Confidential

MEMORANDUM

January 18, 1945

Subject: Liability of the War Department and Army officers arising from the Italian Remittance Program.

A question has been raised concerning the liabilities of the War Department and its officers as a result of the Italian remittance program which has been instituted under Treasury General License No. 32A. In particular the question has been asked whether the War Department or its officers individually may be held liable for wrongs resulting from the acts or omissions of the officers who have been designated to certify to the authority of certain Italian bank officers to sign on behalf of their institutions and to the authenticity of their signatures.

This memorandum will discuss broadly the liabilities of the Government and Army officers which may arise from the remittance program. In the process, an attempt will be made to give a complete exposition of the remittance procedure and to discuss the status and relationships of the various parties involved.

I

Facts

1. The Remittance Procedure

The circumstances surrounding the Italian remittance program are these: three Italian banks, viz., the Bank of Sicily, the Bank of Naples, and the Bank of Italy, have been designated by Treasury General License No. 32A to receive monthly living-expense remittances from persons in the United States to persons within the portions of liberated Italy assigned, respectively, to the three Italian banks. Each of the Italian banks has designated certain U.S. banks as correspondents. Persons in the United States desiring to take advantage of the Treasury license may deposit dollars with the appropriate U.S. bank; the U.S. banks send monthly schedules of names and amounts to their Italian correspondents; and the Italian banks, after the schedules have been approved by the Allied Financial Agency, make payments of equivalent amounts of lire to the designated persons in Italy. The Italian banks deduct a lire fee for their services. Upon notification from the Italian banks that payment has been made, the U.S. correspondent banks confirm dollar credits to special blocked accounts in the names of the Italian banks corresponding to the dollars paid by U.S. remitters. These special accounts are designated as "AF accounts" to distinguish them from any pre-armistice accounts of the banks. The U.S. banks are advised of uncompleted remittances by periodic schedules with instructions to refund the original dollar amount to the remitter.

When the first Bank of Sicily AF accounts were established in the United States, the Bank of Sicily's U.S. correspondents requested the War Department to furnish certifications concerning the authenticity of the signatures of the Bank of Sicily's officers who were to be authorized by the bank to operate the accounts. This request was made by the U.S. banks because, with the Italian political situation obscure, they were unwilling to rely on any certification furnished by an Italian authority. The War Department accordingly authorized certain Army officers connected with the Allied Financial Agency to furnish the requested certifications. When the Bank of Naples entered the remittance program, similar certifications were furnished for the officers of that Bank. The procedure is being repeated for the Bank of Italy.

These arrangements were made as a result of discussions which took place from time to time during 1943-44 between the Allied Financial Agency and the three Italian banks. In each case the arrangements were formalized by an exchange of letters between the banks and the Allied Financial Agency.

2. The Allied Financial Agency

The Allied Financial Agency is now a creature of the Allied Commission administering the Italian Armistice. Initially the Allied Financial Agency was designated as the Allied Military Financial Agency and was an agency of the Allied Military Government of Italy.

First established in accordance with a directive issued by the Combined Chiefs of Staff (Fortune 303, June 1, 1943), the Allied Military Financial Agency had as its main purposes:

(a) to provide a convenient depository, clearing house, and office of financial transactions for the convenience of the Allied military forces;

(b) to provide a depository where necessary for enemy or other funds which might be impounded;

(c) to facilitate control by AMG of financial and property transactions in the occupied territory, and

(d) to provide a source of funds from which to make loans to and through local banks, municipalities, public utilities, private businesses, and individual persons where AMG considered such loans would assist in the restoration of order and the rehabilitation of essential activities and were desirable from the point of view of the military effort, and where local banks were not in a position to provide such financial assistance. (Memorandum of Colonel A. P. Graffety Smith, Chief Financial Officer, AMG, July 15, 1943).

Careful consideration was given to the accounts which might best serve AMFA's needs. Thus, the Chief Financial Officer of AMG, Colonel A. P. Graffety Smith, stated:

" * * * It is fully recognized that AMFA is not an ordinary commercial bank. AMGOT has also in mind the ultimate necessity of transferring AMFA's accounts to the Italians, when the Military Government withdraws, and after all inter-AMGOT transactions have been closed insofar as they offset.

" * * * The broad concept underlying the balance sheet, however, should be stated. With a view to the final liquidation of AMFA, preparatory to transferring its accounts to the Italian government, it will be desirable to show as a cumulative total on the liability side of the balance sheet, the amount of new A.M. Lira notes received by AMFA. This total, less the amount of A.M. Lira notes in AMFA's cash reserve, may be regarded as the effective circulation of A.M. Lira notes. It will therefore have to be taken over by the Italian Government, or some institution (Central Bank) designated by it, as part of the note circulation."

The Allied Military Financial Agency was authorized:

(1) to maintain accounts and records as a basis for eventual settlement between the Allied and Italian governments;

(2) to act as depository, clearing house and finance office for the Allied military forces;

(3) to receive, hold and supply all funds of whatever currency for pay and other cash requirements of the Allied military forces;

(4) to receive, hold and supply Allied military postage stamps;

(5) to withdraw from circulation the spearhead currencies used by U.S. and British forces;

(6) to make advances directly or indirectly to banks and other private and public institutions;

(7) to act as depository for and to exercise control over impounded liquid enemy assets;

(8) to control foreign exchange rates and regulations; and

(9) to advise the Allied Military Government on economic and financial problems. (Memorandum for General Hilldring from Major Hilliard, October 21, 1943).

In accordance with the terms of the Italian Armistice, certain parts of Italy were turned over to the administration of the Italian government

in the fall of 1943 and an Allied Control Commission was established to advise the Italian administration. A short time later AMFA's name was changed to the present style (AFA) and its control was transferred to the Finance Subcommission of the Allied Control Commission (ACC). The Allied Financial Agency retained under the Allied Control Commission such functions of its predecessor as it needed to exercise and was authorized additionally:

(1) to maintain such additional control and subsidiary accounts and records as are necessary to form a basis for final settlement between the Allied and Italian governments;

(2) to act as a finance office and clearing house for the Allied Control Commission;

(3) to receive, hold and supply Italian currencies, received in global amounts from the Italian government, to the Allied authorities; and

(4) to provide such assistance and services as the Finance Subcommission might require in controlling the discharge of the financial terms of the Armistice, including the withdrawal and redemption of currencies issued by the United Nations.

At the time the Combined Chiefs of Staff directed the transfer of AMFA to the Allied Control Commission, it was stated in paragraph 1 d of Cable No. TAM 69, dated October 29, 1943, that "Later on, when the Control Commission ends, all assets and liabilities of AFA (including those of the former AMFA) will be transferred to the Italian government under terms and arrangements to be agreed upon between the Allied and Italian governments."

3. The Agreement Between the AFA and the Bank of Sicily

The arrangements between the Bank of Sicily and the Allied Military Financial Agency are described in a letter from AMFA to the Bank dated January 6, 1944, and two letters from the Bank to AMFA, dated respectively January 11, 1944, and March 6, 1944.

AMFA's letter to the Bank of Sicily of January 6, 1944, stipulates the arrangements concerning remittance schedules and fees described above, and in paragraph 9 provides that

"the Banco di Sicilia will credit AMFA, Palermo, on their books with all dollar remittances received from the U.S."

In paragraph 10 it is provided:

"The Banco di Sicilia will debit AMFA No. 1 Account with the lire equivalent of remittances paid."

These provisions were confirmed by the Bank in its letter of January 11, 1944.

On March 6, 1944, the Bank of Sicily confirmed by letter an agreement, reached verbally, in accordance with which the Bank promised to

> "give to the Allied Financial Agency, upon demand, a mail or cable order of payment or transfer on the AF accounts opened in our name with correspondent banks in the United States or United Kingdom, up to the total balance standing to the credit of the Allied Financial Agency, Palermo, in dollars or sterling on our books."

It was further agreed that such demands would be made solely by the AFA and would be honored by the bank only when signed by two authorized officers of the AFA.

4. The Agreement Between AFA and the Bank of Naples

The agreement between the Allied Financial Agency and the Bank of Naples is expressed in letters from the Bank to AFA dated February 29, 1944, March 8, 1944, and April 29, 1944. Under this agreement, identical arrangements concerning remittance schedules and fees were stipulated and the Bank agreed to open the following two AF accounts:

> "1. AF blocked dollars account. In this account we will credit to you the amounts of dollars, which we have been credited from our correspondents in our AF dollars account with them, as soon as we will be in possession of their credit advices.
>
> "At any time the credit of this account must be in accordance with the credits of the various accounts which we have with our U.S. correspondents.
>
> "2. AF lire account - remittances U.S.A. In this account, as per agreement you will make a first payment in lire, we will debit all payments effected by us. The total of debits must be in accordance with the total of dollars credits, existing in our various AF accounts with our correspondents, at the change rate of lire 100."

Stipulations for the operation of the Bank of Naples AF accounts are provided in the Bank's letter of March 8, 1944. In this letter the Bank agreed

> "to deliver to, or, to the order of, the Headquarters of the Allied Financial Agency, on demand, transfers and/or payment orders, mail or cable at the option of the Allied Financial Agency, drawn on any or all of our 'AF accounts' with our correspondent banks in the United States, payable as the Allied Financial Agency shall direct. Provided that the total value of

such transfers or payment orders shall not exceed the balance standing to the credit of the Allied Financial Agency in 'AF blocked dollar account' on our books at the time such transfers or payment orders are required of us by the Allied Financial Agency."

Identical stipulations concerning the operation of AF sterling accounts were expressed in a second letter of the Bank also dated March 8, 1944.

On April 29, 1944, the Bank of Naples supplemented its letter of March 8, 1944, clarifying certain of the remittance arrangements already described.

5. The Agreement Between the AFA and the Bank of Italy

The agreement between the AFA and the Bank of Italy is dated August 24, 1944, the text being transmitted to the Combined Chiefs of Staff by cable in MAT 298 of September 4, 1944. Under this agreement the Bank of Italy, conforming to the established remittance arrangements, agreed that all dollars, sterling and other proceeds accruing to the Bank in foreign countries as a result of remittances to Italy after July 1, 1943, will be held by the Bank for the account of the Italian government. The Bank undertook to make payments to remittance beneficiaries from its own lire funds and to effect promptly all payments from its AF dollar and sterling accounts by means of payment orders to its correspondents abroad as directed from time to time by the Finance Subcommission of ACC. In the original version, it was stipulated that payment instructions would be initiated by the Finance Subcommission. However, in TAM 312, dated October 13, 1944, the Combined Chiefs of Staff directed that the agreement of August 24 be revised to provide that payments from the Bank of Italy's AF accounts should be initiated by the Italian government.

6. Comparison of the Three Agreements

At this point it should be pointed out that there is a fundamental difference between the accounting procedures established for the Bank of Sicily and the Bank of Naples on the one hand and for the Bank of Italy on the other. Thus, while the Bank of Sicily and the Bank of Naples make payments to remittance beneficiaries after debiting the Allied Financial Agency's lira account, the Bank of Italy makes payments to remittance beneficiaries from its own lire funds. The reason for this difference is explained by the fact that when the remittance program was inaugurated in the Sicily and Naples regions, the Bank of Sicily and the Bank of Naples were unwilling to advance lire against dollars without being guaranteed by AFA that the exchange rate of 100 lire to the dollar would not be changed. These two banks were of the opinion that the rate established by the Allied Military authorities undervalued the lira, and were therefore apprehensive that the rate might subsequently be changed so that their dollar holdings would be depreciated in terms of lire. (See MAT 97, November 21, 1943; TAM 100, December 7, 1943; and letter from AFHQ to CCS, File MGS/123.7,

January 16, 1944). The Bank of Italy, however, holds dollars only for the account of the Italian government; hence, arrangements were made under which the Bank made payments from its own funds.

7. Disbursements from AF Accounts

To indicate the attitude of the Combined Chiefs of Staff toward expenditures from the AF accounts, the following excerpts from a cable of instructions to the authorities in Italy are pertinent (TAM 100, December 7, 1943):

> "When remittances are made to Sicily, such dollars as may accrue therefrom will be placed in post liberation blocked accounts held with U.S. correspondents of Bank of Sicily in name of 'Bank of Sicily, account AF.' In reality dollars in such accounts would be held on books of Bank of Sicily for account of AMFA, but correspondent banks in U.S. would treat all such dollars as being held by them for Bank of Sicily. Lire to be paid to the beneficiaries of the remittances by the Bank of Sicily would be obtained by it from AMFA. AMFA would charge on its books such lire to new account indicated in paragraph 4 (c) of MAT 97. AMFA would be relied on to make sure that fees are reasonable which are charged by Bank of Sicily and other banks participating in effecting remittances.
>
> "The holdings of dollars by Bank of Sicily in 'AF' accounts might be used in appropriate cases with concurrence of AMFA and U.S. Treasury, to meet the urgent needs for foreign exchange to make payments properly chargeable to Italian Government. We assume that adequate records will be kept by AMFA with respect to the amounts of dollars so used. As result of such use of dollars in 'AF' accounts, no entry should be made in new Lira account entitled 'Payments to persons in Italy on account of remittances from the USA'. As you indicate, dollar balance held in 'AF' accounts might eventually be turned over to Italian exchange control or other appropriate governmental authorities against appropriate undertakings by such institutions and Italian Government. We request that you enter into no commitments for out payments without prior reference to U.S. until further notice." (Underscoring supplied)

Subsequent instructions concerning payments from the AF accounts as well as from other foreign exchange assets of Italy have provided that such funds may be used only for specific purposes, all for the benefit of the Italian government. (TAM 136, January 22, 1944).

II

Analysis

So that the activities of the Allied Financial Agency may appear in proper frame of reference, it is necessary before entering into an analysis

of the main questions to examine briefly the international legal status of the Allied forces now occupying certain Italian territories by virtue of a successful military invasion and an armistice.

1. Powers of the Occupation Government

As occupying powers, the Allied forces in Italy have the right and duty under international law to establish a military government and to take over the functions of the existing authorities. This belligerent right proceeds directly from public exigency. With the suspension of the legal Italian sovereignty, as a result of the successful invasion, it became necessary for the Allied forces to provide a temporary government to maintain public safety and social order. This principle is supported by the Hague Conventions of 1907, by numerous judicial decisions, and by international law publicists. IV Hague Convention, Regulations respecting The Laws and Customs of War on Land, Art. 43 (1907); MacLeod v. United States, 229 U.S. 416 (1913); Dooley v. United States, 182 U.S. 222 (1901); New Orleans v. Steamship Company, 20 Wall. 387 (U.S. 1874); Cross v. Harrison, 16 How. 164 (U.S. 1853); Fleming v. Page, 9 How. 602 (U.S. 1849); 2 Oppenheim, International Law (6th ed. 1940) 342; Magoon, The Law of Civil Government Under Military Occupation (2d ed. 1902) 13, 15.

The powers of the military government instituted in accordance with this belligerent right are very broad. Practically speaking, the powers would seem to be limited only by the laws and usages of war. In the case of New Orleans v. Steamship Company, supra, the Supreme Court said (at page 394):

> " * * * the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject."

The same principle has been reiterated many times. Dooley v. United States, supra, and cases there cited.

The broad powers of a military government are not limited by the conclusion of an armistice unless limitations are expressly stipulated in the instrument. Spaight, in his War Rights on Land (1911), says (at page 245-246):

> "In the absence of a special provision (in an armistice), the invading belligerent's war rights as against the population continue unchanged. He can raise requisitions, billet his

soldiers, demand services in kind and even levy contributions, and his general martial law regulations remain in full force. And war conditions still hold good as regards the mutual relations of the inhabitants of the districts held by the two belligerents."

Some writers have contended that an occupation under an armistice of territory which has not previously been held by military might does not carry with it the usual powers available to a belligerent occupant. However, no state practices to support this contention are cited. Feilchenfeld, The International Economic Law of Belligerent Occupation (1942) 111. On the other hand, it appears that the Allied occupation of the Rhineland in 1918-20 was carried out in accordance with the rule first stated. Thus, in the report of the American officer in charge of civil affairs during the Rhineland occupation, it is said:

"International law places upon the Commanding General the responsibility broadly speaking of preserving order, punishing crime and protecting lives and property within the territorial limits of his command. His power in the premises is as great as his responsibility. The Armistice in no sense checked, or refused to the military forces, any of the powers usually and ordinarily exercised by an invading army, except as above noted. A reading of the Armistice clearly shows that each army of occupation was to act as the representative of its respective government in the conduct of the military operations with which it was charged. There was nothing in the Armistice removing from the Commanding General (with the exceptions noted) any of the authority expressly or by inference vested in him by international law or usage." Hunt, American Military Government of Occupied Germany, 1918-1920 (1943) 358.

Reference to the Armistice between the Allied forces and Italy, signed in September of 1943, discloses no limitations which would restrict the powers of the occupation government in Italy. On the contrary, that instrument specifically reserves to the Allied Commander-in-Chief the right to take any measures which in his opinion may be necessary for the protection of the interests of the Allied forces in the prosecution of the war; the right to establish an Allied military government over such parts of Italian territory as may be deemed necessary in the military interests of the United Nations; and the power to impose conditions of a political, economic and financial nature with which Italy will be bound to comply.

From the foregoing it will be perceived that the Allied Financial Agency as the financial arm of the occupation government in Italy, has a special status quite different from private or public municipal law institutions. While it operates as a kind of central bank for the occupation authorities, it cannot be limited to the powers of an ordinary central bank and its dealings may not be judged by ordinary standards of private law. Nevertheless, in some instances its status in the remittance

program parallels those of a private institution and without limiting the agency's international legal powers, it would appear proper to make use by analogy of private law principles in determining the consequences of its acts in facilitating the transfer of funds between the United States and occupied Italy.

2. Relationships of the Parties

The first question to be determined is the relationship between the AFA, the Italian government, the Bank of Sicily, the Bank of Naples and the Bank of Italy.

(a) The Allied Financial Agency is not a party to remittance transactions through the Bank of Italy.

The case of the Bank of Italy may be disposed of quickly. By virtue of the agreement between this Bank and the AFA, the financial transactions of the Bank of Italy in the remittance program are carried out without the participation of the Allied Financial Agency. The Bank acts solely for the account of the Italian government. AFA's function in screening the remittance schedules transmitted to the Bank of Italy by its U.S. correspondents before remittances are paid is a government function only; such screenings are for the purpose of military security and do not involve financial transactions. It is apparent, therefore, that neither the War Department, the Allied Financial Agency, nor the Allied Financial Agency's officers are in any way parties to remittance transactions between the Bank of Italy and its U.S. correspondents.

(b) The Allied Financial Agency, through the Bank of Sicily and the Bank of Naples, holds the power of disposal over the AF accounts of these two banks, for the beneficial use of the Italian government.

The Bank of Sicily and the Bank of Naples appear to be functioning at the direction of the Allied Financial Agency for the single purpose of holding the Agency's dollar accounts in the United States. On the other hand, AFA's transactions with reference to the AF accounts are not carried out for its own benefit. Considering the purposes for which AFA was established and the subsequent expressions of intention by the Combined Chiefs of Staff, quoted above, it would appear that at present the Allied Financial Agency is acting for the account of the Italian government, holding the power of disposal over the AF accounts through the Bank of Sicily and the Bank of Naples. AFA's power of disposal is evidenced by the fact (1) that under its agreements with the two Italian banks, a dollar credit is carried on the books of the banks in AFA's name, and (2) that the two banks are required to issue payment orders against the AF accounts as directed by AFA.

It is clear that at the time AMFA was created it was the intention of the Combined Chiefs of Staff that the assets of AMFA were to be held temporarily, i.e., during the period of occupation, and that ultimately all assets as well as liabilities of the AMFA would be transferred to the

Italian government or one of its appropriate agencies. The Allies, as conquerors, may of course dispose of the AF accounts in any way they see fit; however, at the present time and until other dispositions are made, CCS has provided that such accounts are to be conserved by AFA for the beneficial use of the Italian government.

3. Liabilities of the Allied Financial Agency

At the outset it may be stated as fundamental that the Allied Financial Agency, as combined agency of the United States and the United Kingdom, may be sued only with the consent of both sovereigns. This fact results from the familiar theory that:

> " * * * A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends * * *" Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

Assuming, however, that the procedural obstacles may be removed, what would be AFA's liabilities?

(a) AFA is not liable, on account of remittance contracts, either to the U.S. correspondent banks or their customers, but should stand ready to authorize restitution from AF accounts in the event an Italian bank makes payment to the wrong person.

The transfer of funds to a foreign country through banking channels creates a relationship of principal and agent between the person making the remittance and the bank which initiates the transmission. Rosenberg v. Northwestern National Bank, 180 Minn. 110, 230 N.W. 280 (1930): Legniti v. Mechanics and Metals Nat. Bank, 230 N.Y. 415, 130 N.E. 597 (1921); Fliker v. State Bank, 159 N.Y.S. 730 (Mun.Ct. 1916); 2 Paton's Digest (1926) Sec. 522a; cf. Mazukiewicz v. Hanover National Bank, 240 N.Y. 317, 148 N.E. 535 (1925).

Where the agreement calls for the bank to "remit", "transmit" or "forward" funds to a named beneficiary abroad, the bank's obligation does not include actual delivery but only the sending of the funds. Rosenberg v. Northwestern National Bank, supra; Ferrari v. First National Bank of Connellsville, Pa., 246 N.Y. 382, 159 N.E. 178 (1927); Nicoletti v. Bank of Los Banos, 190 Calif. 637, 214 Pac. 51, 27 A.L.R. 1479 (1923); Katcher v. American Express Co., 94 N.J.L. 165, 109 Atl. 741 (1920). Such an agreement requires the bank to transmit the funds through ordinary banking channels, using due care in choosing a correspondent through whom the money is to be transmitted. Rosenberg v. Northwestern National Bank, supra; Nicoletti v. Bank of Los Banos, supra; Schoibe v. Zaro, 199 App. Div. 807, 192 N.Y.S. 433 (1922); 2 Paton's Digest (1926) Sec. 522a. Decisions involving transfers of funds have held that the bank initiating the transmission of funds is not liable for the negligence of its foreign

correspondent and will not be held liable for a loss resulting from the correspondent's delivery to the wrong payee. Rosenberg v. Northwestern National Bank, supra; Nicoletti v. Bank of Los Banos, supra; 2 Paton's Digest (1926) Sec. 522a. If the bank is unable to perform its obligation or if the correspondent bank fails to make delivery, the customer is entitled to restitution upon demand. Fliker v. State Bank, supra; Pfotenhauer v. Equitable Trust Co., 188 N.Y.S. 464 (1921), affd. 201 App.Div. 846, 193 N.Y.S. 949 (1922); Ahrens v. Guaranty Trust Co. of New York, 208 N.Y.S. 242 (City Ct. of N.Y. 1925); Safian v. Irving National Bank, 202 App.Div. 459, 460, 196 N.Y.S. 141, 143 (1922); Katcher v. American Express Co., supra.

In Rosenberg v. Northwestern National Bank, supra, the plaintiff had employed the bank to purchase and remit Russian rubles to his wife in Russia. Acting through a New York correspondent, the bank advised the credit abroad; however, the rubles were never delivered to the plaintiff's wife. In an action to recover the amount of the remittance, the court said as follows (Syllabus by the Court):

> "A bank simply agreeing to purchase and remit for another Russian rubles to a person in Russia acts as an agent for that purpose. Such an agreement is not one to deliver the rubles. The relationship established is that of agent and principal, and not that of creditor and debtor. When a bank employs a subagent by authority of its principal, express or implied, the sugagent is the agent of the principal. In such a case the bank is not liable for the nondelivery of the rubles due to the negligence, if any, of a responsible subagent selected by it, with due care, to effect the remittance."

In Nicoletti v. Bank of Los Banos, supra, the plaintiff had given $550.00 to the bank to remit to his mother in Italy. The bank transmitted the money to a bank in Milan which negligently paid it to the wrong person. In deciding that the U.S. bank was not liable for the loss, the court held that an agreement to "remit" or "transmit" is an agreement to send and not to deliver. The U.S. bank so agreeing is an agent of the person making the remittance and is not liable for the negligence of the subagent.

Referring to the cases involving the collection of commercial paper through banking channels, the court in the Nicolleti case observed that the principle which controls the duty of the bank receiving paper for collection would seem to be equally applicable to an agreement for the transmission of money. Two different rules have been developed in the collection cases for determining the liability of a forwarding bank. As indicated by the court in the Nicoletti case, California, Massachusetts and certain other states have followed the Massachusetts rule which holds that the forwarding bank is not liable for the negligence of its correspondents. Dorchester Bank v. New England Bank, 1 Cush. 177 (Mass. 1848). Other jurisdictions, notably New York and the Federal courts, have followed the New York rule which holds that the forwarding bank acts as principal in the

collection transaction and is liable for the negligence of the correspondent banks through which collection is effected. Exchange National Bank of Pittsburgh v. Third National Bank of New York, 112 U.S. 276 (1884).

It has been held, however, that even under the New York rule the general liability of the collecting bank may be varied or limited by an express agreement of the parties or by an implication arising from general usage. Exchange National Bank of Pittsburgh v. Third National Bank, supra, at 287; First National Bank of Denver v. Federal Reserve Bank of Kansas City, 6 F. (2d) 339, 343 (C.C.A. 8th, 1925). In the Nicoletti case the court found there is a well established usage followed in the transmission of funds abroad from which it must be implied that the parties agree that the funds are to be transmitted through ordinary banking channels.

It may be concluded from the foregoing discussion that the weight of authority holds that a bank transmitting or remitting funds abroad for a customer is not liable for the negligence of its foreign correspondent. Although a contrary rule is followed in New York in collection cases, a similar result should follow where the aprties have limited the agreement to remittance or transmission only. Considering the rigid pattern established by General License No. 32A, it would seem safe to conclude that New York courts would not hold a bank liable for the negligence of the Italian banks now functioning in the remittance program.

Applying the foregoing rules to determine the liabilities of the AFA, it is clear that recovery may not be had against the U.S. correspondent banks which would give them an action over against the Italian banks or the AFA.

Nor may the negligence of the Italian banks be imputed to the AFA. Thus, although the Italian banks hold the AF accounts subject to the disposal of the AFA, they function independently so far as the payment of remittances is concerned. They are not servants of AFA. They are paid for their services by the person making the remittance. The entire remittance transaction is carried out through the facilities of the bank without direction from the AFA. Mechem states the rule as follows:

> " * * * An independent contractor is one who carries on an independent business, in the course of which he undertakes to accomplish some result or do some piece of work, for another, being left at liberty in general to choose his own means and methods, and being responsible to his employer only for the results which he has undertaken to bring about. Being left at liberty in general to choose his own means and agencies and not being subject to the control of the employer as to the manner in which the work is to be done, he is not the servant of the employer, nor are his servants the servants of the employer; and the employer is not responsible to third persons for injuries to them which result from the manner in which the work is performed by the contractor or his servants. For such injuries, committed either by himself or his servants, the independent contractor must answer." 2 Mechem's Agency (2d ed. 1914) Sec. 1870.

Hence, it is apparent that for transactions out of which liability for negligence might arise, the Italian banks are independent contractors vis-a-vis the AFA. As the above cases hold, they are the independent subagents of the remitter. It follows that AFA should not be held liable for negligence which might arise from a responsibility which the banks have assumed and for which they are paid by another.

It should be remembered, however, that even though AFA is not legally liable, the fact that it has the power of disposal over the AF accounts makes its cooperation necessary in certain instances. If a remittance is not completed, the U.S. banks would be obliged to return the remitter's money to him and might legitimately charge the AF accounts of the Italian banks by a corresponding amount. But in the event an Italian bank makes payment to the wrong payee, the AFA should, if the remitter makes demand, authorize restitution from the AF accounts. So that the Italian banks will bear the loss arising from their own negligence, the lira equivalent of the amount returned should be charged to them by the AFA.

(b) AFA is not liable for the torts committed by its officers.

As a governmental agency, AFA will not be held liable in damages for the delicts of its officers.

In the case of German Bank of Memphis v. United States, 148 U.S. 573, 579 (1893), it is said:

> " * * * It is a well settled rule of law that the government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress * * * "

After reviewing the cases in which this principle was established, the Court went on to say:

> "If this be treated as a case of tort, then it is clear that the government is not liable, not only upon the ground above stated, but because under the act of Congress conferring jurisdiction upon the Court of Claims, 24 Stat. 505, c. 359, there is an express exception of cases sounding in tort." (Underscoring supplied).

A recent case involving this principle is Henson v. Eichorn, 24 F. Supp. 842, 843 (E.D. Ill. 1938). This was a tort action against the Home Owners' Loan Corporation in which the defendant moved to dismiss suit on the grounds that as an instrumentality of the United States it was not suable in tort for the negligent acts of its servants. In sustaining the defendant's motion, the court said:

> "This defendant, being an instrumentality of the United States * * * stands before the court in this suit as if it were the United States. It is too well settled to require

citation of authority that the United States is not liable for damages arising from the torts of its employees unless such liability be assumed, and cannot be sued in any case without its consent * * * "

It may be concluded, therefore, that the Government, in addition to being immune from suit as a sovereign, is, on substantive grounds, not responsible for the misfeasances, nonfeasances and negligence of its servants. The basic rule has been stated by Story in his Commentaries on the Law of Agency, Sec. 319 (6th ed. 1863):

" * * * It is plain, that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of its officers or agents, whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the government * * * "

See also Bussey v. United States, 41 F. (2d) 415, 421 (Ct.Cl. 1930); in re Nabors, 280 Fed. 943, 944 (N.D. Ala. 1922); Robertson v. Sichel, 127 U.S. 507, 515 (1887).

4. Personal Liability of Army Officers

The personal liability of Army officers concerned with the remittance program will in each case depend upon the extent of the officer's authority. As a general rule an officer of the Government is not liable in damages for acts committed within the scope of his official duties. Kendall v. Stokes, 3 How. 87, 98 (U.S. 1845); Standard Nut Margarine Co. of Florida v. Mellon, 63 App. D.C. 339, 72 F. (2d) 557, cert. denied, 293 U.S. 605 (1934); Cooper v. O'Connor, 99 F. (2d) 135, 138 (App. D.C. 1938). However, a public officer will be held personally liable for his wrongful act if such act is committed in the performance of a ministerial duty. Where the duty is discretionary, however, the public officer is not liable for his mistakes of fact or for an erroneous construction of the law. In Kendall v. Stokes, supra, the United States Supreme Court (at page 98):

" * * * But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established * * * "

A more complete statement of the rule is included in the case of Cooper v. O'Connor, supra, where the Court said (at page 137):

"There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. There is also a general rule that if any officer--ministerial or otherwise--acts outside the scope of his jurisdiction and without authorization of law, he is liable in an action for damages for injuries suffered by a citizen as a result thereof. See Bradley v. Fisher, 13 Wall. 335, 351-352, 20 L. Ed. 646. On the contrary, if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he is not to be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law * * * " (Underscoring supplied)

As authority that the rule is the same for both civilian and military officers, the case of Druecker v. Salomon, 21 Wis. 621, 629 (1867); Note (1941) 135 A.L.R. 10, 41, a case involving an action for false imprisonment, may be cited. In this case the court said:

"In Marbury v. Madison, 1 Cranch, 137, Chief Justice Marshall, after reasoning upon the political or discretionary powers of the president and heads of departments, says: 'The conclusion of this reasoning is, that where the heads of departments are the political or confidential agents of the executive merely to execute his will, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.' The same principles are found in Luther v. Borden, 7 How. (U.S.), 1. These principles obviously apply to military commanders, and to the various officers appointed by the president. Wherever the duties of the office are ministerial, any individual injured by the official acts of such officer, or by acts done by him under color of his office, may resort to the courts for redress. Wherever the officer acts in the exercise of a clearly and purely discretionary authority, his determinations partake of the character of judicial decisions * * * " (Underscoring supplied).

Whether a duty is ministerial or discretionary depends upon how the duty is imposed upon the officer and what standards are provided to guide his actions. If the law leaves nothing to the judgment of the officer and carefully prescribes the manner and occasion for performance, the duty is said to be ministerial. State of Mississippi v. Johnson, 4 Wall. 475, 498 (U.S. 1866). But where the law requires the officer to exercise

judgment in making a determination which is necessary to the execution of the law, the duty imposed upon him is discretionary. Decatur v. Paulding, 14 Pet. 497, 515-516 (U.S. 1840).

In the remittance program, the officers may be required to examine a bank's charter and the minutes of the bank's governing body in order to determine whether a bank officer is authorized to sign on behalf of the bank. Before certifying the authenticity of a signature the officer must satisfy himself that the person before him is the proper officer of the bank and then witness the act of signing. Both of these duties require the examination of evidence and might appear to be within the usual definition of "discretionary duties." On the other hand, it would appear that the facts in particular cases lead the courts to an opposite conclusion. Thus, in the case of Stephens v. Jones, 24 S.D. 97, 123 N.W. 705 (1909), it was said (at page 708):

> " * * * Where the duty is such as necessarily requires examination of evidence and the decision of questions of law and fact, such a duty is not ministerial, but is a judicial or discretionary duty; but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exist under which it is his right and duty to perform the act, and although in doing so he must to such extent construe a statue by which the duty is imposed * * * "

And in City of Tacoma v. Peterson, 165 Wash. 461, 5 P. (2d) 1022, 1024 (1931):

> " * * * The ascertainment of a fact which raises the duty, or is collateral to its performance, is not such an exercise of judgment as will deprive the duty of its ministerial character * * * "

In Smock v. Farmers' Union State Bank, 22 Okla. 825, 98 Pac. 945, 949 (1908), and State ex rel. Jones v. Cook, 174 Mo. 100, 73 S.W. 489, 493 (1903), it was held that the duty of a state officer to issue a certificate concerning a bank's organization and its authority to transact banking business was ministerial.

It must be concluded, therefore, that whether officers certifying to the authority of bank officers or to the authenticity of signatures will be held personally liable must depend upon the facts of the particular case. It seems likely, in view of the circumstances in which the officer's duty is performed, that a U.S. court would be extremely reluctant to impose liability on the individual.

It seems clear, however, that all duties of supervision and administration in the remittance program, and also the approval of monthly remittance schedules would be regarded as "discretionary duties". Supervisory officers in the remittance program, like officers planning and supervising other phases of military government, are obviously clothed with discretionary authority. The officers approving monthly remittance schedules, it is

assumed, are required to decide as a matter of military security whether the intended recipient should be allowed to receive a remittance. Officers in this class, if properly authorized, would be wholly exempted from liability for their acts done in performance of their duties.

Just what will be regarded as "the scope of an officer's authority" may be indicated in the following quotation from the case of Cooper v. O'Connor, supra (at page 139):

> "It is not necessary--in order that acts may be done within the scope of official authority--that they should be prescribed by statute (citing authority); or even that they should be specifically directed or requested by a superior officer (citing authority). It is sufficient if they are done by an officer 'in relation to matters committed by law to his control or supervision' (italics supplied) (citing authority); or that they have 'more or less connection with the general matters committed by law to his control of supervision' (italics supplied) (citing authority); or that they are governed by a lawful requirement of the department under whose authority the officer is acting."

This statement is particularly apposite to the present problem in which the requisite authority is derived, not from a statute, but, as will presently appear, from the war powers of the commanders-in-chief of two occupying powers.

5. Authority of the War Department and Its Officers to Institute and Carry Out the Remittance Program.

Since the liability of individual officers depend upon the scope of their authority, it is necessary to examine the extent of the War Department's and its officers' authority to institute and carry out the remittance program.

(a) The United Nations have a right under international law to control remittances to Italy.

The power of the military government has been held to include the right to collect revenues, to establish port regulations, to impose conditions upon the entrance of foreign vessels into occupied ports and to regulate import duties. Cross v Harrison, supra. So also the military government is authorized the establish courts and to pass new laws, Leitensdorfer v. Webb, 20 How. 176, 178 (U.S. 1857), and to establish and maintain telegraph and railroad lines, even in competition with private companies, Magoon, The Law of Civil Government under Military Occupation (1902) 391-407.

The military government may regulate commercial intercourse with an occupied territory. Fleming v. Page, supra, at 615. On this subject, Birkhimer says in his Military Government and Martial Law (3d ed. 1914) (at page 268):

"One of the most important incidents of military government is the regulation of trade with the subjugated district. The occupying state has an unquestioned right to regulate commercial intercourse with conquered territory. It may be absolutely prohibited, or permitted to be unrestricted, or such limitations may be imposed thereon as either policy or a proper attention to military measures may justify. While the victor maintains exclusive possession of the territory his title is valid. Therefore the citizens of no other nation have a right to enter it without the permission of the dominant power. Much less can they claim an unrestricted right to trade therein."

During the American Civil War, the purchase of cotton in "rebellious territory" was prohibited except under Treasury license for which a fee of four cents per pound was exacted. In the case of Hamilton v. Dillin, 21 Wall. 73, 97 (U.S. 1874), the Court held that this duty was legally imposed and could not be recovered by one who had traded with the occupied territory under license. The Court said (at page 97):

"* * * As before stated, the power of the government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the government of the United States as incident to the power to declare war and to carry it on to a successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the government, just as much so as the power to levy military contributions, or to perform any other belligerent act."

It seems obvious that the power to regulate commercial intercourse between the occupied territory and the outside world would include the right to regulate the remittance of funds to and from such a territory. Whether the article imported or exported is cotton or credits would not seem to be important so far as the authority is concerned. Given the right to regulate commerce, the military government may extend its regulations so that every transaction abroad is subject to its control.

(b) Army officers derive their authority to institute the remittance program from the President's delegation of authority to carry out the war in the field.

In the United States, the power to exercise the belligerent right to establish a military government is vested in the President as commander-in-chief of the military forces of the nation. Constitution, Art. II, Sec. 2. In The Grapeshot, 9 Wall. 129, 132 (U.S. 1869), the Court said that the duty of the national government to establish a provisional government in an insurgent territory was that which devolves upon the government of one belligerent while occupying the territory of another belligerent, and that the duty was "a military duty, to be performed by the President

as commander-in-chief, and intrusted as such with the direction of the military forces by which the occupation was held." To the same effect are Cross v. Harrison, supra, at 189; Leitensdorfer v. Webb, supra; and Berdahl, War Powers of the Executive in the United States (1921) 160.

A military commander in the field must therefore derive his authority to establish a military government in occupied territory from a delegation of authority from the President. Such a delegation, it would appear, may be general, and the specific use of the power may be left to the discretion of the commander in the field. MacLeod v. United States, supra, at 432; Cross v. Harrison, supra; Mechanics' and Traders' Bank v. Union Bank, 22 Wall. 276, 297 (U.S. 1874); Magoon, The Law of Civil Government under Military Occupation (2d ed. 1902) 227; Berdahl, War Powers of the Executive in the United States (1921) 160.

In the case of MacLeod v. United States, supra, it was held that the authority of a conquering power to regulate trade with the enemy is a general authority which a local commander may exercise subject to the orders of the President as commander-in-chief. And in Cross v. Harrison, supra, the Court held that the President and properly authorized the military and naval commander of our forces in California during the Mexican War "to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession."

The extent of the power delegated to a military commander by the President was specifically discussed in the case of Mechanics' and Traders' Bank v. Union Bank, supra. In that case General Butler, as military governor of Louisiana, had established a court of civil jurisdiction in New Orleans and the court had rendered a decision which was subsequently challenged. The Court referred to Leitensdorfer v. Webb, supra, and noted that in that case too there had been no express order for the establishment of civil courts emanating from the President or commander-in-chief, but that the courts had been established by the act of the commanding officer of the army occupying the conquered territory. The plaintiff in the Mechanics' and Traders' Bank case argued that General Butler had no authority to establish such a court; that the President alone as commander-in chief had such authority. The Court said (at page 297):

> " * * * We do not concur in this view. General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except so far as they were denied to him by the commander-in-chief, and among those powers, as we have seen, was that of establishing courts in conquered territory * * * "

It would appear then (1) that the War Department's authority to institute and carry out the Italian remittance program is included in the international belligerent right to establish a military government for an occupied territory; (2) that this authority in the United States is vested

by the Constitution in the President as commander-in-chief of the military forces; and (3) that the President may delegate the authority to the commander in the field, who may in turn authorize subordinate officers to administer the details of such a program.

While British precedents have not been examined for this memorandum, we may presume that the British military forces are granted by the Crown powers as broad as those of the American forces. The powers of the military occupants of Italy stem from the plenary powers of the two commanders-in-chief, the President and the King.

III

Conclusions

From the foregoing discussion, the following specific conclusions may be drawn:

1. The Government is not liable to suit on account of the remittance program without the consent of both the United States and the United Kingdom.

2. The Government incurs no liability on account of the remittance program, but the AFA should authorize restitution to the remitter from the AF accounts in the event of a negligent payment to the wrong payee.

3. Whether an individual officer will be held personally liable for a wrongful act committed while performing duties connected with the remittance program will depend upon whether the duty is ministerial or discretionary.

(a) Whether the duty of certifying to the authority and signatures of Italian bank officers will be regarded as ministerial or discretionary will depend upon the facts of a particular case. It seems likely, however, that U.S. courts would be extremely reluctant in the circumstances involved to impose liability on Army officers.

(b) The approval of monthly remittance schedules and all supervisory duties of officers connected with the remittance program seem clearly to involve discretionary authority. Any validly authorized officers assigned to such duties are, therefore, wholly exempt from liability for their acts even if such acts result in a wrong to another.

4. The instituting and carrying out of a program to control the remittance of funds to and from occupied Italy is within the authority of the President and his designated military subordinates. The authority to control remittances, like the authority to control trade, is included in the general delegation of authority to the commander in the field to establish and administer a military government.