty was as to the reason which the court would give in support of its conclusion.

The decision was announced on April ninth in an opinion by Chief Justice Taft. He pointed out that such taxes had been laid since 1789 and said,

"So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate Congressional action. As we said in the Child Labor Tax Case, 259 U. S. 20, 38: 'Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive.'"

This position may have met the facts of the case, for the rate on barium dioxide which was there challenged was not so high as to be prohibitive. It seems, however, that the court might well have gone

1 J. W. Hampton, Jr., & Co. v. United States, U. S. Sup. Ct., decided April 9, 1928. See also (1928) 76 U. OF PA. L. Rev. 868.
further. The President had raised the rate under a statutory provision which was expressly enacted "in order to regulate the foreign commerce of the United States"; and his proclamation had declared that he raised it because the commodity was produced more cheaply in Germany than in the United States. Neither the President nor Congress gave any consideration whatever to the effect of the change upon the revenues of the United States. The rate was changed solely in order to regulate foreign commerce, and no other motive for making the change was professed.

In some cases, as in the Child Labor Tax Case, the court considers the motive of Congress in enacting legislation. It asks whether a law which purports to lay a tax was enacted for the purpose of raising revenue. But it should ask this question only when Congress has power to tax but has no power to regulate. When Congress has both powers the question is immaterial. In such a case Congress may lay a tax without reference to the probable revenue to be derived from it but simply as a method of regulation.

A protective tariff is not an unauthorized regulation masquerading as a tax. It is not a subterfuge but the best means of securing the precise end sought by Congress. In theory, at least, the duty is fixed at such a level as to enable Americans to compete with foreign producers in our home market, but, on the other hand, it gives to the Americans only a limited monopoly of that market and it automatically enables foreigners to enter the market successfully if American producers attempt to take undue advantage of their limited monopoly. Such a tariff regulates foreign commerce by a measure which is in some respects a tax law, subject, probably, to the requirements that it operate uniformly throughout the United States and that the law in which it is imposed originate in the House of Representatives, but it is authorized by the commerce clause of the Constitution as well as by the taxing clause.

Congress has complete authority over the importation of commodities into the United States. As the court said in Buttfield v. Stranahan:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. . . . It is not to be doubted that from the beginning Congress has exercised a
plenary power in respect to the exclusion of merchandise brought from foreign countries: not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion.

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised."

In classing tariff legislation with regulations of foreign commerce the court was fully supported by the history of tariff legislation by the states immediately before the adoption of the Constitution, arguments advanced in favor of the adoption of the Constitution, debates in the first session of the First Congress and legislation enacted as a result of those debates.

For example, on September 20, 1785, Pennsylvania enacted a tariff law entitled

"An act to encourage and protect the manufactures of this State by laying additional duties on the importation of certain manufactures which interfere with them."

And other states adopted similar laws in 1785 and 1786.

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12 Statutes at Large of Pennsylvania, 99 (1785).

*In Massachusetts the Act of July 2, 1785, c. 17, imposing duties, declared in a preamble that it was enacted because "it is highly necessary for the welfare and happiness of all States, and more especially such as are republican, to encourage agriculture, the improvements of raw materials and manufactures, a spirit of industry, frugality and economy, and at the same time to discourage luxury and extravagance of every kind." In New Hampshire the Act of March 4, 1786, imposing duties, was enacted because, as stated in the preamble, "the laying of duties on articles of the produce and manufactures of foreign countries will not only produce a considerable revenue to the State, but will tend to encourage the manufacturing of many of those articles in the same." In Rhode Island an act of the June session, 1785 (18), was entitled "An act for laying additional duties on certain enumerated articles, and for encouraging the manufactory thereof within this State, and the United States of America." And James Madison, writing to Edmund Pendleton in January, 1787, said: "The (Virginia) Senate have saved our commerce from a dreadful blow which it would have sustained from a bill passed in the House of Delegates, imposing enormous duties, without waiting for the concurrence of the other States, or even of Maryland. There is a rage at present for high duties, partly for the purpose of revenue, partly for the purpose of forcing manufactures, which it is difficult to resist." I Madison, Works, 271. See also Hill, The First Stages of the Tariff Policy of the United States, 44, 108 (Publications of American Economic Assn., vol. 8); I Stanwood, American Tariff Controversies, 25.
The Federal Convention did not consider it necessary to discuss the question whether Congress might impose tariffs primarily for the purpose of regulating foreign commerce. Madison merely approached such a discussion when he said concerning state tariffs:

"The encouragement of manufactures in that mode requires duties not only on imports directly from foreign countries, but from other States in the Union, which would revive all the mischiefs experienced from the want of a general government over commerce."

The members of the Convention cannot have been ignorant of the state laws establishing protective tariffs. It was probably a thought that Congress might enact such laws for the benefit of the north and to the detriment of the south which led some members of the Convention to urge that laws for the regulation of commerce should be passed only by two-thirds vote of each House of Congress. Some of the southern members waived this point in consideration of the northern concession that the slave trade should not be prohibited before 1808, although Mason, who was opposed to the slave trade, protested until the end of the Convention, and Virginia proposed an amendment to the Constitution providing that "no navigation law, or law regulating commerce, shall be passed without the consent of two-thirds of the members present, in both Houses." After the Convention had decided that a majority vote in each House should be sufficient for the enactment of laws regulating foreign commerce, no one proposed to limit the power of Congress to regulate foreign commerce by protective tariffs.

The Federalist said nothing upon the subject of such tariffs. The proceedings in the state conventions were not fully reported. For example, in Pennsylvania the advocates of the Constitution prevented the making of a complete report of the debates. But we know that in the Massachusetts convention Thomas Dawes of Boston made an argument in favor of the adoption of the Constitution in which he said:

"Our agriculture has not been encouraged by the imposition of national duties on rival produce; nor can it be, so long as the several States may make contradictory laws. . . .

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1 Madison, Debates, August 29.
2 Madison, Debates, August 29, September 15.
3 Madison, Debates, August 29.
4 Madison, Debates, August 22.
5 Madison, Debates, September 15.
6 3 Elliot's Debates, 660.
7 McMaster and Stone, Pennsylvania and the Federal Convention, 15, 212.
8 2 Elliot's Debates, 57, 59; Debates in the Massachusetts Convention of 1788 (1856 ed.) 156, 158, 159.
"Our manufactures are another great subject, which has received no encouragement by national duties on foreign manufactures, and they never can by any authority in the Confederation. . . . The very face of our country leads to manufactures. Our numerous falls of water, and places for mills, where paper, snuff, gunpowder, iron works, and numerous other articles, are prepared—these will save us immense sums of money, that otherwise would go to Europe. The question is, have these been encouraged? Has Congress been able, by national laws, to prevent the importation of such foreign commodities as are made from such raw materials as we ourselves raise? . . . If we wish to encourage our own manufactures—to preserve our own commerce—to raise the value of our own lands—we must give Congress the powers in question."

In the first session of the First Congress, the second law placed upon the statute books \(^{15}\) declared that it imposed duties there named not only in order to raise revenue but also for the encouragement and protection of manufactures. The debates in Congress showed that as to many items the protection of American industries was the only point considered in fixing the tariff.\(^{18}\) For example, Sherman of Connecticut moved that a tariff of six cents per pound be laid on manufactured tobacco, "as he thought the duty ought to amount to a prohibition." That rate was established.\(^{17}\) And many other instances could be given in which Congress considered only the regulatory aspects of proposed taxes. In several cases there were vigorous disagreements as to the duties which should be charged;\(^{18}\) but no member of either the House or the Senate suggested the least doubt as to the power of Congress to lay duties primarily for the purpose of protection. Every one accepted the argument made by Madison early in the debate:\(^{19}\)

\(^{15}\) Act of July 4, 1789, c. 2, § 1, 1 Stat. 24.

\(^{16}\) I Annals of Congress, 106 (Fitzsimons), 107 (White), 109, 110 (Hartley), iii, 113, 114 (Madison), 119 (Boudinot), 144 (Fitzsimons, Lawrence), 145 (Sinnickson, Madison), 146 (Fitzsimons), 147 (Clymer, Fitzsimons), 153 (Goodhue), 154, 155 (Scott), 157 (Ames), 167 (Sherman, Carroll, Clymer), 170 (Bland, Parker), 208 (Fitzsimons, Gerry); Maclay's Journal, 54, 55, 50, 61, 62, 73, (Maclay).

\(^{17}\) I Annals of Congress, 167.

\(^{18}\) See, e. g., Maclay's Journal, 71-73.

\(^{19}\) I Annals of Congress, i13. Twenty-six years later, as President of the United States, Madison again urged the adoption of protective tariffs (1 Richardson, Messages of the Presidents, 567); and in September, 1828, he wrote to Joseph C. Cabell a long argument maintaining the constitutionality of such tariffs. (3 Madison, Works, 636-647). See also Annals of Congress, 18th Cong., 1st sess., 1994, 2121; Jefferson, Report on foreign commerce on December 16, 1793, Jefferson, Works; Story, Constitution, §§ 1082 et seq.; Cooley, Taxation, §§ 26, 27; Russell v. Williams, 106 U. S. 623, 624, 625 (1882).
"The States that are most advanced in population, and ripe for manufactures, ought to have their particular interests attended to in some degree. While these States retained the power of making regulations of trade, they had the power to protect and cherish such institutions; by adopting the present Constitution, they have thrown the exercise of this power into other hands; they must have done this with an expectation that those interests would not be neglected here."

It is true that the act was so phrased that it did not show on its face that any particular items were designed for any other purpose than raising revenue. Therefore little can be made of the point that its validity was not challenged in court. But a great deal can be made of the debates in Congress. As shown by those debates, taxes for the primary purpose of protecting American producers were imposed by a Congress many of whose members had taken an active part in the framing of the Constitution and all of whom were familiar with the discussions which attended its adoption; the law was approved by the President who had presided over the Constitutional Convention; and no one in that generation, in court or elsewhere, questioned the constitutionality of imposing tariffs for the primary or even exclusive purpose of protecting American industries from foreign competition. Such a contemporaneous interpretation of the Constitution is of the highest importance.

Moreover, the Supreme Court of the United States, in *Buttfield v. Stranahan*, has classed protective tariffs with exercises of the power of Congress over foreign commerce. Therefore, while the passage quoted from the opinion in the *Flexible Tariff Case*, in which a tariff rate was sustained upon the ground that the protection was a merely incidental accompaniment to the raising of revenue, may have been sufficient to dispose of the case then before the court, it seems clear that an act of Congress establishing a tariff for the avowed primary purpose of regulating foreign commerce would not violate either the letter or the spirit of the Constitution.

*Washington, D. C.*

Robert P. Reeder.

**The Right of Contribution as Extended to Negligent Tortfeasors**—It is a fundamental doctrine in equity that where several parties are bound equally by a common obligation, each shall ultimately discharge a proportionate share. And where one has been compelled to respond for a greater amount, he may be reimbursed

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20 *Stanwood, American Tariff Controversies*, 293.
21 192 U. S. 470 (1904), quoted on page 975, *supra*.
22 Page 974, *supra*.
for the excess in a suit against the others. While similar relief may now be obtained at law, it is said that such right is founded only on broad principles of natural justice and does not arise from contract, although action is ordinarily allowed in the nature of an implied assumpsit.

The broad statement has usually been made, however, that as between joint tortfeasors, the right to contribution does not exist. This principle, in so far as it applies, is based on the unwillingness of the courts to grant relief at the instance of one who stands in need of it only because of his own wrongdoing. In equity, the clean hands maxim is familiar; in law: "Ex turpi causa non oritur actio." 2

The rule denying contribution in such cases was first announced in Merryweather v. Nixan, 3 where the joint tort consisted in an intentional injury to a reversionary interest in a mill by two persons. There being a recovery against one, he sued upon an implied assumpsit for contribution of one-half. Lord Kenyon, in denying relief, said that there could be no such action where the former recovery was for a tort. 4 However, the courts very quickly narrowed this broad statement, finding a host of exceptions.

In the first place, the rule was probably intended to be confined to suits by active wrongdoers. Where a recovery in tort is had against one whose liability is merely secondary or imputed, as under the doctrine respondeat superior, he may have relief in the nature of indemnity as against the person primarily liable, 5 or contribution as against those bound jointly with him. A common instance of the latter is a case where a member of a partnership has been made to answer for the tort of the partnership servant. 6 The rule was further restricted to exclude mere technical wrongdoers, persons who, through mistake or ignorance, had done an act not inherently wrongful, but to which the law has attached a tort liability. Early examples

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1 5 Pomeroy, Equity Jurisprudence (4th ed. 1919) §§ 2334, 2338. The doctrine involves the equitable maxim "Equality is Equity."
2 1 Cooley, Torts (3d ed. 1906) 260 et seq.
3 8 T. R. 186 (Eng. 1799). The rule is said to have been foreshadowed, however, in Battersey's Case, Winch 48 (Eng. 1623).
4 For a discussion of the rule as universally applied, see T. W. Reath, Contribution Between Persons Jointly Charged for Negligence (1898) 12 Harv. L. Rev. 176.
6 The right to indemnity is to be distinguished from the right to contribution in that it allows full reimbursement. Also, apart from the equitable remedy, the action for the former may be in the nature of trespass, Brookville v. Arthurs, supra, while only implied assumpsit lies for contribution. See 5 Pomeroy, op. cit. supra note 1, § 2335.
7 Horbach's Admr. v. Elder, 18 Pa. 33 (1851); Story, Partnership (7th ed. 1881) § 220 et seq.
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were the attachment of the wrong person's goods by the joint creditors of another, or the commission of an act prohibited by statute without knowledge of its illegality. These cases generally laid it down as a conclusive test that contribution will be denied only when the persons knew or must be presumed to have known that they were doing an unlawful act.

The only difficulty arises in applying this test to cases of torts based on mere unintentional negligence. Where it is the violation of a common duty attaching to a joint enterprise that constitutes the tort, contribution has been allowed by analogy to the preceding cases. But where separate duties are violated by persons on separate enterprises, the analogy ceases, for they are not strictly joint tortfeasors, although the injury caused is one and indivisible, and, as between themselves, their culpability is equal, so that joint action against them is permitted. On the other hand, their equities ought to be at least as great as if they had been on a joint enterprise, for a recovery against one makes him liable for the negligence of the other, notwithstanding that were it not for such negligence the injury would not have occurred. It is clearly inequitable to allow the complete burden to be placed entirely according to the caprice of the injured person, who may enforce payment from either one as he wishes; besides, the opportunity for collusion is boundless. The ultimate question, therefore, would seem to be whether a negligent act is so inherently wrongful as to deprive the actor of his right to be heard in a court of justice.

In the recent Pennsylvania case of Goldman v. Mitchell-Fletcher Co., an injury had been caused in a collision resulting from the concurring negligence of the operators of a trolley car and a delivery

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3. Armstrong Co. v. Clarion Co., 66 Pa. 218 (1870) (where an injury was caused due to the disrepair of a bridge maintained jointly by the two counties). This decision was likened to a case of partnership in Morton v. Union Traction Co., 20 Pa. Super. 325, 334 (1902); Ankenny v. Moffett, 37 Minn. 109, 33 N. W. 320 (1887). Cf. Spalding v. Oakes, 42 Vt. 343 (1869).
4. It is often said that without concert of action there is not a joint tort, and hence a joint action cannot be maintained. Weist v. Traction Co., 200 Pa. 152 (1901). But this rule is not generally extended to cases of concurrent negligence. See note (1906) 54 U. of Pa. L. Rev. 45, 55.
5. To be distinguished are those situations where the tortfeasors are not in pari delicto as between themselves, in which case the party whose fault is only secondary may have full indemnity. The distinction regards the quality rather than the degree of the negligence, as where a manufacturer delivers a defective machine to one who negligently fails to examine it. Boston Woven Hose Co. v. Kendall, 178 Mass. 232, 59 N. E. 657 (1901); Pullman Co. v. Cincinnati, N. O. & T. P. Ry., 147 Ky. 498, 144 S. W. 385 (1912); Phila. Co. v. Traction Co., 165 Pa. 456, 30 Atl. 934 (1895). Cf. cases supra note 5. Cf. also Horrabin v. City of Des Moines, 198 Iowa 549, 199 N. W. 968 (1924). And see note in 36 L. R. A. (N. S.) 583 (1912).
truck. It was indicated by the court that henceforth, in this jurisdiction, there may be contribution between such negligent tortfeasors. This expression of opinion is prevented from being more than dictum by the fact that the action was brought by a surety of one tortfeasor rather than by the tortfeasor himself, and was actually based on the right of the surety, after having paid a joint judgment against both of the defendants, to be subrogated to the rights of the injured person thereon. Nevertheless it is significant of what will probably be the law, and is contrary to the previously existing impression of the law, in Pennsylvania. The weight of authority in other jurisdictions still refuses relief to a negligent wrongdoer who has been made to bear all of the joint liability, on the ground that he is within the reasoning of the rule of *Merryweather v. Nixan*. Says one court:

“What chancellor would listen with favor to the claim of a plaintiff for contribution or indemnity who admits in his pleading that, but for his failure to perform a public duty, the injury for which he has been held liable would not have occurred?”

The Pennsylvania court, in commenting on the rule of *Merryweather v. Nixan*, doubts whether “the doctrine would have arisen out of a case like the one which occasioned this proceeding, where the responsibility of the defendants grows out of the rule respondeat superior.” But the cases, in denying contribution, make no distinction on this ground. And yet we have seen that contribution is

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13. The use plaintiff was surety on the appeal bond of the delivery truck owner, and having, upon affirmance by the Supreme Court in Goldman v. Mitchell-Fletcher Co., 288 Pa. 102 (1927), paid the joint judgment against its principal and the traction company, brought this suit to be subrogated to the rights of the nominal plaintiff. It was objected by counsel for the traction company that to permit the surety of one defendant to levy for all or part of the judgment upon the property of the other would be, in effect, to permit contribution between the two. It has been held that such an objection is invalid, for the surety, under his right to subrogation, stands in the shoes of the judgment creditor, and his rights therefore are not limited by any legal disability on the part of his principal. Kolb v. National Surety Co., 176 N. Y. 233, 68 N. E. 247 (1903); City of White Plains v. Ellis, 113 Misc. 5, 184 N. Y. Supp. 444 (1920), on which see comment in (1921) 5 MINN. L. REV. 372; Pomeroy, *op. cit. supra* note 1, § 2351. The court replied, however, that even if the result of allowing subrogation would be an effectual contribution, nevertheless, inasmuch as the surety had in its brief stated it as its intention to collect one-half of the judgment from each, “we do not look upon it as one that is improper or unjust,” and showed, in a lengthy discussion, that no Pennsylvania decision had ever held squarely against contribution in such a case.

14. See note, *Contribution Among Joint Tortfeasors*, in (1906) 54 U. of PA. L. REV. 45, for a discussion and criticism of the former law in Pennsylvania. While the court in the Goldman case cites Armstrong Co. v. Clarion Co., *supra* note 9, and Horbach’s Admr. v. Elder, *supra* note 6, in support of allowing contribution, these were cases of partnership or joint undertaking.

permitted among partners where one has been compelled to pay for the tort of a servant. It is submitted that the fact that there was no joint enterprise to begin with, is no reason for denying the aid of the courts to one who has been guilty of only an imputed wrong.

Regardless of this question, however, it is quite clear that the opinion in the Goldman case is supported by an increasingly sympathetic attitude of the courts toward one who has committed only a quasi-delict, an unknowing breach of duty. The English court doubts that the doctrine of Merryweather v. Nixan is "founded on any principle of justice or equity or even of public policy", and has refused to apply it to a negligent tortfeasor. While some recent American decisions continue to apply the doctrine with a growing doubt as to its correctness, others have refused to apply it at all, where the plaintiff's delinquency is based on mere negligence, recognizing that unless he has consciously violated the law, it is not unconscionable in him to ask that his equitable rights be enforced. In many states, this result has been accelerated by statute.

This modern view is undoubtedly sound. As a practical matter, acts of unknowing negligence are of constant and necessary occurrence, as a result of the vast number of absolute duties which a complex society imposes upon its members. To place one who unintentionally breaches one of these duties in the same class with a willful wrongdoer is clearly unreasonable. The courts have recognized this fact in connection with other problems. Had they not, then contracts to indemnify for losses occasioned by the promisee's negligence would be unenforceable, as are promises to relieve one from the con-

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16 Curtis v. Welker, 296 Fed. 1019 (Ct. of Appeals, D. C., 1924), where the rule was applied with undue harshness to directors of a corporation, whose joint negligence had permitted the treasurer to embezzle. The court felt itself bound by Union Stock Yards v. R. R., supra note 15. Norfolk Southern R. R. v. Beskin, 140 Va. 744, 125 S. E. 678 (1924).

17 Public Service Ry. v. Matteucci, 140 Atl. 442 (N. J. 1928); Ellis v. Chicago & N. W. R. R., 167 Wis. 392, 167 N. W. 1048 (1918), the facts of which are strikingly similar to the Goldman case. The latter decision was followed in Mitchell v. Raymond, 181 Wis. 591, 195 N. W. 855 (1923), and in underwriters v. Smith, 166 Minn. 388, 208 N. W. 13 (1926). In the former case, the court said, "We do not overlook the seeming anomaly . . . that defendant Raymond may not recover from defendant Mitchell for the damages . . . done to Raymond's automobile . . . because Raymond's own and contributing negligence at the time of the collision is an absolute bar . . . yet he may recover from Mitchell one-half of the injury to his pocket-book, if he pay the plaintiffs their damages caused by the same joint negligence. Such an anomaly is often the resultant of the application of several rules of law."
sequences of his intentional wrongs, and the door would be closed to a large part of the legitimate insurance contracts of today. Application of the old doctrine is still justified, however, where it is clear that the breach of duty was intentional, for in such cases the reason of the rule denying to a wrongdoer the aid of the court is applicable.

S. F.

Jurisdiction of a Court to Punish Criminal Contempts Committed in Another State.—A much discussed question in the law is that of contempt of court, for the reason that it is through this that the courts are able to preserve their dignity and efficacy. Contempts have been divided into two classes, namely, civil and criminal. A civil contempt consists in a failure to obey a mandate of the court, issued in a civil suit, which is detrimental to the opposing party. The courts, in order that the plaintiff may derive the benefit intended by their decree, attach the person of the defendant to coerce him into obeying or performing the court's order. Prima facie such an act is not a contempt against the court's dignity, but is rather an act directed against the person on whose behalf the violated order was made. A criminal contempt, on the other hand, is an act directed solely against the authority and dignity of the court and, obviously, may occur in either a civil or a criminal action. Such a contempt is variously defined as an act which tends either to obstruct the course of justice or to prejudice the trial of a case; as an act which obstructs the administration of justice and brings the court into disrepute; as acts committed against the majesty of the law, the purpose of their punishment being the vindication of public authority. Of necessity the courts must have the power to attach the person in this latter class of contempts, in order that the sanctity and function of the courts may not become a nullity.

The recent case of State v. Turquette raised two interesting
questions in connection with criminal contempts. In that case the judge of an Arkansas court, situated several hundred yards from the Texas border line, was assaulted by the defendant in the state of Texas while the court was adjourned for lunch. In holding that the defendant was guilty of a criminal contempt, the court were obliged to decide that neither (1) the fact that the assault took place several hundred yards from the courthouse, nor (2) the fact that the assault took place outside the territorial limits of the state of Arkansas, deprived the Arkansas court of jurisdiction. These two questions will be treated in order.

It is well settled that criminal contempts may be either direct or constructive. The classical distinction is that direct contempts consist in open insults rendered in the presence of the court, or improper conduct committed so near the presence of the court as directly to interrupt its proceedings, whereas constructive contempts, on the contrary, are acts not committed in the presence of the court, but which nevertheless tend to obstruct and impede the administration of justice. In the words of Blackstone,

"Contempts . . . are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who reside there, or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of authority."

The distinction between direct and indirect contempts is not merely a theoretical one, because the effect and nature of the two acts are essentially different. Generally it is only in the case of direct contempts that the offender can be instantly punished, by means of summary proceedings. In the case of indirect contempts, the offender is either required to show cause why he should not be attached for contempt, or else the case may be turned over to the grand jury for consideration. In the former case the courts exercise their additional, inherent power to immediately protect and preserve their dignity and authority. It is evident that this power is a prime necessity, because

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8 Whitten v. State, 36 Ind. 196 (1871) (abduction of the plaintiff); Ferrimian v. State, 128 Ill. App. 230 (1906) (failure of witness to answer subpoena); Ex parte McCown, 139 N. C. 95, 51 S. E. 957 (1905) (assault committed on judge at his residence).
9 Stuart v. Reynolds, 204 Fed. 709 (C. C. A. 5th, 1913) (refusal to turn over assets to receiver); Weldon v. State, 150 Ark. 407, 234 S. W. 466 (1921) (assaulting the judge eight miles away from the courthouse). It is interesting to note that in this case the same court which decided State v. Turquette, supra note 7, did not follow the rule which they lay down in the later case, namely that a direct contempt is determined by its effect upon the administration of justice, not by the nearness of the place where the act is committed. See infra note 13.
11 Watson v. Williams, 36 Miss. 331 (1858); Bender v. Young, 252 S. W. 691 (Mo. 1923); Note (1922) 9 Va. L. Rev. 467; Note 8 L. R. A. 586 (1890).
the courts could not otherwise continue their judicial functions than by instantly apprehending a person who directly interfered with the administration of justice. It is equally clear that in the latter class of contempts there is no reason why the courts should have the power to punish the offender immediately, because a slight delay will not lessen the dignity of justice to any serious extent. Therefore not only does there appear to be a distinction in the nature of a direct and an indirect contempt, but the procedure of the courts is materially different, and has logically adapted itself to the two situations.

Undoubtedly the present tendency of the law is to enlarge the category of direct contempts. Some courts still adhere to the old rule and determine whether or not a contempt is direct by the propinquity of the court to the place where the contemptuous act occurred—i.e. if the act was not committed in or near the presence of the court, it is not a direct contempt. The better view, however, would seem to test the matter by determining whether or not the act will directly or indirectly obstruct the administration of justice, regardless of where, in fact, the act constituting contempt was committed. Accordingly it has been held that assaulting a court examiner in a street adjoining the courthouse, or attacking the judge at his home during a pending action are direct contempts. In McCauley v. United States, where a juror was bribed some distance away from the courthouse, it was held that the contempt was committed in the presence of the court. Said the court:

"The question is not one of geography or topography, or propinquity or remoteness, but one of direct influence upon the administration of justice. The administration of justice is equally obstructed wherever the act is done; and the place of solicitation is of absolutely no consequence whatever. Whether the act was done in the courthouse, or a mile or one hundred miles away, the result is precisely the same; the disturbance to the court is precisely the same."

It is thus apparent from this discussion that in the case of State v. Turquette the court could very properly have held that a direct

\[\text{Supra} \text{ notes 8 and 9.}\]
\[\text{United States v. Toledo Newspaper Co., 220 Fed. 458 (N. D. 1915); United States v. Huff, 206 Fed. 700 (S. D. Ga. 1913); United States v. Anonymous, 21 Fed. 761 (D. C. Tenn. 1884). In the last case the court said that the mere place of occurrence was not the test of whether a contempt was direct or not, but rather it depended on the degree with which the act interfered with justice. The court held that hitting a judge interfered with justice, no matter where the act occurred.}\]
\[\text{Ex parte McLeod, 120 Fed. 130 (D. C. Ala. 1903).}\]
\[\text{Ex parte McCown, supra note 8.}\]
\[\text{25 App. D. C. 404 (1905).}\]
\[\text{Supra note 7.}\]
contempt was committed, regardless of the fact that the assault took place several hundred yards from the courthouse. There is nothing which could more directly interfere with justice than an attack upon the judge less than an hour before the court would convene. But a further question arises, namely that the assault took place in a foreign jurisdiction. It is pertinent to inquire whether or not this relieves the defendant of the charge of contempt.

Ordinarily criminal actions are local. The offense is against the state where the act is committed, and the defendant can only be tried for the offense in the jurisdiction where the crime occurred. If a contempt is only a criminal act, the court's ruling in State v. Turquette cannot be sustained. However, an act of direct contempt, at any rate, is not merely criminal in nature, because the contemnor is attached by summary process, and has no opportunity for trial by jury. This contention has been substantiated by cases where a court, by statute, was denied criminal jurisdiction, and yet has punished for criminal contempt. In the case of State v. Middlebrook the court said:

"The fine and imprisonment which the court is authorized to inflict are not intended as a punishment for a crime committed in violation of the criminal law; and a punishment for contempt is no bar to a prosecution for a breach of the peace, notwithstanding the universal maxim that no one shall be put in jeopardy twice for the same offense."

It has likewise been held that the disobediance of a court order respecting property in a foreign jurisdiction is a contempt, because the act is not criminal, but is merely an offense against the dignity and authority of the court issuing the order. Considering these authorities, the conclusion that a contempt is something more than a criminal action is unavoidable, and that being the case, there seems to be no reason why the power to entertain contempt proceedings should be influenced by a rule of criminal jurisdiction. It might be argued that a judicial officer who is outside the jurisdiction of his state loses his official character, and therefore could not be the subject of contempt. The answer seems to be that while the act may be a crime against a private citizen in the state in which it occurred, it tends in its later effect to interfere materially with the administration of justice by that individual in his official character, and the place where the assault occurs is of no consequence. Of course the case

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\[2^3\] State v. Buchanan, 130 N. C. 660, 41 S. E. 107 (1902); People v. Downs, 136 N. Y. Supp. 440 (1911); Clark & Marshall, Crimes (2d ed. 1905) § 486.

\[2^2\] 2 BISHOP, CRIMINAL LAW (9th ed. 1923) § 242, a, 1.

\[2^1\] State v. Howell, 80 Conn. 668, 69 Atl. 1057 (1908); State v. Middlebrook, 43 Conn. 257 (1876). In the Howell case the court held that no criminal intent was necessary.

\[2^0\] Supra note 20, at 267.
is even stronger where the offender has committed a direct contempt, as in *State v. Turquette*, because in this type of cases as the offender is reached by summary process, it is clear that his act is not solely criminal in nature.

An examination of the authorities will disclose the fact that very few courts have passed on the point as to whether physical acts committed against persons involved in judicial proceedings are contempt, if such acts occur in a foreign jurisdiction. In the case of *Snow v. Hawkes*, the plaintiff was bringing suit in North Carolina. Hawkes, the father of the defendant in that suit, meeting the plaintiff in Virginia, compelled him by duress to execute a release to the defendant. In holding that the defendant in the principal case was guilty of contempt, the North Carolina Court said,

"... the question of jurisdiction is material only as it relates to the operation and ultimate effect of the wrongful act. It is perfectly obvious that respondent's paramount object was to secure dismissal of the plaintiff's suit by fraud, deceit and imposition of the court. The imposition was to be consummated in the county where the action was pending through an unlawful scheme which was intended to be not only continuing, but coextensive with the illegal purpose, and therefore operated in our own court."

Two other cases have been found which are somewhat analogous to *Snow v. Hawkes*. In *Hunter v. United States* the court held that the defendant was guilty of a direct contempt, when he removed a boy from a Maryland institution when the boy was placed by a probation order of the District of Columbia court. And in *Ex parte Young*, the court held that it was contempt of court to detain a child outside the jurisdiction of the state, when the court ordered the defendant to bring the child before its presence, notwithstanding the fact that the child had never been within the jurisdiction. But these last two cases are of little authority on the point here discussed, because in both a court order was disobeyed, and also in the former case the court argued that the boy was always in the constructive possession of the court; and in the latter case the jurisdiction of the court over the person of the defendant was obviously satisfied.

It would seem that the court in *State v. Turquette* reached a sensible conclusion, and one that should be countenanced by public policy. If the courts cannot protect the persons of their judicial officers from acts interfering with the administration of justice, wherever the officers may be, there is indeed a dismal gap in our system of justice.

A. M. H. Jr.

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*Farmers State Bank v. State, 13 Okl. Cr. 283, 164 Pac. 132 (1917).*

*183 N. C. 365, 111 S. E. 621 (1922).*

*48 App. D. C. 19 (1918).*

*Ex parte Young, 50 Fed. 526 (E. D. Tenn. 1892).*
Exemption of Gifts to Charity Under Inheritance Tax Statutes.—Under early inheritance tax statutes, only gifts to near relatives of the decedent and to the poor were exempt. Charitable institutions were not favored. But today the laws of the federal government and of almost all our states, exempt from death duties various kinds of charitable bequests. These exemption provisions, from the time of their inception, have caused an incessant stream of litigation. In undertaking any study of these cases, each must, of course, be considered in the light of the language of the statute under which it was decided. These statutes vary very widely as to the breadth of the exemptions accorded. Some statutes, such as the one in New York,3 are very liberal in granting exemptions. Others like the statutes in force in Maryland4 and Pennsylvania,5 are very narrow in their scope. However, throughout the cases, regardless of the nature of the statute in force in the particular jurisdiction, there is to be noted a remarkable divergence in the attitude of the courts. Some courts show marked favor to philanthropic bequests, while others apply a rigid interpretation of the statute, seeking to restrict exemptions. This difference in attitude is the underlying explanation of the divergent decisions laid down by the courts under practically similar statutory provisions.

Thus, in a number of recent cases, the question has arisen as to whether the strict identity of the transferee or the nature of the actual beneficiary is to be considered in determining whether or not the particular bequest is exempt from taxation under the statute. The case of Tax Commission of Ohio v. Security Sav. Bank & Trust Co.,6 affords a striking illustration of a case in which the court defeated exemption by a strict construction of the statute. The Ohio statute7 provides that "the succession of any property passing—to

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1 Dos Passos, Inheritance Tax Law (2d ed. 1895) 92.
2 Only five jurisdictions have no statutory provisions, exempting in some form gifts to charity.—Nebraska, Philippine Islands, Porto Rico, Texas, and Utah.
3 N. Y. Cons. Laws (Cahill, 1923) c. 61, § 221, amended by N. Y. Laws, 1925, c. 143.
4 Md. Code (Bagby, 1911) Article 81, § 120, as amended by Md. Laws, 1924, c. 413. Maryland excepts only transfers to the city of Baltimore or to any county or municipality of the state.
5 Act of 1919, P. L. 794, Pa. Stat. (West, 1920), § 20505. "That all estates in any buildings, ground, books, curios, pictures, statuary, or other works of art, passing by will from a person seized or possessed thereof to any municipality, corporation, or unincorporated body, for the sole use of the public by way of free exhibition within the State of Pennsylvania, whether in trust or otherwise, shall not be subject to any collateral inheritance tax for the use of the commonwealth." In one case under this statute a gift of land to the city of Pittsburgh for a public park was held exempt, but a gift of money to maintain the park was held taxable. In re Frick's Estate, 277 Pa. 242, 121 Atl. 35 (1923).
6 159 N. E. 570 (Ohio, 1927).
7 Ohio Gen. Code (Page, 1926) § 5334.
or for the use of an institution for purposes only of public charity—shall not be taxed." The testator in this case bequeathed property to a trust company to be held in trust for a period of from fifty to sixty years. During this time the money and any interest derived therefrom was to be invested and reinvested until the stipulated period had expired, and the accumulated sum was then to be used in erecting a home for aged Masons, their wives, widows, and dependent orphans. The court, two judges dissenting, held that this gift was not exempt from taxation. The decision was based on two grounds, first, that since the money was to be used for a definite period in business, it was not a gift "for purposes only of public charity"; second, that a gift to members of a single class, such as aged Masons, was not a gift "for purposes only of public charity." Considering at this point only the first ground of the decision, it would seem, if the reasoning of the court is to be followed to its logical conclusion, that any gift of property in trust, only the income of which is to be used for charitable purposes, would not be a gift "for purposes only of public charity" within the statute, for the corpus would be invested, and therefore used in business. No court has as yet gone to such extreme lengths to defeat exemption.

However, the Supreme Court of Wisconsin in a very recent case has taken the same stand as the Ohio Court. The Wisconsin statute provides that property transferred to corporations organized solely for charitable purposes, to be used in furtherance of such purpose, is exempt from tax. In this case, the testator bequeathed money to a trust company, in trust, the income to be used for the benefit of the needy children in the city of Madison. The court held that since the money was transferred to a trust company organized for profit, it was not transferred to a "corporation organized solely for charitable purposes," and hence was not exempt from taxation.

A New York court in one case applied similar reasoning, and decided that the question of exemption was to be determined by the identity of the transferee and not by the purpose of the transfer. The New York statute provides "Any property devised or bequeathed to any—hospital corporation, wherever incorporated—shall be exempt from taxation." The testator bequeathed property to the city of Duluth to be used for a hospital, and the court held that the city of Duluth was a municipal corporation and not a hospital corporation and hence, the bequest was not exempt under the statute. But in two later cases, under the same statute, where bequests were made to municipal corporations to be used for charitable purposes, it was

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8 In re Price's Estate, 213 N. W. 477 (Wis. 1927).
9 Wis. Stat. (1925) §§ 72.01, 72.04.
10 Cf. also In re Robert's Will, 214 N. W. 347 (Wis. 1927).
12 Supra note 3.
held that the purpose of the gift was the determining factor, and
in administering these purposes, the municipal corporation acted as
a charitable corporation. These cases show a state of mind in the
court diametrically opposed to the attitude of the Ohio and Wisconsin
courts. The legislature as well as the courts of New York has been
adopting a progressively liberal attitude in favoring gifts for charit-
able purposes.

The majority of courts apply the rule that exemptions from
taxation must be expressed in the statute and are not to be read into
it by implication. But in a Connecticut case, the court held that it
was the settled public policy of the state, not to impair the usefulness
of gifts to organizations carrying on public work, by subjecting them
to taxation, and therefore it required unequivocal language of the
legislature to change that public policy. The statute in Connecticut
provided that property bequeathed to Connecticut corporations or
institutions, which received state aid shall be exempt from inheritance
or succession taxes. Property was bequeathed to certain educational
and charitable institutions which did not receive any direct appropri-
ation from the state, but were not subject to ordinary state taxes. The
court held that institutions which are exempt from ordinary taxes
are recipients of "state aid" and therefore exempt from inheritance
tax under the statute. But in a later case, the court receded some-
what from the very liberal stand they had adopted. In this case the
property had been bequeathed to a corporation, which by its
charter was exempt from taxation on any realty that it might own.
But at the time of the testator's death, the corporation did not own
any realty, and therefore as yet was deriving no benefit from the dis-
position which the state had shown to aid it. The court held that
the gift to this corporation was taxable, because under the statute, the
donee actually had to be receiving "state aid" at the time of the
testator's death. The theory on which a few courts have held that
these statutes should be construed liberally in favor of charitable or-
ganizations, is that such organizations are doing public work and thus
lessening the burden of government. Since taxes are levied, collected
and expended for the purpose of carrying on the work of govern-
ment, taxing a charitable institution is the same as taxing the state
itself.

The most important consideration in determining the right to

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14 Pitney v. Bugbee, 98 N. J. L. 889, 118 Atl. 780 (1922); Cornett's Executors v. Commonwealth, 127 Va. 640, 105 S. E. 230 (1920); In re Duncan's Estate, 113 Wash. 165, 193 Pac. 694 (1920); In re Frick's Estate, supra note 5.
17 Corbin v. American Industrial Bank & Trust Co., 95 Conn. 50, 110 Atl. 459 (1920).
18 In re Irwin's Estate, 196 Cal. 366, 237 Pac. 1074 (1925); Heald v. Johnson, 216 N. W. 772 (Iowa, 1927); Sage's Executors v. Commonwealth, 196 Ky. 257, 244 S. W. 779 (1922). And see dissenting opinion of Frazer, J., In re Frick's Estate, supra note 5.
exemption involves the question as to whether or not the particular bequest is to an organization or for a purpose of such a nature, that gifts to it are exempt under the statute. In order to determine whether the donee, whether a corporation or a society, is a charitable organization (using "charitable" in its broadest sense), its declared purposes and the work done by it at the time of the decedent's death must be looked into. Here again, the determining factor is often the disposition of the court to adopt a liberal or a narrow attitude. Thus, the second ground for the decision in *Tax Commission of Ohio v. Security Sav. Bank & Trust Co.*, was that a gift to members of a single class, was not a gift for purposes solely of public charity. But in a New York case it was held that a gift of money to be used in the erection of a temple for a Masonic lodge, was a gift for charitable and benevolent purposes, even though the beneficiaries of the philanthropic acts of the society were confined to members of the society. This New York case represents the more prevalent view, namely, that a gift may be one solely for public charity, even though the beneficiaries comprise only a limited class of the public, provided that no pecuniary return is reserved to the donor or to any particular person. However, if the class that is to benefit by the gift is too narrow and too limited, courts will not hold that such a gift is a charitable one. Thus in one case, where the gift was to a corporation organized to provide the members of a certain family with education, and other needs, the New York Court of Appeals, which is committed to a liberal attitude, held that the gift was not a gift to a charitable corporation, because a corporation formed for the purpose of benefiting the needy of one particular family is not a charitable corporation.

In order for a gift to be exempt as a gift for charitable purposes, it must be certain that it will be applied to those purposes. If the executor or trustee is given discretion as to whether or not it is to be applied to purposes, which would make it exempt, the gift is held taxable.

A very interesting question arises, when the bequest is made to a charitable society, incorporated in another state. A few states have statutes specifically providing for this situation. The New

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York, Connecticut, Ohio, and Iowa statutes now exempt gifts to extraterritorial charitable institutions. The theory upon which this rule is based is that the only reason for statutory exemption is that the people of the state derive a benefit from the activities of the institution exempted. If the institution to which the gift is made is located outside the state, the people of the state are not benefited by its operation, and there is no reason why it should be exempt from taxation. Thus it has been held that if the money is to be used within the state, the fact that the donee is incorporated outside the state will not prevent exemption. But in a New Jersey case where money was bequeathed to a New York corporation, although the testator specifically directed that it was to be used for the benefit of the poor people of New Brunswick, N. J., the court held that the gift was not exempt. A similar result was also reached in an Illinois case. On the other hand, a few courts have decided, in the absence of an express statutory provision, that a gift to a charitable corporation even though it is located outside the state, is not subject to inheritance tax.

This last group of cases clearly illustrates the different views entertained by legislatures as well as courts on the problem of the exemption of charities from taxation. While the liberal view of New York seems commendable, a more strict attitude seems to be firmly established in the vast majority of states in this country.

J. M.