offices of a friendly Power." This statement is quoted and indeed the reference to Jay is made to show that those ideas were in the air in the 40's and in the 50's, and to express the hope that they may also be found to be in the air in this year of trial and tribulation.

JAMES BROWN SCOTT.

THE SO-CALLED INVIOLABILITY OF THE MAILS

Recent correspondence between the Allied and United States Governments has called renewed attention to the so-called inviolability of postal correspondence on the high seas during maritime warfare.

The Eleventh Hague Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime Warfare declares:

> The postal correspondence of neutrals or belligerents, whether official or private in character, found on board a neutral or enemy ship is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.
>
> The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port (Art. I).
>
> The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible (Art. 2).

These proposals were made by Germany at the Second Hague Conference of 1907, and were supported by an argument on the part of Herr Kriege, one of the members of the German delegation, which cannot be said to have much applicability to the circumstances of the present war. Herr Kriege said:

> Postal relations have at our epoch such importance—there are so many interests commercial or other, based on the regular service of the mail—that it is highly desirable to shelter it from the perturbations which might be caused by maritime war. On the other hand, it is highly improbable that the belligerents who control means of telegraphic and radio-telegraphic communication would have recourse to the ordinary use of the mail for official communications as to military operations. The advantage to be drawn by belligerents from the control of the postal service therefore bears no prejudicial effect of that control on legitimate commerce.

It cannot be said that the Eleventh Convention of 1907 is legally binding in this war; it was not signed by Russia, one of the leading belligerents, and it has not been ratified by more than half of the states represented at the Second Hague Conference.

In any case the provisions of the first paragraph of Article I do not

apply, "in case of violation of blockade, to correspondence destined for or proceeding to a blockaded port." For reasons best known to themselves, the Allied Governments of France and Great Britain have not sought shelter either under this provision or under the plea that the Eleventh Convention is not legally binding—pleas which they might have entered with entire justice and propriety.

Prior to the limited adoption of the Hague Convention dealing with this subject, the doctrine relative to the inviolability of mails was doubtful, and the practice by no means uniform. For example, Hall, after admitting that ordinary letters are *prima facie* innocent, and that they should only be seized under very exceptional circumstances, goes on to say:

> At the same time it is impossible to overlook the fact that no national guarantee of the innocence of the contents of a mail can really be offered by a neutral Power. No government could undertake to answer for all letters passed in the ordinary manner through its post-offices. To give immunity from seizure as of right to neutral mail-bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it, and it is not difficult to imagine occasions when the absence of such power might be a matter of grave importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail-bags, upon a declaration in writing being made by the agent of the neutral government on board that no dispatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being officially stated in writing. (Hall, 5th ed., pp. 675, 679–680.)

Lawrence treats this matter very fully in his War and Neutrality in the Far East (pp. 185ff.). He says:

> In recent times a practice has grown up of granting special favors to such mail-boats in time of war, if they are neutral and willing to accept the conditions imposed. The United States has been the pioneer in this matter. During her war with Mexico she allowed British mail-steamers to pass unmolested in and out of the port of Vera Cruz, which came into her possession for a time in 1847. In 1862, when the American Civil War was at its height, the Government of Washington exempted from search the public mails of any neutral Power, if they were duly sealed and authenticated, but it was added that the exemption would not protect "simulated mails verified by forged certificates and counterfeit seals." If a vessel carrying mails rendered itself subject to capture for other reasons, she might be seized, but the mail-bags were to be forwarded unopened to their destination. The example thus set was followed by France in 1870. At the commencement of her great war with Germany she announced that she would take the word of the official in charge of the letters on board a regular mail-steamer of neutral nationality as to the absence of any noxious communications. The proclamation of President McKinley at the beginning of the war with Spain in

1898 went further still. It declared that "the voyages of mail-steamers are not to be interfered with, except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade." A similar indulgence was granted by Great Britain in the course of the Boer War to steamers flying the German mail-flag. They were not to be stopped on mere suspicion that there might be unlawful despatches in their bags. On the other hand, many modern cases may be mentioned where no indulgence, or a very limited one, was given. For instance, in 1898 Spain did not duplicate the American concession, and in 1902 Great Britain and Germany would not allow neutral mail-steamers to pass through their blockade of Venezuelan ports, but stopped them instead, and after overhauling their correspondence and detaining what seemed noxious, sent the rest ashore in boats belonging to the blockading squadron.

We see then that practice is by no means uniform. It is impossible, therefore, to argue that the usage of the last half-century has conferred upon the vehicles of the world's commercial and social communications an immunity from belligerent search which they did not before possess. The utmost we can venture to assert is that such a usage is in process of formation, and is in itself so convenient that it ought to become permanent and obligatory, due security being taken against its abuse. This last condition will be difficult of attainment. No government agent on board a mail-steamer can be aware of the contents of the letters for which he is responsible. There would be a terrible outcry if he took means to make himself acquainted with them. His assurance, therefore, as to the innocence of the communications in his bags can be worth but little, even though it is given in all good faith. States must face the fact that to grant immunity will mean that their adversaries in war will use neutral mail-boats for the conveyance of noxious despatches made up to look like private correspondence. Probably it will be worth while to take the risk of this rather than dislocate the affairs of half a continent by capturing and delaying its correspondence. While general freedom was given, it might be wise to reserve a right of search and seizure in circumstances of acute suspicion.

Many other authorities, including French and German ones, might be cited to show that, prior to the meeting of the Hague Conference of 1907, the immunity of mail-bags from search was far from established. Nor can the ratification of the Eleventh Hague Convention by less than half the members of the International Comity (if such an entity exists) be said to have created a new and binding rule in international law.

However, it is an omen of good augury that the United States and the Allied Governments, in their recent correspondence on the subject, were able to agree on general principles, though they differed somewhat in their application.

In the first place, all the Powers (apparently including even Germany) are agreed that post parcels constitute merchandise which may be seized and, under certain circumstances, confiscated.

Furthermore, the United States Government apparently agrees with

the Allies that "merchandise hidden in the wrappers, envelopes, or letters, contained in the mail-bags" may be seized.

In the next place, the United States and Allied Governments agree that "genuine correspondence" is inviolable, but the United States does not admit that "belligerents may search other private sea-borne mails for any other purpose than to discover whether they contain articles of enemy ownership carried on belligerent vessels or articles of contraband transmitted under sealed cover as letter mail," except in the case of an effective blockade.

The gist of the complaint of the United States is that the Allied Governments have seized and confiscated mail from vessels in port instead of at sea.

> They compel neutral ships without just cause to enter their own ports or they induce shipping lines, through some form of duress, to send their mail ships *via* British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. Acting upon this enforced jurisdiction, the authorities remove all mails, genuine correspondence as well as post parcels, take them to London, where every piece, even though of neutral origin and destination, is opened, and critically examined to determine the "sincerity of their character," in accordance with the interpretation given that undefined phrase by the British and French censors. Finally the expurgated remainder is forwarded, frequently after irreparable delay, to its destination. Ships are detained *en route* to or from the United States or to or from other neutral countries, and mails are held and delayed for several days and, in some cases, for weeks and even months, even though not routed to parts of North Europe *via* British ports. * * * The British and French practice amounts to an unwarranted limitation on the use by neutrals of the world's highway for the transmission of correspondence.

It may thus be seen that the difference is one of application or mode of procedure. It is the question as to whether the right of visit and search must continue to be exercised on the high seas; or whether, under the circumstances of changed methods of transportation, of improved modern devices for evading discovery, and of the dangers from submarines, the rules pertaining to the mode of exercising the right of search must not be modified so as to meet present-day conditions. On this point the Allies would seem to have the better of the argument. The attitude of the United States appears to be needlessly obstructive, legalistic, and technical. We stand upon the letter rather than the spirit of our rights.

The Memorandum presented by the Allied Governments of France and Great Britain on February 15, 1916, contains one palpable hit:

> Between December 31, 1914 and December 31, 1915, the German or Austro-Hungarian naval authorities destroyed, without previous warning or visitation, 13

mail ships with their mail-bags on board, coming from or going to neutral or Allied countries, without any more concern about the inviolability of the dispatches and correspondence they carried than about the lives of the inoffensive persons aboard the ships.

It has not come to the knowledge of the allied governments that any protest touching postal correspondence was ever addressed to the Imperial Governments.

Is not our Government in this matter straining at a gnat and swallowing a camel?

AMOS S. HERSHEY.

THE CASE OF VIRGINIA *v.* WEST VIRGINIA

On June 14, 1915, in the case of Virginia *v.* West Virginia (238 U. S. 202), the Supreme Court of the United States awarded Virginia the sum of $12,393,929.50, to be paid by West Virginia with interest thereon at the rate of five per centum from July 1, 1915, until paid. In this most recent decision of the Supreme Court in this long drawn-out and carefully argued case, decided on June 12, 1916, Virginia petitioned a writ of execution against West Virginia "on the ground that such relief is necessary as the latter has taken no steps whatever to provide for the payment of the decree." West Virginia resisted the petition for three reasons, which are thus stated by Chief Justice White, delivering the opinion of the Supreme Court:

(1) Because the State of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in January, 1917, and the members of that body have not yet been chosen; (2) because presumptively the State of West Virginia has no property subject to execution; and (3) because although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between States and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a State if in the exercise of jurisdiction such a judgment was entered.

These objections on the part of West Virginia are of a kind to give the jurist pause, although they do not seem to impress the layman, who believes that a court cannot be a court unless it has power to com-