Extradition (1903), 11. It has been enunciated in extradition cases under the treaty applicable to the present case. *Wright v. Henkel*, 190 U.S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948 (1902); *Collins v. Loisel*, 259 U.S. 309, 42 Sup. Ct. 469, 66 L. Ed. 965 (1921); *Greene v. United States*, 154 Fed. 401 (C.C.A. 5th 1907); *Collier v. Vaccaro*, 51 F. (2d) 17 (C.C.A. 4th 1931). It has been repeated in cases involving the same offence as that charged in the principal case. *Kelley v. Griffin*, 241 U.S. 6, 36 Sup. Ct. 487, 60 L. Ed. 861 (1915); *Bingham v. Bradley*, 241 U.S. 511, 36 Sup. Ct. 634, 60 L. Ed. 1136 (1915). The court here, advancing beyond previous decisions, refused to apply the above principle on the ground that the treaty did not specifically require criminality in both countries for the acts here alleged while it did require criminality in both countries for other offenses. See *Ford v. United States*, 273 U.S. 593, 47 Sup. Ct. 531, 71 L. Ed. 793 (1926); *Springer v. Philippine Islands*, 277 U.S. 189, 48 Sup. Ct. 480, 72 L. Ed. 845 (1927).

The treaty states that certain persons shall "be reciprocally delivered up." Great Britain will not extradite unless the offense is a crime in Great Britain. Extradition Act of 1870, 33 & 34 Vict. C. 52, § 26, schedule 1; *Ex parte Piot*, 15 Cox C.C. 208 (1883); *Re Bellencoutre*, 17 Cox C.C. 253 (1891). The present holding seemingly deprives the treaty of its reciprocity, but this should not be a fatal objection to the court's liberal construction. But see 32 Mich, L. Rev. 417 (1924), where the present decision was interpreted to mean that since the offense was a crime in "most states" the requirement of criminality in both countries was satisfied.

JOSEPH TOBE ZOLINE

Taxation—Status of Government Lessees under "Instrumentality" Doctrine—[Federal].—Defendant, lessee of oil and gas rights on municipal land used for water supply and other civic purposes, sought exemption as a state instrumentality from a federal tax on its share of the net income derived from the lease. The city received a percentage of the proceeds from the sale of oil and gas removed, and defendant agreed to pay for all development. The lower court allowed the exemption. On appeal, *held*, the lessee's net income was taxable; it was remote from governmental function, and the effect on the state's activities was inconsiderable. *Burnet v. Jergins Trust*, 288 U.S. 508, 53 Sup. Ct. 439, 77 L. Ed. 925 (1933).

The broad principle that an "instrumentality" of the government cannot be taxed has been used to hold lessees of government property immune from taxation on the income from the lease. The doctrine as thus applied is exemplified in the *Gillespie* case where a state tax on the net income derived from a lease of restricted Indian land was held invalid. *Gillespie v. Oklahoma*, 257 U.S. 501, 42 Sup. Ct. 171, 66 L. Ed. 338 (1922). The court reasoned that a lease of land dedicated to the support of a governmental agency is an "instrumentality" of the government, that a tax on the lease is invalid since it "is a tax upon the power to [lease] and could be used to destroy [that] power," and that therefore a tax on the income from the lease is likewise invalid. This doctrine had been previously enunciated in *Choctaw, Oklahoma & Gulf R.R. v. Harrison*, 235 U.S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234 (1914), where the gross income derived from coal mining under a lease of restricted Indian lands was held exempt from taxation on the theory that the lessee was an agency succeeding to the duties of the government, notwithstanding the state's contention that it taxed only the coal at the pit's mouth as personal property of the lessee. Cf. *Indian Oil Co. v. Oklahoma*, 240 U.S. 522, 36

Sup. Ct. 453, 60 L. Ed. 779 (1916); *Large Oil Co. v. Howard*, 248 U.S. 549, 39 Sup. Ct. 183, 63 L. Ed. 416 (1919).

Since the *Gillespie* case the tendency has been to limit the application of the rule there announced. In *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, 51 Sup. Ct. 432, 75 L. Ed. 1032 (1931), a federal tax was sustained on income received by lessees of public school land from the sale of oil produced thereon. The *Gillespie* case was distinguished on the ground that by state law a lease operated to vest in the lessee the title to the oil underground, and hence the income being taxed was derived from the sale of private property. This distinction seems unsatisfactory, however, in view of the fact that title to the oil in the *Gillespie* case vested in the lessee on severance. See opinion of Stone, J, dissenting, in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 401, 52 Sup. Ct. 443, 76 L. Ed. 815 (1931). The latter case, though holding invalid a federal tax on the net income from oil lands dedicated to the support of public schools and leased from the state, conceded that the doctrine of the *Gillespie* case should be limited to "circumstances closely analogous." See *Indian Territory Co. v. Board of Equalization*, 288 U.S. 325, 53 Sup. Ct. 388, 77 L. Ed. 503 (1933); 33 Col. L. Rev. 1075 (1933). In the present case the court reads into this dictum of the *Coronado* case the implication that before the circumstances are sufficiently analogous to the *Gillespie* case, the lands involved must be exclusively dedicated to the support of a definite and strictly governmental purpose.

The *Gillespie* case rests on the premise that a lessee of lands from which a government derives income for its governmental functions becomes thereby an instrumentality of that government. Clearly, however, a lessee is not an instrumentality in the sense that he is an active participant in a governmental function. See *McCulloch v. Maryland*, 4 Wheat. (U.S.) 316, 4 L. Ed. 579 (1918); *South Carolina v. U.S.*, 199 U.S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261 (1905). A lessee is conducting an essentially private enterprise. *Forbes v. Gracey*, 94 U.S. 762, 24 L. Ed. 313 (1876); *Wells v. Savannah*, 181 U.S. 531, 21 Sup. Ct. 697, 45 L. Ed. 986 (1900); *Garland County v. Gaines*, 56 Ark. 227, 19 S.W. 602 (1892); *LaSalle County Mfg. Co. v. Ottawa*, 16 Ill. 418 (1855); *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 507 (1907). Moreover, the income from the sale of an article which is personal property of the vendor at the time of the sale has always been a legitimate subject of taxation. *Alderman v. Wells*, 85 S.C. 507, 67 S.E. 781 (1910); *Ex rel. Chandler v. French*, 73 W.Va. 658, 81 S.E. 825 (1915). For purposes of taxation, income as such has been classified as a separate entity regardless of its source, and without relation to any particular property or business. *Tyle Realty Co. v. Andrews*, 240 U.S. 115, 36 Sup. Ct. 281, 60 L. Ed. 554 (1915); Black, Income Tax (2d ed. 1915), § 187. And even if the lessee were in fact an agency of the government, "no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such agent," *Railroad Co. v. Peniston*, 18 Wall. (U.S.) 5, 33, 21 L. Ed. 787 (1873).

In view of the dubious foundation of the *Gillespie* case, and of the immunity from state and federal taxation it grants to large private incomes, it would seem more desirable to follow the suggestion of the dissenting justices in *Burnet v. Coronado Oil Gas Co.*, 285 U.S. 393, 401, 52 Sup. Ct. 443, 76 L. Ed. 815 (1931), and overrule the *Gillespie* case, rather than follow the method of the present case of limiting it by tenuous distinction which will lead to further litigation.

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