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THE APPLICATION OF THE CRIMINAL LAW OF A COUNTRY TO ACTS COMMITTED BY FOREIGNERS OUTSIDE THE JURISDICTION

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The present paper is confined to a discussion from an American point of view of the application of the criminal law of a country to acts committed by foreigners outside the territorial limits of the country concerned. It will include a statement of the prevailing theories adopted by American courts and jurists, accompanied by a brief summary of typical cases decided by American Courts, and a critical analysis of these theories and of their application in American judicial opinions.

All discussions of the problem under consideration must, naturally, begin by assuming the territorial organization of the modern political society into so-called "sovereign states", and with this, all the consequences that of "logical necessity" follow from that organization. As a matter of fact, all American discussions, as indeed all other discussions known to the present writer, do start from this point. Unfortunately there is much disagreement as to what consequences necessarily do "logically" follow from the admitted political facts. This disagreement exists not only between writers trained under different systems of law, but also between Anglo-American writers and judges whose training is primarily in the traditions of Anglo-American law and legal ideas. In the course of our discussion we shall undertake, *inter alia*, to discover just why this is so. In doing so we shall find it necessary to examine critically some of the fundamental ideas underlying all discussions of the powers of so-called "independent, sovereign states".

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In American law discussions of the problem are usually based upon the ideas set forth in the first American treatise on the Conflice of Laws, Story's classic work, first published in 1834. These ideas were, of course, not original with Story, but first received systematic statement in English in his treatise. The following passages are relevant to our discussion:

> "Before entering upon my examination of the various heads which a treatise on the Conflict of Laws will naturally embrace, it seems necessary to advert to a few general maxims or axioms which constitute the basis upon which all reasonings on the subject must necessarily rest; and without the express or tacit admission of which it will be found impossible to arrive at any principles to govern the conduct of nations, or to regulate the due administration of justice.
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> "The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it. A state may therefore regulate the manner and circumstances under which property, whether real or personal or in action, within it, shall be held, transmitted, bequeathed, transferred, or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases calling for the interposition of its tribunals to protect and vindicate and secure the wholesome agency of its own laws within its own domains.
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> "Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations; that each could legislate for all, and none for itself; and that all might establish rules which none were bound to obey. The absurd results of such a state of things need not be dwelt upon."[1]

[1] STORY, COMMENTARIES ON THE CONFLICT OF LAWS (8th ed. 1883) §§ 17, 18.

The important parts of these passages, for our present purposes, are the following:

> "The laws of every state bind directly all persons who are resident within it, whether natural-born subjects or aliens .... and acts done within it .... No state or nation can by its laws directly bind persons not resident therein, whether natural-born subjects or others."

The opinions of American courts abound in similar statements. A typical example in the field of criminal law follows:

> "It may be assumed, as a general proposition, that the criminal laws of a state do not bind, and can not affect, those out of the territorial limits of the state. Each state, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right to determine within its own borders what shall be tolerated and what prohibited; what shall be decreed innocent and what criminal; its powers being limited only by the Federal Constitution, and the motive and objects of government. While each state is thus sovereign within its own limits, it can not impose its laws upon those outside the limits of its sovereign power."[2]

In considering such passages it must be kept in mind that for the purposes of so-called "jurisdiction" over crime, the states of the American union are "foreign" to each other. That is, the general criminal law is state law and not federal law, and one state in dealing with criminal cases is in general as distinct and separate from other states as France is from England. To be sure, owing to the common inheritance of Anglo-American legal traditions the criminal laws of the various states bear a sharp family resemblance and so do not differ in content as much as does the criminal law of England differ from that of France. Nevertheless, the types of problems of "jurisdiction" over crime which arise between the American states are similar to those which arise between countries foreign to each other. Consequently, although the majority of American cases have to do with "interstate" rather than "international" situations, the underlying problems are of a similar general character.[3]

[2] Worden, J., speaking for the court in Johns v. State, 19 Ind. 421, 81 Am. Dec. 408 (1882).

[3] Almost no attention has been paid by American courts and writers to possible differences between "conflict of laws" problems involving "international" situations and "interstate" situations. In the typical collections of cases for use in teaching the subject a given section, *e. g.*, the one on Domicil, will contain a mixture of cases dealing with international and interstate situations. Indeed, cases involving purely intra-state situations (domicil

The fundamental idea enumerated by Story has never been expressed more clearly than by Mr. Justice Holmes of the United States Supreme Court. He has written as follows:

> "It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state."[4]
>
> "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done . . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than of the place where he did the acts, not only would be unjust, but *would be an interference with the authority of another sovereignty* contrary to the comity of nations, which the other state concerned justly might resent."[5]

According to this view, for a state or country to apply its criminal law to the acts either of its own citizens or of foreigners, where those acts are committed abroad, would not be merely unjust and inexpedient, it would be an interference with the authority of another sovereign. This idea also underlies the following statement of Dicey in his great work on the Conflict of Laws. He says:

> "To treat an act done, e. g. in Italy, which by the law of Italy is absolutely innocent or justifiable, as a tort [*a fortiori*, as a crime] would be an interference with the authority of the Italian state."[6]

One purpose of the present paper is to examine into the validity of these and all similar statements. The American law is of course derived from the English law. It will therefore be instruc-

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in one city or another, one village or another, within the same American state) will be included. A similar mode of treatment is found in the Restatement of the Conflict of Laws now being prepared under the auspices of the American Law Institute. In the field of jurisdiction to tax the importance of the distinction has been made clear by the recent decision of the United States Supreme Court in Burnet, Commissioner of Internal Revenue v. Brooks, 288 U. S. 378, 53 S. Ct. 457 (1933). The importance of the distinction is discussed in a paper by Armand B. Dubois in (1933) 17 MINN. L. REV. 361.

The difficulties growing out of the American system under which the general criminal law is State rather than federal law and the consequent limitations on "jurisdiction", are leading to a statutory extension of federal jurisdiction, based in part upon the power of the federal government to regulate foreign and interstate commerce.

[4] Mulhall v. Fallon, 176 Mass. 266 (1900).

[5] American Banana Company v. United Fruit Co., 213 U. S. 347, 356 (1909).

[6] DICEY, THE CONFLICT OF LAWS (4th ed. 1927) 725.

tive before proceeding further to examine briefly the English law. Limitations of space preclude doing more than indicating the general point of view of the English courts. This can best be done by considering one of the leading English cases which deals with the general problem, *viz., Regina v. Keyn.*[7a] In that case the accused had been convicted of the offense of manslaughter on the high seas at the Central Criminal Court in London under a statute allowing that Court to hear and determine offenses "committed on the high seas and other places within the jurisdiction of the Admiralty of England." The facts were admittedly such as to warrant the conviction, if there was "jurisdiction" to try the defendant as amenable to English law. The admitted facts were as follows: Being in command of the German steamer "Franconia" and having occasion to pass the "Strathclyde", a British ship, the accused brought his ship unnecessarily close to the latter, and then, by negligence in steering, ran into the "Strathclyde" and broke a hole in her, in consequence of which she filled with water and sank. As a result, the deceased, whose death the accused was charged with having caused, being on board the "Strathclyde", was drowned. It was admitted that the negligence of the accused having resulted in the death of the deceased amounted under English law to manslaughter.

The legality of the conviction was contested, on the ground that the accused was a foreigner; that the "Franconia", the ship he commanded, was a foreign vessel, sailing from a foreign port, bound on a foreign voyage; and that the alleged offense was committed on the high seas, outside the jurisdiction of England. The government contended that the conviction was proper, on two grounds: (1) that as the accident happened within the three-mile limit, it happened within what must be regarded as the territorial limits of England; (2) that the death which the accused had caused took place on an English vessel, and that an English vessel is for purposes of jurisdiction to be treated as English territory, and so the crime was committed in English territory. The Court by a divided vote quashed the conviction as made without jurisdiction. Cockburn, C. J., who read an opinion in favor of quashing the conviction, after rejecting the first ground as unsound, entered upon a long discussion of "territorial jurisdiction". He said:

> "No proposition of law can be more incontestable or more uniformly admitted than that, according to the general law

[7a] L. R. 2 Ex. D. 63, 13 Cox C. C. 403 (1876).

> of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, can not be made responsible to its law for acts done beyond such limits."

The learned judge at this point in his opinion quoted from Story, Huber, and Dr. Lushington in support of the statement. As we have seen, this is substantially the usual form in which the supposed fundamental principle of the law of nations is stated by Anglo-American jurists. Cockburn, C. J., admitted one exception, that of a foreigner on board the ship of another nation; but regarded this as an apparent rather than a real exception, the ship being "likened to a floating portion of the national territory."

The second contention, that since the negligent acts of the accused resulted in an injury to and the sinking of a British ship and the death of the deceased on that ship, the accused was subject to English law, the learned judge rejected. Interestingly enough, following the analogy of an earlier English case — *Regina v. Coombe*[7b] the learned judge assumed that the accused would have been amenable to English law if he had intentionally run into the "Strathclyde", but distinguished the case of a merely negligent collision like that presented by the case before him. In taking this view the learned judge adopted in general a line of argument which runs through the English and American cases dealing with this subject. It will be well, therefore, to set it forth, at least in substance. Starting with the proposition that a sovereign state has jurisdiction to determine the legal consequences of "acts" done within its territorial limits, the learned judge proceeds to distract attention from the fact that when this principle was enunciated what was meant by "acts" was clearly the whole "crime", *i. e.*, the movements of the actor's body as well as the consequences in the external world, which series of events all taken together are alleged to constitute a "crime", and *that the reason for assigning jurisdiction to the state where the "acts" are done was the presence of the accused within the territorial limits of that state so that he owed the duty of obedience to the laws in force there.* Adopting the line of argument referred to as usually found in Anglo-American judicial opinions, the word "act" in the principle under consideration is now given a new and hitherto apparently unintended meaning, *viz.*, the contract of the force set in motion by the actor with the person of the injured party. On this basis the learned judge concluded that the "act of killing",

[7b] 1 Leach 388 (1786).

if the collision had been intentionally caused, would have "occurred" on the British ship, the "Strathclyde", and so the accused would have "acted" within a place subject to British law. The following passage from the opinion of Cockburn, C. J., contains the essence of the argument and may be regarded as typical of the general Anglo-American point of view. He says:

> ". . . . When a man strikes a blow with a club, or inflicts a wound by the thrust of a sword, or the stab of a knife, or blows out another's brains by putting a pistol to his head, the act takes effect immediately. If he hurls a stone, or discharges a bullet from a gun or pistol at another person, at a distance, the instrument he uses passes from him; the stone or bullet, having left his hand, has to make its way through a given space before it strikes the blow it is intended to inflict. But *the blow is as much the act of him who casts the stone, or fires the gun, as though it had taken effect immediately.* In such a case *the act,* in lieu of taking effect immediately, *is a continuing act* till the end has been effected, that is, till the missile has struck the blow, *the intention of the party using it accompanying it* [*the missile*] *throughout its course.* The act must be taken to be the act of the party in the effects it was intended to produce, till its agency has become exhausted and its operation has ceased. When, therefore, a person being in one jurisdiction fires a shot at a person who is in another, as was the case in *Reg. v. Coombe,* it may well be held *that the blow struck by the bullet is an act done in the jurisdiction in which the bullet takes effect.*
>
> ". . . . Whether the same principle would apply to a case of manslaughter, arising from the running down of another ship through negligence, or to a case where death is occasioned by the careless discharge of a gun, is a very different thing, and may, indeed, admit of serious doubt. For, in such a case, there is no intention accompanying the act into its ulterior consequences. The negligence in running down a ship may be said to be confined to the improper navigation of the ship occasioning the mischief; the party guilty of such negligence is neither actually, nor in intention, and thus constructively, in the ship on which the death takes place."[8]

[8] L. R. 2 Ex. D. 63, 234-255 (1876). The italics are the present writer's. Compare the use of the word "act" in the discussion of Criminal Attempts by Professor Beale in (1903) 16 HARV. L. REV. 492, 493:

"An attempt may be described as *an act* regarded as a *step toward another act* . . . .

In investigating criminal attempt, therefore, we are to consider, first, what was *the intended result* which is *regarded by the law as a criminal act;* and secondly, what has the defendant done as a step toward bringing about that result . . . .

The point in the chain of results selected by the law as *the criminal act* is *the contact* of the poison with the tissues of the body. The *physical harm, not the death* of the victim, *is the criminal act;* the death, being subsequent,

Notice the character of the logical reasoning. "The *act,* in lieu of taking effect immediately, is a *continuing act* till the end has been effected . . . . *it may well be held that the blow struck by the bullet is an act done in the jurisdiction in which the bullet takes effect.*" In other words, the physical contact of an inanimate object, a bullet, with the person of the injured party is now said to be "an act" of a human being, the accused. Clearly the meaning of the word "act" as used in the principle of jurisdiction under discussion has been given a new and arbitrary meaning. Moreover, the argument wholly overlooks the crucial point, *viz.,* that on the territorial theory as originally enunciated only persons with the territorial limits of the state in question can be bound by its laws, and this accused was not within those limits; he was on a German vessel on the high seas. Nor is anything added to the argument by the assertion that "the intention of the party accompanies the missile throughout its course." Just what real meaning loose language of this kind can have is not clear. Apparently it is thought by the learned judge to justify the distinction he next proceeds to assert, between a blow intentionally struck and a merely negligent injury, for he argues that in the latter case "there is no intention accompanying the act [missile] into its ulterior consequences." Obviously, figurative language of this kind can hardly be regarded as constituting a valid "reason" for distinguishing the negligent injury from the intentional injury.

Some of the judges in the case of *Regina v. Keyn* dissented from the decision of the majority. If we analyze the opinion of one of the dissenting judges, we find him starting with precisely the same fundamental principle of jurisdiction, but reaching an opposite conclusion by giving to the verbal symbol "act" a different meaning. For example, Denman, J., who dissented, argued as follows:

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is, as we have seen, an immaterial factor in considering the attempt to commit the crime.

It is quite true that in the ordinary use of language a man attempts to brings about *results* as well as to do *acts;* that when a murderer in intention fires a pistol he is attempting not only to put a bullet into the object aimed at, but to cause the death of his intended victim, who may be a hundred miles away. But attempt in that sense, having a mere mental connection with the intended result, is not the concern of *the criminal law,* which *punishes physical acts only.*"

And see the discussion of the meaning of "act" in the present writer's paper on *Act, Intention, and Motive in the Criminal Law* (1917) 26 YALE L. J. 645.

". . . . suppose that a foreigner in a foreign ship, lying on the sea in deep water, were to commit a burglary by thrusting a hooked stick through the window of some building adjoining the sea, and thus, and thus only, break in and steal goods and chattels. I think that in such a case, if he were to be afterwards on shore, our Courts would have jurisdiction to try him, and that if they tried him, they must hold that, though he was a foreigner breaking, entering, and stealing in the county of S., and therefore liable to be tried and punished there.

"The conclusion that the prisoner did commit the offence of manslaughter on a British ship is, I think, inevitable from the considerations and from the authorities above applied to the case. He being in command of his ship, which is found to have been under his immediate direction, so directed her as to cause her bow to penetrate the *Strathclyde* and make a large hole in her through which the water rushed in. I am of opinion that *the making of that hole was his negligent act done within British jurisdiction,* just as much as if he had personally boarded the vessel and staved her in with a hammer, and that by doing that act, followed as it was by the immediate sinking of the vessel and drowning of the deceased, he was liable to be tried for a manslaughter committed on the high seas within the jurisdiction of the Central Criminal Court."[9]

The view adopted by the majority of the Court in *Regina v. Keyn, supra,* distinguishing negligent injuries from intentional injuries in dealing with this "jurisdictional" question, is not in accord with the view of the authorities in America. This appears clearly in the respective opinions of Lord Finlay and Judge John Bassett Moore in the case of the S. S. "Lotus", decided by the Permanent Court of International Justice (discussed below). The facts were substantially similar to those in the *Franconia* case. Lord Finlay denied jurisdiction to the state whose nationals were negligently killed on the high seas; Mr. Moore reached the opposite conclusion.[10]

It will be seen from this discussion that the English law has never been actually in accord with the supposed "fundamental principle of international law" that the law of a given state (country) can not be applied to the acts of persons, including foreigners, who are outside its territorial limits when they act. The slightest consideration of either the English or the American decisions makes this clear. For example, if we turn to America we

[9] L. R. 2 Ex. D. 63, 106, 107 (1876).

[10] See *infra* for discussion of the case and extracts from the opinions.

find the Supreme Court of Indiana in the case of *Johns v. State,*[11] referred to above, immediately after the enunciation of the general principle, adding:

> "But while it is clear that the criminal law of a state can have no extraterritorial operation, it is equally clear that each state may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts, within her own limits, shall be deemed criminal, and by punishing the commission of those acts. *And the right of punishment extends not only to persons who commit infractions of the criminal law actually within the state, but also to all persons who commit such infractions as are, in contemplation of law, within the state.*"

In other words, the American court here recognizes that there are "exceptions" to the supposed principle; that in some cases persons who are actually not within the territorial limits of the state in question when they act and the "crime is committed" may, if the state can get hold of them later, be dealt with by the state for violation of its laws. These cases, according to the courts, are those in which "in contemplation of law" the "crime is committed" within the state even though the actor is without the state. To obtain a correct idea of the Anglo-American point of view, we must, therefore, examine somewhat carefully these "exceptions".

They are in general based upon the proposition that where a person outside a state "sets in motion a force which takes effect inside the state," he is answerable where the "act takes effect" or "the evil is done", and the crime is said "to have been committed, in contemplation of law", in the state in which the effects are thus produced. It will be useful to note a few typical applications of this idea.

If a person in one state or country "sets a force in motion", *e. g.,* fires a bullet from a gun, with intent to cause the death of another person in another state, he is amenable to the criminal law of the second state in which the bullet strikes and kills the deceased. Interestingly enough, the further, supposedly logical, consequence is deduced that since the murder is "deemed, in contemplation of law, to have been committed" in the second state, it was *not* committed in the first state (in which the accused was when he fired the gun). For example, in *State v. Hall,*[12] the ac-

[11] *Supra* n. 2.
[12] 114 N. C. 909, 19 S. E. 602 (1894).

cused had stood on the North Carolina side of the state line and shot into Tennessee. The bullet struck and killed the deceased in Tennessee. It was decided that in the absence of a statute specifically so providing, the accused could not be punished in North Carolina, since "in legal contemplation" the "killing" took place in Tennessee. The court quoted with approval the following passage from the opinion in a Georgia case:

> "Of course, *the presence of the accused within this State is essential* to make his act one which is done in this State; *but the presence need not be actual. It may be constructive.* The well established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to a point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook, or other contrivance, by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation, enters the building. So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, *the law regards him as accompanying the ball,* and as being represented by it, up to the point where it strikes."[13]

But in a later stage of the case[14] the same court held that although Hall had been "constructively" absent from North Carolina and "present" in Tennessee at the time of the "killing", such constructive conduct did not make him a fugitive from justice so as to authorize his surrender to the authorities of Tennessee. This curious result is in part due to the interpretation given to Art. IV, Section 2 of the Constitution of the United States, which provides that "a person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." This article and the federal statute passed in pursuance of it have been interpreted by the courts as requiring that the accused shall have been actually present in the state in which the "crime" is "deemed to have been committed" and then fled; a mere "constructive presence" is not sufficient. Thus in *State v. Hall,*[15] the court re-

[13] Simpson v. State, 92 Ga. 41, 17 S. E. 984 (1893). The italics are the present writer's.

[14] State v. Hall, 115 N. C. 811, 20 S. E. 729 (1894).

[15] *Supra* n. 14.

viewed exhaustively the authorities on that subject and reached the conclusion that:

> "To hold that a person who is liable to indictment only by reason of his constructive presence is a fugitive from the justice of a state within whose limits he has never gone since the commission of the offense, involves as great an error as to maintain that one who has stood still, and never ventured within the reach of another, has fled from him to avoid injury. One who has never fled cannot be a fugitive."

The case of *Simpson v. State*[16] reveals the difficulties into which these theories lead. In that case the accused, while in the state of South Carolina, shot at a person in a boat on the Savannah River within the territorial limits of Georgia. As we have seen, had the bullet struck the person aimed at, under the view universally followed by American courts a crime would have been committed where the act "took effect", where the bullet struck the injured party. But in this case the bullet missed this person and struck the water near the boat, within the territorial limits of Georgia. The accused was charged with "shooting at" the person in question. The counsel for the defense argued plausibly that as the bullet did not "take effect" in Georgia no crime had been "committed" in that state. The following extracts from the opinion of the court indicate sufficiently the kind of reasoning which was relied upon to justify the decision that a "crime was committed" in Georgia:

> "If one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle . . . . As we have already stated, the act of the accused did take effect in this state. *He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move*, and was therefore, in a legal sense, after the ball crossed the state line, up to the moment it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment. It having been established by abundant authority and precedent that in crime there may be a constructive as well as an actual presence, there can be, in a case of this kind . . . . no rational distinction in principle, as to the question of jurisdiction, whether the attempt is successful or not.'"[17]

[16] 92 Ga. 41, 17 S. E. 984 (1893).

[17] The italics are the present writer's. It will be noticed that in none of these cases does the reasoning in support of the decision lay any emphasis upon the nationality of the accused. Apparently the same rule applies equally to foreigners and to nationals. The important thing is where the "crime is committed", not who committed it.

The character of the prevailing type of reasoning used by American courts appears clearly in the italicized portion of the extract above. A "constructive", *i. e.*, a fictitious, "presence" in the state has taken the place of the actual presence demanded by the territorial principle as originally enunciated. The actual result reached in the case of *Simpson v. State* is sensible enough, to be sure, for it can hardly be denied that the accused had sufficiently "disturbed the peace" of the state of Georgia to justify its dealing with him by means of its criminal law if its officials could lay their hands on him without invading the territory of some other state. Obviously, the court recognized this, but in the belief that the alleged fundamental principle of territorial jurisdiction was a complete and correct statement as to jurisliction, felt obliged to resort to the artificial and unreal reasoning found in the opinion.

The idea that the accused person is punishable only by the state in which the "act took effect", that it is there that the "crime is committed", was applied logically in *Stewart v. Jessup*.[18] The accused person made false representations in Indiana for the purpose of inducing the sale to him of some horses. In reliance on the representations the owner of the horses sold them on credit to the accused, the sale and delivery taking place in New York. The Indiana court held that the crime of obtaining property by false pretenses had been committed in New York and not in Indiana. In this case, of course, the accused person was actually and not merely "constructively" present when the goods were obtained, and so could have been extradited to that state if he had fled from it.

The application of these territorial ideas has interesting results in the case of bigamy. For example, the statutes of North Carolina provided that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such person shall be guilty of a felony." In *State v. Cutshall*[19] the Supreme Court of the state held that the act was invalid, in so far as it covered marriages entered into outside the state. In this case, the second marriage took place in South Carolina. In the report of the case it does not appear whether the accused was or was not a resident of the state

[18] 51 Ind. 413, 19 Am. Rep. 739 (1875).
[19] 110 N. C. 538, 15 S. E. 281, 16 L. R. A. 130 (1892).

of North Carolina at the time of the second, bigamous, marriage; the court apparently regarded that as immaterial. The attempt of the prosecuting officials to subject him to the jurisdiction of the state by alleging a cohabitation in North Carolina with the second wife was unsuccessful, the court taking the view that the statute was directed at going through the second marriage ceremony and not at the subsequent cohabitation.

The North Carolina court recognized that that state could, had it so wished, have made the cohabitation in the state with the second wife, even though the second and invalid marriage had been entered into outside the state, an offense against the state. This has been done by statute in some states. A case upholding the validity of such a statute is *State v. Stuart*.[20] The statute in question in that case provided that "every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriage would be punishable, if contracted in this state, and shall afterward cohabit with such person within this state, shall be adjudged guilty of bigamy and punished in the same manner as if such second marriage had taken place in this state." It makes no difference under this type of statute whether the accused is or is not a citizen or resident. For example, in *Commonwealth v. Bradley*[21] the accused was first married in New Hampshire; later, he married a second wife in Connecticut, and only thereafter came to Massachusetts for the first time and cohabited there with the second wife. He was held punishable under a Massachusetts statute similar to the Missouri statute quoted above.

In the case of the crime of larceny, the American courts resorted to an interesting subterfuge in order to escape from the logical consequences of the territorial theory which they purported to be following. In order to understand the American cases, it is necessary to note that in dealing with larceny the English courts escaped from the rule that only the county in which the "crime was committed" could convict an accused, by adopting the artificial view that in the case of larceny there was a "continuing trespass" each moment as the accused carried the stolen goods about, and that therefore when he carried them into another county, with the felonious intent of keeping them, there was a new larceny in the latter county, and he could be tried and convicted

[20] 194 Mo. 345, 92 S. W. 878 (1906).
[21] 56 Mass. 553 (1848).

there. This rule, of course, had no international aspects, and did not apply to cases in which the goods were stolen in a foreign country.[22] Many, though not all, of the American courts seized upon this idea and held that when goods were stolen in another American state — theoretically, for purposes of jurisdiction, a "foreign" country — but brought into a second state, there was a new "taking with felonious intent" in the latter state, and so the thief could be tried and convicted there. They argued that before the American revolution the colonies (which later became states) were analogous to English countries, that therefore the English rule applies to them, and so to the states after the separation from England.[23] Other American courts rejected this theory.[24] The courts which followed the rule usually limited it to goods stolen in another American state. For example, in *Stanley v. State*[25] it was held that where the original theft occurred in Canada and the stolen goods were brought into Ohio, the Ohio courts had no jurisdiction to punish the thief. Two or three states, however, extended the doctrine even to this group of cases. Thus in *State v. Underwood*[26] it was held larceny in Maine to bring into that state goods stolen in Canada. It is interesting to note that this extension was actually justified chiefly on grounds of social expediency. The court said:

> ". . . . Maine is a border State. Many of the inhabitants of the frontier towns are engaged in business which renders it necessary for them to have and to use their property on both sides of the line. Our treaty of extradition with England does not embrace persons charged with larceny, and, highly as we respect the decisions of the learned court of our parent Commonwealth, we are not disposed to depart from what we understand the law to be in this State, by adopting the doctrine of the *Commonwealth v. Uprichard* as law in Maine, — the more especially, when the consequence would probably be, *either* to render our border towns places of refuge for thieves, who might obtain a livelihood by stealing the property of our citizens and others, over the border, with every facility for a quick, and therefore a safe return to their places of retreat, on this side of the line, where they might enjoy the fruits of their pilfering and plunder with impunity, or *else*, to cause a legislative enactment, as was the case in New York, which would, undoubtedly, make the law what, without the aid of the statute, we understand it to be now."

[22] Rex v. Prowes, 1 Moody C. C. 349 (1832).
[23] Commonwealth v. Holden, 9 Gray (Mass.) 7 (1857).
[24] People v. Gardner, 2 Johns. (N. Y.) 477 (1807).
[25] 24 Oh. St. 166 (1873).
[26] 49 Me. 181 (1858).

And so it is that the abstract logic of some wide, all-inclusive theory yields before a practical situation when the need appears great enough to the judges who are to decide. Clearly, of course, this whole doctrine of "continuing trespass" is an evasion of the territorial theory. It should be noted in passing that by statute some states have adopted the rule laid down in *State v. Underwood.*[27]

A still more obvious departure from the logic of the territorial theory by the American courts is found in the cases dealing with non-support of wife or minor children. It is a common American practice to make such non-support a criminal offense. Apparently the chief purpose in doing this is to enable the state to force the husband to discharge his duty of support and especially to enable the extradition of the delinquent husband who flees to another state to escape the enforcement of the duty. In cases of this kind the offence consists in a failure to act, an omission, rather than in positive action. The difficulty of applying the territorial theory that only the state in which the "crime is committed", *i. e.*, the "act is done", is obvious. Of course no question is raised where all the persons concerned — husband and dependents — are in the one state. But suppose the husband is in one state and the dependents in another: Where is the crime of failure to support "committed"? Interestingly enough, there is much unanimity on the part of the American courts in holding that, where the statutes properly interpreted so provide, it is within the power of the state in which the dependents are to punish the delinquent husband who "omits" while in another state. Of course if he has never "fled" from the state in question after committing the offense he can not be extradited, and punishment must await his coming into the state voluntarily. Naturally the belief in the universal applicability of the territorial theory leads the courts in this group of cases into logical difficulties. The following extract is typical.

> ". . . . The statute under consideration, save the portion in relation to abandonment, is essentially negative. The penalty is denounced, not on the commission of any affirmative act, but on the omission of the plainest duty. Necessarily, then, *the venue depends on where the omission to perform the duty occurred.* The accused had settled with his family in Story county. Neither he nor they had done anything to

[27] *Supra* n. 26. Missouri is an example: Mo. Rev. Stat. (1929) § 2362.

> change that residence. This being so, it was his duty as husband and father to provide for them and furnish them with food, clothing, and shelter at their place of residence in Story county. He owed no such duty elsewhere, and, because of the situation of his wife and children, *must have omitted the duty in Story county, or not at all* . . . . The presence of the offender within the county where a crime is committed is not always essential, but *some portion of the act or omission to act must have taken effect therein.*"[28]

Apparently American courts make no distinction between citizens and foreigners in this group of cases, any more than in any of the other groups previously discussed. Everything turns upon the court's ability to satisfy itself that it can frame what seems to it a plausible argument that the "crime was committed" or the "act took effect" within the state.

Another interesting group of cases is that in which the accused while in another state makes use of an "innocent agent" to produce consequences within the state. For example, in *People v. Adams,*[29] the accused, a citizen and resident of Ohio, in that state wrote out certain false statements which he sent to innocent agents in New York. In the latter state the agents presented the statements, as intended, to certain persons who parted with money in reliance upon the truth of the statements. The court held that the "crime was committed" by the accused in New York. In the opinion it is said:

> "He was indicted for what was done here and by himself. True the defendant was not personally within this state, but *he was here in purpose and design, and acted by his authorized agents. Qui facit per alium facit per se.* The agents employed were innocent, and he alone was guilty."

The last sentence suggests a distinction made by the courts which may at first sight seem irrational, *viz.,* that in such a case as the last discussed the accused would have "committed" no crime in New York if the agents had had guilty knowledge of the falsity of the statements. This distinction grew out of the technical distinction in Anglo-American law in cases of felony between "accessories before the fact" and "principals". The "accessory before the fact" was one who procured another to commit a crime. In the case of *People v. Adams,* if the agents had known of the falsity of the statements, they would have committed the crime of

[28] State v. Dvorcek, 140 Ia. 268, 118 N. W. 399, 401 (1908).
[29] 3 Den. (N. Y.) 207, 45 Am. Dec. 468 (1846).

obtaining property by false pretenses in New York; the accused would have been merely an "accessory before the fact". The argument would then be made that as the "procuring" was done in Ohio, the crime of accessory would have been committed there and not in New York.[30] Thus in *State v. Wyckoff*[31] the accused in New York employed another person to go to New Jersey and steal certain articles and deliver them to the accused in New York. It was held he had committed no crime in New Jersey.

The following extract from the opinion in *State v. Grady*[32] gives an excellent statement of the origin and evil effects of this distinction between innocent and guilty agents:

> "It is undoubtedly true as claimed, that the courts of this state can take no cognizance of an offense *committed* in another state. Such was the decision in Gilbert v. Steadman, 1 *Root,* 403. But it is true, and universally conceded, that if an offense is *committed* in this state by the procuration of a resident of another state who does not himself personally come here to assist in the offense, of a grade below felony, such non-resident offender can be punished for the offense by our courts if jurisdiction can be obtained of his person. It is said, however, that if the offense is of the grade of felony no such punishment can be inflicted. As it is more important to protect our citizens against great crimes than small ones, unless such a distinction not only exists but is founded in justice and essential to the symmetry of the law, it should be discarded. Such a rule cannot be founded in justice. The general proposition that no man is to suffer criminally for what he *does* out of the territorial limits of the country, if applied to a case where the act is completed out of the country is correct; but it is the highest injustice that a man should be protected in doing a criminal act here because he is personally out of the state. His *act* is here, although he is not . . . . The reason given for the distinction is, that if the offense is a felony, he sustains the relation to it, if performed by a guilty agent who can be punished, of an accessory and not of a principal, and that, as technically an accessory, he must be pursued in the locality where he committed the enticement. The doctrine has never been recognized in this state, is inconsistent with our system of criminal law, and does not com-

[30] There is the possibility in the case under consideration that since the solicitation was made by letter posted in Ohio but read and acted on by the agents in New York, the "procuring" would be held to have been "committed" in New York, rather than in Ohio.

[31] 2 Vroom (N. J.) 65 (1864).

[32] 34 Conn. 118 (1867).

mand itself to our judgment. In the first place it has not been recognized here . . . .

"In the second place, the doctrine is inconsistent with our system of criminal law. By express statutory provision we have done away with the distinction between principal and accessory in felony; and every person who aids and assists in the commission of a crime, or the protection of a criminal, is made a principal, and punishable and indictable as such. No man can therefore be accessory to a felony which has been committed here, and the doctrine is entirely inapplicable. He is a principal or nothing.

"And in the third place, the doctrine as applicable to this country is vicious and should be repudiated. It originated, as Mr. Bishop tells us, in the blunder of some judge, who held that inasmuch as one who attempted to incite another to do an act could only be punished in the county where the attempt was made, therefore one who incited an act which was actually committed in another county could be punished for the incitement and as an accessory only in the county where the act of incitement was committed. The blunder was corrected by the statute of *Edward* VI, *Chap.* 24, § 4, which provided that such accessory might also be indicted in the county where the offense was committed. It would seem that a rule thus originating in a blunder, and applicable only in respect to counties, in the state where the offense is committed, and corrected by express statute, and favoring the commission of crime, ought not to be adopted and applied to states situated as these are, tied together by a ligament giving to the citizens of each citizenship in all. For these reasons we are satisfied that the second objection ought not to prevail."

Fortunately the technical distinction between principal and accessory has been done away with in most states, so that those who procure others to commit crimes are themselves "principals", or "shall be punishable as if they were principals". Where this is the case, the courts take the view that one who outside the state procures another to commit a crime within the state is punishable where the guilty agent commits the crime. Thus in *Weil v. Block*[33] one who outside the state procured others to attempt within the state to bribe public officers was held under such a statute amenable to punishment within the state.[34]

It is obvious that most of the difficulties connected with the prevailing American doctrine are of the courts' own making. Con-

[33] 76 W. Va. 685, 86 S. E. 666 (1915).

[34] There are many states in which statutes expressly provide for the result reached in the Connecticut case cited in n. 32 *supra*.

sider, for example, the ruling that the criminal can not be punished in the state in which he actually acted (*e. g.*, aimed and fired a gun) if the "act takes effect" in another state: there was no logical necessity for its adoption. Happily to-day statutes in many states provide that the courts of the state may try and convict an accused person whenever "any part" of the "crime" occurs in the state. Examples of such statutes are:

> "The following persons are liable to punishment in this state: (1) any person who commits within the state any crime, in whole or in part."[35]
>
> "The following persons are liable to punishment under the laws of this state: (1) All persons who commit, in whole or in part, any crime within this state."[36]

The New York statute was construed and applied in *People v. Zayas*[37] in which the statute was held to authorize the punishment in New York of any who in that state made false pretenses but obtained the property in Pennsylvania. Speaking for the court, Mr. Justice Seabury said:

> "The reversal could be sustained upon either of two grounds, viz., first, that the acts alleged constitute a crime under the law of this state, or second, that the acts alleged considered in connection with the law of the state where the crime was consummated, constitute a crime . . . . We are now called upon to determine upon which of these grounds our decision should rest, and I think that we should place our judgment in this case on the ground that the acts alleged constitute a crime under the law of this state without regard to the law prevailing in the state where the crime was consummated."

The California statute was construed and applied in *People v. Botkin*,[38] a case in which the accused mailed in San Francisco, California, a box of poisoned candy, addressed to a person in Dover, Delaware, with intent that the person to whom the box was addressed should eat of the candy and her death be caused thereby. The candy was received by the person to whom it was addressed, she ate some of it, and her death was the result. The court held that

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[35] PENAL LAW OF NEW YORK, § 1930.
[36] COL. PEN. CODE (Deering, 1923) § 27.
[37] 217 N. Y. 78, 111 N. E. 465 (1916).
[38] 132 Cal. 231, 64 Pac. 288 (1901).

> ". . . . the crime of murder was in part committed within this state . . . . The language quoted can have but one meaning, and that is: a person committing a murder in part in this state is punishable under the laws of the state, the same as though the murder was wholly committed in this state."

Another type of statute found in some states has to do with homicide cases only. Thus the statutes of Massachusetts provide that

> ". . . . if a mortal wound is given, or other violence or injury inflicted, or poison administered, on the high seas or on land, either within or without the limits of this state, by means whereof death ensues in any county thereof, such offence may be prosecuted and punished in the county where the death happens."[39]

In *Commonwealth v. Macloon*[40] this statute was applied to two officers, one a citizen of Maine, the other a British subject, who had attacked and injured a man on board a British merchant vessel on the high seas. After the infliction of the injuries the one attacked went to Chelsea, Suffolk County, Massachusetts, and there died of the injuries. The Massachusetts court exhaustively reviewed the history of the English and American law of jurisdiction over crime, and concluded:

> "Upon full consideration the court is unanimously of the opinion that there is nothing in the Constitution or laws of the United States, the law of nations, or the Constitution of the Commonwealth, to restrain the legislature from enacting such a statute."

In the absence of a statute of this kind the American authorities with substantial unanimity deny jurisdiction to the state in which the death occurs when the injuries were inflicted in some other state.[41]

The difficulty inherent in any attempt to reach a simple solution of the problem of the "jurisdiction" of a "sovereign state" over the acts of persons, especially foreigners, done outside its geographical limits, by means of supposedly "logical" arguments about "territorial jurisdiction" is exemplified in the case of the S. S. "Lotus", heard and decided in 1927 by the Permanent Court

[39] MASS. GEN. LAWS (1921) c. 171, § 19.
[40] 101 Mass. 1 (1869).
[41] State v. Carter, 27 N. J. L. 499 (1859) is an example.

of International Justice.[42] The facts were as follows: In August, 1926, a collision occurred on the high seas between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt*. The latter was cut in two, sank, and eight Turkish nationals who were on board were drowned. The *Lotus* put into Constantinople, where the French commanding officer was arrested by Turkish officials and charged with manslaughter. He objected that the Turkish courts had no jurisdiction, but was found guilty and sentenced to imprisonment and to pay a fine.

The French government objected to this exercise of jurisdiction by Turkish courts over a Frenchman on account of acts and events which occurred on the high seas. By agreement the matter was referred to the Permanent Court. The questions submitted by the parties to the court were as follows:[43]

> "Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24, 1923, respecting conditions of residence and business jurisdiction, acted in conflict with the principles of international law — and if so, what principles — by instituting, following the collision which occurred on August 2, 1926, on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople — as well as against the captain of the Turkish steamship — joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the *Lotus* at the time of the collision, in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers?
>
> "Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?"

Six of the twelve judges concurred in an opinion sustaining Turkey;[44] Judge John Bassett Moore, who concurred on the precise point of law raised by the facts of the collision but on different grounds, neverthless dissented from the result; and five other judges dissented, all writing separate dissenting opinions.[45] The

[42] PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE, SERIE A, RECUEIL DES ARRETS: No. 10, AFFAIRE DU LOTUS (1927).
[43] *Ibid.* p. 5.
[44] MM. Huber, Bustamante, Oda, Anzilotti, Pessoa and Feizi-Daim Bey.
[45] The five dissenting were MM. Loder, Weiss, Nyholm, and Altamira, and Lord Finlay. Mr. Moore dissented from the opinion of the Court, and, because of the form of the particular Turkish statute under which the action

six judges who joined in the opinion of the Court[46] reasoned in substance as follows:[47]

International law governs relations between sovereign, independent states. Sovereignty means unlimited power; hence any restriction on the jurisdiction of a state can not be presumed. While clearly a state may not exercise its power within another state's territory, it may exercise its powers in its own territory by applying its law to acts done and events happening abroad, unless there is some positive prohibition in international law. That there is no such prohibition is shown by the fact that nearly all systems of law claim and have always claimed this power, the extent varying from state to state. In the case before the Court effects caused by the accused had happened on a Turkish vessel, which is to be assimilated to Turkish territory. Many countries, including France herself, have claimed and claim jurisdiction in cases of effects occurring within their territory caused by acts done abroad. There is therefore no evidence of a positive rule of international law, generally agreed upon, limiting Turkey in the manner claimed by France.

M. Loder in his dissenting opinion[48] first enunciated the same general principles as to sovereignty and exclusive territorial jurisdiction. He reached the opposite conclusion by interpreting those principles as prohibiting the application of the law of a state to acts committed abroad, except in the case of its own nationals. M. Weiss argued in a substantially similar way,[49] as did the other dissenting judges. It is noteworthy that Lord Finlay[50] and Mr. John Bassett Moore,[51] the two English speaking judges, reached opposite conclusions as to the precise case before the Court. This

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had been taken, took the view that the action of the Turkish courts was improper in the case as represented, but that Turkey would have been justified in acting under a properly limited statute.

[46] By virtue of the fact that the President of the Court was among these six judges, the opinion became that of the "majority", the President having the "casting vote". Note, however, that Judge Moore agreed with the six that Turkey under a proper statute would have been entitled to deal with the situation, thus making an actual vote of seven to five on the precise point raised by the facts as they actually occurred.

[47] See pp. 18-23 of the official report of the case.

[48] *Ibid.* p. 35.

[49] *Ibid.* p. 44.

[50] It should be noted that in his opinion Lord Finlay, equally with the continental judges, decided the case first "on principle", *i. e.*, attempted to "deduce" his result from certain assumed "principles", and then added: "But there is also authority which points in the same direction", citing the case of *Regina v. Keyn* above referred to.

[51] See pp. 65, 69-70 of the report of the case.

difference of view is explicable in view of the fact that the opinions in the English case of *Regina v. Keyn* previously discussed contain arguments in accord with Lord Finlay's views, and that, as pointed out above, the weight of judicial opinion in America is contrary to the English law.

It is obvious that if equally able judges can start with what appear at first sight to be the same fundamental assumptions and can nevertheless reach diametrically opposite results, it must be because of ambiguities in the terms in which these assumptions are expressed. Just that seems to be the case. The matter therefore requires a closer analysis than that usually given it.

The first thing to be noted is, that if states really were fully "sovereign", in the sense used, for example, by writers like Austin, there would be no such thing as "international law". To speak of the "legal powers" of a "sovereign", if that term is used in the Austinian sense, is a contradiction in terms. The "sovereign" is the law giver, not subject to law. If, therefore, we assume a completely sovereign state, it follows that that state can legally do anything it pleases in the way of attaching legal consequences to acts which happen anywhere in the world, irrespective of the nationality of the actor. Some writers reach exactly this result. For example, W. W. Willoughby, in discussing the very problem we have here under consideration, writes as follows:

> "The legal omnicompetence of a State within its own territory necessarily carried with it, as we have seen, a full jurisdiction over all persons within its borders, whether nationals or aliens, and whether these aliens be domiciled or only temporarily within its territory. From this general principle it results that it is within the complete legal discretion of each State to decide what legal responsibility, civil or criminal, it will impute to the acts of persons, whether nationals or aliens, over whom its courts obtain jurisdiction, and whether these acts are committed within or without the State's territory."[52]

A critical examination of the learned author's whole discussion, however, reveals that the statement just quoted is nothing more than a logically deduced conclusion from the doctrine of "sovereignty" as outlined in the earlier portions of the book. Given his definition of the "omnicompetent State", the learned

[52] W. W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW, p. 400.

author is naturally compelled by the force of logic to take the position that "international law" is not "law" in the same sense that "municipal law" is law. Nevertheless, at another point he recognizes that there actually is a "body of rules regulating international relations which . . . . find their source no longer in abstract and vague doctrines of natural law, but in precedent and convention."[53] If so, then there may conceivably be limitations upon the actions of states, imposed by this "body of rules regulating international relations" called "international law", even though one prefers not to call them "legal" limitations. That is, in so far as these limitations, if they exist, in fact do affect the conduct of states, and in so far as they are or would be recognized as valid by an international tribunal such as the Permanent Court of International Justice, they operate to prevent states from being fully and completely "sovereign", that is, from doing as they please without being called to account by other states.

However this may be, it seems clear that any attempt to deduce these limitations by mere "logic" from statements about the "sovereignty of independent states" must of necessity fail in the absence of an agreement on the meaning of the terms used. All attempts to do have resulted in the chaos of conflicting views exemplified in the case of the *"Lotus"*. The problem thus seems to resolve itself into this: Can there be said to be a set of "rules" of reasonably definite content, established by international law, so regulating international relations that it is always illegal for a state to apply its criminal law to the acts of foreigners committed abroad? If so, their source must lie in "precedent" and "convention". Do precedent and convention exist from which we can formulate a "body of principles framed in accordance with the legal sense of civilized nations"[54] under which states actually are limited in respect to the matter under discussion? If so, it must be because there actually is a concensus of opinion on the matter among the experts concerned, *i. e.*, among the judges and other members of the legal profession in the various countries of the civilized world. Is there such a concensus? Are there such "precedents" and "conventions"? Apparently not. In fact, we find not only that the opinions of the experts vary widely,[55] but that

[53] *Ibid.* p. 303.
[54] Beale, *The Jurisdiction of a Sovereign State* (1922) 36 HARV. L. REV. 241, 242 (1922).
[55] See L. VON BAR, INTERNATIONAL LAW, PRIVATE AND COMMERCIAL (1883) 626 ff.

the actual practices of civilized nations also vary, and so that the validity of any particular set of opinions and practices has not as yet been established as a part of "international law".

If our discussion to this point is accepted, we must conclude that any limitations which may ultimately be worked out through the development of a concensus of world opinion, perhaps through decisions of some world court, will in the last analysis be based upon ideas of social expediency, rather than upon "logical" deductions from "territorial" theories. The same is true in the case of the United States with reference to the constitutionality of state laws covering acts outside a state's geographical limits: so far as answers have been given to this type of question, they have actually been reached chiefly because of conscious or unconscious ideas of social expediency, the "inarticulate major premises", of the judges, rather than because of any compelling "logic".

If now we turn our attention to the question of the social expediency of permitting a state to apply its criminal law to the acts of foreigners committed abroad, it will become necessary first of all to make an examination into the purposes of the criminal law and the best means for attaining those purposes. In Anglo-American law in the past emphasis has been placed upon punishment, partly as retribution and partly as a means of preventing through fear the doing of similar acts by others. Naturally enough, when retribution is emphasized, only acts which rather directly amount to an "offense against the sovereign" will be thought of as criminal. Thus this point of view leads more or less directly to the orthodox Anglo-American doctrine with its stress upon the place in which the "crime is committed".

If, on the other hand, the emphasis is shifted primarily to the prevention of conduct regarded in the given state as anti-social, and if, in connection with this, the segregation of the offender is regarded in large part from the point of view of the possibility of reclaiming the "criminal", the place in which the "crime is committed" at once comes to assume less importance. The enforcement of the criminal law becomes to a considerable degree a means of selecting persons in need of remedial treatment, or of permanent detention where "cure" is impossible. When the matter is viewed in this way, it becomes of less importance where the acts of the accused were done. His conduct reveals certain anti-social tendencies or "behavior patterns" which need to be dealt with in some way or other. He must be either reformed or locked up.

What was unreasonable from the older point of view may thus become quite reasonable when one shifts to the other point of view. It is not surprising therefore to find that what has been called the "cosmopolitan" theory of criminal justice has been advocated by jurists in a number of countries and accepted as part of the law in some European states.[68]

If one asks how far this "cosmopolitan" theory of criminal jurisdiction ought to be recognized, the reply seems to be that no decision can be reached on *a priori* grounds, and that doubtless a satisfactory solution can be reached only on the basis of trial and error. Obviously, there are many practical difficulties in the way, due to the varying views in different countries as to what conduct ought to be regarded as "anti-social". Clearly not all kinds of so-called "criminal acts" ought to be dealt with on the "cosmopolitan" theory. No adequate discussion can here be given. It may, however, be pointed out that the mere fact of living together in groups makes it necessary at all times and in all places to fix upon a certain number of types of conduct which must be checked if group life is to continue. Very possibly attempts to apply a "cosmopolitan" theory of crime ought to be limited to types of conduct of this general character. To one bred in the traditions of the Anglo-American legal system, it seems entirely possible that the matter can best be dealt with by being left for solution to the gradual process of "judicial inclusion and exclusion" by international tribunals similar in character to The Permanent Court of International Justice.

[68] The theory has been accepted farthest in Austria, Italy, Norway, and Russia, according to MEILI, LUHRBUCH DES INTERNATIONALEN STRAFRECHTS AND STROFPROZESSRECHTS (1910) 183. Grotius was apparently the first to enunciate it: 2 DE JURE BELLI ET PACIS, ch. 20, § 40. Compare the discussion by the present writer in (1924) 33 YALE L. J. 464-466.