CONFLICT OF CRIMINAL LAWS

BY: EDWARD S. STIMSON

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EDWARD S. STIMSON

Assistant Professor of Law
Washington University
Chicago

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*To EDGAR NOBLE DURFEE*
*Whose teaching at the University of Michigan Law School afforded the author a great intellectual experience.*

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## PREFACE

This is the fourth of a series of books and articles on the Conflict of Laws. It has been preceded by a book, "Jurisdiction and Power of Taxation," and two articles, "Jurisdiction Over Foreign Corporations" and "Conflict of Workmen's Compensation Laws."

In "Conflict of Criminal Laws" my purpose has been to make a thorough analysis of the problem of jurisdiction over crime with a view to ascertaining and recommending general principles to be applied in solving the problem, to accurately state the law, and to collect and cite all of the Anglo-American authorities it was possible to find. The central problem dealt with is the problem of what law should be applied to determine the legal effect of a person's conduct when he does an act in one state which produces harmful effects in another. There is a conflict in the authorities upon this question, some courts applying the law of the state in which the accused was at the time of the conduct the legal

effect of which is in question, and others the law of the place where an effect was produced. Results reached by the courts vary from crime to crime.

The general problem is first considered, the reasons offered by the courts in support of the opposing views are analyzed, and the conclusion is reached that the sound view is that the law which governs is the law of the state in which the accused was at the time of the conduct, the legal effect of which is in question. This is also the weight of authority, although the decisions are fairly evenly divided between the two views. There follows a detailed consideration of fourteen different crimes. Special problems arise in connection with each crime because of the different elements of which each is composed, and varying results have been reached by the courts due to historical development and the differing views held by judges. The method of treating each crime is as follows:

1. A clear statement of the problem to be solved.

2. An accurate statement of the state of the law.

3. The historical development of the rules where that is necessary to an understanding of them.

4. A criticism of the rules in the light of general principles derived from a consideration of the problem as a whole.

In addition to the central problem other problems necessary to make the book a complete treatment of the Conflict of Laws relating to crime are dealt with. These include the applicability of laws to citizens while they are abroad, the extent to which the principle that courts will not try persons accused of violating foreign law is applicable, problems related to extradition, such as the rights of persons illegally removed from one state or country to another and the right to try persons for crimes other than those for which they were extradited, and forfeitures or criminal proceedings in rem. Incidentally, it was necessary to consider related problems of venue, since venue cases are frequently relied upon by the courts as "authority" in dealing with similar problems of jurisdiction.

Thanks are due to Dean Herbert F. Goodrich of the University of Pennsylvania Law School and to my colleagues, Professor Tyrrell Williams and Professor Ralph Fuch, who have read the manuscript.

EDWARD S. STIMSON
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# Conflict of Criminal Laws

A sovereignty's jurisdiction or power to deal with crime depends upon its jurisdiction or power over persons or property.

## I. JURISDICTION OVER PERSONS

In ascertaining the jurisdiction or power of a sovereignty over persons, the Anglo-American courts apply one or another of three principles. These are the principles of

territoriality, citizenship, and domicile. They conflict with each other, and confusion results whenever two of them are not eliminated or subordinated. Fortunately, the courts do not employ the domicile principle in determining a sovereignty's jurisdiction over crime.

## A. CITIZENS ABROAD

A sovereignty may apply its criminal laws to the conduct of its own citizens sojourning abroad, provided it has secured custody of their persons or property.[1] However, in most cases it is not good policy to do so. There are two reasons for this: (1) the government has no interest in the conduct of its citizens abroad except when that conduct results in injury to it, because the peace and good order of its territory is not disturbed;[2] (2) it would subject its citizens to the possibility of double punishment for the same act, because in most cases the citizen's foreign act or omission would be a violation of the criminal law of the sovereignty in whose territory he was at the time, and a conviction of violating the foreign law would not bar proceedings for a violation of the domestic law.[3]

If the statute expressly so provides, it applies to citizens who have violated its provisions while abroad.[4] In the absence of an express provision, the statute does not as a matter of course apply to citizens abroad. The presumption is that it does not, and interpretation is necessary to ascertain the legislative intent. In the ordinary case where there is no direct injury to the government and the acts or omissions are generally punished by foreign governments, the courts infer that the legislature did not intend to apply the statute to citizens abroad.[5] In United States v. Bowman[6] it was necessary to interpret an act of Congress which made the following acts criminal: (1) making false claims against the government or any of its agencies; (2) making false representations for the purpose of obtaining payment of a claim against the government or any of its agencies; (3) stealing and (4) embezzling government property; and (5) conspiring to do any of these. The Supreme Court of the United States held that by implication the statute applied to citizens abroad.

## B. THE TERRITORIAL PRINCIPLE

The territorial principle is the most important in the Anglo-American law of jurisdiction. It is the general principle employed in solving most conflict of laws problems. However, it is in reality two principles. The first may be stated as follows: a sovereignty has power or jurisdiction over all persons[7] in its territory, and has no power or jurisdiction over persons within the territory of another sovereignty.[8] It will be noticed that this is merely a statement of *fact*, a recognition of reality. That it becomes more than this is due to a second conflict of laws principle. This second principle is that the law applicable to an individual is the law to which he was subject at the *time* of the acts or omissions the legal effect of which are in question, and not the law of the forum in which his rights may afterwards be brought into question.[9] This conflict of laws principle is part of the common law of the forum.[10] It is founded on fairness and convenience. Its advantages are: (1) it prevents friction between sovereignties, for a sovereignty in whose territory conduct is legal may well feel aggrieved if the individual is punished for that conduct by

another sovereignty into whose territory he afterwards goes;[11] (2) it prevents confusion in the affairs of individuals, because the legal effect of an individual's conduct always depends on one law and not upon the law of any sovereignty into whose territory he may subsequently go.

Since these principles are a part of the Anglo-American *common* law, it becomes important to inquire whether the legislature can change them by statute so as to make the local law applicable to foreign conduct. There are three views upon this. The first is that such a statute can have no effect because it is beyond the power of the legislature to give extraterritorial application to its law.[12] Those who take this view unconsciously assume that the power of the legislature at the time when the foreign acts or omissions occurred must be ascertained. They ignore the power which the sovereignty has over the individual at the time of trial. The second view is that since the local sovereignty has power over the individual at the time of trial, the court is bound to obey the command of the legislature and apply the local law to his prior foreign acts, regardless of how unfair this may be.[13] The third view is that although the sovereignty has power to apply local law to the foreign acts of an individual who has subsequently come within its power, this is so unfair that it is contrary to due process of law, and the legislature is prohibited by the sovereign's constitution from exercising its power in this way.[14]

It is submitted that this third view is the sound view. Obviously it is unfair to judge the prior acts of an individual by the law of a country which he subsequently visits. The evil is akin to that which induced the adoption of the constitutional provisions against ex post facto laws.[15] If his conduct is punishable by the law of the sovereignty in whose territory he was at the time of the conduct in question, he is subjected to the possibility of double punishment for the same act.[16] A conviction for a violation of the law of one sovereignty is no bar to a conviction for a violation of the law of another.[17]

In applying the territorial principle it is necessary to distinguish the power of the court to try the case from the question of what law should be applied in determining whether or not an act or omission is criminal.[18]

## 1. JURISDICTION OF THE COURT

The jurisdiction of the court or its power to try the case depends upon custody of the person of the accused. When the arrest is within the territory of the sovereignty in which the crime was committed, the fact that it is illegal or that the warrant is defective does not deprive the court of jurisdiction or entitle the prisoner to release if there is reasonable ground to believe that he is guilty of a crime.[19] He is left to his civil action against the person making the arrest. The reason for this is that the defect can be cured by issuing a warrant and rearresting the prisoner on the spot. This is unnecessary, however, because the purpose of the arrest is to secure the personal presence of the accused in court to answer the charges of the indictment or information, and if he is there, nothing can be accomplished by going through the form of a legal arrest.[20]

Custody is usually secured by arrest within the territory or extradition to it. If custody is obtained by illegal removal from the territory of another sovereignty, it is still custody. The court has physical power over the person of the accused. Its jurisdiction or power is in no way affected by the illegal manner in which custody is obtained. There remains the question whether sound policy or other principles require the release of the prisoner or his return to the sovereignty from whose territory he was illegally removed. The great weight of authority is that the illegality of removal does not entitle the prisoner to be released or returned.[21] It is submitted that an examination of the reasons upon which these decisions are based will show that they are unsound.

The first reason is that the prisoner has no "private" right to be released or returned.[22] This assumes that the only wrong is the wrong to the sovereignty whose territory has been invaded and that the prisoner has no right in the matter. There are two errors in this assumption. First, it assumes that the prisoner's right is to be determined by the local law. It ignores the conflict of laws problem involved. If we apply the conflict of laws principle that the law applicable to an individual is the law to which he was subject at the time of the conduct in question, then whether or not the prisoner has a right not to be removed must be determined by the law of the sovereignty from whose territory he was illegally removed.[23] It will be found that the foreign law gives the individual a right not to be removed except in the manner prescribed by it.[24] This right is afforded by the law of the foreign sovereignty independent of treaty, and it is therefore unnecessary to consider whether an individual can acquire any private right under a treaty. It is submitted that the foreign law should be applied and the prisoner returned. The second error is a failure to distinguish between the illegal arrest and the illegal removal. Subsequent legal arrest within the territory may cure the former and leave the prisoner to his civil action against the persons making the illegal arrest. It ought not deprive him of the right not to be removed which he had by the foreign law.[25]

It should not make any difference that the prisoner could have been legally removed because of a treaty authorizing removal for the crime with which he is charged. The usual treaty, such as the Ashburton treaty with Great Britain, provides that the accused shall be delivered up only upon such evidence of criminality as, according to the laws of the place where the fugitive or person charged with crime shall be found, would justify his apprehension and commitment for trial if the offense or crime had been there committed, and provides for a hearing before a magistrate of the asylum state to determine this.[26] By the *statute* of the asylum state which usually accompanies such a treaty, the accused has a right to have this question heard before a magistrate.[27] That is, he has a right to have this question determined in the asylum state.

Where the illegal removal is from one state of the United States to another, the question is somewhat different. Article IV, Section 2, Clause 2 of the United States Constitution, and the Interstate Rendition Act,[28] require the state to surrender any person charged with crime in another state, provided he is a fugitive from justice. The accused has no right of asylum.[29] He has no constitutional right to a hearing in the state from which he was illegally removed.[30] It is true that he has a right not to be removed in an illegal manner, but since the governor of the state from which he was illegally removed would have been

obliged to surrender him anyway,[31] it is difficult to see how the accused has been harmed. This is not true where the accused was not physically present in the state where the crime was committed at the time of the act. In that case he is not a fugitive from justice.[32] Article IV, Section 2, Clause 2 and the Interstate Rendition Act only require a state to surrender one charged with crime in another state when he is a fugitive from justice.[33] It gives him no immunity from removal when not a fugitive.[34] Nevertheless, at common law[35] and by statute in some states,[36] he has such a right. When a prisoner who has been illegally removed from another state of the United States proves that he was not a fugitive from justice, the court should apply the law of the state from which he was removed, and release him.[37]

The second reason for holding that illegal removal gives the prisoner no right to be released or returned is that any disturbance of the relations between the two sovereignties arising out of the invasion of foreign territory is a matter with which the courts are not concerned, because it is a political matter for the executive branch of the government to deal with.[38] The difficulty with this is that in order to appease the sovereignty whose territory has been invaded, the executive may be obliged to surrender the prisoner. If the prisoner is charged with a violation of federal law, the president could secure his release by pardoning him. If he is charged with a violation of state law, the president could only appeal to the governor of the state to pardon him. If the state court does not release or return him, the president would be without power to appease the foreign sovereignty in this way.

If the illegal removal is from one state of the United States to another, there is the same possibility of conflict between the states.[39] Of course, the governor could secure the release of the prisoner by pardoning him. But since the prisoner had no right not to be removed except where he was not a fugitive, it would seem preferable to hold him pending communication with the governor of the invaded state. If he interposed no objection, the trial could proceed.[40] If he did object, then the court could order the return and surrender of the prisoner to a representative of the invaded state, pending legal proceedings for his removal.[41]

A third reason is that the liability of kidnappers criminally [42] to the sovereignty whose territory has been invaded and civilly[43] to the person illegally removed is sufficient to discourage such illegal forays. Doubtless this is true, but we have already seen that other considerations may require a different result.

A fourth reason is that the courts are afraid that if they release the prisoner he may not be caught again.[44] This difficulty can be overcome by ordering the return and surrender of the prisoner to a police officer of the invaded sovereignty, pending legal proceedings for his removal.

Very similar to the problem of illegal removal is the question whether one who has been extradited for one crime may be tried for another. Here again the question is not whether the court has jurisdiction, for it has custody of the accused. It has power to try him, and the question is whether it should. Where the accused has been extradited from a foreign

country, the courts hold that he cannot be tried for crimes other than those for which he was extradited.[45] The prisoner's right is inferred from the terms of the treaty which provides for extradition for certain specified crimes only, and for those only when by the law of the asylum state the evidence would justify holding the accused if the crime had been committed in its territory. The British law is that an individual can acquire no private right under a treaty which is merely an agreement between the two sovereignties, but in the United States the accused is held to acquire a right because of the constitutional provision[46] declaring treaties to be the supreme law of the land, binding on the judges of every state. It will be noticed that the accused is held to have a right by the local law. It is submitted that the accused's right is not acquired from the local law nor the treaty but from the foreign law.[47] If this were recognized, the result would usually be the same, but the contrary result in the illegal removal cases could not be justified on the ground that constitutional and treaty provisions are not involved.[48] There is no justification for the difference anyway, because even though the removal was not pursuant to a treaty, if there is a treaty, it would seem to be equally inferable that the accused had a right not to be removed in any other manner than that provided for in it, and if the constitution affords the prisoner a right in one case, it should in the other.

In these cases the courts release the prisoner. Whether or not he ought to be released should depend upon whether or not he can be extradited for the crime with which he is charged. If he cannot be extradited for it, he should be released. If he can be extradited for it, then he has no right to be released. He could be held for extradition in the country from which he has been removed, and there is no reason why he cannot be held where the crime has been committed. He is, however, entitled to a legal removal for the crime charged, and should be returned and surrendered to a police officer of the asylum state in order that he may be legally removed for the particular crime with which he is charged.

Where extradition is from one state of the United States to another, the courts hold that the prisoner may be tried for crimes other than those for which he was extradited.[49] The reason for this is that the accused has been legally removed, and under Article IV, Section 2, Clause 2 he has no right of asylum in the state from which he was removed; that is, he has no right not to be removed for the crime with which he is charged, or for any crime. The result in the cases where the question has arisen is sound. However, it is possible for the prisoner to have been a fugitive from justice as to the crime or crimes for which he was removed and not a fugitive as to the crime with which he is charged. If this situation arises, he should not be tried for the latter, because of his right not to be removed when not a fugitive.

## 2. CRIMES LOCAL NOT TRANSITORY

In Anglo-American law the courts of one state will refuse to try persons charged with violating the criminal laws of another state.[50] Historically, the rule developed from the application of a similar principle of venue. This principle is that no court will try a person charged with having committed a crime in any county or judicial district outside of its own[51] unless authorized to do so by statute,[52] or unless the court of the judicial district in which the crime was committed has ordered the venue changed to it.[53] Thus, in 1734

the King's Bench in The King Against Hooker[54] refused to grant a motion for an information against a man charged with committing an assault and battery in Newfoundland, where there were no courts. The reason given was that the offense was local and that an information could not be distinguished from an indictment. In East India Co. v. Campbell[55] the court said that one charged with stealing goods in the East Indies could be tried in Calcutta but not in England. In Rex v. Anderson [56] it was held that a man could not be indicted for larceny in England merely because the goods were afterwards brought there, when the original taking was in Scotland. In Rafael v. Verelst[57] the court held that a civil action for a false imprisonment which occurred in India was transitory and could be brought in England. It distinguished criminal actions, saying, "Crimes are in their nature local and the jurisdiction of crimes is local.... But personal injuries are of a transitory nature." The venue rule was in existence in the fourteenth century,[58] and seems always to have been taken for granted, since the courts have never given any reason for it. Obviously, it is founded on convenience. The witnesses are likely to live near the place where the crime was committed. Their presence at the trial can be obtained with less inconvenience to them and less expense to the state. This is as true today as when the jurors were their own witnesses and were selected from the vicinage because persons from the locality where the incident occurred would be more likely to know the facts.[59] The rule is a sort of local doctrine of forum non conveniens. Its object is to secure trial in the most convenient place in the state.

Some courts, in applying the rule that the courts of one state will refuse to try persons charged with violating the criminal laws of another state, say that they do not have jurisdiction.[60] This is inaccurate. These courts have authority to try criminal cases and therefore have jurisdiction over the subject matter. We have already seen that jurisdiction over the person of the accused depends upon custody of his person.[61] A state having physical control over a person has power to try him for a violation of foreign law, even though it does not choose to do so. The rule expresses a policy. It is not based on lack of jurisdiction or power over the person of the accused. It is a doctrine of forum non conveniens in criminal cases.

The courts apply the rule inflexibly in every case. Under some circumstances sound policy may require the trial of a person charged with violating foreign law.[62] It would seem that this should be so where: (1) the state whose law was violated does not apply for extradition, or the state of asylum refuses to grant it; and (2) the accused is dangerous to the peace and good order of the asylum state, which should be determined by ascertaining whether the act or omission is criminal by its law.[63] The rule is so well established that any change must be effected by statute. It may be that in such a statute the penalty provided should be deportation to the state whose law was violated.

The immigration laws of the United States provide for the deportation of aliens who admit having committed abroad, or have been convicted abroad of, crimes involving moral turpitude.[64] They also provide for the deportation of aliens convicted here of crimes committed here.[65] They do not provide for the deportation of aliens who have in fact committed crimes abroad which they do not admit and for which they have not been tried.[66] These individuals would seem to be as undesirable as those in the two classes

covered by the statute. If the state whose law they are charged with violating does not apply for extradition, they should be tried here, and, if convicted, deported.

Constitutional provisions guaranteeing the right to trial in the state or county in which the crime was committed must be considered. Section 20 of Magna Charta is in part as follows: "... and none of the aforesaid amerciaments shall be assessed but by the oath of honest men 'of the Vicinage.' " This section deals with the levy of fines by the nobles, and the words "of the Vicinage" do not appear in section 39, the important section which guarantees trial by jury. In England, trial in the county in which the crime was committed was never thought of as a fundamental right. Parliament has enacted many statutes authorizing trial in counties other than the one in which the crime was committed.[67] It has also authorized the trial in England of citizens accused of committing crimes abroad.[68]

The Constitution of the United States guarantees the right to trial in the state in which the crime was committed. Many state constitutions have provisions guaranteeing the right to trial in the county in which the crime was committed. The origin of these provisions is obscure.[69]

The colonists seem to have regarded what was a mere rule of convenience as a fundamental right of Englishmen.[70] Article III, Section 2, Clause 3 of the United States Constitution is qualified as follows: "but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed," and the Sixth Amendment is construed to be limited by this provision.[71] Article III, Section 2, Clause 3 and the Sixth Amendment offer no obstacle to legislation authorizing the trial of persons accused of violating foreign law. This is not true of the provisions in state constitutions which are not so qualified. In states having these constitutional provisions such legislation may be unconstitutional.[72]

The application of the rule that the courts will refuse to try persons charged with violating the *criminal* laws of another state necessitates some test by which criminal laws can be distinguished from civil laws. Criminal laws are laws prohibiting an act or imposing a duty the disobedience of which the legislature intends shall be punished. The test is the legislative intent to punish.[73] In criminal laws the legislative intent is that disobedience shall be punished by the imposition of some restraint, disadvantage, disability, or incapacity. In civil laws the legislative intent is to confer a benefit in the nature of a right to reparation, restoration, compensation, or special protection. Civil laws may impose burdens and induce persons to refrain from what may be regarded as antisocial conduct, but this results from and is incidental to the benefit or right conferred. In one case the purpose is to punish, and the rights conferred are incidental. In the other the purpose is to confer rights, and the burdens are incidental. The test is not the presence or absence of a provision for arrest,[74] nor whether the action must be commenced by indictment, information, or complaint,[75] nor whether or not the action must be brought in the name of the state,[76] nor whether or not the law can be enforced by imprisoning the person to whom it is applied.[77]

In the cases of Huntington v. Attrill the Supreme Court of the United States[78] and the Privy Council of England[79] held that the test employed in distinguishing civil and criminal laws for all other purposes was the test which must be used in applying the rule that the courts will refuse to try persons charged with violating the criminal laws of another state.

The courts have experienced the greatest difficulty in classifying statutes making directors and officers liable for the debts of the corporation in case of their failure to file or their falsification of reports. This difficulty has been due to the fact that these statutes make the directors and officers liable for debts of the corporation incurred prior to their default. Prior to Huntington v. Atrill[80] some courts held these statutes penal or criminal[81] because directors and officers were liable regardless of whether or not their default had caused the loss. This reasoning would make workmen's compensation acts penal because they impose liability without fault. It overlooks the fact that a creditor could recover no more than the amount of his claim and could not recover at all if he had been paid by the corporation.[82] The obvious purpose of the statute is to protect creditors of the corporation, not to punish directors and officers. Then, too, who can say to what extent the prior creditor may have been induced to forbear from pressing his claim or suing by lack of knowledge of the true financial condition of the corporation? [83] In Huntington v. Attrill[84] it was held that this type of statute was civil and not criminal. Subsequent decisions are in accord,[85] with a few exceptions.[86]

Are support or bastardy statutes which provide for commencing the action by indictment or information but which provide that the money judgment shall be used for the support of the illegitimate minor child, indigent parent, or other person protected, and which authorize imprisonment to enforce the judgment, criminal so as to come within the rule? Several cases so hold.[87] It is submitted that these decisions are wrong because the obvious purpose of these laws is remedial, not punitive. For procedural purposes these laws are held to be civil, not criminal.[88]

Are tax laws criminal so as to come within the principle that the courts will not try persons accused of violating the criminal laws of another state? Conceivably they may be, in so far as they impose penalties for the nonpayment of taxes. To that extent they may be punitive.[89] Not so, however, that part of the law which imposes the tax. Its purpose is to raise revenue, not to punish the person taxed. Nevertheless, there is a long line of dicta to the effect that foreign tax laws will not be enforced. These began with a statement by Lord Mansfield that "no country takes notice of the revenue laws of another." [90] No reason was given for this provincialism, which seems unnecessary to the decision. It was followed by two cases[91] involving foreign statutes which prohibited the introduction in evidence of receipts, notes, etc., which were not stamped. In a New York case the court said that the real reason for the refusal to enforce these statutes was that they dealt with court procedure as to which the law of the forum governed.[92] In a North Carolina case decided in 1905 a tax law of New Jersey was enforced.[93] The issue is not discussed and apparently was not raised. Municipal Council of Sydney v. Bull[94] was decided in the King's Bench in 1909. A statute of New South Wales imposed a personal obligation upon the owners of real estate for street improvement assessments, and

authorized recovery by suit. The court held that the city of Sydney could not recover in England on the ground that the action was analogous to an action to enforce the penal or revenue laws of another country. The court reached the right result, but the reason should have been that since the owner lived in England the laws of New South Wales could not apply to subject him to a personal obligation, although they could operate in rem upon land in New South Wales.

In State of Colorado v. Harbeck[95] the state of Colorado claimed that the estate of a deceased person was subject to its inheritance tax statute. None of the property was in Colorado, there were no beneficiaries in Colorado, and the deceased died in New York although he was domiciled in Colorado. The New York court took the view that the tax was upon the right to receive the inheritance and that the Colorado statute did not apply, because neither the property nor the persons taxed (the beneficiaries) were in Colorado when the owner died. The dicta that the courts of one state will not enforce the revenue laws of another was not referred to. Other cases present this same problem.[96]

In Moore v. Mitchell the Federal District Court for the Southern District of New York [97] relied upon the dicta in addition to holding that the Indiana law could not be applied because Indiana did not have jurisdiction to tax. The circuit court of appeals[98] affirmed the decision on a different ground. The Supreme Court[99] affirmed the decision on the ground that the Indiana law authorizing the county treasurer to sue could not be given extraterritorial effect.

The only cases in which the application of Mansfield's dictum was absolutely essential to the result were decided in 1911[101] and 1926.[102]

The rule, if it is a rule, is due to this motley of decisions. It is submitted that it is unsound in principle. Once an obligation has arisen by the laws of a foreign state having jurisdiction over the person taxed at the time of the assessment, there is no reason why it should not be enforced. The mere fact that the right accrues to the state should not produce this result. Other rights accruing to foreign states by their own law have been enforced.[103] Judge Learned Hand's suggestion that it is a political matter is without merit.[104] The Supreme Court of the United States, in Milwaukee County v. M. E. White Co.,[105] held that the obligation to pay taxes was not penal.

The chief difficulty in applying the rule that the courts will not try persons accused of violating foreign criminal laws comes in determining whether or not it should be applied to exemplary damage statutes. This is due to the difficulty which the courts have had in determining whether or not actions to recover not only actual but also exemplary damages are civil or criminal. It would seem that in so far as a law confers a right to actual damages it is remedial and civil, the purpose being to confer a right, and the burden being incidental, but that in so far as it subjects the offender to the payment of additional damages it is punitive and criminal, the purpose being to punish the offender by imposing a burden, and the right conferred being incidental. However, most courts have put the entire statute in one category or the other with, as might be expected, conflicting results.

The classification of these statutes as civil or criminal is important for purposes other than the application of the rule we are here considering. Must the jury be convinced beyond a reasonable doubt, or only by a preponderance of the evidence? Do constitutional guaranties against double jeopardy apply? So, for many other procedural purposes, the courts have had to decide whether actions for actual and exemplary damages are civil or criminal. For these purposes most courts have held the action civil on the ground that the law was remedial in some degree.[106] This reasoning, if reasoning it can be called, is unsatisfactory because it could as well be held that the action is criminal because the law is to some extent punitive. A respectable minority have held these laws criminal.[107]

A few have held them partly criminal and partly civil.[108] For the purpose of applying the rule that the courts will not try persons accused of violating foreign criminal laws, exemplary damage statutes have been held civil[109] and criminal.[110] In Huntington v. Attrill[111] the Supreme Court approved cases holding exemplary damage statutes civil. This was dictum because the question was not before it. In James-Dickinson Farm Mortgage Co. v. Harry,[112] relying upon this dictum, it held the statute civil. Some of the courts holding these laws criminal have avoided the necessity of holding the action partly civil and partly criminal by saying that actual damages could be recovered at common law, i.e., regarding the statute as only conferring the right to additional damages. This rationale is of little help where the statute confers a new right to damages, — one that did not exist at common law.

It is submitted that foreign exemplary damage laws, when applicable, should be enforced not only as to the civil part but also as to the criminal part, where the state of the forum has a similar law,[113] because, ordinarily, the accused cannot be extradited for these crimes, and to allow him to go unpunished would encourage conduct made criminal by domestic law. However, the procedural difficulties which would be encountered in trying a civil and a criminal action together seem insurmountable and the enactment of such laws should not be encouraged.

Some wrongful death statutes present a similar problem. Some provide that damages shall be assessed with reference to the degree of culpability of the offender. Others provide for the recovery of a specified amount regardless of the amount necessary to compensate the injured parties. There is the same conflict of authority. For the purpose of determining whether or not to enforce the foreign law, statutes of the first type have been held criminal[114] and civil[115] depending upon whether or not the court believed the main purpose to have been punitive or remedial. The same is true of statutes of the second type.[116] In Atchison, Topeka & Santa Fe Ry. Co. v. Nichols[117] the Supreme Court of the United States held such a statute civil. Wrongful death statutes giving the widow or next of kin a right to compensatory damages only are held civil for this purpose.[118]

Usury statutes present a similar problem. In so far as they allow recovery of interest paid in excess of the legal rate, they are, of course, civil.[119] Where, however, they allow recovery of double or treble the illegal interest paid, or afford the borrower a defense to this extent, they are exemplary damage statutes and have been held both civil[120] and

criminal[121] for the purpose of determining whether or not the lender should be tried for a violation of foreign law.

In Wisconsin v. Pelican Insurance Co.[122] and Huntington v. Attrill[123] the Supreme Court of the United States held that courts could go behind a judgment for the purpose of ascertaining whether or not the action in which it was obtained was civil or criminal so as to apply the dogma that "The courts of no country execute the penal laws of another ..."[124] It held that between states of the United States the full faith and credit clause of the Constitution of the United States did not prevent this. Earlier state court decisions are to the contrary.[125] It is submitted that they represent the sound view. The true rule is not that foreign penal laws will not be enforced, but that an accused will not be *tried* for violating a foreign criminal law, and the reason for it is that the trial can more conveniently be held in the state where the accused was at the time of the conduct in question. The trial having occurred in the foreign state, there is no reason why a pecuniary judgment, though obtained in a criminal proceedings, should not be enforced by the means ordinarily employed for enforcing judgments obtained in civil suits.

3. WHAT LAW GOVERNS

We are concerned here with the problem of what law governs or is to be applied to determine whether or not an act is criminal. The general principle applied is the territorial principle. The rule as generally stated is that the courts of the state where the crime is committed have jurisdiction. This is highly inaccurate. We have already seen that the court's jurisdiction over the person of the accused depends upon custody. What is referred to, then, is not the jurisdiction of the court, but (1) the principle that the courts try the accused only when the law of their own sovereignty has been violated, and (2) that the law violated is the law of the place where the crime is committed. The latter proposition is the one with which we are concerned, and it, too, lacks definiteness. The difficulty is to determine where the crime has been committed. The classic example which illustrates the problem is the case where the accused, standing in one state, fires a shot which strikes and kills a man in another state. In which state is the crime committed? The very statement of the problem in this form overlooks the real problem, because it assumes that a crime has been committed. In some cases whether or not the act is criminal depends upon what law is applied to it. In Beatty v. State[126] the accused turned his cattle loose in Missouri near the Arkansas line. They roamed in Arkansas. An Arkansas statute made it a crime to allow cattle to run at large. Missouri law contained no such prohibition. Was Beatty's act criminal?[127] This depends upon whether Beatty was subject to Arkansas or Missouri law. In many cases, though the act is criminal by the law of both states, the penalty imposed by the law of one is more severe than that imposed by the law of the other. The fundamental problem with which we have to deal is the problem of what law determines the criminal character of an act. The conflict in the decisions upon this question is largely due to two conflicting principles. They are:[128]

(1) The law of the place where an act or omission takes effect or produces an injury governs or determines whether or not the act or omission is criminal.[129]

(2) The law of the place where the accused was at the time of the act or omission governs or determines whether or not the act or omission is criminal.[130]

It is submitted that the latter is to be preferred. It is in accord with the general principle that a sovereignty has power or jurisdiction over all persons in its territory and no power or jurisdiction over persons within the territory of another sovereignty.[131] At the *time* of the act or omission the state in which the actor was located has actual physical power over him. If the law of that state applies, its enforcement officers are in a position to enforce the law. They have actual power to arrest the actor. At the time of the act or omission, the state in which the effect is produced has no actual physical control over the actor. If its law applies, its enforcement officers are not in a position to enforce it. They cannot go into the territory of the other sovereignty to make the arrest. If the actor remains there, the state in which the effect is produced will be obliged to apply to the other sovereignty to surrender or extradite him. Between independent sovereignties the actor can be extradited only for those crimes specified in the treaty, if one exists.[132] Between states of the United States he could not be extradited at all, because he is not a fugitive.[133] Thus, the sovereignty in which an effect is produced can only apply its law to a few of the instances where an effect is produced within its territory.

It is true that if it secures custody of accused by extradition or arrest within its territory it has power to apply its own law. Whether it does so or not is a matter for it to determine, a matter of policy, but if it does, it is applying law to which the actor was not subject at the time of the act. Its law is made retroactive to apply to his conduct at a time when he was not subject to its power.[134] Another objection is that if it applies its law it is apt to incur the resentment of the state in which the actor was at the time of his act or omission, for the latter is likely to insist that the actor had a right to govern his conduct by and was subject to its laws alone.[135]

What law should the sovereignty in whose territory the actor was at the time of the conduct in question apply? Obviously its own. To apply the law of the sovereignty in which the effect is produced would mean that it is surrendering sovereign power over its territory and requiring persons therein to govern their conduct by foreign law. This is too much to expect of it.[136]

The individual should be subject to the laws of only one state at a time.[137] If he is subject to the laws of several states, the laws of one will deprive him of rights which he has by the laws of the other. The state in which the effect is produced has little real power. Instead of applying its own law to the few cases where it can, it should require other governments to enact and enforce laws to prevent the individuals in their territories from producing harmful effects abroad. Indeed, the notion that the state in which a harmful effect is produced should apply its law arises from the assumed necessity for it to do so in order to protect itself against harmful effects. It assumes that the conduct in question was not a violation of the law of and will not be punished by the sovereignty in whose territory the actor was at the time. Usually this is not true.[138]

In subsequent paragraphs an attempt is made to show the state of the law of particular crimes produced by these conflicting theories.

a. Homicide, Assault, and Battery

Does the law of the place where an injury is produced, or the law of the place where the accused was at the time of the conduct which produced it, govern? In The King v. Alsop,[139] decided in 1691, the indictment was for shooting with hail shot at conies in a conicote, contrary to 2 & 3 Edw. VI, Ch. 14. The accused was convicted. Several errors were alleged, one of which was that the indictment did not state in which county accused stood when he shot. Counsel for the prisoner argued: "In some places a man may stand in one county and shoot into two or three; and here it does not appear where the offense was committed, for that is where the party stood, or was when he shot, not where the object he shot at was." The conviction was reversed. In Rex v. Combes,[140] decided in 1785, a revenue officer in a small boat which had run aground on a sandbar a hundred yards offshore was shot from the shore and killed. Accused was convicted in an admiralty court and the question was whether he was properly tried in the admiralty jurisdiction. The court held that he was but gave no reason. Sergeant Leach's headnote states that the offense is committed where the death happens and not at the place from whence the cause happens. Only venue was involved in these cases, for it is clear that regardless of what court could try the accused, the character of his conduct would be determined by English law. The only English decision which actually involves the question of what law governs is the great case of The Queen v. Keyn,[141] in which the thirteen judges of the Court of Criminal Appeal, including the Lord Chief Justice of England, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer participated. The accused was master of the "Franconia," a German vessel, which due to his negligence ran down and sank the "Strathclyde," an English ship, one and one-half miles off the coast of England, causing the death by drowning of one of the "Strathclyde's" passengers. Although Keyn was not a citizen of Great Britain, he was tried in England and convicted of manslaughter. On appeal two questions were considered: (1) whether the English criminal law extended to the three-mile limit; and (2) whether the crime could be said to have been committed on board the English ship because Keyn's conduct produced an effect there. A majority of the judges who considered it necessary to decide the second question [142] held that the crime could not be said to have been committed where the effect was produced.[143] The conviction was quashed.

In United States v. Davis,[144] decided in 1837, Davis was tried for manslaughter in the Circuit Court for the District of Massachusetts. While on an American ship in the Society Islands he had fired a shot which killed a man on a Society Island schooner. Justice Story applied Rex v. Combes and held that the crime was committed on board the schooner and the jurisdiction over the offense belonged to the foreign government and not to the courts of the United States. In State v. Hall[145] it was held that a North Carolina court could not try one who from North Carolina shot and killed a man in Tennessee, because the law of Tennessee was violated and North Carolina would not enforce the criminal law of another state. State v. Morrow[146] and Simpson v. State [147] are in accord, holding that

the accused could be tried in the state where the effect was produced, by its law. In the former, the Supreme Court of

South Carolina held that one who from the District of Columbia sent medicine to his sweetheart in South Carolina, advising her to take it to produce an abortion, could be tried in South Carolina for violating its law.[148] In the latter, the accused in South Carolina had shot at a man in Georgia and missed. He was indicted in Georgia for assault with intent to murder, and the Supreme Court of Georgia held that he could be tried in Georgia for a violation of its law.

Opposed to the Davis and Hall cases are People v. Botkin[149] and People v. Licenziata,[150] in each of which a court in the state where the accused was at the time of his act held that he could be tried there for a violation of its law, although the harmful effect was in another state. In the former, the accused had mailed poisoned candy in California to his victim in Delaware. He was indicted for murder in California, and the Supreme Court of that state held that he could be tried in California for a violation of its law. In both cases the court was influenced by statutes providing for the punishment of persons who commit a crime in whole or in part within the state. It is submitted that the result should be reached without the aid of statutes. The contrary decisions are based upon an old English venue decision which in The Queen v. Keyn was held to have no bearing on the question.[151]

On August 2d, 1926, the French steamer "Lotus" collided with the Turkish collier "Boz-Kourt" on the high seas, sinking the latter and causing the death of eight Turkish nationals who were on board. The "Lotus" proceeded to Constantinople, where Lieutenant Demons, a French citizen, who was officer of the watch on the "Lotus" at the time of the collision, was arrested, tried and convicted of involuntary manslaughter, and sentenced. The French government protested, and the dispute between France and Turkey was submitted to the Permanent Court of International Justice under an agreement that the question of jurisdiction should be decided in accordance with the principles of international law as provided in article 15 of the Convention of Lausanne. The court divided six to six, and the case was decided by the vote of the president. The decision[152] is that there is no general principle of *international law* prohibiting a state from applying its own law in its own territory to the prior foreign acts of foreigners, nor any special rule of *international law* on the question of jurisdiction over crime in the sense of a custom having the force of law, because there is no uniformity in the practice among nations. There was, therefore, no principle of *international law* prohibiting Turkey from doing what she did. It will be observed that the decision is not an approval of the Turkish policy, which will inevitably bring it into conflict with other states. Therefore, it has no bearing on what conflict of laws policy a state should adopt. It is remarkable that five of the dissenting judges thought that the principle that the criminal law applicable to an individual is the law of the ship or territory in which he was at the time of the conduct in question, had sufficient support among the nations, or was sufficiently desirable as a means of preventing conflict between nations, or was so essentially a part of the territorial principle, that it could be said to be a principle of international law instead of merely a conflict of laws principle of the municipal law.

b. Homicide — Place of Death

The problem here is what law is applicable to or has been violated by one who has inflicted injuries in one state on a victim who goes or is carried into another state and dies there. In 1492 it was held that an indictment in Middlesex which laid the blow in Middlesex and the death in Essex was good.[153] Tremaille, J., said: "It seems that it is not material where he died, for the striking is the principal point, but it requires death; otherwise, it is not felony; but whether he died in one place or another is immaterial." A statute enacted in 1549 authorized trial in the county where death occurred.[154] Its preamble recites that theretofore the accused could not be indicted in either county,[155] but Lord Hale, writing in 1678, said, "At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent and might be found tho in another county." [156] Hume v. Ogle,[157] decided in 1590, was an appeal of murder in which the declaration alleging that the blow was struck in one place and the victim died in another, and therefore the accused committed murder in the place first mentioned, was held insufficient because murder was not committed until the victim died, and therefore he could not be said to have been murdered in the place first mentioned.[158] In Grosvenor v. Inhabitants of St. Augustine[159] a shot was fired from the lath of St. Augustine, killing a revenue officer on the sea. A statute provided that when any officer enforcing a customs act should be killed by an offender against the act, the inhabitants of the rape, lath, or hundred in which such fact should be committed should be liable to pay £100 to his executor. It was argued that the fact was not committed in St. Augustine but the court held that it was, because the object of the statute was to make the inhabitants of the place where the act was done answerable for it in order to interest them in repressing the offense. In Rex v. Hargrave[160] the indictment alleged the giving of blows in one parish and death in another. Counsel for the prisoner claimed that the indictment did not allege the commission of an offense in any particular place. Mr. Justice Patterson said, "The giving of the blows which caused the death constitutes the felony. The languishing alone, which is not any part of the offense, is laid in Kent." These decisions do not deal with the question of what law governs, yet they are the "precedents" which were applied when cases arose involving the law of two states.

The first cases involving the law of two states are two decisions in the United States.[161] These courts held that the law violated was the law of the state in which the victim died, and being courts of the state in which the blow was inflicted, they could not try the accused. They have not been followed.

In 1729 a statute was enacted in England providing for indictment in England either when the victim was stricken or poisoned in England or when he died there.[162] Louisiana courts applying this statute as a part of the common law of their state have held that they could try the accused if the victim was stricken in the state, although he died in another state.[163]

In all other cases, in which no statute was involved, it has been held that the law violated is the law of the state where the blow was inflicted or poison given.[164] The accused can be tried there[165] and not where the victim died.[166] The reason is that the law applicable to an individual is the law of the place where he acts or fails to perform a duty. It is his act or omission which is made criminal, and although the act or omission is not homicide unless death ensues, the subsequent death is merely a result which relates back and characterizes the act or omission.[167]

Some states have statutes, similar to the English act, authorizing the trial of persons whose victims die in the state when death results from a blow inflicted or poison administered outside of the state. The question arises whether these statutes are valid. In spite of the able dissenting opinion of Justice Campbell in People v. Tyler,[168] it has generally been held in the United States that these statutes are valid and that the accused can be tried in and by the law of the state in which the victim died.[169] There is no question but that having acquired custody of the accused, the state has power to apply its law to his prior foreign acts.[170] However, the policy of these statutes is unwise. The accused is subject to the law of the place where he was at the time of the conduct in question. It is not necessary that he be subject to any other law. If the penalty imposed by the law of the two states differs, the law to which he was subject at the time should apply. It is unfair to subject the individual to a law to which he was not subject at the time, merely because power over him is subsequently acquired. It is so unfair that the statute should be held to be contrary to due process of law.[171]

In England the statute has been interpreted to apply only to citizens abroad, and therefore not to be applicable to foreigners the victims of whose foreign conduct die in England.[172]

c. Public Nuisance

In several cases the issue raised is what law governs or is applicable to one who maintains a nuisance when a structure is maintained or process carried on in one state which produces disagreeable or harmful effects in another. At common law, where a structure or process in one county produced an effect in another county, the venue was in either.[173] Only two cases have been found where the law of two states was involved. In State v. Lord[174] defendant's dam in Maine flooded a public road in New Hampshire. He was convicted in New Hampshire and the conviction was sustained on the ground that the nuisance was in New Hampshire, because the gist of the offense was the overflowing and damaging of the highway there. In People v. International Nickel Co.[175] fumes from defendant's plant in New Jersey produced harmful effects in New York. Defendant was indicted in New York. The court held that it could not try him because the nuisance was in New Jersey. It said that maintaining or misusing the plant was the nuisance and gas was merely the effect or result.[176]

It is submitted that this is a false issue. The question of what law governs should depend upon the location of or jurisdiction over defendant during the time that the nuisance was being maintained. If any law is violated, it is the law of that state. Where the structure

was or where the process was carried on is as immaterial as where effects were produced. Only the state in which the structure is can abate it,[177] but the question here is what law was the person responsible for maintaining it subject to during the period of its maintenance.

d. Abandonment and Nonsupport

Some statutes make abandonment of wife or children a crime. The wording of these statutes varies. Some merely use the word abandon. Others make abandonment of wife or children leaving them in a destitute condition, or abandonment of wife or children without providing adequate support for them, criminal. Under these statutes the gist of the crime is the abandonment. Abandonment is not the mere act of separation, but separation plus an intention to abandon.[178] When the intention coincides with the separation, the cases uniformly hold that the law of the state in which the accused was at the time of the abandonment applies, and the courts of other states will not try him.[179] If the separation occurs prior to the formation of an intention to abandon, and the accused is in another state at the time the intention is formed, what law applies? In In re Robertson [180] it was held that the law of the state in which the accused was at the time he formed the intention governed. The abandonment occurred there and he was not a fugitive from and could not be extradited to the state in which his dependent was. In State v. Beam[181] the contrary result was reached on the ground that the crime was committed where the dependent was. It is submitted that In re Robertson is the better decision.

Still other statutes make abandonment and failure to support the crime. Under them there are two elements to the crime: (1) abandonment, and (2) nonsupport. If the abandonment occurs in one state and the nonsupport in another, what law is applicable? There are three cases where courts in the state where the husband or father was during the time of his failure to support have held that they could not try him because the abandonment occurred in another state.[182] It is submitted that this is not a necessary conclusion. The purpose of these statutes is to prevent men having the means to support their families from wilfully failing to do so. The gist of the offense is the wilful nonsupport. The law applicable should be the law of the state in which the accused was during the time of such failure to support. The abandonment should be treated as a necessary condition precedent without which the crime is not committed but the location of which is immaterial.[183]

Some statutes make abandonment or nonsupport criminal. If the accused is charged with nonsupport, the place where the abandonment occurred is immaterial.[184] Other statutes merely make the nonsupport criminal. What law is applicable when the accused was in one state and his dependents were in another during the period of nonsupport? The authorities are divided on the point. The better considered decisions hold that the law of the state in which the accused was during the period of nonsupport is applicable.[185] He can be tried there[186] and not in the state where his dependents were during the time alleged.[187] The courts of the latter will not apply their own law to his prior foreign omission nor enforce the foreign law. In State v. Sanner[188] the statute contained certain provisions which indicated that the legislature intended it to apply to persons outside of the state who neglected to support dependents who were within the state. The court felt

obliged to follow the statute in spite of an earlier decision reaching the opposite result[189] under a statute which did not contain these provisions. The validity of the statute was not questioned.[190] In Ex parte Lewis,[191] a Nevada case, counsel for the prisoner assumed that the Ohio cases represented the law. The Kansas cases [192] hold that the law of the place where the dependent was at the time of the failure to support governs, and the courts of that state can try the accused for a violation of its law. The theory, that the law of the place where an effect is produced governs, was relied upon.[193] Earlier venue cases [194] were cited. So was State v. Sanner, although there was nothing in the statute to indicate that the legislature intended it to impose a duty on nonresident husbands and fathers.

e. Crime by Agent

At common law in misdemeanors all are principles.[195] In felonies there is a distinction between crimes committed by means of agents who have no criminal intent and those who have. If the agent is innocent, his procurer is liable as a principal.[196] If the agent is guilty, his procurer is not regarded as a party to the crime which the agent commits.[197] He is criminally liable as an accessory before the fact, a separate crime. In some states statutes abolish accessories and make the procurer liable as a principal when the agent is guilty,[198] as in the case of misdemeanors and felonies where the agent is innocent.

If the procurer in one state procures another to commit a crime in a second state, what law should be applied in judging the procurer's act? The answer which the courts have given depends upon whether by their own law the procurer is an accessory or a principal, a consideration which ought to be wholly immaterial.

(I) *Accessories Before the Fact*

At common law the accessory could be indicted in the county where he was at the time he did the procuring, although the trial could not proceed until the principal had been convicted.[199] The accessory could not be tried in the county where the principal crime was committed if he was not there when his accessorial acts were performed.[201] However, some doubt was thrown on this by a note by Fineux and Kingsmill,[202] who reasoned by analogy from the fact that coroners could inquire of persons in other counties.[203 ]This doubt was settled by a statute in 1549 which provided that the venue for accessories was in the county where the accessorial acts were performed.[204] The preamble to this statute recites that theretofore accessories could not be tried in either county,[205] although this was not the law.

In cases involving the law of two states the great weight of authority is that the law of the state in which the accessory acts applies.[206] He can be tried there [207] and not in the state where the person procured committed his crime.[208] These cases apply the rule that the law applicable is the law of the state in which the accused was at the time of the conduct in question. A few decisions are contra.[209] Statutes providing for trial where the accessory was at the time of his procuring,[210] and statutes providing for trial where the principal crime was committed,[211] have been applied without questioning their validity.

(II) *Principals*

In Barkhamstead v. Parsons[212] the Town of Barkhamstead brought an action in Connecticut against Parsons to recover a penalty imposed by a Connecticut statute for bringing any poor and indigent person into the state and leaving him in any town thereof. Parsons was a resident of Massachusetts and did not personally conduct the paupers into Connecticut, but sent them there under the care of his son, who was a minor. Counsel for Parsons claimed that he was not amenable to the criminal laws of Connecticut because not a citizen of Connecticut and not personally within its territorial jurisdiction at the time of his acts. The court said: "Qui facit per alium, facit per se, is of universal application both in criminal and in civil cases; and he who does an act in this state, by his agent, is considered as if he had done it in his own proper person."

This case has been followed almost without question in cases involving the question of what law is applicable to a principal who causes his agent to perform criminal acts in another state. They hold that the principal is subject to the law of the state in whose territory the agent acts.[213] The courts there will try him,[214] and the courts of the state in whose territory he was when his own acts were performed will not.[215] This is the rule in misdemeanors,[216] felonies where the crime is consummated through an innocent agent or agency,[217] and felonies consummated through a guilty agent where accessories have been abolished by statute.[218] It is applied alike to procurers[219] and joint partners in crime.[220]

(III) *Criticism*

Translated, the Latin maxim is: "He who acts through another acts for himself or acts himself." [221] Of course, it is not literally true that the agent's act is the principal's act. What is meant is that the principal acquires legal rights by and is legally responsible for the agent's act as *if* it were his own. This is a conclusion, not a reason. The maxim developed in the substantive law of master and servant or agency without reference to the problems of jurisdiction and the conflict of laws. However apt it may be as a shorthand expression of the substantive law, it is of no use in solving the problems of jurisdiction and the conflict of laws. The principal is not physically present in the state where the agent acts. To treat him as literally there is to create a fiction which serves no useful purpose. To say that he is subject to the law of that state as if he were present is to state a conclusion without offering a reason for it. It produces the same result as the doctrine that the law of the state in which an effect is produced governs, but if that is the reason there is no occasion for hiding it behind the maxim.

In Flexner v. Farson, a civil suit, a Kentucky statute authorized the service of process upon nonresidents doing business in the state through agents by serving an agent in the state. Flexner obtained a judgment in Kentucky against Farson et al., partners residing in Illinois. Service was made on their agent in Kentucky pursuant to the statute. In a suit on this judgment in Illinois its Supreme Court held that the partners were not subject to Kentucky law; that an attempt to apply it to them was a violation of due process of law, contrary to the Fourteenth Amendment; that, therefore, the Kentucky court was without

jurisdiction over the persons of defendants; that its judgment was void and not entitled to faith and credit.[222] The Supreme Court of the United States affirmed the decision.[223] It is a direct negation of the doctrine that a principal is subject to the law of the state in which his agent acts.

Whether the principal is considered a participant in the crime which the agent commits or an accessory committing a separate crime, the problem is the same. It is submitted that the solution arrived at in the accessory cases is the sound one, i.e., that the law applicable is the law of the state in which the principal was at the time of the conduct in question. To be criminal, his conduct must violate that law. Of course, if the acts of the agent are not criminal by the law of the state in which he acts, the principal will have committed no crime, for it cannot be criminal to cause another to do what is not criminal.[224]

*(IV) Corporations*

Corporations, being intangible, can have no existence in space. Since they can act only by means of agents, they are considered as being subject to the law of the state in which the agent is at the time of the act or omission, the legal effect of which is in question.[225] The rule for corporations is and should be different from what it is for individuals.

*(V) Mail, Telegraph, and Carrier*

Assuming it to be sound doctrine that the law applicable to a principal is the law of the state in whose territory his agent acts for him, should the mails, the telegraph, and carriers be considered agents for this purpose? They have been so considered in a number of decisions.[226] It is submitted that there is no justification for this. The mails, telegraph companies, railroads, express companies, and other carriers are not agents. They are independent contractors.[227] They agree to produce a result and are not subject to the control of the persons with whom they contract as to the manner in which the work shall be done. The maxim, qui facit per alium, facit per se, applies only to agents and servants. It does not apply to independent contractors. The act of an independent contractor is not the act of his contractee in the sense intended by the maxim. Generally the contractee does not acquire legal rights by and is not legally liable for the acts of an independent contractor. It follows that the contractor's acts cannot subject the contractee to the law of another state.

The cases applying the maxim to carriers[228] assume that they are agents, because of the general rule that in the absence of a special agreement, title and the risk of loss pass from the vendor to the purchaser — consignee on delivery to the carrier. The assumption is unjustifiable because the reason for the rule is that it is the presumed intention of the parties.[229]

There are criminal cases which cannot be reconciled with the decisions holding that the maxim applies to the postal service.[230] They do not mention the maxim but assume that the place of trial is the place where the accused was during the transaction. Civil cases

holding that a foreign corporation is not doing business where the postal service delivers mail sent by it are also contra.[231]

f. Conspiracy

In Regina v. Best[232] decided in 1705, it was agreed by the court that "conspiracy is the gist of the indictment, and that though nothing be done in prosecution of it, it is a complete and consummate offense of itself;" and "the venue must be where the conspiracy was, not where the result of the conspiracy is put into execution." The King v. Brisac and Scott[233] was decided ninety-eight years later. The pursers of English naval vessels were required to pay for supplies by drafts drawn on the Commissioners for Victualizing the Navy, accompanied by certificates signed by the commander, master, and boatswain, certifying that the supplies purchased were actually received on board the vessel, and specifying the quantities, prices, etc. While at sea or at Lerwick, in the Isle of Shetland, Scott, the purser, and Brisac, the captain of the "Irish," prepared and signed a false draft and certificate and secured the signatures of the others while the draft and certificate were blank. The draft was mailed by one of the conspirators at Lerwick and received by the commissioners in Middlesex. The defendants were tried and convicted in Middlesex on an information containing eleven counts, setting out all of the acts done by defendants. When Brisac was brought up for sentence, his counsel objected that the gist of the offense charged in the information was conspiracy, which took place on the high seas out of the jurisdiction of the common law, and that accused should have been tried by an Admiralty commission. Counsel for the crown argued that the offense must be evidenced by overt acts and that the delivery of the letter in Middlesex was an act done there for which defendants were answerable. The court sentenced Brisac, saying that conspiracy could be tried in the county where overt acts were done by some of the conspirators, and also that the information charged the delivery of the false draft and certificate in Middlesex which was in itself a crime and defendant's act done there because the persons who innocently delivered the draft and certificate in Middlesex were mere instruments [234] in their hands for that purpose.

Where the law of two states is involved, the question is whether the law applicable to the accused is the law of the state in which he was at the time he agreed to participate, or the law of the state in which the principal crime is committed or in which some act is done toward committing it by any one of the conspirators. Many cases applying The King v. Brisac and Scott hold that the accused can be tried in the state if an overt act in furtherance of the conspiracy was done there, although he was not there when he agreed to participate or when the overt act was done.[235] The converse of this is not true. There are no cases holding that accused cannot be tried in the state where he was at the time he agreed to participate in the conspiracy.

The fallacy in the decisions upholding trial in the state where an overt act was done lies in the assumption that the situs of an act which is not part of the crime has something to do with the law applicable to the accused.[236] The mistake is in treating the overt act as the crime and then applying to it either qui facit per alium facit per se [237] or the idea that a crime is committed where an effect is produced.[238]

In Dealy v. United States[239] accused was indicted, tried, and convicted in the District Court of the United States for the District of North Dakota for a violation of section 5440 of the Revised Statutes,[240] defining the crime of conspiracy to defraud the United States. By section 5440 no crime was committed unless some act was done to effect the object of the conspiracy. The conspiracy was alleged to have been formed in North Dakota, but there was no allegation as to the place of the overt act. Counsel for the accused claimed it occurred in Canada. The Supreme Court affirmed the conviction, holding that the gist of the offense was conspiracy and the location of the overt act was immaterial because the statute merely made it a necessary condition subsequent in order to afford the conspirators an opportunity to abandon their intention and avoid the penalty. Trial at the place where the accused was when he made the agreement has been upheld in other cases.[241] There are no cases sustaining the converse, that is, that the accused cannot be tried where the overt act occurred. In Hyde and Schneider v. United States[242] the Supreme Court divided five to four on this question. Justices Holmes, Hughes, Lurton, and Lamar were for applying the reasoning in Dealy v. United States that the location of the overt act was immaterial, but were outvoted. Since the decision in Dealy v. United States, the courts have said that the accused could be tried in either place.[243] In habeas corpus proceedings removal from the place of conspiracy to the place of the overt act[244] and vice versa [245] has been sustained. This is hardly a solution of the problem of what law governs. If the accused is subject to the law of one state for his conduct there, the same conduct should not subject him to the law of other states.[246]

g. Attempts

Only one case involves the law of two states. In Rex v. Waugh,[247] accused was tried and convicted in Victoria for an attempt to obtain money by false pretenses. The letter containing the false representation was written and mailed in Victoria to the intended victim in Tasmania. It was held that Victoria law was applicable and accused could be tried there.

h. Libel

At common law there was a split in the authorities as to where the venue was. In 1767 and 1776 the accused was held to be triable for the crime of sending a threatening letter in the county where the letter was received.[248] In The King v. Johnson,[249] decided in 1805, an Irish judge was indicted in Middlesex for a libel written and mailed in Ireland to a newspaper printed in Middlesex. He filed a plea to the jurisdiction of the court, alleging that in spite of the union of Great Britain and Ireland, the latter was governed and regulated by the laws of that part of the United Kingdom called Ireland, and not by the laws of Great Britain; that for his acts while in Ireland he was subject to the law of that part of Great Britain called Ireland; that the crime was committed there and not in Middlesex, as alleged, and was triable in the Irish courts. A demurrer to the plea was sustained.[250] Lord Ellenborough said that the plea admitted that the crime was committed in Middlesex (sic) and was defective because it did not name any other court in England in which accused could be tried. In 1808 in Rex v. Watson[251] Lord Ellenborough held that the venue was in the county where the libelous letter was

received, but in 1810 in The King v. Williams[252] he held that the venue was in the county where the libelous letter was mailed.

In The King v. Burdett [253] the accused was tried in Leicestershire on an information charging him with libeling the King. Accused admitted writing the libel, but claimed that he did not intend to publish it. He was convicted. On a motion for a new trial counsel for the accused contended: (1) that the mere writing of a libel was not a crime; (2) that the accused was not triable in Leicestershire unless there was a publication there; and (3) that there was no evidence of a publication in Leicestershire.[254] The evidence was that the letter was dated Kirby Park, August 22d; that Kirby Park was in Leicestershire; that the accused lived there and was seen there on August 22d and 23d; that the letter was delivered to Brooks in Middlesex by Bickersteth, the professional friend of the accused; and that the envelope was not sealed and there was no postmark upon it. The court refused to grant a new trial, holding (1) that the crime consisted of writing *and* publishing, and was triable in either the county where the writing or the county where the publishing occurred, and (2) that publishing meant the act of exposing, sending, or parting with possession,[255] and that there was sufficient evidence from which the jury could infer that the letter was delivered to Bickersteth in Leicestershire which amounted to publishing it there. Bayley dissented on the ground that publishing was the gist of the crime, and that the evidence was insufficient to justify an inference that the letter was delivered to Bickersteth in Leicestershire.

What law is applicable when the law of two or more states is involved? The crime of libel is now generally defined by statute. It may be a crime to compose, make, write, dictate, print, publish, circulate, or sell a libel. Some or all of these words may be included in the statute. If the word "compose," "make," "write," "dictate," or "print" is included in the statute, any person who does the act while in the state violates its law and may be tried there.[256] When the word "publish," "circulate," or "sell" is employed in the statute, the question is whether the law applicable to the accused is the law of the state in whose territory the libel was received or read by others, or the law of the state in which the accused was at the time he sent the libel or parted with its possession. Here, too, there is a split in the authorities. Some hold that the law applicable is the law of the state or states in which the libel is received or read by others, and that the accused can be tried there.[257] Others hold that the law applicable is the law of the state in which the accused was at the time he sent the libel or parted with its possession,[258] that he can be tried there [259] and not in the state or states where the libel is received or read by others.[260]

The real problem is the problem of crime by agent,[261] or by mail, or the problem of place of effect [262] versus location of the actor. This is seldom perceived. The decision is usually reached by applying the word "publish" or the word "circulate," used in the statute. Some courts have interpreted "publish" to mean sending or parting with possession.[263] Others have unconsciously interpreted it to mean a communication to the minds of readers.[264] Each definition has been employed in statutes defining the word.[265]

"Circulate" has unconsciously been interpreted to mean delivery to persons receiving the libel.[266] Like the word "publish," it could be interpreted to mean sending or parting with

possession. If we interpret the words "publish" and "circulate" to mean that others must receive or read the libel, it does not follow that the law applicable is the law of the state in which the libel is received or read. The receiving or reading is not the accused's act. His act is the sending or parting with possession. That is the criminal act. It may be that no crime is committed unless the libel is received or read by others, but their receiving or reading is merely a result which relates back and characterizes the act.[267] The law applicable should be the law of the state in which the accused was when he sent the libel or parted with its possession.

There is another aspect of the problem which arises out of an ambiguity in the word "libel." When many copies of a single statement are printed, is each copy a libel, or is the statement the libel? The answer cannot aid us in solving the problem which we are here considering. One crime or many, the question is the same. Yet in newspaper cases, the place of trial has been held to be where the paper was printed on the ground that there was only one crime,[268] and where a copy was received or read on the ground that the publication of each copy was a separate crime.[269]

i. False Pretenses

Two acts are necessary to constitute the crime of obtaining property by false pretenses: (1) the making of false pretenses; (2) the obtaining of property. If the accused is in one state when the false pretenses are made and in another when the property is obtained, what law, if any, has been violated?

In Rex v. Munton,[270] decided in 1793, the facts were that the accused, while in Antigua in the West Indies, falsely represented to the Navy office in London that he had paid a certain price for stores, and received by way of reimbursement more than he had spent. He was tried in London. His counsel objected to the jurisdiction of the court. Lord Kenyon overruled the objection, saying that the offense was committed in London, where the false returns were received and where the fraud was completed by their having been allowed. In 1820, in Rex v. Burdett,[271] Chief Justice Abbott, referring to the case of Rex v. Buttery,[272] said, "The language of the statute [273] makes the offense to consist in obtaining the money, and not in using any false pretense whereby money shall be obtained. The indictment was in Herefordshire; but the money was received in Monmouthshire; the judges thought the indictment was laid in the wrong county."

Since then, in the absence of statutes specifically dealing with the question, the courts have held that the law of the state in which the property is obtained is applicable.[274] The accused can be tried there [275] and not in the state where the false pretenses were made.[276] Where the false pretenses were made is immaterial.[277] Making them is not a crime. The significant act is the obtaining of property.[278] Its criminal character depends upon its being preceded by false pretenses which have induced the victim to part with his property. False pretenses are a condition precedent without which the subsequent obtaining would not be criminal.

Where there are statutes authorizing the trial of crimes partly committed within the state, it has been held that one who obtains property elsewhere by false pretenses made in the state is subject to its law and triable in its courts.[279] Strictly speaking, there cannot be part of a crime.[280] There is only one criminal act and one moment in time when the crime is committed. It follows that no part of the crime is committed where the false pretenses are made. It is said that the legislature intended to change the character of the crime so that the making of false pretenses is the significant act and the obtaining of property is a condition subsequent necessary to make the false pretenses criminal.[281] This may be so. If there cannot be part of a crime, there is nothing to which these statutes can apply. Interpreted as they are, their policy is unwise. The accused is criminally liable for the act of obtaining property in the state where he was when he obtained it. If he is criminally liable for the act of making false pretenses in the state where he was when he made them, he may be punished twice. A provision in the statute that a conviction or acquittal elsewhere will be a bar to prosecution in the state[282] will not prevent the state in which the accused was when the property was obtained from *subsequently* trying him for the different act.

Generally, it is said that the crime was committed where the property was obtained. This is hardly a workable formula. Many cases hold that the property was obtained at the place where possession was delivered to an agent of the accused, either an individual or a collection agency, such as a bank, although the accused was not there.[283] Railroads, express companies, and the mails have erroneously been considered agents for this purpose.[284] The decisions seem to be based upon two ideas. One is the assumption that obtaining property means obtaining possession of property. This is not the law. Obtaining property means obtaining title to property.[285] Obtaining possession of property by false pretenses with intent to deprive the owner of his title therein is not included in the crime

of obtaining property by false pretenses.[286] It is larceny.[287] The fact that possession was transferred to accused's agent at a particular place should be immaterial. The other idea is that title passes on delivery to the carrier or agent. This involves the assumption that the significant place is the place where the property is at the time title passes. Is the law applicable, the law of the state in which the property, the victim, or the accused was at the time title passed? Each may have been in a different state. The true question is not where was the property obtained but to what law was the accused subject at the time it was obtained.[288] It is submitted that the law applicable should be the law of the state in which the accused was at the time title passed.

The victim's check, draft, or note is considered a "thing of value" under statutes employing these words,[289] and the obtaining of them is specifically made a crime by others.[290] The cases treat the obtaining of money upon such an instrument as also a crime, even though it is obtained from a different person than the one to whom the false pretenses were made, so that the law violated and the place of trial depends upon whether the accused is indicted for obtaining the money or the instrument.[291] It is submitted that this is wrong. If the instrument is obtained in one state and the money in another, the accused can be punished in each, and may suffer two penalties for what ought to be one offense. Where the statute makes obtaining the instrument a crime, obtaining the money

upon it is immaterial,[292] and ought not be considered a crime. Since the victim cannot be harmed until the instrument is negotiated or collected, statutes making it a crime to obtain anything of value should be interpreted as making obtaining the money upon the instrument a crime, and obtaining the instrument should be considered an attempt punishable only in case the obtainer failed to get the money upon it.

Since the cases treat the obtaining of the money upon the instrument as a crime, the question arises as to when the money is obtained. If the instrument is discounted or sold, is the money obtained when it is sold or when it is finally paid by the drawee or maker? The earlier decisions treat the final payment as the obtaining,[293] but later and better considered decisions hold that the money is obtained and the crime completed when the money is received from the vendee, and the place of subsequent collection from the drawee or maker is immaterial.[294]

j. Forgery and Uttering

What law is applicable to or has been violated by one who forges an instrument? In all cases but one[295] it has been held that the law of the state in which the accused was at the time the instrument was forged governs.[296] He can be tried there [297] and not in any other state.[298] When a deed to land situated in one state has been forged in another, what law is applicable to the accused? A majority of the courts hold that he is subject to the law of the state in which he was at the time the instrument was forged, that he can be tried there [299] and not in the state in which the land is situated.[301] In Hanks v. State[302] the accused was tried in Texas, charged with forging in Louisiana a deed to Texas land. A Texas statute provided: "persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter which do not in their commission necessarily require a personal presence in this state, the object of this chapter being to reach and punish all persons offending against its provisions whether within or without this state." The court held that Texas law was applicable to the accused and he could be tried there, because there was no limitation on the power of the legislature.[303] This ignores the due process clause of the Fourteenth Amendment.[304]

The question which has arisen most frequently in forgery cases is whether evidence that the instrument was uttered, or an attempt made to pass it, or that it was in the possession of the accused within the jurisdiction, is sufficient along with evidence of the forgery to justify a jury in drawing the inference that the accused was within the jurisdiction when the instrument was forged. The courts hold that the evidence is sufficient unless there is other evidence indicating that the forgery occurred elsewhere.[305]

The courts say that the accused is triable for the uttering or publishing of a forged instrument in the place where it was uttered or published.[306] This is of little use in solving the problems which have confronted them. Where there is evidence that the accused has sent a forged instrument by mail or by means of an innocent agent to a person in another state, was it uttered or published in the state in which the accused mailed it or parted with its possession or in the state where it was received by his "intended victim"? Some courts hold that the instrument was uttered or published in the

place where the accused parted with its possession, that he can be tried there[307] and not in the place where it was received by his intended victim.[308] Others hold that it is uttered where received by the intended victim, and the accused can be tried there[309] and not in the place where he parted with its possession.[310] The conflict is the same as that which exists on the question of where a libel is published under similar circumstances.[311]

The real problem is the problem of crime by agent or by mail, or the problem of place of effect versus the location of the actor. Its solution does not lie in the interpretation of the word uttered. Even if an instrument is not uttered or published until received by the intended victim, the jurisdictional problem is the same. It should be solved by applying the law of the state in which the accused was at the time the instrument was uttered.

k. Prohibition of Sales

Where statutes prohibit the sale of mortgaged property or intoxicating liquor or other commodities, the question arises as to what law is violated by persons making such a sale. The courts say that the law of the place where the sale was made is applicable.[312] They will refuse to try the accused if the sale was made outside of the state.[313] The courts say that the crime was committed or consummated where the property was sold, but this is hardly a workable formula. Where is property sold? Is the place of sale the place where the property, the place where the vendor, or the place where the purchaser is located at the time title passes? The courts seem to proceed upon the notion that the sale occurs at the place where the property is located at the time title passes. Thus, it has been held that the accused is not triable if the property was delivered to a carrier in another county,[314] and that the accused is triable in the county where his agent delivered the property to the purchaser, although he himself was not in that county at the time.[315] It is submitted that this is wrong. The issue is not where the crime was committed or where the property was sold, but to what law was the accused subject at the time title passed. It is submitted that he should be subject to the law of the state in whose territory he was at the time title passed.

Where the statute makes the "solicitation" of sales a crime, it has been held that the law is applicable to one who solicited sales while in the state, although delivery was to be made outside of the state.[316] Where a person in one state solicits a person in another by mail or by agent, what law is applicable? The cases hold that the law of the state in which the person solicited was located governs, and the accused can be tried there.[317] Various reasons are given, such as that the crime was "consummated" there and that the effect was there. It is submitted that these decisions are unsound, and the accused should be held to be subject to the law of the state in which he was at the time when he mailed the letter or the agent did the soliciting.

There are several cases arising under statutes making it a crime to sell or "dispose" of mortgaged property where, although the property was sold in another jurisdiction, it was held that removal from the state was a "disposing" of the property within it.[318]

l. Larceny

The question here is whether or not an accused who stole property in one state and carried it into another can be tried in the courts of the latter, either because he was subject to its law so that it may be applied to him, or because the second state has so far abrogated the rule that no state will enforce the penal laws of another that the second will apply and enforce the criminal law of the first.

In order to understand the law on this subject it is necessary to trace the development of the law of venue in England. In a case[319] decided in the King's Bench in 1406, an appeal of larceny was brought in Middlesex against a man who had stolen goods in London and carried them into Middlesex. The court of King's Bench held that the appeal was maintainable in Middlesex, "for when a man robs another of his goods and carries them into divers counties, he commits the robbery in each county, and the appeal is maintainable in whatever county the plaintiff will." In 1489 a case [320] came before the Exchequer Chamber in which the accused was arraigned upon an indictment in Surrey for having stolen goods in that county. He pleaded that he had been indicted for taking the same goods on the same day in the county of Middlesex, that it was the same felony, and he had been acquitted. The court held that the plea was bad because it did not traverse the allegation that the goods were stolen in Surrey, and the crime could not be tried in any other county than that in which the goods were originally stolen. The court distinguished indictment from appeal of larceny on the ground that the latter was an action brought by the person wronged to recover his goods, which necessarily had to be brought in the county in which the goods were situated. The result was reached by analogy to an action of trespass for battery which could only be brought in the county in which the battery was committed. The reporter added "but some at the bar held that it was different in felony, because it is felony in every county where the goods are, or come, etc." Lord Hale misunderstood the case, and in his Pleas of the Crown cited it for the proposition that "if A steals the goods of *B* in the county of *C* and carry them into the county of *D, A* may be indicted for larceny in the county of *D* for the continuance of the asportation is a new caption;"[321] which is just the opposite of what the court held. Other writers [322] followed Hale, with the result that the law of venue came to be what Hale said it was.[323] The rule, considered merely as a rule of venue, is not a bad one. If the accused is arrested with the goods in his possession, some of the witnesses will be in the county where the arrest was made, and it will be as convenient to try him there as in the county where the original taking occurred. The mischief comes from the fiction that the "continuance of the asportation is a new caption," which Hale adopted from the appeal of larceny case. If the crime was complete with the original taking, so that the accused could be convicted in the county where that occurred, the subsequent carrying of the property into another county would seem to be immaterial. In the states of the United States where the law of venue is the same [324] as it is in England, it is held that a conviction of acquittal in one county is a bar to prosecution in any other.[325] In the English case of Rex v. Smith [326] two horses were stolen by defendants at different times in Somersetshire, so that the taking of each horse constituted a separate crime there. Defendants were found in possession of both horses in the county of Wilts, where they were arrested and tried. The court held that there were two felonies, and compelled the prosecutor to elect upon which he would proceed, overruling his contention that the possession of both horses in Wilts was a new taking and thus a single felony. These decisions indicate that the possession of the

property in another county is not a new taking which will constitute a separate crime, and that the fiction adopted by Lord Hale will not be applied whenever the accused would be materially affected thereby.

In England the law of jurisdiction is quite different from the law of venue. In Butler's Case,[327] decided in 1586, the question was whether pirates who had robbed divers of the Queen's subjects at sea and brought the goods into Norfolk could be tried in a common-law court in Norfolk. At the Norfolk Assizes they were committed to the vice-admiral of the district on the ground that bringing the property into the county was part of the same felony as the original taking, which occurred in territory under admiralty jurisdiction to which the common law did not extend. Lord Coke said of this case: "it is not like, where one stealeth goods in one county and brings them into another, there he may be indicted of felony in any of the counties, because that the original act was felony whereof the common law taketh knowledge." In 1763, in Rex v. Anderson,[328] it was held that a man could not be indicted in England merely because the goods were brought there when the original taking was in Scotland. In 1773 a statute [329] was enacted which provided that when goods were stolen in Scotland and brought into England, or vice versa, the accused could be tried where the goods were found in his possession. This is merely a venue statute, since Parliament had power to legislate for both England and Scotland. Except in cases covered by it, an accused who has stolen property abroad and imported it into England cannot be tried in England.[330]

In the United States there is a conflict in the authorities on the law of jurisdiction. Some courts hold that the accused can be tried in the state into which he has carried property stolen abroad, applying the doctrine developed in the venue cases.[331] Others, in accord with the English authorities, hold that he cannot be tried there.[332] It is submitted that this is the sound view.

In Rex v. Peas,[333] decided in 1774, the accused was tried in Connecticut on an information charging him with feloniously stealing a horse in New York and riding it into Connecticut. His plea in abatement on the ground that only the courts of New York had jurisdiction was sustained, but he was convicted on a new information charging that the crime was committed in Connecticut. What the actual facts were as shown by the evidence is not stated, but the marginal note "a thief may be taken up and tried wherever he carries the stolen goods" indicates that the evidence established the facts which were alleged in the original indictment to which the doctrine of the English venue cases was applied. It is difficult to see why a change in the indictment should produce a different result.

In State v. Brown,[334] decided in 1794, the accused had stolen a horse in the Territory South of the Ohio and brought it into North Carolina. By the law of the Territory the offense was punishable by pillory, branding, and whipping. By the law of North Carolina it was punishable by death. The accused was indicted in North Carolina. The prosecutor, relying on the English venue cases, claimed that the asportation into North Carolina was a new taking and a crime committed there. The court rejected his contention, holding that the accused could not be tried in North Carolina. Judge Ashe examined the venue

doctrine and said that there was only one crime, because a conviction or acquittal in one county would be a bar to prosecution in another. He said that the law violated was the law of the Territory, because the crime was committed there where the original taking occurred, and that the application of North Carolina law would be unjust because a conviction or acquittal would not bar prosecution in the Territory and because the penalty was more severe.

The next three cases are contra. In the first[335] the writ of error was quashed because it was not filed in time, thus leaving the trial court's decision undisturbed. In Massachusetts[336] the court thought that the problem was the same as in the venue cases. The third[337] was decided on the authority of the Massachusetts case. In State v. Ellis[338] the court said, "The law, most probably, was originally settled on a supposed analogy to the stealing of goods in one county and conveying them into another; ... Whether there exists this analogy or not, in my opinion, it is much too late to recur to first principles." These courts were ignorant of State v. Brown and the English authorities contra.

The courts applying the doctrine of the venue cases have not wholly escaped the conflict of laws problem, for the question has arisen whether it is necessary to prove the foreign law in order to establish the character of the original taking or whether this is governed by the local law.[339] If the foreign law is applied, the court is in reality enforcing the penal laws of another state. If the local law governs, the court is either giving extraterritorial effect to its own law or making it a crime to import goods the acquisition of which was not criminal by the foreign law. The courts of Massachusetts and Ohio were impressed by this dilemma in cases where the original taking was in a foreign country, and held that they could not try the accused who afterwards brought the goods into the state.[340] They had previously held in cases where the original taking was in another state of the United States that they could try the accused. These decisions were left undisturbed so that in these states the accused can be tried if the original taking was in a sister state but not if it was in a foreign country. There is no sound reason for this distinction.

The sound view is that there is only one crime which is complete as soon as the original taking has occurred. This is clearly indicated by the venue cases holding that conviction or acquittal in one county is a bar to prosecution in any other. What is subsequently done with the property is immaterial. The law which ought to be applied is the law of the state in which the accused was at the time of the original taking. The law of the state into which the property is afterwards brought should not be applied. To do so is to apply a law to which the accused was not subject at the time of the original taking. If the importation of the stolen property by the thief is regarded as a separate crime committed by the accused while in the territory, a conviction or acquittal of that crime will not bar prosecution for the original crime in the state where the accused was when the original taking occurred. The wrongdoer could be punished a number of times for what is essentially one crime.

The decisions upholding trial in the state into which the property was brought could be supported if interpreted as merely authorizing the court to try the case by the foreign law, thus partially abrogating the rule that no state will enforce the penal laws of another. If

interpreted in this way the crime would be transitory to a limited extent, and a conviction or acquittal in one state would be a bar to prosecution in the other. This interpretation would bring the court face to face with the provision in many state constitutions requiring that the accused be tried in the county in which the crime was committed. This constitutional provision should not prevent trial in states where the goods are brought which have already adopted this view, because at the time that the constitution was adopted the crime was regarded as committed there.[341]

A number of states have statutes providing that every person who steals property in another state or territory and brings it into the state may be convicted and punished in the same manner as *if* the larceny had been committed in the state.[342] These statutes have been held to be constitutional.[343] These decisions are sound, for there can be no question but that the state has power to make the bringing of stolen property into its territory a crime. However, in applying these statutes the courts differ on the question of whether the character of the original taking is to be determined by the law of the place where the accused was when it occurred or by their own law.[344] It would seem that the application of its own law would violate due process either because it is an extraterritorial application of it[345] or because it is the application of a law to which the accused was not subject at the time of the original taking.[346]

The soundness of the policy represented by these statutes is another matter. If interpreted as making it a separate crime for the thief to bring stolen property into the state as the genesis of the common law would seem to require, they make it possible to punish the wrongdoer several times for what is essentially one crime. A clause in the statute providing that a conviction or acquittal in the state where the original taking occurred shall be a bar to prosecution does not afford adequate protection to the accused, for it cannot prevent the state in which the original taking occurred from *subsequently* trying the accused for the different act. If these statutes could be interpreted as merely authorizing the courts to try the case by the foreign law and so partially abrogating the rule that the state will not enforce the penal laws of another, their policy could not be criticised.

m. Robbery, Aggravated Larceny, and Burglary

In opinions rendered in 1538[347] and 1584-1587 [348] are statements to the effect that if robbery is committed in one county and goods carried into another, an *appeal* of robbery can only be brought in the first. Apparently these dicta are statements of the law of an earlier case.[349] Lord Hale, relying on these statements, inaccurately says that the accused cannot be "indicted" in the county into which the goods are brought[350] because the indictment must be in the county in which the force and putting in fear was.[351] Subsequent decisions follow the rule laid down by Lord Hale, and the accused cannot be indicted for robbery,[352] aggravated larceny,[353] or burglary[354] in a county into which the goods are afterwards brought. Statutes authorizing trial there have been held unconstitutional because a violation of the provision requiring that the accused be tried in the county in which the crime was committed.[355] He could be indicted for simple larceny in the county into which the goods were afterwards brought.[356] No cases

involving two states have been found on this point, but since the fiction justifying venue in the county into which the goods are brought is not applied in these cases, it cannot interfere with the application of the law of the state in which the accused was at the time the property was taken from the victim's possession or dwelling, or, in the case of burglary, the law of the state in which the accused was at the time of the breaking and entering.

In State v. McAllister[357] defendants were indicted and convicted in West Virginia for robbery. They had seized one Wallace in Kentucky, intending to hang him. Wallace offered money for his release and defendants took him to West Virginia, where he obtained a check for $200 from a friend. He retained the check in his possession until the party had returned to Kentucky, and there gave it to defendants. The West Virginia Supreme Court held that defendants could not be tried in West Virginia because the robbery was committed in Kentucky, and reversed the conviction.

n. Kidnapping

State v. McAllister[358] suggests the problem of what law should be applied in determining the legal effect of the conduct of an accused who has seized a person in one state and taken him into another against his will. The problem seems to be similar to that described when goods are stolen in one state and carried into another.[359] However, something depends upon just what the crime of kidnapping consists of. Blackstone[360] denned it as "the forcible abduction or stealing away of a man, woman, or child, from their own country and sending them into another." It is doubtful whether Blackstone meant that a sending out of the country was essential to the crime, since he relied upon Exodus 21:16, "He that stealeth a man, and *selleth* him, or if he be found in his hand, he shall surely be put to death." He also says that in the civil law the offense was "spiriting away and stealing men and children." However, in two of the cases cited by him the victim was seized in England and carried to Jamaica.[361] In Click v. State,[362] a Texas case, the court raised the question whether a conveying out of the country was essential to the crime, but found it unnecessary to decide the point. In State v. Rollins[363] the New Hampshire court held by analogy to the crime of larceny that any asportation was sufficient, and that the person taken need not be carried into another country. At common law, then, the crime may be said to have consisted of any taking or asportation of a person with intent to deprive him of his liberty.[364] It would seem that where there is an asportation in several states, the law of the state in which the accused was at the time the asportation was first coupled with the necessary intent should be applied to determine the legal effect of his conduct. Otherwise, the accused could be punished in both states for what is essentially the same act. The only cases arise under statutes defining the crime. In State v. Whaley[365] the accused was indicted for assisting in kidnapping a negro. He assisted in taking a negro in Delaware. The men he assisted took the negro into Maryland. The accused was tried in Delaware, and it was erroneously assumed [366] that he could not be tried there unless the men he assisted could be tried there. As to that the court held that they could have been tried in Delaware, because the gist of the offense defined by the statute was the carrying of the free negro "out of this state into another state." On the other hand, in United States v. Ancarola[367] and State v. Stickney[368] it was

held that the accused could be tried in the state where the victim was afterwards brought, applying statutes making it a crime to bring into the state a person kidnapped in another state. It is submitted that the policy of the statutes involved in the last two cases is not a wise one. The possibility of double punishment is obvious.

o. Receiving Stolen Goods

What law governs or is applicable to one who receives goods knowing them to be stolen, embezzled, or obtained by false pretenses, if the goods were stolen, embezzled, or obtained in another state or afterwards taken there by the receiver? A majority of the courts hold that the law applicable is the law of the state in which the accused was at the time he received the goods.[369] He cannot be tried in the state in which the original wrongdoer committed his crime.[370] He can be tried in the state in which he was at the time he received the goods.[371] There are some cases holding that the accused cannot be tried in the state where he was when he received the goods unless the original wrongdoer could be tried there for a violation of its law.[372] These decisions are unsound. The reasoning upon which they are based is repudiated in In re Loomis.[373] In that case horses stolen in South Dakota were received by the accused in Nebraska. He was tried in Nebraska. His counsel argued that since the person who took the horses could not be tried in Nebraska for a violation of its law, the accused could not be tried there because the court could not try the question of whether or not the original taking was in violation of South Dakota law. The court held that although the South Dakota law had to be applied in determining whether or not the goods were stolen, the receiving of stolen goods in Nebraska was a violation of Nebraska law, and therefore the court would not be enforcing the penal laws of another state.[374]

Whether the receiver is regarded as an accessory after the fact[375] to the crime of larceny, embezzlement, or obtaining by false pretenses, or as committing an independent crime, the result should be the same. If regarded as an accessory after the fact, then the rule that the law which governs is the law of the state in which the accused was when the accessorial acts were done should apply.[376] If receiving is regarded as an independent crime, then the principle that the law which governs is the law of the state where the accused was at the time of the conduct in question should apply.[377] Only in case the receiver is regarded as a principal participating in the crime of larceny, etc., could the unsound principle that the law governing is the law of the state where his guilty agent stole, embezzled, or obtained the property[378] be applied.

Although there are no cases involving the law of two states, there are a number of venue cases holding that the receiver cannot be tried in a county into which he afterwards carries the goods,[379] i.e., every asportation is not a new receiving.

p. Embezzlement

Embezzlement is the formation of an intention by a person lawfully in possession of the personal property of another to keep or use it for his own purposes. Since secret intentions cannot be known, there must be some overt act indicating such an intention,

either user or refusal to deliver upon demand. What law is to be applied to determine the legal character of the act or the penalty for misappropriation of personal property by a fiduciary? Most courts hold that the applicable law is the law of the state in whose territory the accused was when he converted the property, i.e., when he formed the intention to keep or use it for his own purpose. He can be tried there[380] and not in any other state.[381] There may be several overt acts indicating an intention to convert, and these may have been done by the accused in different states. Since the crime is committed when the intention is first formed, the location of the accused at the time of subsequent overt acts is immaterial.[382] Subsequent overt acts may characterize prior acts ambiguous in themselves, so that it can be inferred that the intent existed at the time of the prior ambiguous act.[383] The English courts have thought that where the accused was under a duty to account for the property at a particular place, his failure to account there constituted a conversion there.[384] Several American courts have taken the same view.[385] It is unsound, because failure to account is not alone evidence of an intention to keep or use for one's own purposes.[386] It may be due to negligence or circumstances making it impossible to account. Assuming that failure to account is evidence which along with other evidence will establish an intention to convert the place where accused had a duty to account is not material. The conversion or formation of the intent to keep or use for his own purposes may have taken place while the accused was elsewhere. Most American courts so hold.[387]

Sometimes it does not appear where the accused was when he formed the intent or where the overt act is done. The location of the accused must then be inferred from the facts in evidence.[388] Formation of the intent to appropriate while in the state is often presumed from the fact that the goods were last seen in possession of the accused within the state.[389]

In one case the court held that the law of the state into which the accused afterwards brought the embezzled property governed.[390] This is unsound because the crime is complete when the intention to appropriate is formed, and the subsequent asportation is immaterial.[391]

q. Bigamy

What law determines the legal character of the conduct of a person who marries while legally married to a living person? In the King v. Sessions,[392] in 1664, at The Old Baily in London, the question arose whether the statute was violated by the accused when one marriage was across the sea and the other in England, and all the judges agreed that the second marriage was the offense and the statute only applied when it took place in England. This case has been followed, the courts applying the law of the state in whose territory the accused was when the second marriage was solemnized. They will not try the accused when the second marriage was outside of the state.[393] In the absence of an express provision in the statute, the venue is also in the county or judicial district in which the second marriage occurred. The accused cannot be tried elsewhere.[394] The place of the first marriage is immaterial. Of course, the existence of a legal spouse is a circumstance without which the second marriage would not be criminal, but if its legality

is recognized, the place where the status was acquired has no effect upon the criminal law applicable to the conduct of the accused in marrying again.

Some states have statutes of which the following is an example:

"... 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 England or *elsewhere*, every such offender, and every person counselling, aiding or abetting such offender shall be guilty of felony, ..."[395]

They have been held inapplicable to those whose second marriage took place outside of their territory, either on the ground that the legislature had no power to legislate for those beyond the territory[396] (assuming that the power to be ascertained was the power which existed at the time of the second marriage rather than that which existed at the time of the trial), or on the ground that the application of law to which the accused was not subject at the time of the conduct in question was so unfair as to be contrary to due process of law and therefore unconstitutional.[397] However, in The Trial of Earl Russel[398] the English House of Lords held that the statute applied to a citizen of England whose second marriage took place in Nevada, although this was contrary to an earlier decision of the Privy Council in McLeod v. Attorney General for New South Wales.[399] Venue, of course, is a different matter, and many statutes providing for trial in the county in which the accused is arrested have been followed.[401] However, these statutes have been held unconstitutional in states having constitutional provisions guaranteeing the right to trial in the county in which the crime was committed.[402]

Many statutes make cohabitation within the state with the spouse of an out-of-state bigamous marriage a crime.[403] Since in most states adultery is made a crime by another statute,[404] this is merely a method of securing the application of local law to an act done outside of the territory. What the statute aims at is not the adultery or cohabitation but the bigamous marriage. This is shown by the question whether the second marriage must be shown to be illegal by the law of the state in which it occurred. A Vermont court held that it must be,[405] thus viewing the statute as merely authorizing trial within the state by the foreign law. Most statutes, however, make the criminal character of the cohabitation depend upon whether or not the second marriage is criminal by the local law[406] or are so interpreted by the courts.[407] They ought to be held unconstitutional as a violation of due process of law, because they require the application of law to which the accused was not subject at the time of the second marriage. However, the contrary has been held.[408] Under such statutes, venue in the county where the cohabitation occurred has been upheld.[409]

C. CONDUCT ON WATER

1. WHAT LAW GOVERNS? What law applies to the conduct of persons on water?

a. On Waters Not Within the Territory of Any Sovereignty

(I) *Concurrent Jurisdiction Theory*

In the Trial of Joseph Dawson and Others,[410] at the Old Bailey in London in 1696, for piracy, the Grand Jury was, instructed that "The King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world, ..." This was before the doctrine of the freedom of the seas had become established and Spain and Portugal were claiming exclusive jurisdiction over large areas of the open ocean.[411] The difficulty with the theory of concurrent jurisdiction is that it would result in multiple punishment for one act, because conviction or acquittal of the violation of the laws of one country would be no bar to a trial for violation of the laws of any of the others.[412] Few courts have adopted this theory, and it was expressly repudiated in United States v. Robbins.[413]

(II) *Ships National Territory*

The generally accepted principle is that which treats each ship and boat as a bit of floating territory of the country to which it belongs. Thus, the law applicable to persons on the high seas outside of the territory of all countries is the law of the ship.[414] Courts will try persons for their alleged criminal conduct while on board a ship of their own country on the high seas outside of the territory of all other countries,[415] and will refuse to try persons for their conduct while on foreign ships outside of their own territory.[416]

The nationality of a ship depends upon the citizenship of its owners,[417] and not upon its registry or the flag it flies,[418 ]although it seems that a prima facie case of nationality may be made out from the registry and flag flown.[419] No cases involving ships owned by corporations have been found, though it would seem that for this purpose corporations should be deemed citizens of the country in which they are incorporated.[420] If a ship is owned by a number of individuals, citizens of different countries, it would seem that the ship should be held to have the nationality of the country whose citizens owned the largest interest. In United States v. Palmer[421] and United States v. Kessler,[422] it was said that American law did not apply where the ship was exclusively owned by foreigners, thereby implying that it would apply if one of the owners was a citizen of the United States, no matter how small his interest might be.[423] If this were so, a ship could have several nationalities at once and multiple punishment would be possible, a conviction or acquittal of violation of the law of one country being no bar to trial for violation of the law of another country.[424]

Who has the burden of proving the national character of the vessel? The Supreme Court, in United States v. Holmes et al.,[425] ruled that the accused had the burden of proof. The persons accused had been convicted of piracy, under a statute making murder on the high seas piracy, without any showing of the national character of the vessel on which they were at the time of the alleged acts. On the other hand, in Regina v. Serva and Nine Others,[426] tried at the Exeter Assizes, the conviction was held to be wrong, and the prisoners were discharged because the state had not shown that the ship on which the killing occurred was English. It would seem that where the conduct is criminal by the

laws of all countries the accused should have the burden of showing that he has violated some other law than that of the forum, for otherwise he might go unpunished, though the act be proved, because the prosecuting officer of no country could prove that the ship had the nationality of the forum. However, where conduct is criminal by the laws of some countries and not by the laws of others, it would seem that the burden of proving the nationality of the ship should be upon the state as a part of the burden of proving the guilt of the accused.

Some federal statutes and constitutional provisions have been interpreted as not applying to American ships on the high seas. In Scharrenberg v. Dollar Steamship Co. et al.[427] a statute prohibiting assisting, encouraging, or soliciting the *migration* or *importation* into *this country* of contract *laborers* was interpreted not to apply to assisting, etc., the employment of a Chinaman in Shanghai to work as a seaman on an American vessel. The reasons for this interpretation were that a "seaman" was not a "laborer," that American ships are only figuratively and not actually a part of "this country," and that bringing into or going on board an American vessel could not be said to be an "importation" or a "migration." This view is perhaps excusable when we consider that the man on the street thinks of importation as a bringing into the land area of a country. Yet in spite of this common conception, the courts have interpreted importation to mean a bringing into the territorial waters of a country.[428] It would seem that it could as well be interpreted to mean a bringing into American ships, which for jurisdictional purposes are deemed part of our territory.

In Cunard Steamship Co., Ltd., et al. v. Mellon[429] the Eighteenth Amendment was interpreted as not applying to American ships outside of American territorial waters. The Eighteenth Amendment so far as it is here material was as follows: "... the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." It will be observed that the words "importation" and "exportation" are similar to the words in the statute interpreted in Scharrenberg v. Dollar Steamship Co. et al., upon which the court relied. However, this authority could have no application to the words "sale," "transportation," and "manufacture" used in the statute, which it would seem should have been interpreted to apply to American vessels on the high seas, for certainly they are "territory subject to the jurisdiction" of the "United States." The court also relied upon In re Ross.[430] In that case Ross, a Canadian citizen, killed the mate on an American ship while it was in port in Japan. He was convicted in an American consular court in Japan without indictment by a grand jury and without a jury trial. He sued out a writ of habeas corpus contending that he had been deprived of his constitutional rights. The circuit court refused to release him and the Supreme Court affirmed this decision on the ground that the Constitution of the United States did not apply to Japanese territory. This should have been a sufficient reason for the decision, because the ship was in Japanese territorial waters and the doctrine that a ship is part of the territory of the nation whose citizens own it should only be applied when the ship is on the high seas outside of the territory of any nation.[431] However, it was contended that the ship was American territory, and the court answered this by saying that the Constitution did not apply to American ships except when the

accused was brought to this country for trial. This unsound doctrine is no justification for the decision in Cunard Steamship Co. et al. v. Mellon, that a part of the Constitution does not apply to American ships on the high seas at all.

(III) *Piracy*

It would seem that the law applicable to the piratical conduct of persons on the high seas outside of the territory of any country would be the same as the law applicable to all other conduct there, i.e., the law of the ship. Unless otherwise defined by statute [432] piracy is robbery[433] upon the high seas.[434] There would seem to be no reason why the principle employed in determining the applicable law should be different for robbery than for murder and other crimes.

(a) INTERNATIONAL LAW

There is a great deal of dicta[435] and some authority[436] to the effect that piracy is a violation of international law which may be punished by any country in which the offender is afterwards arrested or to which he is brought after arrest upon the high seas. This view of the matter assumes that there is some all-pervading law, some natural law or jure gentium which it is the duty of all courts everywhere to enforce. This is no doubt due to the influence of the natural-law philosophers, now discredited. International law is not law at all in the sense in which the word is used by lawyers.[437] It is merely international custom with no other sanction than public opinion. Like other customs, for example the "custom of merchants," it may be received into and become a part of the municipal law. However, when incorporated into the law of a country, it can have no greater territorial extent than the rest of its law. International custom does not fix the penalty for piracy, different penalties being fixed by the laws of different countries.[438] If the penalty fixed by the law of the forum is applied to an accused for conduct on a foreign ship on the high seas, the court is applying law to which he was not subject at the time of the conduct in question. The foreign law cannot be applied, since the courts refuse to try persons for a violation of foreign law. If we assume the existence of an all-pervading law, it could not be enforced in the federal courts because they have no authority to try anyone for an act unless it is made a crime by federal statute defining it and fixing the penalty.[439]

The view that piracy is a violation of international law is the result of a misunderstanding of statements made by early text-writers and of opinions in some early decisions. Coke said that before the statute of 25 E. 3, c. 1, piracy by a citizen was treason "because pirata est hostis humani generis" and it was against his allegiance, but piracy by an alien was not treason, for though he were hostis humani generis, yet it was not against his allegiance.[440] Blackstone, relying upon this passage, said that piracy was "an offense against the universal law of society." He added: "By declaring war against all mankind, all mankind must declare war against him; so that every community hath a right, by the rule of self-defense, to inflict that punishment upon him which every individual would, in a state of nature, have been otherwise entitled to do for any invasion of his person or personal property." [441] The difficulty with the analogy to war is that pirates are not given the rights of war. They are tried in courts, have a right to trial by jury, and in dealing with

them the court must consider whether at the time of the alleged criminal conduct, they were subject to the law which it proposes to apply. Story, relying on Blackstone, said: "The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the universal law of nations; a pirate, being deemed an enemy of the human race."[442] This is an astonishing statement when we consider that thirteen years before it was made the Supreme Court had held that persons committing piracy on a foreign vessel on the high seas could not be tried in the United States because they had not violated its law.[443]

Art. 1, Sec. 8, Cl. 1 of the United States Constitution provides: "The Congress shall have power ... To define and punish piracies and felonies committed on the high seas and offenses against the *law of nations*."[444] Congress provided that "Whoever, on the high seas, commits the crime of piracy *as defined by the law of nations*, and is afterwards brought into or found in the United States, shall be imprisoned for life." [445] In United States v. Smith[446] the argument for the prisoner was that Congress was bound to define, in terms, the offense of piracy, and could not leave it to be ascertained by judicial interpretation. Story, J., said that Congress could define by reference to a term of known and definite meaning, and that writers on international law and maritime law all recognized the term "piracy" to mean robbery or forcible depredations on the sea animo furandi. It should be noticed that for his purpose it would be sufficient if the word had an accepted meaning by international law in the sense of international custom, since the meaning of all words depends upon customary usage.

(b) LAW IN THE UNITED STATES

In United States v. Palmer[447] the Supreme Court held that a person accused of committing piracy on a foreign vessel on the high seas could not be tried in the United States because not subject to its law at the time of the act. The applicable law is held to be the law of the ship, and the decision is a repudiation of the theory that piracy is a violation of international law, which may be punished in any country in which the accused is afterwards tried. In United States v. Furlong, alias Hobson,[448] the same view was taken of murder in a foreign vessel on the high seas. Justice Johnston's dictum that piracy is an offense within the criminal jurisdiction of all nations is explained by his statement that he did not concur in the decision in United States v. Palmer. He said that murder on the high seas was not within the jurisdiction of all nations because it was not piracy, which he defined as robbery on the high seas. Thus he reached the same result by narrowing the meaning of the term "piracy."

United States v. Klintock [449] is difficult to understand. The accused was an officer on a ship which seized a Danish vessel. It is stated that the pirate ship was owned outside of the United States, though the nationality of the owners is not stated. The accused was convicted, and moved in arrest of judgment upon the ground that he could not be punished under section 8 of the Act of 1790, relying upon United States v. Palmer. The motion was overruled. The court reaffirmed its position in United States v. Palmer, but said that persons on a vessel which did not belong to the subjects of any foreign power were proper objects of the penal codes of all nations, so that the laws of the United States

extended to them.[450] The ambiguity in the opinion is that it does not appear why the court said that the ship did not belong to the subjects of any foreign power. There is language to the effect that what is meant by ownership is possession and control,[451] so that a ship in the possession and control of pirates cannot be considered to be owned by the citizens of any country.[452] This position is untenable, first, because the nationality of the ship depends upon the citizenship of those having title,[453] not upon the citizenship of those having possession or control; and, secondly, because the pirates would ordinarily be citizens of some country. The other possible view is that the ship was not considered to belong to the subjects of any foreign power because there was no evidence of it. In United States v. Holmes[454] the doctrine of the Klintock case was applied to the crime of murder. The court held that the burden of proving the national character of the ship was on the accused. Since in United States v. Furlong, alias Hobson,[455 ]murder on the high seas was held not to be a violation of international law, United States v. Klintock can hardly be explained as an adoption of the international law theory. From United States v. Holmes and United States v. Demarchi[456] it would seem that the true explanation of United States v. Klintock is that the law of the forum is applicable in the absence of evidence of the citizenship of the owners of the ship. In other words, the ship is presumed to have the nationality of the forum, so as to place upon the accused the burden of proving ownership by citizens of foreign countries. There are dicta in a number of opinions to the effect that piracy is a violation of international law, which may be punished by any country in which the offender is afterwards arrested or to which he is brought after arrest upon the high seas.[457]

(c) ENGLISH LAW

There are two English cases both taking the view that piracy is a violation of jure gentium. In Attorney General for the Colony of Hong Hong v. Kwok-A-Sing[458] the facts were that the accused and other coolies who were being shipped from Macao, a Portuguese port in China, to Peru, on a French vessel, revolted, killing the captain and members of the crew and taking possession of the ship, which they sailed back to China. The accused was arrested in the English port of Hong Kong for extradition to China, charged with murder. On habeas corpus he was released on the ground that there had been no violation of Chinese law, since it did not extend to a French ship on the high seas. He was arrested again for trial in Hong Kong, charged with piracy jure gentium, and on habeas corpus again released. On appeal the Privy Council held that the first release was proper since murder on the high seas was a violation of the law of the ship, but that the second release was wrong since he could be tried in Hong Kong for piracy jure gentium. In a very early case the view was taken that all countries had concurrent jurisdiction over the sea.[459]

b. In Territorial Waters

What law is applicable to the conduct of individuals on territorial waters? Is it the law of the territory, or the law of the ship? From what has already been said, it would seem to be clear that the applicable law should be the law of the territory. The device of treating each ship as a part of the territory of the country whose citizens own it was necessitated by the

doctrine of freedom of the seas, i.e., the doctrine that no country had exclusive power of jurisdiction over the open ocean. To apply this device to waters which are definitely within the territory and under the control of any country is to violate either the principle that the laws of no country have any force or effect within the territory of another[460] or the principle that the law applicable to individuals is the law to which they were subject at the time of the conduct in question.[461]

To what extent have the courts taken this view? When they have been confronted with the problem of conduct on a foreign ship in their own territorial waters, they have invariably held that the applicable law was the law of the territory, i.e., their own law.[462] When confronted with the problem of conduct on a ship of their own nationality in foreign territorial waters their decisions are conflicting. A majority have held that the applicable law is the law of the ship,[463] i.e., their own law. A minority have held that the law of the territory governs.[464] It is submitted that the minority view is the sound one. Various reasons have been offered in support of one conclusion or the other. A critical examination of them will be found under the separate headings below.

(I) *Admiralty Jurisdiction*

The principal reason for the majority view is that foreign territorial waters are within the admiralty jurisdiction.[465] The argument is that since the admiralty courts have jurisdiction over causes of action arising in foreign territorial waters, the common-law courts to which the criminal jurisdiction of the admiralty courts was transferred also have it. Admiralty jurisdiction includes all matters happening on navigable waters, including foreign territorial waters.[466] This has nothing to do with the conflict of laws. It is merely the type of case which the admiralty courts may adjudicate, as distinguished from that which falls within the province of the common-law courts. It is merely the admiralty courts jurisdiction over the subject matter,[467] and this should be distinguished from jurisdiction in the sense of sovereign power which determines the applicable law. It has never meant that admiralty courts must apply the law of the forum in adjudicating causes of action arising in foreign territorial waters. In adjudicating transitory civil causes of action arising there, they apply the foreign territorial law.[468] Courts having criminal jurisdiction cannot do this because they refuse to try persons accused of violating foreign law. They ought not apply local law to conduct in foreign territorial waters merely because admiralty courts are empowered to *hear* civil causes arising there.

Some federal statutes provide that they apply to conduct "on the high seas *within the admiralty and maritime jurisdiction of the United States*." This language is unfortunate because most courts have treated conduct on American ships in foreign waters as within the jurisdiction of the United States merely because admiralty courts had jurisdiction over the subject matter.[469] If we assume that Congress intended to make American criminal law apply to American ships in foreign territorial waters, then it has exceeded its power, because: (1) no country has power to apply its law within the territory of another;[470] and (2) to apply American law to persons who were not subject to it at the time of the conduct in question merely because power over their persons is subsequently acquired, is unfair and contrary to due process of law.[471]

(II) "*High Seas*"

Some courts have made the result depend upon an interpretation of the term "high seas" used in these statutes. Some have said that "high" is used in the sense of highway, high seas meaning seas where a ship can go, i.e., navigable water including territorial waters.[472] Others interpret it to mean free seas, i.e., seas not subject to the exclusive jurisdiction of any country, where the free passage of ships cannot be interfered with, which does not include territorial waters.[473] This is a false issue. Even if we assume that Congress intended to legislate for persons on American ships in foreign territorial waters, the question would remain as to whether or not it had power to do so. It is submitted that it does not have this power.[474]

(III) *Matters Affecting Only Those on the Ship*

Some writers on international law attempt to determine the law applicable to foreign ships in port by distinguishing between matters affecting only those on the ship and matters affecting the public peace of the territory, being of the opinion that the law of the ship applies to the former and the law of the territory to the latter. This theory is referred to in only a few cases.[475] In Wildenhus' Case[476] the facts were that one member of the crew of a Belgian ship stabbed another while the ship was in port in Jersey City. Both were citizens of Belgium. It should seem that here, if ever, was a matter affecting only those on the ship. However, the Supreme Court of the United States held that it affected the peace and good order of the port, since public interest would be aroused and New Jersey was entitled to hold the accused for a violation of its law. Since persons are held to be subject to the territorial law for even minor acts done while they were on foreign ships in local territorial waters,[477] it may be said that the courts do not employ this theory.

(IV) *Statute of 1825*

Paragraph 5 of the Act of March 3, 1825,[478] provides: "And be it further enacted, That if any offense shall be committed on board any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offense shall be cognizable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if said offense had been committed on board of such ship or vessel on the high seas and without the jurisdiction of such foreign sovereign or state: Provided, always, That if such offender shall be tried for such offense and acquitted or convicted thereof in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States." Some of the American decisions in which the court applied American law to the conduct of persons on American ships in foreign territorial waters relied upon this statute.[479] It is based upon the theory discussed in the preceding paragraph that in territorial waters the law of the ship applies to conduct which affects only those on the ship, a theory which has been repudiated in cases involving conduct on foreign ships in local territorial waters.[480] It is submitted that here

again Congress has exceeded its power by attempting to make its law apply to waters within the territory of another country.[481] The clause in the statute making trial in the foreign country a bar to a second trial in the United States would not prevent the foreign country from trying the accused for a violation of its law after a conviction or acquittal here.[482]

(V) "*Out of the Jurisdiction of Any State*"

The Criminal Code provides that certain criminal laws of the United States apply to conduct on American ships "on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States and out of *the jurisdiction of any particular state*, ..." [483] The italicized clause appeared in earlier statutes dealing with particular crimes. In Wynne v. United States[484] counsel for the accused contended that the word "state" was used in a generic sense, meaning any political community, and that therefore accused could not be tried for an act done in foreign territorial waters. The Supreme Court rejected this contention, holding that Congress meant state of the United States.[485] As a matter of interpretation this may be correct, but it is submitted that the result reached was wrong, for since Congress has no power to legislate for persons within the territory of another sovereignty, the generic interpretation would only have produced the result which should be reached by applying conflict of laws principles.

The United States Constitution confers upon the federal government judicial power over all cases of admiralty and maritime jurisdiction.[486] Whether this gives Congress authority to apply its criminal laws to waters within the territory of a state of the Union where this is not conferred by the commerce clause[487] or the power to punish counterfeiting [488] or some other express power conferred upon the federal government, has never been decided. Chief Justice Marshall said that it was not a transfer of territory, that it was not a grant to the federal government of general or exclusive jurisdiction over this part of state territory.[489]

Since admiralty courts only had jurisdiction in civil cases,[490] it would seem that "maritime" is merely a synonymous term and that the clause merely confers jurisdiction over civil causes of a certain type. Furthermore, it gives the federal government *judicial* power over this subject matter. A grant of judicial power over certain subject matter is not a grant of power to legislate for territorial waters not ceded by the states. The United States Constitution also provides that Congress shall have power to define and punish felonies committed on the *high* seas.[491] The ambiguity here lies in the term "high seas." Does it include waters within the territory of a state of the United States? The possible meanings of this term have already been set out in considering whether or not foreign territorial waters were included.[492] While there are no cases involving the interpretation of high seas as used in this section, it would seem probable that it was not intended to give Congress power to legislate for waters within the territory of a state.[493] The power of a state of the United States to legislate for waters in its territory has been upheld.[494] If Congress also has this power, it has for the most part refused to exercise it. The possibility of double punishment for the same act is largely eliminated by the section of the criminal code quoted above. While it does not apply to all federal criminal laws, it

prevents the application of most of them to waters within a state of the Union.[495] In a recent case [496] the words "out of the jurisdiction of any state" were held not to modify "high seas," but to apply only to the words "or any other waters within the admiralty and maritime jurisdiction of the United States," and the federal statute was held to apply to waters within the territory of a state of the Union because, although within the three-mile limit, they were "high seas." It is submitted that this decision should not be followed. It is contrary to the interpretation placed upon earlier statutes similarly worded.[497]

2. JURISDICTION OF THE COURT

The general problem of the jurisdiction of courts has been discussed.[498] All that will be done here is to refer to several cases involving arrest upon the sea. In United States v. Schouweiler et al.[499] and United States v. Ferris,[501] the persons accused were arrested on foreign ships on the high seas outside of limits fixed in treaties extending the three-mile limit for purposes of arrest. Pleas to the jurisdiction of the court were sustained. In the Ferris case the court rejected the prosecution's contention that the illegality of the arrest did not deprive the court of jurisdiction. These decisions are contra to the weight of authority,[502] where the illegal arrest and removal are from the land territory of another country. They support the opinion advanced in the previous discussion of that problem that the result reached in a majority of the decisions is wrong because the person arrested has by the foreign law a right to a legal removal.[503] In The King v. Garrett[504] the court held that it had jurisdiction to try persons arrested on a foreign ship in local territorial waters, i.e., the arrest and removal were legal because made in territory of the government of which the court was a part.

II. JURISDICTION OVER PROPERTY — FORFEITURES OR PROCEEDINGS IN REM

A. CIVIL OR CRIMINAL?

1. IN GENERAL

Can a proceeding in rem be a criminal action? It would seem that its civil or criminal character would depend upon the nature of the law alleged to have been violated. We have already seen that the test of the character of a law is whether the legislative object was to punish the offender or to confer a benefit in the nature of a right.[505] The former are criminal and the latter are civil. It would seem that a proceeding in rem is criminal when the action is brought to enforce a criminal law. In most of the early cases it was assumed that a proceeding in rem must necessarily be civil. In Gelston v. Hoyt[506] the action was trespass for seizing a ship. The defendants pleaded in justification that they seized the ship because, contrary to law, it was being fitted out to aid the rebels in Santo Domingo. Plaintiffs introduced in evidence the record of a judgment acquitting the ship, rendered in a proceeding to secure its forfeiture. The court held that the judgment was conclusive on the question whether the ship was being fitted out in violation of the statute. Since the verdict in a criminal case is not res judicata of the facts necessarily determined in reaching it when these facts are in issue in a subsequent civil action,[507] it

is clear that the court assumed that the action against the ship was civil. In Clifton v. United States[508] and Snyder v. United States[509] the Supreme Court treated the action as civil for one purpose and criminal for another purpose. In Origet v. United States[510] the Supreme Court held that a personal action against the owner for fine or imprisonment was not a prerequisite to the proceeding in rem, on the ground that the action was civil. The decision is sound, but if the action *is* criminal the same result should be reached, because whether or not the crime penalized by forfeiture was committed can be determined in it. In three cases,[511] decided in federal district courts, it was held not to be a violation of the constitutional prohibition against compelling a man to testify against himself in criminal cases, to compel the claimant in forfeiture proceedings to produce books and papers, because the action was civil, not criminal.

In Coffey v. United States [512] the information was in rem for the forfeiture of ten barrels of brandy, certain stills, and equipment. The statute made it a crime to defraud or attempt to defraud the United States of the tax on distilled spirits, and provided that the penalty for violation should be (1) forfeiture of certain specified property to be secured in an action in rem, and (2) fine or imprisonment. The claimant pleaded that he had been tried and acquitted for the same acts, and the court held that this was a bar to the action. Justice Blatchford said that the proceedings to enforce the forfeiture must be a proceedings in rem and a civil action, but in considering the contention that the degree of proof required was different in criminal and civil actions, he said that the forfeiture was a punishment for the crime so that the proceedings in rem would be the same as a second criminal prosecution.[513] In Boyd v. United States [514] a proceeding in rem to secure the forfeiture of property was held to be a criminal action. The information was against thirty-five cases of polished plate glass, to secure their forfeiture for the importer's attempt to defraud the United States of the tariff. The trial court compelled the claimant to produce books and papers. It was held that this was a violation of the Fifth Amendment, providing that no person shall be compelled to testify against himself in a criminal action. In Stone v. United States [515] the basis of the decision in Coffey v. United States was said to be that the proceeding in rem was a criminal action. Boyd v. United States has been followed in subsequent decisions in the federal courts.[516] Thus, it is clear that a proceeding in rem may be a criminal action.

2. TIME WHEN TITLE PASSES

When a statute provides that property shall be forfeited when put to certain uses or for specified conduct relating to it, should title pass to the state immediately upon the prohibited use or act or only upon a judgment of forfeiture after seizure and appropriate proceedings to try the question of the owner's guilt? Should innocent parties, who acquire an interest in the property for value after the user or conduct prohibited by the statute but prior to seizure of the property, be protected? If Coffey v. United States and Boyd v. United States are sound decisions and the sole object of these statutes is to punish the owners of the property, it would seem that title ought not pass until sentence of forfeiture is pronounced, and that persons purchasing bona fide before seizure should be protected. This may enable some wrongdoers to escape the penalty of forfeiture, but the opposite result reached by a majority of the courts visits the punishment upon innocent persons.

a. Early English Law

In early English law title to personal property or real estate subject to forfeiture did not pass until after a trial or inquisition and a finding of the fact or act which under the law resulted in forfeiture.[517] Title to personal property passed upon conviction.[518] Title to real estate passed upon sentence of attainder.[519] The personal property forfeited was that owned by the offender when the verdict of guilty was returned.[520] Purchasers buying bona fide after commission of the crime but before conviction acquired a good title.[521] The real property forfeited was that owned at the time of the criminal act, the forfeiture relating back and voiding all mesne conveyances.[522] This rule antedates the statute of quia emptores, when crime was regarded more as a breach of the feudal bond than an offense against the state. Upon breach of the feudal bond title reverted to the lord, i.e., there was no forfeiture to the state but a reversion to the lord.[523] The reasons for this rule defeating mesne conveyances have disappeared with the passing of feudalism and the rise of the modern conception of crime as an offense against the state.

There are two English cases arising under the Navigation Act of 1660.[524] This statute provided that goods should not be imported into or exported from British territory in ships other than those built in British territory and manned by a crew three-fourths of whom were English. The penalty provided was a forfeiture of ship and goods, one-third of which should go to the person who should "seize, inform or sue for the same in any court of record, by bill, information, plaint or other action wherein no essoin, protection or wager of law shall be allowed." Obviously, the drafter of this statute was in doubt as to whether the action was civil or criminal. Robert qui tam v. Witherhead,[525] decided in 1702, was an action of detinue brought by a common informer relying upon this statute. It was objected that detinue would not lie because the plaintiff had no title to the goods. The court held that detinue would lie. Holt said that title was acquired by bringing the action, which was equivalent to a seizure. Rokeby said that title was divested out of the owner by importation, but did not vest in the person suing until he brought the action or seized the property. In Wilkins v. Depard,[526] decided in 1793, the action was trespass and the defense was that the goods had been seized as forfeited by a violation of the statute. Plaintiff replied that there had been no sentence of condemnation. A demurrer to this reply was sustained on the ground that plaintiff lost title by violation of the statute.

Innocent purchasers were not involved in these cases. The first assumes that the action is civil and expands the writ of detinue to enable the plaintiff to bring that form of action. Rokeby's remark treats the owner as though he held a conditional title from the state subject to reversion upon the happening of a condition subsequent. The decision in the second was based upon Rokeby's remark.

b. American Decisions

In United States v. Grundy,[527] decided in 1806, the facts were as follows: Brown's assignees had sold a ship which was among his assets at the time of the assignment. The United States claimed the proceeds on the ground that it had acquired title by forfeiture prior to the bankruptcy. There had been no proceedings to secure forfeiture. Prior to the

bankruptcy Brown had registered the ship, filing a false affidavit. The government claimed that under the statute title vested in it immediately upon the filing of the false affidavit. The statute provided that "there shall be a forfeiture of the ship *or the value thereof*." The court held that title did not pass to the government until it had elected to take the ship and not the value, and that the title of Brown's creditors secured by the assignment was superior to the claim of the United States. In a dictum Chief Justice Marshall said that if the statute so provided, title might vest immediately upon the doing of the prohibited act. In The St. Jago de Cuba,[528] decided in 1824, the court said that under this statute the forfeiture would not operate to deprive subsequent bona fide lienholders of their liens. In Caldwell v. United States [529] the same interpretation was given to this type of statute.

In United States v. Nineteen Hundred Sixty Bags of Coffee [530] the statute involved prohibited the importation of certain articles and provided that goods imported in violation of the law "shall be forfeited." Coffee so imported had come into the hands of claimants, who were bona fide purchasers. In a proceedings brought by the United States to secure its forfeiture, the Supreme Court held that Congress intended that title should pass to the government upon importation, so that no title was acquired by the bona fide purchasers. The court divided four to three. Justice Johnson, who wrote the majority opinion, said that a contrary interpretation would enable the offender to avoid the forfeiture. Justice Story in the dissenting opinion said that there was nothing in the language of the statute requiring the interpretation put upon it by the majority; that in applying the early English statutes title was held not to pass until after a trial or inquisition; that in the case of chattels it was the interest, if any, which the offender had at the time he was convicted which passed, and that even if it were assumed that the doctrine of relation back applied to chattels, the common-law rule that a fiction should not be permitted to work a wrong would prevent its application to innocent parties. It is submitted that Justice Story was right and that the decision is unsound, not only for the reasons which he gave but because its effect is to punish innocent parties for a crime committed by a former owner.

Nevertheless, the Supreme Court has continued to give the same interpretation to this type of statute.[531]

Under some statutes the release of property seized as forfeited for its violation may be secured by posting a bond.[532] It would seem that such a statute gives the offender an option to forfeit the property or pay its value, and that under it, as under the statute involved in United States v. Grundy,[533] title could not pass until it was no longer possible to secure the release of the property by posting a bond conditioned upon the payment of the value of the property in case of conviction. The Supreme Court of Michigan has held that bona fide purchasers acquire good title to property released upon the posting of a bond by the offending owner.[534]

3. PUBLIC NUISANCE

When an accused has been convicted of maintaining a public nuisance, it has been the practice from early times not only to impose a fine but also to order an abatement[535] of the nuisance when it has been alleged[536] and shown to be still continuing. In Rex and Regina v. Wilcox[537] the owner of a glass house was convicted of maintaining a public nuisance. The court imposed a fine and ordered an abatement of the nuisance. Subsequently, the convicted man was pardoned. It was held that the pardon discharges only the fine and not the order of abatement, because the latter was not punishment for the crime but a removal of that which is a grievance to other people. Since the object in abating the nuisance is not to punish the offender[538] but to enforce the public right, the action, in so far as it is prosecuted to secure an abatement of the nuisance, is civil and not criminal. Thus, the practice sanctions the union of a civil and a criminal action. The inconveniences of this practice must eventually cause it to be abandoned. Pleading in civil and criminal actions is different. The degree of conviction necessary before the jury can decide for the party having the burden of proof is different. Usually the principal object of the proceedings is to secure the abatement of the nuisance. This may fail in a criminal proceedings although the existence of a nuisance is proved, because the accused is not shown to have been responsible for it. In The King v. Watts[539] the owner of a ship which had sunk in the Thames River was indicted. It appeared that the sinking was caused by the negligence of those handling another ship which collided with the accused's ship, and that it was in no way the fault of the accused or those handling his ship. The court held that the indictment could not be sustained.

Thus, the principal object of the proceedings which was to secure the abatement of an obstruction to navigation on the Thames could not be secured. The Queen v. Chichester[540] is a similar case. The accused did not appear for sentence, and the court held that in his absence it could not order an abatement of the nuisance. In People v. High Ground Dairy Co.[541] the court took the view that the whole action was civil because the purpose of the statute was not to punish but to prevent a recurrence of the nuisance. It concluded that since the action was civil, a criminal intent was not an essential element. This goes too far.

A separate civil action to secure abatement might be in personam or in rem. The following cases illustrate the difficulties of an action in personam. In Cofer alias Rosencrans v. Territory[542] the lessee of premises who operated a house of ill fame was convicted of maintaining a nuisance. The sheriff was ordered to abate it. The lessee abandoned the premises, but the owner continued the same use of the premises. It was held that the order did not authorize the sheriff to abate the nuisance as against the owner, and that it was necessary to bring a new action against her. In State v. Paggett [543] an employee in charge of a powder magazine in a settled area was convicted of maintaining a nuisance. He was ordered to abate it. It was held error to make this order, since he was not the owner of the property. It is apparent that a proceeding in rem may be the desirable form of action to secure the abatement of a nuisance. As previously pointed out, such a proceeding in rem would not be a criminal proceeding.

B. THE OFFENDER — PROPERTY OR OWNER?

## 1. ADMIRALTY JURISDICTION

In England the admiralty courts were deprived of the criminal jurisdiction which they formerly exercised by the Statute of 28 Henry VIII, chapter 15.[544] The purpose of the law was to afford the accused a trial in accordance with common-law forms, that is, a jury trial. By section nine of the Act of September 24, 1789,[545] Congress conferred upon the federal district courts "exclusive original jurisdiction of all *civil* causes of admiralty and maritime jurisdiction *including all seizures* under the laws of impost, navigation or trade of the United States where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas; ..." The drafter of this statute evidently considered that forfeiture actions were civil and not criminal, and that when the seizures were made upon navigable waters, admiralty courts had jurisdiction over the subject matter. In proceedings to secure forfeitures under these laws the government's initial pleading has sometimes been called a libel,[546] sometimes an information,[547] and sometimes a "libel of information." [548] Since forfeiture proceedings have been held to be criminal[549] and admiralty courts long ago lost jurisdiction over criminal actions, it would seem that forfeiture proceedings are not properly admiralty proceedings and that regardless of what the government's initial pleading is called, admiralty law with its peculiar doctrines has no application in forfeiture proceedings. The original statute conferred jurisdiction over certain forfeiture proceedings upon the federal courts, but it is not necessary to accept the drafter's view that their trial is an exercise of admiralty jurisdiction. The statute has been changed, and the present act does not involve such an assumption.[550]

## 2. INNOCENT OWNERS

Some statutes provide that property shall be forfeited when used in a way or for a purpose prohibited, without limiting this to a use by or on the authority of the owner or restricting the forfeiture to the wrongdoer's interest in the property. The language taken literally requires the forfeiture of the interests of innocent persons. Probably this result was not intended because not foreseen. The drafters of these statutes seem not to have thought of the interests of innocent mortgagees and lienholders or of innocent owners of property lost or stolen or used without their knowledge, consent, or authority. If so, then the statute might be construed not to forfeit the interests of innocent persons because the legislature did not intend it to. If the literal meaning was intended, the statute would seem to be unconstitutional, for to punish innocent persons is so unfair and unjust that it would seem to be a violation of due process of law.[551] No end which the state wishes to accomplish would seem to require such a price.

The authorities upon the question are conflicting. United States v. Cargo of the Ship Favourite [552] was the first case decided in this country. Interpreting an act of Congress, the Supreme Court ruled that Congress did not intend that goods salvaged from a shipwreck and brought ashore by strangers to the owner at a place where there were no customs officers should be forfeited. In United States v. The Schooner Little Charles[553] the question was whether statements made by the master of the ship were admissible in evidence as admissions of the owner. Marshall said that the proceeding was against the

vessel, not the owner, but he also said, "It is true, that inanimate matter cannot commit an offense." Several federal cases[554] subsequently decided relied upon the following language from Chief Justice Marshall's opinion in United States v. Cargo of the Ship Favourite, "the law is not understood to forfeit the property of owners or consignees on account of the misconduct of mere strangers, over whom such owners or consignees could have no control." Statutes of South Carolina have been interpreted as not forfeiting the interests of innocent persons.[555] The leading case for this view is United States v. Two Barrels of Whiskey,[556] decided by the Circuit Court of Appeals for the Fourth Circuit in 1899. The interest of an innocent mortgagee in a horse, mule, and wagon used in transporting liquor upon which the tax had not been paid was held not to be forfeited, on the ground that the statute was criminal, its object being to punish wrongdoers, and the mortgagee had committed no crime.

The weight of authority sustains the forfeiture of the interests of innocent persons.[557] This line of cases began with Mitchell v. Torup,[558] decided in the English Court of Exchequer in 1766, and Story's dictum in The Palmyra,[559] decided by the Supreme Court of the United States in 1827. Three reasons are given for this view. They are: (1) the literal language of the statute requires it; (2) the proceedings being in rem are civil, not criminal; (3) the property is the offender. The third reason comes from two sources: (a) the fiction that the ship is the offender, which is a part of admiralty law applicable in civil cases, and (b) the early English law of deodand by which property which by misadventure or accident was directly instrumental in the death of a human being was forfeited to the King's almoner for pious uses.[560] The latter is obviously founded upon a superstition. In Mitchell v. Torup the court decreed the forfeiture of a ship because sailors brought two hundred and twenty-one pounds of tea to England in her without the knowledge of her owner, master, or mate. It was argued that the property was the offender, but the court disapproved of this argument and relied upon the other two. In The Palmyra it was decided that it was unnecessary to obtain a conviction of the offender before proceeding against the property. The decision is right because the guilt of the accused can be determined in the trial in the proceedings in rem, but Story put it upon the ground that the thing was the offender. This was due to his belief that he was exercising admiralty jurisdiction. In United States v. Brig Malak Adhel[561] the Supreme Court upheld the forfeiture of a ship used by pirates, although the owners were innocent. Story, who wrote opinion, said that in admiralty the ship was regarded as the offender. Dobbins Distillery v. United States[562] was an action to secure the forfeiture of a distillery for the lessee's acts in violating the revenue laws. Although the Supreme Court was clearly not exercising admiralty jurisdiction, it upheld the forfeiture of the innocent lessor's interest on the ground that the property was the offender, citing The Palmyra and United States v. Brig Malak Adhel. In United States v. Stowell[563] the Supreme Court reached the same result on the ground that the statute required it.

Goldsmith-Grant Co. v. United States,[564] decided by the Supreme Court in 1921, is the leading case. The United States brought the action to secure the forfeiture of an automobile used in transporting liquor in violation of the revenue laws. The claimant was a vendor who had retained title to secure an unpaid portion of the purchase price, and who had no knowledge of the use which the purchaser intended or to which he afterwards

put it. The Supreme Court sustained the forfeiture of the innocent vendor's interest. It was contended that Congress could not have intended what the words literally meant because the result would be so contrary to that justice which should be the foundation of the due process of law required by the Constitution. Justice McKenna answered this argument by saying that Congress could compel the owners of property to exercise care to prevent the prohibited use, and for this purpose could ascribe personality to the property as had been done in the early English law of deodand. The difficulty with this answer is that it is difficult to see how mortgagees and lienholders can by any diligence on their part prevent the person in possession from putting the property to the prohibited use. Justice McKenna added that whether the reason was artificial or real, the rule was now too firmly fixed to be changed. Are we to be bound forever to an unjust rule by the chains of stare decisis? Counsel put several hypothetical cases to show the absurdity of a literal interpretation, asking whether a Pullman sleeper or an ocean liner would be forfeited by the act of a passenger in transporting a bottle of illicit liquor, and whether property stolen or taken from an owner without his consent would be forfeited. McKenna ignored the inference that Congress could not have intended the literal meaning, saying that the court would consider these cases when they arose.

The Supreme Court continues to sustain the forfeiture of the interests of innocent persons. Goldsmith-Grant Co. v. United States was followed in Van Oster v. Kansas[565] and Various Items of Personal Property v. United States.[566] The latter was a proceedings to secure the forfeiture of a distillery for a violation of the revenue laws by the corporate owner. It had been tried for the same acts in a separate action and convicted. The Supreme Court held that the forfeiture proceedings did not put the owner in jeopardy a second time. Justice Sutherland said that the property was the offender. He admitted that this was a fiction, but said that the forfeiture was no part of the punishment for the criminal offense. The decision is contra to the Supreme Court's own decision in Coffey v. United States,[567] where the opposite result was reached. The reasoning is the opposite of that employed in Boyd v. United States,[568] where the Supreme Court ruled that a forfeiture proceeding was criminal because the object of the statute was to punish the owner.

A majority of the lower federal courts have followed Goldsmith-Grant Co. v. United States.[569] Yet it is significant that in many cases they have upon one pretext or another reached the opposite result.[570]

C. WHAT LAW GOVERNS?

The question to be considered here is whether the forfeiture laws of a sovereignty apply to property in its territory owned by persons who are not subject to its law. If the object of the law is to punish the owner for conduct prohibited by it,[571] it would seem proper to inquire whether or not the accused has violated the law of the forum, since courts will not try persons for a violation of foreign law.[572] If at the time of the conduct the legal effect of which is in question, the accused was not within the territory nor a citizen of the sovereignty in whose court a forfeiture of the res is sought, he was not, by the better view,[573] subject to its law and cannot have violated it. While the state of the forum has

power over the accused's property, it would seem that the fairness which due process of law requires would not permit it to punish him for violating a law to which he was not subject at the time of the act alleged to be criminal. It is submitted that this is the sound view. On the other hand, if the property is regarded as the offender and the forfeiture is not to be regarded as punishing the owner,[574] it is only necessary that the property have been within the territory of the state of the forum at the time of the allegedly illegal use.

The only case upon the point which has been found is United States v. The Brig Neurea.[575] This was a proceeding to secure the forfeiture of a ship which was brought into waters of the United States carrying more passengers than were permitted by the laws of the United States. The vessel was Swedish, that is, it was owned in Sweden, but whether the owner was an individual or a corporation does not appear. The Supreme Court sustained the overruling of a demurrer to the libel. If the owner was an individual who was in Sweden at the time the ship was brought into the United States, he could not, by the better view,[576] have violated our law and ought not have been punished.[577] If the owner was a Swedish corporation, it was doing business here and subject to our law by the activity of its agents here.[578]

Blackmer v. United States[579] was a proceeding in rem, authorized by a federal statute subjecting property in the United States to the payment of a fine, which might be assessed against citizens abroad for contempt of court in failing to return to the United States to testify as witnesses when served with a subpoena. The American citizenship of persons in France was held to make them subject to the law. If they had not been citizens of the United States, power over their property would hardly have justified punishing them for violation of a law to which they were not subject.

D. JURISDICTION OF COURTS

The court's jurisdiction would seem to depend upon the res being within the territory of the government of which the court is a part. It was so held in Rose v. Himley,[580] in which a prize court of the French possession of Santo Domingo was held not to have jurisdiction to decree the forfeiture of a vessel which was seized outside of the territorial waters of Santo Domingo, and which at the time of the adjudication was in the Spanish possession of Cuba. However, in Hudson v. Guestier[581] the same court sustained the jurisdiction of a French court in Guadaloupe which had decreed the forfeiture of a ship seized in the territorial waters of the French possession of Santo Domingo, and which at the time of the adjudication was in a Spanish port. It is submitted that Hudson v. Guestier is wrong.

It would seem that the court should refuse to exercise the power or jurisdiction acquired when the res is seized outside of and brought within the territory of the government of which the court is a part. The illegal removal should not be countenanced.[582]

It may be well to mention several constitutional questions of a jurisdictional nature which may arise. These are: (1) The question whether the seizure is reasonable so as to satisfy federal[583] and state constitutional provisions guaranteeing the right to be free from

unreasonable searches and seizures.[584] (2) The question whether constitutional provisions requiring that "in criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him; ... "[585] or "the right to appear and defend, in person or by counsel" and "to meet the witnesses against him face to face," [586] requires the presence of the accused at the trial. These provisions have generally been held to guarantee the accused an *opportunity* to cross-examine the witnesses against him and a right to have the *jury* see them testify so that they can judge of their credibility, except when the witness cannot be obtained and his testimony has been reduced to writing in a prior proceedings in which the accused had an opportunity to cross-examine him.[587] They do not require the actual presence of the accused at the examination of the witnesses.[588] It would seem to follow that all that is required is that the accused have an *opportunity* to be present at the trial, not that he actually be there.[589] The question arose in Blackmer v. United States, but the court merely said that contempt was not a crime within the meaning of the Sixth Amendment.[590]

## III. TERRITORIAL WATERS

In applying the principle of the territoriality of law it is necessary to determine what is included within the territory of a state. What is included within the land territory of a state is either a question of fact, i.e., what territory the state maintains possession of and control over to the exclusion of other states, or a question of what boundary lines have been established by treaty. The laws of a state apply to its waters as well as to its land territory.[591] The problem here is to determine what waters may be considered as within the territory of a state.

### A. WITHIN THE LAND TERRITORY OF A SINGLE STATE

Seas and lakes surrounded by the land territory of a single state and rivers having the land territory of a single state upon both banks are part of the territory of that state.[592]

### B. BETWEEN THE LAND TERRITORIES OF TWO STATES

#### 1. BOUNDARY UNDEFINED

When the boundary line between two states is a river, the center of the river is treated as the boundary when the exact line has not been agreed upon.[593] In the case of navigable rivers the center of the navigable channel is considered the center of the river.[594]

#### 2. BOUNDARY DEFINED

Generally, a definite boundary line has been agreed upon between the two states or specified in the grant of territory by one state to another.[595] On rivers this may be either the center of the river[596] or one side of it.[597] When the boundary is on one side, the river will be entirely within the territory of one state. Just what is to be included in the term "river" is not quite clear. It may mean the bed and banks as well as the water, so that the boundary would be "ordinary high watermark";[598] it may mean the water only, so that

the boundary will change with changes in the level of the water in the river,[599] and this may be limited to the water when the river is within its banks.[601] It has been held to mean the river at its lowest level, so that the boundary is low watermark on the designated bank.[602]

3. CONCURRENT JURISDICTION BY STATE COMPACT OR FEDERAL STATUTE

By compact between states and in federal statutes creating states of the United States, some states bordering on rivers have been given "*concurrent jurisdiction*" over the river, even though a definite boundary line was established at the middle of the river or along one shore. What is meant by concurrent jurisdiction? Does it mean double jurisdiction? Does it mean that each state may legislate for and apply its laws to persons on the river for the purpose of determining the legal effect of their conduct while there, though they are actually within the territory of the state on the opposite shore? If so, then persons may be punished for acts permitted by the law of the state in which they are merely because the law of the state across the river overlaps the law of the state in whose waters they are, or if the law of the two states is the same, persons may be twice punished or put in jeopardy for the same act because a conviction or acquittal on a charge of violating the laws of one state is no bar to trial on a charge of violating the laws of another.

In the Compact of 1783 between Pennsylvania and New Jersey, jurisdiction over offenses committed on the Delaware River was vested exclusively in the state in which the offender was first arrested.[603] The only other compact of this type seems to be section ten of the Compact of 1785 between Virginia and Maryland.[604] While under the Compact of 1783 between Pennsylvania and New Jersey there is no possibility of double punishment for the same act, what law is the court to apply to an act which is criminal by the law of one state and innocent by the law of the other?

A majority of the state court decisions hold that concurrent jurisdiction means that each state has power to apply its law in determining the legal effect of the conduct of persons on the river in the territory of the other, regardless of what the other state does.[605] The federal courts[606] and some state courts [607] hold that concurrent jurisdiction means that the two states must enact similar legislation, so that one state cannot apply its criminal law to conduct on that part of the river outside of its territory which would be innocent by the law of the other.

There is a dictum to the effect that conviction or acquittal in one state is a bar to trial in the other.[608] The only decision so holding[609] was based upon the express provision to that effect in the Compact of 1783 between Pennsylvania and New Jersey. The dictum is contrary to the authorities holding that a conviction for or an acquittal of a charge of violating the law of one state is no bar to trial for a violation of the law of another state.[610]

A grant of concurrent jurisdiction over a river has been held to confer jurisdiction over that part of a bridge beyond the boundary line which is over the river,[611] but not to

confer jurisdiction over islands beyond the boundary line[612] or the dry bed of the river after it has changed its course.[613]

It is submitted that the policy of these compacts and federal statutes is unsound. Rorer says that the object was to overcome the difficulty of ascertaining just where upon the river the act was done.[614] If so, the problems created by concurrent jurisdiction are more serious than the one it was intended to solve. The difficulty can be met by a rebuttable presumption that the accused was within the territory when he did the act the legal effect of which is in question, as has been done in cases of doubt when the boundary was upon land.[615] It is doubtful whether the reason given by Rorer is the true one, since the object in giving the states of the northwest territory concurrent jurisdiction on the Ohio River seems to have been to guarantee to the citizens of each state the right to navigate the whole river.

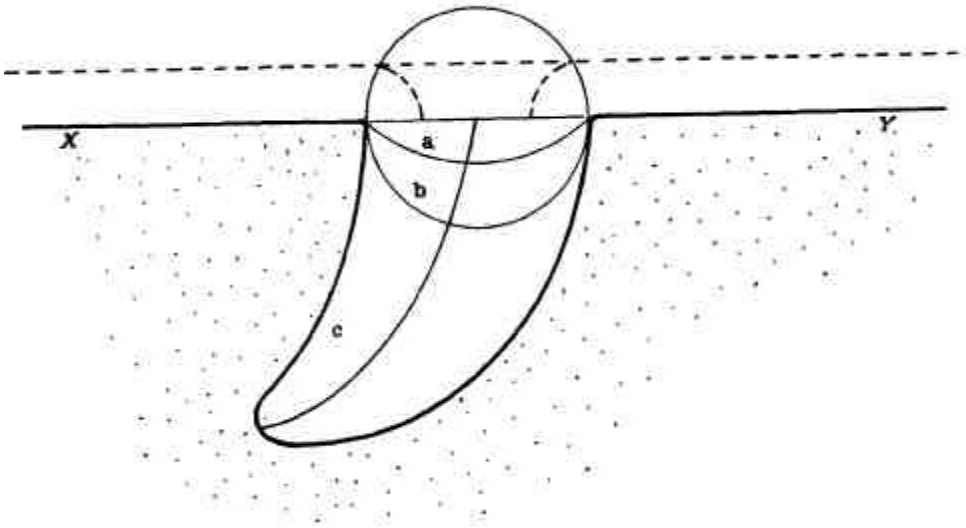
## C. THE OCEANS AND WATERS BORDERED BY THREE OR MORE STATES

### 1. THE THREE-MILE LIMIT

By international custom the territory of a state is regarded as including the marginal sea within three miles of the shore at low tide.[616] In England the common law as distinguished from admiralty law was regarded as extending only to the water's edge at low tide. Admiralty courts having been deprived of criminal jurisdiction, it was held that the common law did not apply to a person upon the sea within the three-mile limit at the time he did the act alleged to be criminal.[617] The Territorial Waters Jurisdiction Act of 1878 [618] extended the criminal law to the territorial waters of the empire.

### 2. INTRA FAUCES TERRAE

By international custom, also, waters which are intra fauces terrae are regarded as a part of the land territory of a state.[619] There is no precise rule for determining what waters are intra fauces terrae. Literally, the term means within the jaws of the land,[620] and as applied by the courts seems to mean waters largely surrounded by the land of one state.[621] To what extent waters must be surrounded by the land territory of a single state in order to be intra fauces terrae is never stated. It is submitted that largely surrounded should mean that the indentation is equal to or greater than the radius of a circle of which a line drawn from headland to headland is the diameter. Thus, in the diagram on page 186, the indentation in the coast *XY* represented by the line 6 is a bay which is intra fauces terrae. The bay represented by the line *a* is not intra fauces terrae, while the bay represented by the line *c* clearly is.[622]




If the bay is intra fauces terrae, it would seem that the state's territory should include waters three miles seaward of a line drawn from headland to headland,[623] although some writers on international law have taken the view that these waters are not included.[624]

3. STATUTES

a. General Laws

Statutes which contain no provision as to the territory in which they are applicable are in the absence of other factors construed in the light of international custom to apply within the three-mile limit,[625] intra fauces terrae,[626] and in harbors[627] and not to apply on foreign ships beyond the three-mile limit.[628] Courts of states claiming exclusive jurisdiction over portions of the sea beyond the three-mile limit have applied their law to persons who were there at the time of the conduct the legal effect of which was in question.[629] It is submitted that they should not do so. The international custom is so well established that any state attempting to exercise such jurisdiction will find itself in the wrong in disputes with other states which inevitably will occur, and will be compelled by international opinion to abandon the claim. It is hardly worth fighting for, and arbitrators will apply the international custom and deny it.[630] Most of the decisions involve the claim of the United States to exclusive jurisdiction over certain parts of Bering Sea. In In re Cooper[631] a British ship was seized fifty-four miles off the coast and charged with violating the sealing laws of the Territory of Alaska. No objection to the jurisdiction was taken at the trial, and sentence of forfeiture was entered. A writ of prohibition was denied on the ground that the face of the record, containing a recital that the seals were taken and the ship arrested within the Territory of Alaska, did not show that the trial court lacked jurisdiction, and that on an application for such a writ the court could not examine the evidence. The decision in The Sylvia Handy[632] went off on the same procedural point. In The James G. Swan[633] the vessel was seized seventy miles from land for taking seals, all of which were killed more than nine miles from land. The statute provided that it applied to the "dominion of the United States in the waters of

Bering Sea." At this time the United States was claiming exclusive jurisdiction over these waters, based upon the claim to and exercise of exclusive jurisdiction there by Russia prior to the purchase of Alaska. The court held that the statute applied on the ground that it must look to the political department of the government to determine what the "dominion of the United States in the waters of Bering Sea" was. The same result was reached in The Alexander.[634] Subsequently, the arbitrators of the fur seal controversy between England and the United States decided that the United States did not have jurisdiction beyond the three-mile limit in Bering Sea.[635] After this, in The La Ninfa,[636] the Circuit Court of Appeals for the Ninth Circuit, relying upon the finding of the arbitrators, held that the "dominion of the United States in the waters of Bering Sea" did not extend beyond the three-mile limit.

b. Statutes Extending Jurisdiction

Some statutes expressly provide that they apply beyond the three-mile limit. Those involved in the decisions are revenue laws expressly providing that they apply within twelve miles of the coast. Church v. Hubbart,[637] cited in subsequent cases, is not directly in point since no such statute was involved. It was a civil action to recover on an insurance policy taken out upon a ship. The policy did not cover loss occasioned by seizure for illicit trade with the Portuguese. The ship was seized while four or five leagues from land in the Bay of Para. The court held that the loss was not covered by the policy, partly on the ground that seizure in neighboring seas was lawful, i.e., that the laws of Brazil extended out to sea this far (not noticing that the Bay of Para is intra fauces terrae), and partly on the ground that the parties intended to exempt the insurer from liability for loss due to any seizure by the Portuguese, lawful or unlawful. In The Coquitlam the action was to secure the forfeiture of the vessel and its cargo for violation of revenue laws of the United States prohibiting transfers of cargo within twelve miles of the coast without securing a special permit. The District Court for the District of Alaska found that the transfers were made from three to seven miles from the coast of Alaska, applied the statute, and decreed a forfeiture.[638] The decree was reversed by the Circuit Court of Appeals upon the ground that the statute only required a forfeiture in the case of transfers from vessels bound for the United States, and none of the vessels from which skins were transferred were bound for the United States.[639]

In United States v. Bengochea et al.,[640] the action was to secure the forfeiture of a Cuban fishing smack for refusing to produce a manifest when visited by revenue officers while six or seven miles off the coast of Florida. The statute provided that it applied to waters within twelve miles of the coast. The owner's defense was that Congress' attempt to apply the law of the United States to foreign vessels beyond the three-mile limit violated international law (i.e., it was an application of the law of the United States to determine the legal effect of the conduct of persons in Cuban territory). The Circuit Court of Appeals for the Fifth Circuit said that this was the first time that these laws had been directly attacked, and sustained the application of the law relying upon Church v. Hubbart and saying that to sustain the objection would enable ships to hover off the coast for the purpose of violating our laws.

It is submitted that the decision is wrong, for if by international custom the seas are free and the law of the vessel applies beyond the three-mile limit, then an attempt to legislate for vessels beyond that limit will inevitably bring the state so legislating into conflict with the state whose ship is involved, and if this controversy is submitted to arbitrators or the World Court to adjudicate, they will undoubtedly apply the custom and deny the right of the state to legislate for persons or property beyond the three-mile limit. In this connection it is interesting to note that Secretary of State Evarts regarded the seizure of American merchant ships by Mexican officials more than three miles from the coast of Mexico for a violation of its revenue laws as a violation of international law.[641]

4. TREATIES

By a treaty with another state or states a sovereignty can extend its jurisdiction beyond the three-mile limit, so that within the limit so established its laws will apply and the acts of its officers be valid upon ships having the nationality of parties to the treaty. The liquor treaties which the United States entered into with Great Britain and other countries are an example of this. The interpretation of these treaties is involved in several decisions. In the Pictonian[642] the action was to secure the forfeiture of a British vessel for selling liquor fourteen miles off the coast of the United States. The treaty with Great Britain was interpreted as extending the prohibition law to British vessels which were within one hour's sail of the coast as well as authorizing boarding, search, and seizure of British vessels there, on the ground that the laws applied to the territory of the United States which could be extended by treaty. In subsequent decisions other and higher federal courts held that the treaties did not extend the prohibition law of the United States beyond the three-mile limit, but only authorized boarding, search, and seizure in the designated zone.[643] This view was approved by the United States Supreme Court in Ford v. United States.[644]

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## Notes

[1] Notes 4 and 6, pp. 2 and 3, and Commonwealth v. Gaines, 2 Va. Cases 172 (1819).

[2] Christiancy, J., in People v. Tyler, 7 Mich. 161, 221 (1859).

[3] People v. Tyler, supra; Holmes, J., dissenting in Commonwealth v. Gaines, 2 Va. Cases 172 (1819). In People v. Tyler at p. 223 Christiancy, J., says, "Thus the offenses committed against the United States (under section five above cited) would generally, if not always, constitute also offenses against the foreign sovereignty, though not necessarily of the same kind or grade, and might be there tried and punished. The punishment so inflicted would have no respect to the offense against the United States, and, technically at least, would be for a different offense. And, as the courts of one nation would not be bound to notice the criminal laws of another, the offender might be liable to be twice punished for the same act."

[4] The King v. Speke, 3 Salk. 358 (1694); Rex v. Sawyer, Russ. & Ry. 294 (1815); Regina v. Azzopardi, 1 Car. & K. 203, 2 Mood. C.C. 289 (1843); State ex rel. Chandler v. Main, 16 Wis. 398 (1863); The Trial of Earl Russel, [1901] A.C. 446; Rex v. Casement, [1917] 1 K.B. 98; Blackmer v. U. S., 284 U.S. 421, 53 S. Ct. 252, 76 L. Ed. 375 (1932).

[5] People v. Tyler, 7 Mich. 161 (1859); People v. Merrill, 2 Parker's Crim. 590 (N.Y., 1855); State v. Hall, 114 N.C. 910, 19 S.E. 602 (1894); Holmes, J., dissenting in Commonwealth v. Gaines, 2 Va. Cases 172 (1819).

[6] 260 U.S. 94, 43 S. Ct. 39, 67 L. Ed. 149 (1922).

[7] The principle applies to property as well as persons; Rose v. Himely, 4 Cranch (U.S.) 241, 279 (1808); but in dealing with jurisdiction over crime, we are concerned chiefly with persons.

[8] Story on Conflict of Laws (8th Ed.), sections 18-20; Beale, "Jurisdiction of a Sovereign State," 36 H.L.R. 241, 245; Stimson, Jurisdiction and Power of Taxation, pages 1-4. Some civil cases illustrating this principle are: Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670; Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877); The Badish Anilin Und Soda Fabrik v. The Basle Chemical Works, [1898] A.C. 200; Jeffries v. Boosey, 4 H.L.R. 815, 926 (1891). For criminal cases see notes 12 and 14, pp. 5 and 6. A sovereignty's jurisdiction or power over citizens sojourning abroad may be regarded as an exception to this principle, although it is a separate principle.

[9] This principle, which with a few exceptions is uniformly acted upon, is assumed but seldom expressed. It has been referred to as the doctrine of comity. It is also referred to as the doctrine of the uniform enforcement of foreign created rights. Beale, Conflict of Laws, (Work of 1916), section 73. The conflict of laws is concerned not only with the territorial applicability of laws but also with the *time* when they become applicable. *Time* is as important as place in determining the law applicable to individuals who move about. Count de Vareilles-Sommieres, a French writer, noticed this. He says, "... there is an exact and decisive reason for not applying the local law to acts done outside the territory by foreigners, which does not exist when their acts are within the territory; and that reason is the won *retroactivity* of laws." Vareilles-Sommieres, i, vi. See Beale, Conflict of Laws (Work of 1916), section 75.

[10] Goodrich on Conflict of Laws, section 6; Wharton on the Conflict of Laws (3d Ed.), section 1; Dicey on "Private International Law as a Branch of the Law of England," 6 L.Q. Rev. 1; Dicey, Conflict of Laws (4th Ed.), pages 3-4.

[11] The Case of the S.S. "Lotus," discussed at note 52, post, p. 56; Ex parte Joseph Smith, quoted from in note 6, post, p. 72. The Cutting Case, Foreign Relations of the United States (1887) 757, II Moore, International Law Digest 228. Cutting, a citizen of the United States, published a libel in a Texas newspaper. Subsequently he was arrested and convicted in Mexico in accordance with a statute authorizing the punishment of crimes

committed abroad against Mexican citizens by foreigners. On appeal the conviction was affirmed, but Cutting was released because the prosecutor was induced to withdraw from the case due to the international complications arising from the vigorous protests of the United States through Secretary of State Bayard. In the cases of Warren and Costello, II Moore, International Law Digest 226, two naturalized American citizens were convicted in Ireland of treason felony on account of an expedition against the British government. While under the impression that their acts and declarations in the United States were being made the foundation of the criminal prosecution in Dublin, the House of Representatives of the United States adopted a resolution requesting the President to take such measures as should seem "proper to secure the release from imprisonment of Messrs. Warren and Costello, convicted and sentenced in Great Britain for words and acts spoken and done in this country."

[12] State v. Knight, 1 N.C. (Taylor) 65 (1799); State v. Carter, 27 N.J.L. 499 (1859); McLeod v. A. G. for New South Wales, [1891] A.C. 455; Campbell, J., dissenting in Tyler v. People, 8 Mich. 320, 341 (1860). See also State v. Stephens, 118 Maine 327, 108 Atl. 105 (1919); Reg. v. Lewis, 7 Cox C.C. 277 (1857); People v. Mosher, 2 Parker's Cr. 195 (N.Y., 1855).

[13] The Marianna Flora, (Story, J.), 11 Wheat. (U.S.) 1, 40 (1826); Story on Conflict of Laws (1834), section 23; Ex parte McNeeley, 36 W. Va. 84, 14 S.E. 436 (1892); Commonwealth v. MacLoon, 101 Mass. 1 (1869). See also State v. Caldwell, 115 N.C. 794. 20 S.E. 523 (1894).

[14] State v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892). Cf. Hartford Accident and Indemnity Co. v. Delta and Pine Land Lumber Co., 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178 (1934). Campbell, J., dissenting in Tyler v. People, supra, note 12, thought that the statute was unconstitutional because beyond the power of the state to give extraterritorial application to its law. He did not name the particular provision of the constitution violated.

The court in State v. Cutshall, supra, thought that trial in the vicinage where the crime was committed was an incident of jury trial which was an essential element of right included in due process or law of the land. See note 69, post, p. 28.

[15] " ... there is an exact and decisive reason for not applying the local law to acts done outside the territory by foreigners, which does not exist when their acts are within the territory; and that reason is the *non retroactivity* of laws." Vareilles-Sommieres, i, vi. See Beale, Conflict of Laws (Work of 1916), section 75.

[16] Compare the cases holding that the due process clause of the Fourteenth Amendment prohibits the states from applying their tax laws in such a way that the taxpayer is subjected to the possibility of double taxation from the concurrent action of several states in taxing him on account of the same interest in property. The cases are collected in Stimson, Jurisdiction and Power of Taxation, page 4, note 9. See especially First National Bank v. Maine, 284 U.S. 312, 52 S. Ct. 174, 76 L. Ed. 713 (1932); Farmer's Loan and

Trust Co. v. Minnesota, 280 U.S. 204, 50 S. Ct. 98, 74 L. Ed. 371 (1930); Safe Deposit and Trust Co. v. Virginia, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A.L.R. 386 (1929); Baldwin v. Missouri, 281 U.S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A.L.R. 1303 (1930). May not the same provision prohibit the states from applying their criminal laws in such a way that the accused becomes liable to be twice punished for the same act?

[17] Phillips v. People, 55 Ill. 429 (1870). See also Marshall v. State, 6 Neb. 120 (1877).

[18] This is seldom done. The rule that the courts of one state will refuse to try persons charged with violating the criminal laws of another state means that the court will refuse to act when the law which governs is foreign law. See I B 2, post, and I B 3, post.

A case involving jurisdiction of the court over the person of the accused and not involving the question of what law governs is Commonwealth v. Feuerstein and Stern, 98 Pa. Sup. Ct. Rep. 201 (1929), post, note 19, p. 9.

[19] Rex v. Marks, 3 East 157 (1802); The Queen v. Hughes, 4 Q.B. Div. 614 (1879); In re Baptiste Paul No. 1, 5 Alberta Law 440 (1912); Rex v. Hurst, 20 Dom. Law Rep. (Alberta Sup. Ct., 1914); Albrecht v. U. S., 273 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 505 (1926); In re Johnson, 167 U.S. 120, 17 S. Ct. 73, 42 L. Ed. 103 (1897); Commonwealth v. Tay, 170 Mass. 192, 48 N.E. 1086 (1898); People v. Eberspacher, 86 Hun 410 (N.Y., 1894); People v. Bradley, 58 Misc. 507 (N.Y., 1908); People v. Jeratino, 62 Misc. 587 (1909); People v. Harmer, 75 Misc. 399 (1912); People v. Ostrosky, 95 Misc. 104, 110 (1916); People v. Dennis, 132 Misc. 410 (1928); State v. De Hart, 3 N.J. Misc. 71, 129 Atl. 427 (1925); People v. Miller, 235 Mich. 340, 209 N.W. 81 (1926); State ex rel. Brown v. Fitzgerald, 51 Minn. 534, 53 N.W. 799 (1892); State v. Volk, 144 Minn. 223, 174 N.W. 883 (1919); State v. Wenzel, 77 Md. 428 (1881); In re Fitton, 68 Vt. 297, 35 Atl. 319 (1896); State v. May, 57 Kan. 428, 46 Pac. 709 (1896); Smith v. State, 20 Ala. App. 442, 102 So. 733 (1924); Humphrey v. State, 46 Ga. App. 720, 169 S.E. 53 (1933); People v. Guthman, 211 Ill. App. 373 (1918). Contra: In re Baptiste Paul No. 2, 5 Alberta Law 442 (1912); Rex v. Davis, 5 Alberta Law 443 (1912), due to a misunderstanding of Dixon v. Wells and Pearks, Gunston & Tee Ltd. v. Richardson, infra.

Where a statute provides for service of summons instead of arrest, jurisdiction is not acquired unless the statutory method of service is complied with. Dixon v. Wells, 25 Q.B. Div. 249 (1890); State Board of Medical Examiners v. Morrison, 159 Atl. 92 (N.J.S. Ct., 1932). Corporations, being intangible, cannot be arrested, and jurisdiction over them must necessarily be obtained by service of summons. U. S. v. Standard Oil Co. of Indiana, 154 Fed. 728, (D.C., W.D., Tenn., E.D., 1907); U. S. v. John Kelso Co., 86 Fed. 304 (D.C., N.D., Cal., 1898). Jurisdiction is not acquired unless the statutory method of service is complied with. Pearks, Gunston & Tee, Ltd. v. Richardson, [1902] 1 K.B. 91.

There is language to the effect that an appearance for any purpose other than to object to the jurisdiction of the court amounts to a general appearance, that accused impliedly consents to the jurisdiction or waives the jurisdictional objection. Miller v. U. S., 6 F.(2d) 463 (C.C.A., 1925); U. S. v. Lloyd, 23 F.(2d) 858 (D.C., N.D., Cal., 1928); People v.

Lowrie, 163 Mich. 514, 128 N.W. 741 (1910): State ex rel. Brown v. Fitzgerald, 51 Minn. 534, 53 N.W. 799 (1892); Matter of Blum, 9 Misc. 571 (N.Y., 1894); People v. Burns, 19 Misc. 680 (1897); People v. Cuatt, 70 Misc. 453, 126 N.Y. Supp. 1114 (1911). In all but the first of these the accused had been arrested and was in custody. Suppose the accused, while in a foreign country from which he cannot be extradited, causes his attorney to file a plea of not guilty? If the statutory penalty is a fine, jurisdiction might be obtained by consent as in civil cases. The fine could be enforced by levying execution upon property owned by the accused within the jurisdiction. Cf. Blackmer v. U. S., 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375 (1932). If the punishment is imprisonment or death, trial would be a useless gesture because the court, not having physical power over the accused, could not enforce its sentence.

In Commonwealth v. Feuerstein and Stern, 98 Pa. Sup. Ct. Rep. 201 (1929), accused, who had not been arrested and who was in another state, filed a motion to quash the indictment. The trial court granted the motion. The decision was reversed. The appellate court said, "There is no right to file an appearance de bene esse in our criminal courts. Those courts deal with the body of a defendant, and until he has been arrested or has actually surrendered his body or has entered bail to appear, he is in no position to assert his rights in such court."

[20] Albrecht v. U. S., 273 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 505 (1926); State v. Volk, 144 Minn. 223, 174 N.W. 883 (1919); Smith v. State, 20 Ala. App. 442, 102 So. 733 (1924).

[21] Ex parte Scott, 9 B. & C. 445 (1829); State v. Smith, 1 Bailey 283 (S.C.L., 1829); State v. Brewster, 7 Vt. 118 (1835); Dow's Case, 18 Pa. 37 (1851); People v. Rowe, 4 Parker's Cr. 253 (N.Y., 1858); State v. Ross & Mann, 21 Iowa 467 (1866); Lagrave's Case, 14 Abb. Pr. 333, note (1873); State v. Day, 58 Iowa 678, 12 N.W. 733 (1882); Ex parte Ker, 18 Fed. 167 (C.C., N.D., Ill., 1883); Ker v. Illinois, 110 Ill.. 627 (1884); Elmore v. State, 45 Ark. 243 (1885); Brooklin v. State, 26 Tex. App. 121, 64 S.W. 387 (1888); Kingen v. Kelley, 3 Wyo. 566, 28 Pac. 36, 15 L.R.A. 177 (1891); Baker v. State, 88 Wis. 140, 57 N.W. 570 (1894); In re Little, 129 Mich. 454, 89 N.W. 38 (1902); Mathews v. State, 19 Okla. Cr. 153, 198 Pac. 112 (1921); State v. McAninch, 95 W. Va. 362, 121 S.E. 161 (1924); State v. Chandler, 158 Minn. 447, 197 N.W. 847 (1924); U. S. v. Voight, 67 F.(2d) 744 (C.C.A., 1933); Whitney v. Zerbst, 62 F.(2d) 970 (C.C.A., 1933); Leahy v. Kunkel, 4 F. Supp. 849 (1933); Wilson v. State, 145 So. 591 (1933). Contra: Commonwealth v. Shaw, 6 Cr. Law Mag. 245 (Pa. Com. Pleas, 1885); State v. Johnson, 36 Fed. 258 (1888); State v. Simmons, 39 Kan. 262, 18 Pac. 177 (1888); In re Robinson, 29 Neb. 139, 45 N.W. 267 (1890); Ex parte Sykes, 46 Tex. Cr. 51, 79 S.W. 538 (1904).

In The Richmond, 9 Cranch 102 (U.S., 1815), and The Merino, 9 Wheat. 391, 401-403 (U.S., 1824), the same decision was reached with regard to property illegally removed from foreign territory.

In Ker v. Illinois, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 431 (1886), and Mahon v. Justice, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1888), the Supreme Court of the United

States held that the state court's decision did not deprive the accused of his liberty without due process of law.

[22] See the early cases, supra, note 21, especially State v. Brewster.

[23] This was argued without success in Mathews v. State, 19 Okla. Cr. 153, 198 Pac. 112 (1921). The illegal removal was from one state of the United States to another, in which case the illegal removal has only accomplished what Article IV, Section 2, Clause 2 of the United States Constitution, and the Interstate Rendition Act require.

[24] Anglo-American law, note 35, post, p. 14; French law, Clark, Extradition, page 209.

[25] The courts regard a subsequent arrest within the territory by an officer having authority as sufficient to justify retention of the prisoner in custody. Ker v. Illinois, 110 Ill. 627 (1884); The Richmond, 9 Cranch 102 (U.S., 1815).

[26] See article 10 of the Ashburton Treaty, quoted in Commonwealth v. Hawes, 13 Bush 697, 703 (Ky., 1878). As to the meaning of this article, see Factor v. Laubenheimer, 54 S, Ct. 191 (1933).

[27] See the British Extradition Act of 1870, 33 and 34 Vict, ch. 52.

[28] Rev. St. Sec. 5278, 18 U.S.C.A. Sec. 662.

[29] Mahon v. Justice, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1888); Lascelles v. Georgia, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 550 (1893).

[30] Munsey v. Clough, 196 U.S. 364, 25 S. Ct. 282, 49 L. Ed. 515 (1905); Pettibone v. Nichols, 203 U.S. 192, 27 S. Ct. Ill, 51 L. Ed. 148 (1906).

[31] Commonwealth of Kentucky v. Dennison, 65 U.S. 66, 16 L. Ed. 717 (1860), holds that Art. IV, Sec. 2, Cl. 2 imposes a positive duty on the state in which one charged with crime in another state is found, to surrender him on demand of the executive authority of the latter; that Congress had authority to enact a law to carry this provision into effect; that under the act of Congress the governor had a duty to cause the arrest and surrender of the fugitive, and that his duty was ministerial and he had no discretion in the performance of it. However, the court held that neither the Constitution nor the statute gave it any power to compel a state officer to carry out his duty. We need not consider the unsoundness of the proposition that express authority was needed. Surely one who has been illegally removed cannot be heard to say that he has a right to the possibility that the governor will not perform his duty. Cf. Lascelles v. Georgia, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 550 (1893).

[32] Hyatt v. People ex rel. Corkran, 188 U.S. 691, 23 S. Ct. 456, 47 L. Ed. 657 (1903), and cases cited in note 36, post, p. 15.

[33] Supra, note 32. See also Ex parte Reggel, 114 U.S. 642, 651 (1884).

[34] Pettibone v. Nichols, 203 U.S. 192, 27 S. Ct. 111, 51 L. Ed. 148 (1906). In Innes v. Tobin, 240 U.S. 127, 36 S. Ct. 290, 60 L. Ed. 562 (1916), the governor of Texas ordered accused surrendered to an officer from Georgia sent to remove her for a crime committed there. She had been removed to Texas from Oregon and acquitted of the crime with which she was charged there. On habeas corpus a state court refused to order the release of accused. Held that the federal statute did not cover the case, since it provides for the surrender of the fugitive by the state to which he has fled, but that it did not prevent the state from ordering the removal of the accused.

[35] The Anglo-American doctrine is that in the absence of a treaty or statute an individual has a right not to be removed or surrendered to a foreign sovereignty to answer for a crime committed there. Commonwealth ex rel. Short v. Deacon, 10 Serg. & R. (Pa., 1823); Ex parte Dos Santos, Fed. Cas. No. 4016 (C.C., D. of Va., 1835); U. S. v. Davis, Fed. Cas. No. 14932 (C.C., D. of Mass., 1837); Ex parte McCabe, 46 Fed. 363 (D.C., W.D. of Tex., 1891); Terlinden v. Ames, 184 U.S. 270, 289, 22 S. Ct. 484, 46 L. Ed. 534 (1901); In re Cohen, 8 Ont. Law 143 (1904); Ex parte Alvarez, 14 Porto Rico 628 (1908); 1 Moore on Extradition, ch. II. The same rule prevails in England. Clark upon Extradition (4th Ed.), ch. V. Contra: Matter of Washburn, 4 Johns Ch. 106 (N.Y., 1819); Matter of Clark, 9 Wend. 212 (N.Y., 1832). Extradition without the authority of statute or treaty would be a deprivation of liberty without due process of law. Magna Charta, section 39, provides: "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him or send upon him, except by the lawful judgment of his peers and by the law of the land"; Mott, Due Process of Law, page 3; McKechnie, Magna Carta, page 375.

[36] O'Malley v. Quigg, 172 Ind. 350, 88 N.E. 611 (1909); State v. Hall, 115 N.C. 811, 20 S.E. 729 (1894).

[37] The contrary was held in In re Moyer, 12 Idaho 250, 85 Pac. 897 (1906); aff'd 203 U.S. 221, 27 S. Ct. 121, 51 L. Ed. 160. See also State v. Wellman, 102 Kan. 503, 170 Pac. 1072 (1918). But see State v. Simmons, 39 Kan. 262 (1888).

[38] State v. Smith; State v. Brewster; People v. Rowe; Ker v. People (Ill. Sup. Ct.), supra, note 21.

[39] See Mahon v. Justice, supra, note 21, where the governor of West Virginia brought habeas corpus proceeding in the District Court of the United States for the District of Kentucky, seeking to secure the return of Mahon, who had been illegally arrested in West Virginia and taken to Kentucky. See also Commonwealth of Kentucky v. Dennison, 65 U.S. 66, 16 L. Ed. 717 (1860), where the governor of Ohio refused to extradite one charged with assisting slaves to escape in Kentucky. Had the fugitive been kidnapped, armed conflict between the two states might have followed.

[40] In State v. Brewster, supra, note 21, the prisoner had been illegally removed from Canada. The court said that Canada might waive the objection of invasion of its territory. In Dow's Case, supra, note 21, the court mentioned the absence of any objection from the governor of Michigan, who had granted extradition.

[41] In Commonwealth v. Shaw, supra, note 21, a common pleas court in Pennsylvania released a prisoner who had been illegally removed from New York, because the governor of that state demanded it. In Mahon v. Justice, supra, note 21, the Supreme Court of the United States sustained the District Court of Kentucky in refusing to aid the governor of West Virginia in securing a return of Mahon, who had been illegally removed to Kentucky from West Virginia.

[42] Ker v. Illinois (U.S.); State v. Day; supra, note 21. Blackstone defined kidnapping as the "forcible abduction or stealing away of a man, woman or child, from their own country, and sending them into another." 4 Blackstone's Commentaries 219.

[43] Ex parte Scott; Dow's Case; Ex parte Ker; Ker v. Illinois (U.S.); supra, note 21. The person illegally removed recovered in Bromley v. Hutchins, 8 Vt. 194 (1836), for assault and battery; in Mandeville v. Guernsey, 51 Barb. 99 (1865), for false imprisonment.

[44] Ex parte Ker. In Ker v. People (Ill. Sup. Ct.), the court said that to release the prisoner would interfere with the administration of justice. Both cases, supra, note 21.

[45] Commonwealth v. Hawes, 13 Bush. (Ky.) 697 (1878); Blandford v. State, 10 Tex. App. 627 (1881); U. S. v. Watts, 14 Fed. 130 (D.C., D. of Cal., 1882); State v. Vanderpool, 39 Ohio St. 273 (1883); U. S. v. Rauscher, 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886); Ex parte Hibbs, 26 Fed. 421 (D.C., D. of Ore., 1886); contra: U. S. v. Caldwell, 8 Blatch. 131 (D.C., S.D. of N.Y., 1871); U. S. v. Lawrence, 13 Blatch. 295 (D.C., S.D. of N.Y., 1876). See also Adriance v. Lagrave, 59 N.Y. 110 (1874).

[46] Article 6, Clause 2.

[47] See notes 35 and 24, supra.

[48] The distinction was justified on this ground in Ex parte Ker, Ker v. People, and Ker v. Illinois, supra, note 21.

[49] Lascelles v. Georgia, 148 U.S. 537, 13 S. Ct. 687, 37 L. Ed. 550 (1893); State v. Hall, 40 Kan. 338, 19 Pac. 918 (1888). See also Innes v. Tobin, 240 U.S. 127, 36 S. Ct. 290, 60 L. Ed. 562 (1916). Contra: In the matter of Frank Cannon, 47 Mich. 481, 11 N.W. 280 (1882).

[50] The King against Hooker, 7 Mod. 193 (1734); East India Co. v. Campbell, 1 Ves. Sen. 246 (1749); Rex v. Anderson, 2 East P.C., c. 16, sec. 156; Rafael v. Verelst, 2 Wm. Bl. 1055 (1776), dictum; Gilbert v. Steadman, 1 Root 403 (Conn., 1792); Rex v. Munton, 1 Esp. 62 (1793), dictum; State v. Brown, 1 Hay. 100 (N.C., 1794); People v. Gardner, 2

Johns. 477 (N.Y., 1807); People v. Schenk, 2 Johns. 479 (N.Y., 1807); Simmons v. Commonwealth, 5 Binney 617 (Pa., 1813); U. S. v. Bladen, 1 Cranch C.C. 548, Fed. Cas. No. 14605 (C.C., D.C., 1816); Commonwealth v. Linton, 2 Va. Cr. Cas. 205 (1820); U. S. v. Wright, 2 Cranch C.C. 296, Fed. Cas. No. 16773 (C.C., D.C., 1822); Rex v. Prowes, 1 Moody 349 (1832); Regina v. Madge, 9 Car. & P. 29 (1839); U. S. v. Plympton, 4 Cranch C.C. 309, Fed. Cas. No. 16057 (D.C., C.C., 1833); U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14932 (C.C., Mass., 1837); Simpson v. State, 23 Tenn. 455 (1844); Regina v. Garrett, 6 Cox C.C. 260 (1853); Commonwealth v. Uprichard, 69 Mass. 434 (1855); Regina v. Lewis, 7 Cox C.C. 277 (1857); State v. Carter, 27 N.J.L. 499 (1859); Beal v. State, 15 Ind. 378 (1860); State v. Babcock, 30 N.J.L. 29 (1862); State v. Le Blanch, 31 N.J.L. 82 (1864); People v. Loughridge, 1 Neb. 11 (1871); Stanley v. State, 24 Ohio St. 166 (1873); Stewart v. Jessup, 51 Ind. 413 (1875); The Queen v. Keyn, L.R. 2 Exch. Div. 63, 13 Cox C.C. 403 (1876); Lee v. State, 64 Ga. 204 (1879); State v. Mitchell, 83 N.C. 674 (1880); In re Carr and Dillon, 28 Kan. 1 (1882); People ex rel. Drake v. Bergen, 36 Hun 241 (N.Y., 1885); Jemmerson v. State, 80 Ga. 111 (1887); State v. Weber, 48 Mo. App. 500 (1892); State v. Shuey, 101 Mo. App. 438, 74 S.W. 369 (1903); State v. Hall, 114 N.C. 910, 19 S.E. 602 (1894); State v. Buchanan, 130 N.C. 660, 41 S.E. 107 (1902); Van Buren v. State, 65 Neb. 223, 91 N.W. 201 (1902); Jessup v. State, 44 Tex. Cr. 83, 68 S.W. 988 (1902); Newby v. State, 75 Neb. 33, 105 N.W. 1099 (1905); Bates v. State, 24 Wis. 612 (1905); State v. Ewers, 76 Ohio St. 563, 81 N.E. 1196 (1907); Brown v. U. S., 35 App. Cas. 548, Ann. Cas. 1912A 388 (D.C., 1910); People v. Flury, 173 Ill. App. 640 (1912); Commonwealth v. Apkins, 148 Ky. 207, 146 S.W. 431 (1912); People v. International Nickel Co., 168 App. Div. 245, 153 N.Y. Supp. 295 (1915). In Memorandum, 2 Ventris 314 (1691), it was held that there was nothing in the Habeas Corpus Act of 31 Car. II to prevent the sending of Colonel Lundy to Ireland for trial on a charge of committing a capital crime there. In Musgrave v. Medex, 19 Ves. Jr. 652 (1816), Mr. Leach moved for a commitment upon a foreign affidavit. Lord Chancellor Eldon said that upon the research both of himself and the Register no instance could be found of committing a man on a foreign affidavit; on which, if improperly committed, he cannot assign perjury; and it could not be done without a precedent.

[51] Anonymous Case, Yearbook 4 Hen. VII 5 pl. 1, Translation; Beale's Cases on Criminal Law 596 (Exchequer Chamber, 1489); Stedman's Case, Richard Thomas' Case, Cro. Eliz. 137 (1589); Regina v. Best, 1 Salk. 174 (1705); Charnock's Case, 1 Salk. 288 (1707); Rex v. Inhabitants of that part of the Parish of Weston lying in the county of Gloucester, 4 Burr. 2507 (1770); The King v. Gough, 2 Doug. 791 (1781); The King v. Thomas, 2 Leach 634, 2 East P.C. 605 (1794); Rex v. Thomsen, 2 Russel on Crimes (1795) 328; The King v. Parkes & Brown, 2 Leach 776 (1796); Rex v. Buttery, referred to by Abbott, C.J., in Rex v. Burdett, 4 B. & A. 179 (1820); Pearson v. McGowran. 3 C. & B. 700 (1825); Rex v. Millar, 7 Car. & P. 665 (1837); Regina v. Stanbury, 9 Cox C.C. 94 (1862); Roach and Emanuel v. State, 5 Cold. 39 (Tenn., 1867); Smith v. State, 55 Ala. 59 (1876); Norris v. State, 25 Ohio St. 217 (1874); Robberson v. State, 3 Tex. App. 502 (1878); In re Eldred, 46 Wis. 530 (1879); Ex parte Parker, 11 Neb. 309 (1881); State v. Hughes, 22 W. Va. 743 (1883); State v. McGraw, 87 Mo. 161 (1885); Brechwald v. People, 21 Ill. App. 213 (1886); Landa v. State, 26 Tex. App. 580 (1888); Connor v. State, 29 Fla. 455, 10 So. 891 (1892); Commonwealth v. Fagan, 2 Pa. Dist. 401 (1893);

Thulemeyer v. State, 34 Tex. Cr. 619, 31 S.W. 659 (1895); Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899); Dechard v. State, 57 S.W. 813 (Tex. Cr. Rep., 1900); State ex rel. Delevan v. Justus, 85 Minn 114, 88 N.W. 415 (1901); Commonwealth v. Weaver, 10 Pa. Dist. 533 (1901); State v. Bass, 97 Maine 484, 54 Atl. 1113 (1903); State v. Dangler, 74 Ohio St. 49, 77 N.E. 271 (1906); Burns v. Tarbox, 76 Ohio St. 520, 81 N.E. 761 (1907); State v. Pray, 30 Nev. 206, 94 Pac. 218 (1908); State v. Berry, 112 Maine 501, 92 Atl. 619 (1914); People v. Nogueras, 23 Porto Rico 309 (1915); People v. Ballas, 55 Cal. App. 748, 204 Pac. 412 (1921); State v. Roy, 155 La. 238, 99 So. 205 (1924). See also Gawen & Hussee v. Gibbs, 1 Dyer 38a at 39a and 40a (1538); Bulwer's Case, 7 Co. la at 2a (1584-1587).

[52] Note 67, post, p. 27.

[53] Change of venue at the instance of the state: Regina v. Clace, 4 Burr. 2456 (1769); Rex v. Inhabitants of Bodenham, 1 Cowp. 78 (1774); Statute 38 Geo. III, c. 52 (1798); The King against Nottingham, 4 East 208 (1803); Barry v. Traux, 13 N.D. 131, 99 N.W. 769 (1904); Zinn v. Morton County, 17 N.D. 135, 114 N.W. 472 (1908); State v. Winchester, 19 N.D. 756, 122 N.W. 1111 (1909); Glinnan v. Judge of Recorder's Court, 173 Mich. 674, 140 N.W. 87 (1913). Contra: People v. Powell, 87 Cal. 348 (1891). Even in states where constitutional provisions expressly guarantee the right to trial by an *impartial* jury of the county or district in which the crime shall have been committed, courts have upheld a change of venue at the instance of the state on the ground that trial in the vicinage was guaranteed only when an *impartial* trial could be had there. State v. Miller, 15 Minn. 344 (1870); Hewitt v. State, 43 Fla. 194, 30 So. 795 (1901); State v. Durflinger, 73 Ohio St. 154, 76 N.E. 291 (1905); State v. Holloway, 19 N. Mex. 528, 146 Pac. 1066 (1914). Contra: Kirk v. State, 1 Cold. 344 (Tenn., 1860); Osborn v. State, 24 Ark. 629 (1867); Wheeler v. State, 24 Wis. 52 (1869); In re Nelson, 19 S.D. 214, 102 N.W. 885 (1902).

Change of venue at the instance of the accused: Rex v. Lewis, 2 Strange 704 (1726); Rex v. Cowle, 2 Burr. 834 (1759); Statute 38 Geo. III, c. 52 (1798); The King against Hunt, 3 B. & Ald. 444 (1820); Rex v. Russel, 4 B. & Ad. 576 (1832); State v. Albee, 61 N.H. 423 (1881); State v. Kent, 5 N.D. 516, 67 N.W. 1052 (1896). Application constitutes a waiver of the accused's right under express constitutional provisions guaranteeing trial by an impartial jury of the county or district in which the crime shall have been committed. Perteet v. People, 70 Ill. 171 (1873); State v. Potter, 16 Kan. 80 (1876); Weyrich v. People, 89 Ill. 90 (1878); State v. Albee, 61 N.H. 423 (1881); Lightfoot v. Commonwealth, 80 Ky. 516 (1882); State v. Crinklaw, 40 Neb. 759 (1894); Kent v. State, 64 Ark. 247, 41 S.W. 849 (1897); Kennison v. State, 83 Neb. 391, 119 N.W. 768 (1909). Joining in a stipulation for a change of venue waives this right. Osborn v. State, 143 Wis. 249, 126 N.W. 737 (1910). A failure to object to the venue seasonably constitutes a waiver of the right. State v. Browning, 70 S.C. 466, 50 S.E. 185 (1904); In re Mote, 98 Kan. 804, 160 Pac. 223 (1916).

[54] 7 Mod. 193 (1734), supra, note 50.

[55] 1 Ves. Sen. 246 (1749), supra, note 50.

[56] 2 East P.C., c. 16, section 156, notes 50, p. 20, and 28, p. 107.

[57] 2 Wm. Bl. 1055 (1776), supra, note 50.

[58] The statute of 5 Edw. III, c. 11 (1331), provides: "Item, where in times past some persons appealed or indicted of divers felonies in one county, or outlawed in the same county have been dwelling or received in another county, whereby such felonious persons indicted and outlawed have been encouraged in their mischief, because they may not be attached in another county; (2) it is enacted, that the justices assigned to hear and determine such felonies, shall direct their writs to all the counties of England, where need shall be, to take such persons indicted." The earliest case found was decided in 1489. See note 51, supra. In Rex v. Inhabitants of Weston, 4 Burr. 2507 (1770), supra, note 51, Lord Mansfield said, "The old jurisdiction of counties was local. They were like different kingdoms. There was no jurisdiction out of the county; no process, out of it."

[59] See Graves v. Short, Cro. Eliz. 616 (1598); Bushell's Case, Vaughan 135 (1670).

[60] U. S. v. Davis; Regina v. Garrett; State v. Mitchell; In re Carr and Dillon; People ex rel. Drake v. Bergen; State v. Weber; State v. Hall; Newby v. State; Bates v. State; State v. Ewers; Commonwealth v. Apkins; People v. International Nickel Co.; supra, note 50.

[61] See I B 1 Jurisdiction of the Court.

[62] " ... the real danger to society comes not from the fact that an offense was committed within a specific political division of territory, nor from the fact that harmful consequences have occurred within a given area of land, but because there are in existence human beings with anti-social tendencies. These human beings have to be controlled wherever they may be. Their dangersomeness does not cease simply because they step across a boundary line between counties or states or nations." Levitt, "Jurisdiction Over Crimes," 16 J. Crim. L. & Crim. 316, 495 at 498 (1925).

[63] The Austrian Penal Code enacted in 1852 provides:

"Section 39. Again, if a foreigner has committed abroad an offense other than those indicated in the preceding paragraph (treason and counterfeiting) he shall always be arrested upon entering the country; arrangement shall be made forthwith for his extradition to the state where the offense was committed.

"Section 40. Should the foreign state refuse to receive him, the foreign offender will generally be prosecuted in accordance with the provisions of the present penal code. If, however, more lenient treatment is prescribed by the criminal law of the place where he committed the act, he shall be treated according to this more lenient law. Expulsion shall also be included in the penal sentence in addition to the infliction of the usual penalty."

Translation by E. D. Dickinson in Cases and Readings on The Law of Nations, page 691. The Polish Code of 1932 provides:

"Art. 10, Section 1. Polish penal law is applicable to an alien who has committed abroad an offense not covered by articles 5, 8, and 9; if the perpetrator of the offense is found on the territory of the Polish State and if his extradition is not granted, the conditions of articles 6 or 7 being fulfilled.

"Section 2. Prosecution takes place on the order of the Minister of Justice.

"Art. 6, Section 1. An act committed abroad only brings penal responsibility when the said act was made an offense by the law in force at the place of its commission.

"Section 2. In case of difference between the two laws, the judge, in applying the Polish law may take account of the difference in favor of the accused.

"Art. 7. The provisions of article 6 are not applicable:

(a) To functionaries who, being in the service of the State abroad, have committed an offense.

(b) To persons who have committed an offense in a place not subject to the authority of any state." Translation furnished by Dr. Wm. W. Bishop, Jr., of Princeton.

Similar provisions may be found in the following foreign penal codes:

Italian Penal Code of 1930 (translated and published by the British Foreign Office, 1931), Article 10. Hungarian Criminal Code, Articles 9 and 16. Argentine, La loi du 25 April 1885, Article 5.

See Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 1925 British Year Book of International Law, pages 44 and 48.

[64] 8 U.S.C.A., sections 136e, 154, and 155.

[65] 8 U.S.C.A., section 155.

[66] See Ex parte Koerner, 176 Fed. 478 (C.C., E.D., Wash., E.D., 1909); Ex parte Watshorn, 160 Fed. 1014 (C.C., S.D., N.Y., 1908), holding that the alien could not be deported because of a conviction in absentia abroad subsequent to his entry.

[67] In 1604 the statute of 2 James I, c. 11, against bigamy, authorized trial in the county in which the accused was arrested. Statutes authorizing the trial of particular crimes in any county in England are: 33 Hen. VIII, c. 23 (1542); 9 Geo. n, c. 35, sec. 26 (1736); 19 Geo. II, c. 34, sec. 5 (1746); 43 Geo. III, c. 113, sec. 6 (1803). For other statutes of a similar character see 1 Chitty on Criminal Law (5th American Edition, from the 2d and

last London Edition), pages 178-189. The statute of 15 and 16 Geo. V, c. 86, sec. 11, enacted in 1925, abrogates the common-law rule of venue and fixes it in the county where the accused was arrested or is in custody or has appeared in answer to a summons.

[68] Treason, 35 Hen. VIII, c. 2 (1544); Crimes committed in {Newfoundland, 10 and 11 Wm. III, c. 25, sec. 13 (1704-5). See Chitty, op. cit.

[69] Section VIII of the Frame of Government, prepared by William Penn for Pennsylvania in 1682, provides: "That all trials shall be by twelve men, and as near as may be, peers or equals, *and of the neighborhood* ..." II Poore, The Federal and State Constitutions, Colonial Charters and other Organic Laws of the United States, page 1524.

Resolution 5 of the Declaration of Rights, drawn up by the Continental Congress in 1774, is: "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers *of the Vicinage*, according to the course of that law."

The statute of 14 Geo. III, c. 39, enacted in 1774, authorized the governor of Massachusetts Bay Colony in a case where an officer or magistrate was indicted for a crime in connection with the enforcement of the revenue laws or the suppression of riots to direct that the trial be held in another colony or in England, when it appeared that an impartial trial could not be had. Although this statute only provides for a change of venue, it is the only basis which the writer has found for the indictment of King George III in the Declaration of Independence for giving his assent to acts of pretended legislation: "*For transporting us beyond seas to be tried for pretended offenses*." Section 8 of the Virginia Bill of Rights, adopted in 1776, asserts the right to a trial by an impartial jury of twelve men "*of his vicinage*." Section X of the Vermont Constitution of 1777 guarantees the right to trial by an impartial jury "of the country." II Poore, page 1860. Art. XIII of the Massachusetts Constitution of 1780 provides: "In criminal prosecutions, the verification of facts, in the vicinity where they happen is one of the greatest securities of life, liberty, and property of the citizen." I Poore, page 959. The constitutions of Maryland and North Carolina, adopted in 1776, guarantee the right of trial by jury but contain no guaranty as to the place of trial. Constitution of Maryland, sec. III; 1 Poore, page 817; Constitution of North Carolina, sec. XIV; II Poore, page 1410.

[70] This may be due to a passage in 4 Blackstone's Commentaries (1769), page 351: "When therefore a prisoner on his arraignment has pleaded not guilty, and for his trial has put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, liberos et legales homines, de vicineto; that is freeholders, without just exception, and of the visne or neighborhood: which is interpreted to be of the county where the fact is committed." But on page 304 of the same volume are enumerated a large number of offenses which under various statutes could be tried in any county in England.

[71] U. S. v. Dawson, 15 How. 484, 487, 14 L. Ed. 775 (1851); U. S. v. Jackalow, 1 Black 484, 17 L. Ed. 225 (1862); U. S. v. Newark Meadows Imp. Co., 173 Fed. 426 (C.C., S.D., N.Y., 1909).

[72] In the following cases legislation authorizing the trial of persons for acts done in another state was held unconstitutional, although there was no express constitutional provision as to the place of trial, because trial in the vicinage where the crime was committed was held to be an essential element of jury trial included in the constitutional guaranty of that right. State v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892); Van Buren v. State, 65 Neb. 223, 91 N.W. 201 (1902); State v. Le Blanch, 31 N.J.L. 82 (1864). Venue cases in accord: Swart v. Kimball, 43 Mich. 443 (1880); People v. Brock, 149 Mich. 464 (1907). In Ex parte McNeeley, 36 W. Va. 84, 14 S.E. 436 (1892), Brannon, J., thought the statute contrary to a provision of the state constitution guaranteeing the right to trial in the "county where the crime is alleged to have been committed," but deferred to a statement in Bishop's Criminal Law (7th Ed.), sec. 115 (not supported by authority), that the problem was not one of constitutional law but of international law. In People v. Merrill, 2 Parker's Cr. 590 (1855), reversed on other grounds, 14 N.Y. 74, a New York statute was held contrary to the Sixth Amendment to the Constitution of the United States. The court overlooked the fact that the Sixth Amendment applies to the federal government only and is not a limitation upon the states. Venue statutes authorizing trial in some other county than that in which the crime was committed have been held unconstitutional because contrary to these provisions. Armstrong v. State, 1 Cold. 338 (Tenn., 1860); Ex parte Slater, 72 Mo. 102 (1880); State v. Smiley, 98 Mo. 605 (1889); State v. Carroll, 55 Wash. 588, 104 Pac. 814 (1909).

[73] Note to The Queen v. Paget, 3 Fost. & F. 29, 176 Eng. Rep 14 (1862): " ... in either case the proceeding is substantially of a civil and not a criminal character, the distinction taken in the most ancient and approved authorities being, not whether the crown is a party (for so it is in mandamus and quo warranto), but whether the real end and object of the proceeding is punishment or reparation"; Parker v. Green, 9 Cox C.C. 169 (Q.B., 1862); Ames v. Kansas, 111 U.S. 449, 4 S. Ct. 437, 28 L. Ed. 482 (1884). "This writ (the original common law writ of quo warranto), however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo warranto, which in its origin was 'a criminal method of prosecution, as well to punish the usurper by fine for the usurpation of the franchise as to oust him or keep it for the crown.' 3 Bl. Comm. 236. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the unlawful possessor, — the fine being nominal only" "; Illinois ex rel. Hunt v. Illinois Central R. Co., 33 Fed. 721 (C.C., N.D., Ill., 1888); State v. Chicago, B. & Q. R. Co., 37 Fed. 497 (C.C., S.D., Iowa, 1889); Gruether v. Cumberland Telephone & Telegraph Co., 181 Fed. 248 (C.C., W.D., Tenn., 1909); Brow v. Mayor, etc., of Mobile, 23 Ala. 722 (1853); State v. Stearns, 31 N.H. 106 (1855), "The question whether a legal proceedings is to be deemed civil or criminal, or as partaking of the nature of civil and criminal proceedings is to be determined by the consideration whether the law is designed to suppress and punish a public wrong, an injury affecting the peace and welfare of the community and the general security, or

whether it is designed mainly to afford a remedy to an individual for an injury done to his person or property"; State v. The Manchester & Lawrence Railroad, 52 N.H. 528 (1873); State v. Grand Trunk Railway Co. of Canada, 58 Maine 176 (1870); Winslow v. Anderson, 4 Mass. 377 (1808), dictum. Contra: Atcheson v. Everett, 1 Cowp. 382 (1775); Dyer v. Hunnewell, 12 Mass. 271 (1815); Belcher v. Johnson, 42 Mass. 148 (1840).

[74] Statutes in some jurisdictions provide for commencing some criminal actions by the service of summons instead of arrest. These statutes usually apply to misdemeanors. For example, see Throckmorton's Annotated Code of Ohio (1930), sections 13432-13436. Criminal proceedings against corporations must necessarily be commenced in this way. See note 19, supra, for cases applying these laws.

[75] Proceedings held civil though commenced by information or indictment: Ames v. Kansas, 111 U.S. 460, 4 S. Ct. 437, 28 L. Ed. 487 (1883), see quotation supra, note 73; Illinois ex rel. Hunt v. Illinois Central R. Co., 33 Fed. 721 (C.C., N.D., Ill., 1888); State v. The Manchester & Lawrence Railroad, 52 N.H. 528 (1873); State v. Grand Trunk Railway Co. of Canada, 58 Maine 176 (1870). Proceedings held criminal though commenced by ordinary complaint: State v. Chicago B. & Q. R. Co., 37 Fed. 497 (C.C., S.D., Iowa, 1889); State v. Stearns, 31 N.H. 106 (1855). Contra: Atcheson v. Everett, 1 Cowp. 382 (1775); Dyer v. Hunnewell, 12 Mass. 271 (1815); Belcher *v.* Johnson, 42 Mass. 148 (18407.

[76] See the quotation from the note to The Queen v. Paget, 3 Fost. & F. 29, 176 Eng. Rep. 14 (1862), supra, note 73.

[77] This should be obvious. Some civil rights may be enforced by imprisonment. Imprisonment for debt is an example. Courts of equity may enforce their decrees by imprisoning the person upon whom the decree operates. The penalty for misdemeanors is usually only a fine. Corporations cannot be imprisoned for violations of criminal law.

[78] 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). "The question whether a statute of one state, which in some respects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. There can be no better illustration of this than the decision of this court in Dennick v. Railroad Co., 103 U.S. 11.... That decision is important as establishing two points: 1st, the court considered 'criminal laws,' that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extra-territorially...." Pages 673-675. Accord: Atchison, Topeka & Santa Fe Ry. Co. v. Nichols, 264 U.S. 348, 44 S. Ct. 353, 68 L. Ed. 720 (1924). "We repeat, we think the motive and effect of the law is not punishment in the sense of a penal law, but remuneration — 'damages for a civil injury.' " Page 352.

[79] [1893] A.C. 150. "In one aspect of them the provisions of sec. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors in

respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial." Page 157.

[80] Supra, note 78 (1892).

[81] Derrickson v. Smith, 27 N.J.L. 166 (1858); Holsey v. McLean, 12 Allen 438 (Mass., 1866); First Natl. Bank of Plymouth v. Price et al., 33 Md. 487 (1871); Price v. Welson & Gould, 67 Barbour 9 (N.Y., 1873); Sayles v. Brown, 40 Fed. 8 (C.C., D. Md., 1889), dictum.

[82] The Great Western Machinery Co. v. Smith, 87 Kan. 331, 124 Pac. 414 (1912); Sherman & Sons Co. v. Bitting, 26 Ga. App. 299, 105 S.E. 848 (1921).

[83] The Great Western Machinery Co. v. Smith, supra, note 82.

[84] Supra, note 78.

[85] Fitzgerald v. Weidenbeck et al., 76 Fed. 695 (C.C., Minn., 1896); First Natl. Bank v. Weidenbeck, 97 Fed. 896 (C.C.A., 1899); Davis v. Mills, 99 Fed. 39 (C.C., Conn., 1900); Farr v. Briggs' Estate, 72 Vt. 225, 47 Atl. 793 (1900); and cases cited supra, note 82. In Gardner v. Rumsey, 81 Okla. 20, 196 Pac. 941 (1921), the court divided three to three.

[86] Carey v. Schmeltz, 221 Mo. 132, 119 S.W. 946 (1909); Cary v. Schmeltz, 141 Mo App. 570, 125 S.E. 532 (1910) (reluctantly following the state supreme court); Commercial Natl. Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085 (1909); Nesbit v. Clark et al., 272 Pa. 161, 116 Atl. 404 (1922).

[87] Graham v. Monsergh, 22 Vt. 543 (1850); The State of Indiana ex rel. Stone v. Helmer, 21 Iowa 370 (1866), dictum. Contra: In re Macartney, Macfarlane v. Macartney, [1921] 1 Ch. 522, dictum.

[88] Mahoney v. Crawley, 36 Maine 486 (1853); State v. Pate, 44 N.C. 244 (1853); Ward v. Bell, 52 N.C. 79 (1859); State ex rel. Clements v. Durham's Administrators, 52 N.C. 100 (1859). Contra: Bancroft v. Mitchell, 2 Q.B. 549 (1867).

[89] Helwig v. U. S., 188 U.S. 605, 23 S. Ct. 427, 47 L. Ed. 614 (1902); Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061 (1922); Regal Drug Co. v. Wardell, 260 U.S. 386, 43 S. Ct. 152, 67 L. Ed. 318 (1922): U. S. v. La Franca, 282 U.S. 568, 51 S. Ct. 278, 75 L. Ed. 551 (1931). See also dictum in Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 290, 8 S. Ct. 1370, 32 L. Ed. 239 (1888). Cf. People v. Coe Mfg. Co., 112 N.J. Law 536, 172 Atl. 198 (1934), where the court held that the penalties were no more than liquidated damages for nonpayment of the tax, i.e., compensatory and civil, not punitive and criminal.

In Gulledge Bros. Lumber Co. v. Wenachee Land Co., 122 Minn. 266, 142 N.W. 305 (1913), it was held that a Washington statute depriving corporations which had not paid their franchise tax of the right to sue was unenforceable in Minnesota because penal. This was not a suit to enforce payment of a tax, but an ordinary action for breach of contract, the defense being that the plaintiff had no right to sue because it had violated the statute.

Where the penalty for the illegal foreign conduct is to prevent any contract right from coming into existence, the applicable foreign law will be enforced, i.e., where certain acts or failure to act will make the contract void. Beadell v. Moore, 199 App. Div. 531 (N.Y., 1922).

[90] Holman v. Johnson, 1 Cowp. 341 (1775).

[91] Ludlow and others v. Van Rensselaer, 1 Johns. 95 (1806); James v. Catherwood, 3 Dowl. & Ry. 190, 16 E.C.L. 196 (1823). In the latter case it was said that the rule had been regarded as settled since a dictum by Lord .Hardwicke. Apparently the case referred to is Boucher v. Lawson, Cas. T. Hard. 85 (1734), which was an action on the case to recover gold shipped from Portugal to London safely, but which the carrier refused to deliver to the shipper. The defense was that by the law of Portugal exporting of gold was illegal. Hardwicke said that there was no showing what penalty was imposed by the law of Portugal, and to enforce the law would interfere with British trade. There is also a dictum in Henry v. Sargeant, 13 N.H. 321 (1843).

[92] Beadell v. Moore, 199 App. Div. 531 (1922).

[93] Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905).

[94] [1909] 1 K.B. 7.

[95] 232 N.Y. 71, 133 N.E. 357 (1921).

[96] Matter of Bliss, 121 Misc. 773 (N.Y., 1923); In re Visser; H. M. The Queen of Holland v. Drukker and others, [1928] Chancery 877; Matter of Martin, 136 Misc. 51 (N.Y., 1930).

[97] 28 F.(2d) 997 (D.C., S.D., N.Y., 1928).

[98] 30 F.(2d) 600 (C.C.A. 2, 1929).

[99] 281 U.S. 19, 50 S. Ct. 175, 74 L. Ed. 617 (1930).

[[100] – No note for this number.]

[101] State of Maryland v. Turner, 75 Misc. 9 (N.Y., 1911).

[102] New York Trust Co. v. Island Oil & Transport Corp., 11 F.(2d) 698 (C.C.A. 2, 1926).

[103] The Republic of Mexico agt. Arrangois and others, 11 How. Pr. 1 (N.Y., 1855), aff'd 5 Duer 634; United States of America v. Wagner, L.R. 2 Ch. App. 582 (1867); The Sapphire, 78 U.S. 164, 20 L. Ed. 127 (1870); State of Yucatan v. Argumedo, 92 Misc. 547 (N.Y., 1915); State of Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933). In the last case the original jurisdiction of the Supreme Court was invoked. Cf. Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 8 S. Ct. 1370, 32 L. Ed. 239 (1888), holding that Art. 3, Sec. 2 of the United States Constitution does not confer original jurisdiction upon the Supreme Court of the United States in cases where the action could not be maintained in the state courts on settled principles of international law.

[104] Concurring in Moore v. Mitchell, 30 F.(2d) 600 (C.C.A. 2, 1929). After the tax law has been enacted, the matter is no longer political. Cf. cases supra, note 3.

[105] 296 U.S. 268, 56 S. Ct. 229, 80 L. Ed. 155 (1935). See also People v. Coe Mfg. Co., 112 N.J. Law 536, 172 Atl. 198 (1934).

[106] Wilkinson v. Colley, 5 Burr. 2694 (1771); Woodgate agt. Knatchbull, 2 Term R. 148 (1787); Reed v. Inhabitants of Northfield, 13 Pick. 94 (Mass., 1832); Reed v. The Inhabitants of Chelmsford, 33 Mass. 128 (1834), Quimby v. Carter, 20 Maine 218 (1841); Mitchell v. Clapp, 12 Cush. 278 (Mass., 1853); Burnett v. Ward, 42 Vt. 80 (1869); Stanley v. Wharton, 9 Price 301 (1912). Where the recovery allowed is entirely remedial, the law is, of course, civil; Turner v. Warren, 2 Str. 1079 (1738); Bones v. Booth, 2 Wm. Bl. 1226; Moore v. Jones et al., 23 Vt. 739 (1848); Grace v. M'Elroy, 1 Allen 563 (Mass., 1861).

[107] Strong v. Stebbins, 5 Cowen 210 (N.Y., 1825); Gwin v. Breedlove, 2 How. 29, 36 (1844), dictum; Edwards v. Osgood, 33 Vt. 224 (1860); Riker v. Hooper, 35 Vt. 457 (1862); Conn v. Neeves and another, 40 Wis. 393 (1876). Where the recovery allowed is entirely punitive, the law is, of course, penal: Hubbell v. Gale, 3 Vt. 266 (1830); White v. Comstock, 6 Vt. 405 (1834); Brooks, qui tam v. Clayes & Morse, 10 Vt. 37 (1838). Contra: Webster v. The People, 14 Ill. 365 (1853); Stockwell v. United States, 80 U.S. 531 (1871).

[108] Philpot v. The Mo. Pac. Ry. Co., 85 Mo. 164 (1884). A statute giving a right of action to the person injured for compensatory damages provided that he sues within three months, and after that to anyone who sues, is remedial and civil as to the first part and punitive and criminal as to the right of action given the common informer. Brandon v. Pate, 2 H. Bl. 308 (1794); Cole v. Graves, 134 Mass. 471 (1883).

[109] Boyce v. The Wabash Ry. Co., 63 Iowa 70 (1884); Louisville & Nashville R. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348 (1910); Coryell v. Atchison, Topeka & Santa Fe Railway Co., 273 Mo. 361, 201 S.W. 77 (1918); James-Dickinson Farm Mortgage Co. et al. v. Harry, 273 U.S. 119, 47 S. Ct. 308, 71 L. Ed. 569 (1927). In a number of cases foreign exemplary damage statutes have been enforced without any discussion as to whether they were civil or criminal. Bruce's Admr. v. Cincinnati R. R. Co., 83 Ky. 174

(1885); Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897); Louisville & Nashville R. R. Co. v. Smith, 135 Ky. 462, 122 S.W. 806 (1909); Louisville & Nashville R. R. Co. v. Lynch, 137 Ky. 696, 126 S.W. 362 (1910); Roseberry v. Scott, 120 Kan. 576, 244 Pac. 1063 (1926).

[110] Bettys v. The Milwaukee and St. Paul Ry. Co., 37 Wis. 323 (1875); Langdon v. The New York, Lake Erie and Western Rd. Co., 58 Hun 122 (1890); Taylor, Fair & Co. v. The Western Union Telegraph Co., 95 Iowa 740, 64 N.W. 660 (1895); Mohr v. Sands, 44 Okla. 330, 133 Pac. 238 (1913); Grinestaff v. N. Y. Central R. R., 253 Ill. App. 589 (1929).

[111] 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892), supra, note 78.

[112] 273 U.S. 119, 47 S. Ct. 308, 71 L. Ed. 569 (1927).

[113] See notes 62 and 63, supra.

[114] O'Reilly v. N. Y. & N. E. R. R. Co, 16 R.I. 388, 15 Atl. 763 (1889); Adams v. Fitchburg Rd. Co., 67 Vt. 76, 30 Atl. 687 (1894); Cristilly, Admr. v. Warner, 87 Conn. 461, 88 Atl. 711 (1913); McLay v. Slade, 48 R.I. 357, 138 Atl. 212 (1927).

[115] Boston & Maine R. R. v. Hurd, 108 Fed. 116 (C.C.A., 1901); Armbruster v. Chicago, Rock Island & Pac. Ry. Co., 166 Iowa 155, 147 N.W. 337 (1914); Hill, Admx. v. Boston & Maine Rd., 77 N.H. 151, 89 Atl. 482 (1914); Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918); Daury v. Ferraro, 108 Conn. 386, 143 Atl. 630 (1928); Wellman, Admr. of Stone's Estate v. Mead, 93 Vt. 322, 107 Atl. 396 (1918). The Connecticut and Vermont cases overrule the earlier cases in the same jurisdiction, cited supra, note 14, p. 42.

[116] Criminal: Marshall v. Wabash R. Co., 46 Fed. 269, (C.C., S.D., Ohio, 1891); Dale v. The Atchison, Topeka & Santa Fe Rd. Co., 57 Kan. 601, 47 Pac. 521 (1897); Matheson v. The Kansas City, Fort Scott & Memphis Rd. Co., 61 Kan. 667, 60 Pac. 747 (1901); Raisor v. C. & A. R. R. Co., 215 Ill. 47, 74 N.E. 69 (1905); El Paso & Southwestern Co. v. Londe, 108 Tex. 67, 184 S.W. 498 (1916); Clay v. Atchison, T. & S. F. Ry. Co., 201 S.W. 1072 (Tex. Civ. App., 1918); aff'd 208 S.W. 911 (Tex. Sup., 1921).

Civil: Atchison, Topeka & Santa Fe Ry. Co. v. Nichols, 264 U.S 348, 44 S. Ct. 353, 68 L. Ed. 720 (1924).

[117] Supra, note 16.

[118] Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 114 Tenn. 344, 84 S.W. 618 (1904); Southern Ry. Co. v. Decker, Admx., 5 Ga. App. 21, 62 S.E. 678 (1908). For other purposes they have been held civil even though the statute required the action to be commenced by indictment and referred to the recovery as a fine. State v. Grand Trunk

Ry. Co. of Canada, 58 Maine 176 (1870); State v. The Manchester & Lawrence Rd., 52 N.H. 528 (1873).

[119] See Moore v. Jones et al., 23 Vt. 739 (1848), where such a statute was held civil for the purpose of determining whether or not the claim could pass to an assignee in bankruptcy.

[120] Barnes et al. v. Whitaker, 22 Ill. 606 (1859); Arnold v. Potter, 22 Iowa 194 (1867). In the latter the court proceeded upon the ground that if the contract had been void by the foreign law that law would have been enforced. See Houghton v. Page, 2 N.H. 42 (1819). This overlooks the possibility of the lender recovering principal and legal interest in some action not founded upon the void contract. Thus, where the usury occurs in granting an extension or renewal of a preexisting indebtedness not tainted with usury, the prior valid obligation is not extinguished by the void agreement and can be enforced. See cases collected in 3 A.L.R. 877, note. So where the borrower seeks relief from the usurious contract in a court of equity, he must do equity by paying the principal and legal interest. See cases collected in 17 A.L.R. 123, note, and 70 A.L.R. 693, note. It would seem that if it is inequitable for the borrower to retain money paid him by the lender, an action at law quasi ex contractu on the common counts for money lent, money paid and money had and received to plaintiff's use could be maintained for the money actually paid and legal interest, since such an action lies whenever it is unconscionable for defendant to retain plaintiff's money. Several early cases held that such an action could not be maintained. Scott v. Nicholl, 4 Doug. 314, 99 Eng. Rep. 899 (1785); Cowles v. Hart & Bristol, 1 Root 396 (Conn., 1792). It may well be doubted whether they now represent the law, since in Early v. Mahon, 19 Johns. 147 (1821), it was recognized that the invalidity of the contract did not affect the consideration. In Wycoff v. Longhead, 2 Dall. 92 (1786), it was held that principal and legal interest could be recovered as otherwise the borrower would be unjustly enriched. See also Geyer v. Spencer, 189 N.E. 429 (Ind. App., 1934).

[121] Bryant v. Ela, Smith 396 (N.H., 1815); Sherman et al. v. Gassett et al., 9 Ill. 521 (1847); Willis agt. Cameron, 12 Abb. Pr. 245 (N.Y.C.P., 1861); Blaine v. Curtis, 59 Vt. 120, 7 Atl. 708 (1886); Patterson v. Wyman, 142 Minn. 70, 170 N.W. 928 (1919). A statute allowing the recovery of legal interest, the amount recovered to go to the state, is entirely punitive and criminal — Crebin v. Deloney, 70 Ark. 493, 69 S.W. 312 (1902).

[122] 127 U.S. 265, 8 S. Ct. 1370, 32 L. Ed. 239 (1888).

[123] 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892).

[124] Chief Justice Marshall's dictum in 10 Wheat. 66, 123, 6 L. Ed. 268 (1825).

[125] Healy v. Root, 11 Pick. 389 (Mass., 1831); The State of Indiana ex rel. Stone v. Helmer, 21 Iowa 370 (1866). See also Milwaukee County v. M. E. White Co., 296 U.S. 268, 278, 56 S. Ct. 229, 234, 80 L. Ed. 155, 162 (1935).

[126] 73 Ark. 428, 84 S.W. 477 (1904).

[127] The court held that Missouri law governed and no crime was committed, reversing a conviction and sentence imposing a fine of $100. Contra: Tutt v. City of Greenville, 142 Ky. 536, 134 S.W. 890 (1911).

[128] W. E. Beckett says: "Hitherto in describing the strict territorial doctrine the ambiguous phrase 'offenses committed within their territory' has been used. This may cover two entirely different classes of cases:

(a) where a man physically present inside the boundary, commits an act which is a criminal offense by the law of the country where he is at the moment;

(b) where a man, without ever entering the territory himself, commits an act, which produces harmful effects inside the state." The Exercise of Criminal Jurisdiction Over Foreigners, 1925 British Yearbook of International Law, pages 44, 52.

[129] Cases supporting this theory are cited in notes 44, p. 54; 45, p. 54; 46, p. 54; 47, p. 54; 74, p. 64; 81, p. 67; 88, p. 69; 92, p. 70; notes 9, p. 73; 11, p. 74; 35, p. 82; 57, p. 88; 69, p. 91; 88, p. 95; and note 2, p. 98; 9, p. 100; 10, p. 100; and 17, p. 102.

This view is taken in Article 3 of the Draft Convention on Jurisdiction with Respect to Crime, prepared by Dean Edwin D. Dickinson as reporter for the Research in International Law, under the auspices of the Harvard Law School. Supplement, 29 American Journal of International Law 439 (1935).

[130] Cases supporting this theory are cited in notes 26, p. 46; 41, p. 52 (see excerpts in notes 42 and 43); 49, p. 55; 50, p. 55; 65, p. 61; 66, p. 61; 67, p. 61; 75, p. 65; 80, p. 66; 86, p. 68; and 87, p. 69; notes 6. p. 72; 7, p. 72; 8, p. 72; 10, p. 73; 39, p. 83; 41, p. 84; 47, p. 85; 59, p. 89; 60, p. 89; 68, p. 90; 98, p. 97; and 99, p. 98; and notes 1, p. 98; 7. p. 100; 8, p. 100; 80, p. 122; 81, p. 122; 92, p. 125; and 93, p. 125.

This is the view taken by the Institute of International Law. See Charles Brocher's report on "Conflict of Laws — Criminal Law" at the meeting in Paris in 1878 and comment thereon, Anuaire de L'Institute de Droit International, 1879-1880, p. 50 et. seq.; L. Von Bar's report on "Conflict of Criminal Laws" at the meeting in Munich, September 7, 1883, and resolutions adopted there, Anuaire de L'Institute de Droit International, 1883-1885, p. 127 et seq.; Andre Mercier's report on "The Conflict in Criminal Laws as Regards Jurisdiction," and a revision of the resolutions of Munich, read and adopted at Cambridge in 1931, Anuaire de L'Institute de Droit International 1931, p. 87 et seq. (This material is in French and was translated for the author by Clark M. McBurney.) The only exception admitted by Von Bar was in the case of a threat to the existence of the state by acts done outside of its territory which were not a violation of the law of the state in which the actor was when he did the act. Westlake and Goos thought there should be no exception. Anuaire 1879-1880, Vol. I, p. 281; Anuaire 1931, p. 90. Several exceptions were added by the revision of 1931. Proposition VI, Anuaire 1931, p. 146.

[131] Supra, p. 3, note 8.

[132] Supra, p. 14, note 35.

[133] Supra, notes 32, 33, 35 and 36, pp. 14 & 15.

[134] Supra, p. 4, note 9.

[135] Supra, p. 5, note 11; post, p. 72, note 6.

[136] The states of the United States refuse to extradite one who by acts in their territory produces an effect in another state, supra, p. 15, note 36. The Cutting Case, supra, p. 5, note 11, indicates that the attitude of the United States is the same. However, there are English decisions sustaining the extradition of British subjects who by acts in England have produced illegal effects abroad. Queen v. Nillins, 53 L.J. M.C. 157 (1884); King v. Godfrey, [1923] 1 K.B. 24. These cases are opposed in principle to the decision in the great case of The Queen v. Keyn, L.R. 2 Exch. Div. 63, 13 Cox C.C. 403 (1876).

[137] See I B, second paragraph.

[138] Cockburn, C.J., in The Queen v. Keyn, L.R. 2 Exch. Div. 236, 13 Cox C.C. 403 (1876), said, "Upon what is the contrary opinion founded? Simply upon expediency, which is to prevail over principle. What, it is asked, is to happen if one of your officers, enforcing your revenue laws, should be killed or injured by a foreigner on board a foreign ship? What is to happen if a British and foreign ship meeting on the ocean, a British subject should be killed by a shot fired from the foreign ship? In either of such cases would not the foreigner guilty of the offense be amenable to the English law? Could it be endured that he should escape with impunity? If brought within the reach of a British Court of justice, could he not be tried and punished for the offense, and ought he to be permitted to escape with impunity, or ought he not to be tried and punished for such offense? My first answer is, that the alternative is fallacious. He will not escape with impunity. He will be amenable to the law of his own country, and it is not to be presumed that the law of any civilized people will be such or so administered, as that such an offense should escape without its adequate punishment."

[139] 1 Show 339

[140] 1 Leach 388.

[141] L.R. 2 Exch. Div. 63, 13 Cox C.C. 403 (1876).

[142] Cockburn, C.J., of England, Amphlett, J.A., Kelly, C.B., Pollock, B., Field, J., and Lush, J. Contra: Coleridge, C.J., of C.P., doubting, and Denman, J., Bramwell, J.A., and Sir R. Phillimore thought that the crime could not be said to be committed where the effect was produced when it was not intended. Grove, J., and Lindley, J., expressed no opinion on the point.

[143] Cockburn, C.J., said: "But let us assume the contrary, let us take the drowning of deceased to have been the act of the defendant done on board a British vessel. Is this conclusive of the question? By no means. The subtle argument which would extend the negligence committed in one ship to another in which it produces its effect finds its appropriate answer in reasoning which though perhaps also savoring of subtlety, is yet directly to the purpose, and must not be overlooked. For the *question is* — and this appears to have been lost sight of in the argument — not whether the death of the deceased, which no doubt took place in a British ship, was the act of defendant in such ship, but *whether the defendent at the time the act was done, was himself within the British jurisdiction*. But, in point of fact, the defendant was, at the time of the occurrence, not on board the British ship, the Strathclyde, but on a foreign ship, the Franconia.... But, though, as we have just seen, an act, begun in one place or jurisdiction, may extend into another, it is obvious that the person doing such continuing act cannot himself be at the same time in both. A man who fires a shot from the shore at one who is on the sea still remains on the shore, and vice versa. One who from the bank of a river dividing two territories, fires a rifle shot at a person on the opposite side, cannot be said to be in the territory where the shot strikes its object. One who from the deck of a vessel, by the discharge of a gun, *either purposely or through negligence*, kills or wounds another, is not thereby transported from the deck of his own vessel to that of the other. But, *in order to render a foreigner liable to the local law, he must, at the time the offense was committed, have been within British territory* if on land, or in a British ship if at sea. I cannot think that if two ships of different nations met on the ocean, and a person on board of one of them were killed or wounded by a shot fired from the other, the person firing it would be amenable to the law of the ship in which the shot took effect. According to the doctrine of Lord Coke in Calvin's Case, protection and allegiance are correlative: it is only where protection is afforded by the law that the obligation of allegiance to the law arises; or, as I prefer to put it, it *is only for acts done when the person doing them is within the area over which the authority of British law extends, that the subject of a foreign state owes obedience to that law, or can be made amenable to its jurisdiction."* (Italics are the author's.) The Queen v. Keyn, L.R. 2 Exch. Div. 63, 235 and 236 (1876); 13 Cox C.C. 403, 540 and 541. See note 38, p. 50, for a continuation of Cockburn's remarks.

[144] 2 Sumn. 482; Fed. Cas. No. 14932.

[145] 114 N.C. 910, 19 S.E. 602 (1894). In 115 N.C. 811, 20 S.E. 729 (1894), it was held that he could not be extradited to Tennessee because by a North Carolina statute persons not "fugitives" could not be extradited. The result was that he could not be tried at all as long as he stayed in North Carolina.

[146] 40 S.C. 221, 18 S.E. 853 (1893).

[147] 92 Ga. 41, 17 S.E. 353 (1893).

[148] See also Robbins v. State, 8 Ohio St. 131 (1857), where only venue was involved.

[149] 132 Cal. 231, 64 Pac. 286 (1901).

[150] 199 App. Div. 106, 191 N.Y. Supp. 619 (1921).

[151] Amphlett, J.A., in The Queen v. Keyn, L.R. 2 Exch. Div. 63 at 118 (1876) said, "Now according to the decision in Rex v. Coombes, the crime must be, for the purpose of determining the venue, held to have been committed on the English ship where the death occurred; but that doctrine, founded as it is upon a convenient fiction, and binding no doubt upon a British subject, does not decide the question before us, which is, whether a foreigner who committed the offense while he was de facto outside the English territory, could be made amenable to English law. With some doubt I have come to the conclusion that he could not. I can find no authority for saying that a state has any jurisdiction to punish a foreigner who at the time of the commission of the offense was not within the territory, and consequently not owing it any allegiance."

[152] The Case of the S.S. "Lotus," Hague Permanent Court of International Justice Publications, Series A, Judgment No. 9.

[153] 7 H. VII. 8 (1492).

[154] 2 and 3 Edw. VI., ch. 24.

[155] "II. And where it often happeneth and cometh in ure in sundry counties of this realm, that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties, for that by the custom of this realm the jurors of the county where such party died of such stroke, can take no knowledge of said stroke being in a foreign county, although the same two counties and places adjoin very near to-gether; ne the jurors of the county where the stroke was given cannot take knowledge of the death in another county, although such death most apparently come of the same stroke. So that the King's majesty within his own realm cannot, by any laws yet made or known, punish such murderers or manquellers, for offenses in this form committed and done; (2) nor any appeal at some time may lie for the same, but doth also fail, and the said "murderers and manquellers escape thereof without punishment, as well in cases where the counties where such offenses be committed and done may join, as otherwise where they may not join."

[156] 1 Hale P.C. 426. (Quotation from the edition of 1736.) See also 1 Hawk. P.C., ch. 31, sec. 13, and 1 East P.C. 361.

[157] 4 Co. Rep. 42a.

[158] The problem is similar to the problem of ascertaining the exact time when a homicide is committed. In Hales v. Petit, 1 Plowden 253 (1561), one who committed suicide was held to have forfeited his lands by attainder because his act was the felony and not his death. The lands were forfeited before they could pass to his heirs by death so that the

heirs were not punished by the attainder. In Heydon's Case, 4 Co. Rep. 41a (1586), it was held that an indictment charging accessories with being present, aiding, and abetting on the day the blow was struck, was bad because there was no felony until the death. In People v. Gill, 6 Cal. 637 (1856), the accused was convicted of second degree murder under a statute enacted after the blow was struck but before the victim died. The conviction was reversed on the ground that the crime was committed on the day of the act and not on the day when the result was determined. The court said that the death must be made to relate back to the unlawful act which occasioned it.

U. S. v. Bladen, post, p. 60, note 61, relied upon Heydon's Case and Hume v. Ogle. People v. Gill, supra, was relied upon in State v. Gessert, post, p. 61, note 65, and therefore is to a considerable extent responsible for the modern view.

[159] 12 East 244 (1810).

[160] 5 Car. & P. 170 (1831).

[161] U. S. v. Bladen, Fed. Cas. No. 14,605 (1816); Commonwealth v. Linton, 2 Va. Cr. Cas. 205 (1820). Ball v. U. S., 140 U.S. 118, 11 S. Ct. 761, 35 L. Ed. 377 (1891), is a peculiar decision. The indictment alleged that the blow was struck in Indian Territory which was within the jurisdiction of the United States District Court for the Eastern District of Texas. Accused was convicted in that court, but the Supreme Court reversed the conviction because the indictment did not allege the time and place of the victim's death. The court said that even though the accused could be tried in the place where the fatal stroke was inflicted, though the death occurred elsewhere, the averment of the place of death was essential (i.e., although the place of death is immaterial, it is essential to allege it).

[162] 2 Geo. II., ch. 21, reenacted 9 Geo. IV., ch. 31, sec. 8 (1829).

[163] State v. McCoy, 8 Robinson 545 (La., 1844); State v. Foster, 7 La. Ann. 255 (1852). So, where the state had a statute similar to the English act: Hunter v. State, 40 N.J.L. 495 (1878). The same result was reached by applying a venue statute: Roach v. State, 34 Ga. 78 (1864).

[164] Notes 65 and 66, on this page.

[165] State v. Gessert, 21 Minn. 369 (1875); State v. Bowen, 16 Kan. 476 (1876); Green v. State, 66 Ala. 40 (1880); State v. Baldwin, 15 Wash. 15, 45 Pac. 650 (1896); Kirkham v. People, 170 Ill. 9, 48 N.E. 465 (1897); Roberson v. State, 42 Fla. 212, 28 So. 427 (1900); U. S. v. Guiteau, 1 Mackey 498 (D. of Col., 1882); Davis v. State, 44 Fla. 32, 32 So. 822 (1902); Moran v. Territory, 14 Okla. 544, 78 Pac. 111 (1904); Commonwealth v. Ball, 126 Ky. 542, 104 S.W. 325 (1907); Covington v. Commonwealth, 136 Va. 665, 116 S.E. 462 (1923). See also Edge v. State, 117 Tenn. 406, 99 S.W. 1098 (1906) (accessory), and Riley v. State, 9 Humph. 646 (1849) (venue).

[166] State v. Carter, 27 N.J.L. 499 (1859); Commonwealth v. Apkins, 148 Ky. 207, 146 S.W. 231 (1912).

[167] In State v. Carter, supra, the court said, "Here no act is done in this state by the defendant.... The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then for a year after an injury is inflicted, murder as to its jurisdiction is ambulatory at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter, in its various degrees, in one place, murder, in its degrees, in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel....

"An act, to be criminal, must be alleged to be an offense against the sovereignty of the government. This is of the very essence of crime punishable by human law. How can an act done in one jurisdiction, be an offense against the sovereignty of another? All the cases turn upon the question where the act was done."

In State v. Gessert, supra, the court said, "It is for his acts that defendant is responsible. They constitute his offense. The place where they are committed, must be the place where his offense is committed, and therefore the place where he should be indicted and tried. In this instance, the acts with which defendant is charged, to wit, the stabbing and wounding, were committed in Washington County. The death which ensued in Pierce County (Wis.) though it went to characterize the acts committed in Washington County, was not an act of defendant, committed in Wisconsin; but the consequence of his acts committed in Washington County; against the peace and dignity of the state of Minnesota." See State v. Bowen and Moran v. Territory, supra, for similar language.

In U. S. v. Guiteau, supra, at page 542, the court said: "We find nothing in the statute, as we have found nothing in the common law, which indicates that an act is not murder in a particular place because the consequences of that act happen in some other place."

Note. — This reasoning is directly contrary to that which sustains the application of the law of the place where a bullet strikes which has been fired across a state line, for there the ground is that an effect has been produced within the state. In State v. Carter, supra, the court attempted to justify the cases sustaining the application of the law of the place of impact on the ground that the impact was the act, and although the defendant was out of the state at the time his act was within it. This is untenable. The act is the aiming of the gun and the pulling of the trigger.

[168] 8 Mich. 320, 341 (1860).

[169] Tyler v. People, 8 Mich. 320 (1860); Commonwealth v. Macloon, 101 Mass. 1 (1869); Ex parte McNeeley, 36 W. Va. 84, 14 S.E. 436 (1892); State v. Caldwell, 115 N.C. 794, 20 S.E. 523 (1894); State v. Lang, 108 N.J.L. 98, 154 Atl. 864 (1931). Cf. State v. Kelly, 76 Maine 331 (1884).

[170] Note 52, supra, p. 56.

[171] Note 14, supra, p. 6.

[172] Reg. v. Lewis, 7 Cox C.C. 277 (Court of Criminal Appeal, 1857).

[173] 2 Hawk. P.C., ch. 25, sec. 35 (1716). In Bulwer's Case, 7 Co. Rep. la (1586), at 2b the following dictum appears: "If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H.4. 8 or I may bring my action in Middlesex, for there I have the damage, as it is proved by 11 R. 2 action sur le case 36." While the cases referred to in this dictum were civil cases, it must be remembered that at that time all actions civil as well as criminal were local.

The same result has been reached by applying various venue statutes. The cases all sustain venue in the county where the effect was produced. State v. Smith, 82 Iowa 423, 48 N.W. 727 (1891); State v. The Glucose Sugar Refining Co., 117 Iowa 524, 90 N.W. 324 (1902); State v. De Wolfe, 67 Neb. 321, 93 N.W. 746 (1903); Commonwealth v. L. & N. Rd. Co., 175 Ky. 267, 194 S.W. 345 (1917); State v. Herring, 21 Ind. App. 157, 48 N.E. 598, 51 N.E. 951 (1898); State v. Wabash Paper Co., 21 Ind. App. 167, 48 N.E. 653, 51 N.E. 949 (1898).

[174] 16 N.H. 357 (1844). Venue case in accord: The American Strawboard Co. v. State, 70 Ohio St. 140, 71 N.E. 284 (1904).

[175] 168 App. Div. 245, 153 N.Y. Supp. 295 (1915), aff'd 218 N.Y. 644, 112 N.E. 1068. Venue case in accord: In re Eldred, 46 Wis. 530, 1 N.W. 175 (1879). In Commonwealth v. Lyons, 1 Pa. L.J.R. 497, 3 Pa. L.J. 167 (1843), ore washed in Centre County polluted the stream further down in another county. Held that the venue was properly laid in Centre County. McManus and M'Collister for the commonwealth argued that the act complained of was done in Centre County; the offense was complete there and however the consequences of this offense might extend to the adjoining county, it was indictable only where it was perpetrated. See also dictum in State v. Babcock, 30 N.J.L. 29 (1862), at page 32.

[176] The inability of the state where the effect or result is produced, to apply its law when it does not have power or jurisdiction over the defendant, is well illustrated by Georgia v. Tennessee Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1906). In this case the state of Georgia filed its bill in the United States Supreme Court asking that the Tennessee Copper Company be enjoined from discharging noxious gases over the state of Georgia from their works in Tennessee. The Supreme Court issued the injunction.

[177] See Meador v. Central Georgia Power Co., 137 Ga. 196, 73 S.E. 3 (1911), a venue case.

[178] People v. Meyer, 12 Misc. 613 (N.Y., 1895); In re Robertson, 38 Nev. 326, 149 Pac. 182 (1915).

[179] Bayne v. People, 14 Hun 181 (N.Y., 1878); People ex rel. Vitan v. Vitan, 8 Cr. R. 25, 10 N.Y. Supp. 909 (1888); Jemmerson v. State, 80 Ga. 111, 5 S.E. 131 (1887); State v. Adams, 137 Tenn. 521, 194 S.W. 579 (1917). The venue cases are contra, holding that the abandonment is in the county where the wife or child is at the time they become destitute, although the accused was in another county. Bennefield v. State, 80 Ga. 107, 4 S.E. 869 (1887); Cleveland v. State, 7 Ga. App. 622, 67 S.E. 696 (1910); Ware v. State, 7 Ga. App. 797, 68 S.E. 443 (1910); Boyd v. State, 18 Ga. App. 623, 89 S.E. 1091 (1916); Johnson v. People, 66 Ill. App. 103 (1895). And so where a statute expressly so provides. In re Price, 168 Mich. 527, 134 N.E. 721 (1912).

[180] 38 Nev. 326, 149 Pac. 182 (1915).

[181] 181 N.C. 597, 107 S.E. 429 (1921). Venue case in accord: People v. Meyer, 12 Misc. 613 (N.Y., 1895). See also People v. Flury, 173 App. Div. 640, 160 N.Y. Supp. 155 (1912), where the court assumed that separation was abandonment.

[182] state v. Weber, 48 Mo. App. 500 (1892); State v. Shuey, 101 Mo. App. 438, 74 S.W. 369 (1903); People v. Flury, 173 Ill. App. 640 (1912).

[183] Just as death is a necessary condition subsequent without which an act or omission will not amount to homicide but the location of which is immaterial.

[184] State v. McCullough, 17 Del. 274, 40 Atl. 237 (1898); Commonwealth v. Hart, 12 Pa. Sup. Ct. 605 (1900); People v. Wexler, 52 App. Div. 67, 64 N.Y. Supp. 861 (1912), overruling People ex rel. Drake v. Bergen, 36 Hun 241 (N.Y., 1885), and People v. Crouse, 86 App. Div. 352, 83 N.Y. Supp. 812 (1903), where the court considered the crime to be abandonment; Noodleman v. State, 74 Tex. Cr. 611, 170 S.W. 710 (1914), semble. Cf. People ex rel. Armstrong v. Quigley, 75 Misc. 151 (N.Y., 1912), where the same mistake was made in a venue case.

[185] Notes 86 and 87, immediately following.

[186] Commonwealth v. Acker, 197 Mass. 91, 83 N.E. 312 (1908); Commonwealth ex rel. Thatcher v. Thatcher, 19 Pa. Dist. 985 (1910). Venue cases in accord: In re Baurens, 117 La. 136, 41 So. 442 (1906); Poindexter v. State, 137 Tenn. 386, 193 S.W. 126 (1916). See also State v. Pick, 140 La. 1063, 74 So. 554 (1917), where it was held that the court was not deprived of jurisdiction by the defendant moving to another county. In Commonwealth v. Acker, supra, the court said, "A person domiciled in this commonwealth is amenable to the statute, whether his minor child is here when the wrong upon him is committed, or has been carried out of the commonwealth by his

father, or has been left by him in another state or country, if, while residing and having his domicile here, he unreasonably neglects to provide for the child. The offender is here within our jurisdiction. While residing here he ought to make provision for the support of his wife and minor children whether they are here or elsewhere. If he fails to do this, his neglect of duty occurs here, without reference to the place where the proper performance of his duty would confer benefits." The court went on to say that it did not find it necessary to determine whether domicile as distinguished from temporary residence was important.

[187] State v. Ewers, 76 Ohio St. 563, 81 N.E. 1196 (1907); neither facts nor opinion is given but the facts and decision are stated in State v. Sanner, 81 Ohio St. 393 at 395, 90 N.E. 1007 at 1008. See also In re Kuhns, 36 Nev. 487, 137 Pac. 83 (1913), where accused was arrested in Nevada on a request for extradition from Pennsylvania. In habeas corpus proceedings he was ordered released because he was not in Pennsylvania at the time of the alleged failure to support and therefore was not a fugitive from justice, and People v. Herrick, 200 Ill. App. 428 (1916), where the statute was enacted subsequent to the period of nonsupport and at a time when accused was in another state. Venue cases in accord: State ex rel. Delevan v. Justus, 85 Minn. 114, 88 N.W. 415 (1901); State v. Dangler, 74 Ohio St. 49, 77 N.E. 271 (1906).

[188] 81 Ohio St. 393, 90 N.E. 1007 (1908). Accord: In re Poage, 87 Ohio St. 72, 100 N.E. 125 (1912).

[189] State v. Ewers. Cf. State v. Dangler. Both cases in note 87, on this page.

[190] See the discussion of this problem at notes 12, 13 and 14, supra, pp. 5 & 6.

[191] 34 Nev. 28, 115 Pac. 729 (1911).

[192] State v. Gillmore, 88 Kan. 835, 129 Pac. 1123 (1913); In re Fowles, 89 Kan. 430, 131 Pac. 598 (1913); State v. Wellman, 102 Kan. 503, 170 Pac. 1052 (1918).

[193] In re Fowles, supra.

[194] State v. Peabody, 25 R.I. 544, 56 Atl. 1028 (1904); Cuthbertson v. State, 72 Neb. 727, 101 N.W. 1031 (1904); State v. Dvoracek, 140 Iowa 266, 118 N.W. 399 (1908); State v. Yocum, 182 Ind. 478, 106 N.E. 705 (1914); Adams v" State, 164 Wis. 223, 159 N.W. 726 (1916). Same result under statute expressly so providing: Demott v. Commonwealth, 64 Pa. 302 (1870); Keller v. Commonwealth, 71 Pa. 413 (1872).

[195] Clark and Marshall on Crimes (3d Ed.), sec. 164 (a); State v. Chapin, post, p. 72, note 8; Duckett v. State, post, p. 75, note 14.

[196] Clark and Marshall on Crimes (3d Ed,), sec. 168, and cases cited in note 14, post, p. 75, except those mentioned in notes 16 and 18, pp. 75 & 76.

[197] Clark and Marshall on Crimes (3d Ed.), sec. 168, note 36; State v. Moore, State v. Chapin, Wixon v. People, Johns v. State, State v. Wyckoff, People agt. Hall, post, p. 72, note 8.

[198] See State v. Chapman, 6 Nev. 632 (1871); Latham v. U. S., 2 F.(2d) 208 (C.C.A. 4, 1924).

[199] 9 Edw. IV Fol. 48 (1470).

[[200] – No note for this number.]

[201] Gawen v. Hussee and Gibbes, 1 Dyer 38a (1538).

[202] Keilwey 67 (1505).

[203] "At common law the coroner might upon view of the body in the county where the fact happened inquire of all accessories or procurers though in another county." 1 East P.C. 362, sec. 129.

[204] 2 and 3 Edw. VI, ch. 24, sec. IV (1549-50).

[205] "In which case (receivers of stolen goods), although the principal felon be after attainted in one country, the accessary escapeth by reason that he was accessary in another county, and that the jurors of the said other county, by any law yet made, can take no knowledge of the principal felony ne attainder in the first county, and so such accessaries escape thereof unpunished, and do often put in ure the same, knowing that they may escape without punishment:" 2 Hawk. P.C., ch. 25, sec. 54, 1 Hale P.C. 623, and 2 Hale P.C. 163 are to the same effect.

[206] See notes 7 and 8, on this page. In Ex parte Joseph Smith, note 8, this page, the court said at page 134, "It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel or advise, any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state, would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offense is perpetrated in Illinois, the only right of Missouri is to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it nations go to war and violate territory."

[207] State v. Whaley, 2 Del. 538 (1836).

[208] Ex parte Joseph Smith, 3 McLean 121 (C.C., D. of Ill., 1842); State v. Moore, 26 N.H. 448 (1853); State v. Chapin, 17 Ark. 561 (1856); Wixon v. People, 5 Parker's Cr. 120 (N.Y., 1861); Johns v. State, 19 Ind. 421 (1862); State v. Wyckoff, 31 N.J.L. 65

(1864); People agt. Hall, 57 How. Pr. 342 (N.Y., 1879). Venue decisions in accord: State v. Kinchin, 126 La. 39, 52 So. 185 (1910); People v. Hodges, 27 Cal. 340 (1865).

[209] U. S. v. King, 20 Dis. of Col. 404 (1892), misunderstanding a case in a state which had abolished accessories by statute; Claramont v. U. S., 26 F.(2d) 797 (C.C.A. 5, 1928), relying on a conspiracy case; King v. Godfrey, [1923] 1 K.B. 24, an extradition case in which the court assumed that the accessory who was at all times in England committed his crime in Switzerland where the principal crime was committed. Two earlier English decisions are inconclusive. In The Queen v. Bull, 1 Cox C.C. 281 (1845), S on the continent wrote B in England, inducing him to give an order for engraving a plate to an innocent engraver. Counsel for S argued that he was an accessory before the fact and not triable in England. Held: he was a principal on the ground that S and B acted jointly through an innocent agent. In The King v. De Marny, [1907] 1 K.B. 388, accused accepted from persons on the continent and published in his newspaper in England advertisements of obscene books and photographs which were sent through the mails to purchasers in England. He was indicted for procuring the publication of obscene matter. His counsel argued that the vendors could not be convicted of violating English law, and accused could not be convicted of aiding and abetting what was no crime. Held: vendors committed a crime in England. Venue cases in accord: Scully v. State, 39 Ala. 240 (1864); Commonwealth v. Pettes, 114 Mass. 307 (1873); Carlisle v. State, 31 Tex. Cr. 537 (1893); State v. Ellison, 49 W. Va. 70, 38 S.E. 574 (1901); Fondren v. State, 74 Tex. Cr. R. 552, 169 S.W. 411 (1914).

[210] State v. Felch, 58 N.H. 1 (1876). The Indiana statute makes the acts of the procurer while in Indiana criminal when the acts of the person procured are criminal both by the law of the state in which he performs them and by the law of Indiana. Cruthers v. State, 161 Ind. 139, 67 N.E. 930 (1903). Venue case applying venue statute: Baron v. People, 1 Parker's Cr. 246 (N.Y., 1851). Venue case applying venue statute to an accessory after the fact: Tully v. Commonwealth, 13 Bush. 142 (Ky., 1877).

[211] Edge v. State, 117 Tenn. 406, 99 S.W. 1098 (1906); Elliot v. State, 77 Fla. 611, 82 So. 139 (1919). Venue cases: State v. Ayres, 67 Tenn. 96 (1874); Commonwealth v. Parker, 108 Ky. 673, 57 S.W. 484 (1900).

[212] 3 Conn. 1 (1819).

[213] Notes 14 and 15, on this page.

[214] Barkhamstead v. Parsons, supra, p. 74, note 12; Harvey's Case, VIII American Jurist 69 (Boston Municipal Court, 1828); The Queen v. Bull, 1 Cox C.C. 281 (1845); People v. Adams, 3 Denio 190 (1846), aff'd, Adams v. People, 1 N.Y. 173 (1848); Reg. v. Taylor, 4 F. & F. 510 (1865); State v. Grady, 34 Conn. 118 (1867); State v. Chapman, 6 Nev. 632 (1871); Commonwealth v. White, 123 Mass. 430 (1877); Commonwealth v. Eggleston, 128 Mass. 408 (1880); Lindsey v. State, 38 Ohio St. 507 (1882); In re Cook, 49 F. 833 (C.C., E.D., Wis., 1892); U. S. v. King, 20 Dis. of Col. 404 (1892); State v. Morrow, 40 S.C. 221, 18 S.E. 853 (1893); Duckett v. State, 93 Ga. 415, 21 S.E. 73 (1893); Carter v.

State, 143 Ga. 632, 85 S.E. 884 (1915); People v. Sansom, 37 Cal. App. 435, 173 Pac. 1107 (1918); Latham v. U. S., 2 F.(2d) 208 (C.C.A. 4, 1924); State v. Devot, 66 Utah 319, 242 Pac. 395 (1925); Updike v. People, 92 Colo. 125, 18 P.(2d) 472 (1933). Venue cases in accord: People v. Rathbun, 21 Wend. 509 (N.Y., 1839); Bishop v. State, 30 Ala. 34 (1857); Reg. v. Cryer, 7 Cox C.C. 335 (1857); State v. Hamilton, 13 Nev. 386 (1878); State v. Barnett, 15 Ore. 77 (1887); State v. Lichliter, 95 Mo. 402 (1888); In re Palliser, 136 U.S. 257 (1890); People v. Wiley, 65 Hun 624, 10 Cr. R. 231, 20 N.Y. Supp. 445 (1892); State v. Hudson, 13 Mont. 112, 32 Pac. 413 (1893); Carlisle v. State, 31 Tex. Cr. 537, 21 S.W. 358 (1893); State v. Habib, 18 R.I. 558, 30 Atl. 462 (1894); Sikes v. State, 28 S.W. 688 (Tex. Cr. App., 1894); Commonwealth v. Karpowski, 167 Pa. 225, 31 Atl. 572 (1895); People v. Winant, 53 N.Y. Supp. 695 (1898); Pearce v. Territory, 11 Okla. 438, 68 Pac. 504 (1902); In re Stephenson, 67 Kan. 556, 73 Pac. 62 (1903); Weare Commission Co. v. People, 209 Ill. 528 (1904); Benson v. Henkel, 198 U.S. 1, 25 S. Ct. 569 (1905); Harges v. Parker, 85 S.W. 704 (1905); State v. Briggs, 74 Kan. 377, 86 Pac. 447 (1906); Pepper v. People, 75 Colo. 348, 225 Pac. 846 (1924).

[215] Jessup v. State, 44 Tex. Cr. 83, 68 S.W. 988 (1902). Venue cases in accord: Norris v. State, 25 Ohio St. 217 (1874); People v. Ballas, 55 Cal. App. 748, 204 Pac. 401 (1921).

[216] Barkhamstead v. Parsons, Commonwealth v. Eggleston, Duckett v. State, supra, note 14.

[217] All cases supra, p. 75, note 15, and all cases in note 14, except those mentioned in notes 16 and 18.

[218] State v. Grady, State v. Chapman, Latham v. U. S., State v. Hamilton, People v. Wiley, People v. Winant, Pearce v. Territory, Harges v. Parker, supra, p. 75, note 14. So held, although there was no statute abolishing accessories and making them liable as principles. U. S. v. King, State v. Morrow, Carlisle v. State, supra, p. 75, note 14.

[219] All cases supra, p. 75, note 15, and all cases supra, note 14, except those mentioned in note 20, post.

[220] State v. Grady, State v. Chapman, State v. Hamilton, supra, p. 75, note 14.

[221] Ballentine's Law Dictionary, Black's Law Dictionary.

[222] 268 Ill. 435, 109 N.E. 327 (1915). Accord: Caldwell v. Armour, 1 Pa. 545, 43 Atl. 517 (1899); Moredock v. Kirby, 118 Fed. 180 (C.C., W.D. of Ky., 1902); Cabanne v. Graf, 87 Minn. 510, 92 N.W. 461 (1902).

[223] 248 U.S. 289, 39 S. Ct. 97, 63 L. Ed. 250 (1918). Cf. Hess v. Pawlowski, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091, (1927), discussed in 18 St. Louis Law Review 202, note 27.

[224] See Cruthers v. State, 161 Ind. 139, 67 N.E. 930 (1903).

[225] Kansas City Steel Co. v. Arkansas, 269 U.S. 149, 46 S. Ct. 59, 70 L. Ed. 204 (1925). Cf. International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479 (1914). See generally the author's article on "Jurisdiction over Foreign Corporations," 18 St. Louis Law Review 195.

[226] *Mail:* Updike v. People, 92 Colo. 125, 18 P.(2d) 472 (1933). Venue cases: People v. Rathbun, 21 Wend. 509 (N.Y., 1839); Reg. v. Cryer, 7 Cox C.C. 335 (1857); State v. Hudson, 13 Mont. 112, 32 Pac. 413 (1893); State v. Briggs, 74 Kan. 377, 86 Pac. 447 (1906); Jessup v. State, 44 Tex. Cr. 83, 68 S.W. 988 (1902). Cf. In re Palliser, 136 U.S. 257 (1890); Benson v. Henkel, 198 U.S. 1, 25 S. Ct. 569, 49 L. Ed. 919 (1905), where the venue was held to be in the district where the letter was received because the effect was produced there. *Telegraph:* State v. Devot, 66 Utah 319, 242 Pac. 395 (1925). *Railroads*, venue cases: Norris v. State, 25 Ohio St. 217 (1874); State v. Lichliter, 95 Mo. 402, 8 S.W. 720 (1888); State v. Habib, 18 R.I. 558, 30 Atl. 462 (1894); Commonwealth v. Karpowski, 167 Pa. 225, 31 Atl. 572 (1895); In re Stephenson, 67 Kan. 556, 73 Pac. 62 (1903). *Express company*, venue case: State v. Barnett, 15 Ore. 77, 14 Pac. 737 (1887).

[227] But see State v. Devot, supra, dissenting opinion.

[228] See carrier cases note 26 immediately supra.

[229] Williston on Sales (2d Ed.), secs. 259, 261, 278.

[230] Bates v. State, 124 Wis. 612, 103 N.W. 251 (1905). U. S. v. Wright, Fed. Cas. No. 16,773, 2 Cranch C.C. 296 (C.C., D.C., 1822); Perkin's Case, II Lewin's C.C. 150 (1826); U. S. v. Staats, 8 How. 41 (U.S., 1850); U. S. v. Bickford, Fed. Cas. No. 14,591 (C.C., D. Vt., 1859).

[231] The cases are collected and discussed in 18 St. Louis Law Review at 219. Minnesota Commercial Men's Association v. Benn, 261 U.S. 140, 43 S. Ct. 293, 67 L. Ed. 573 (1922), is the leading case.

[232] 1 Salk. 174.

[233] 4 East 164 (1803).

[234] I.e., agents.

[235] Commonwealth v. Gillespie, 7 Serg. & Rawle 469 (Pa., 1822); Commonwealth v. Corlies, 3 Brewster 575 (Pa., 1869); Noyes v. State, 41 N.J.L. 418 (1879) aff'd 43 N.J.L. 672; International Harvester Co. of America v. Commonwealth, 124 Ky. 543, 99 S.W. 637 (1907); International Harvester Co. of America v. Commonwealth, 137 Ky. 668, 126 S.W. 352 (1910); International Harvester Co. of America v. Commonwealth, 144 Ky. 403, 138 S.W. 248 (1911); U. S v. Linton, 223 Fed. 677 (D.C., W.D. of Wash., N.D., 1915); State v Faunce, 91 N.J.L. 333, 102 Atl. 147 (1917); Ford et al. v. U. S., 273 U.S. 593, 47 St. Ct. 531, 71 L. Ed. 793 (1927); U. S. v. Downing, 51 F.(2d) 1030 (C.C.A. 2,

1931). Venue cases: People v. Arnold, 46 Mich. 268 (1881); Raleigh & Heidenheimer Bros. v. Cook, 60 Tex. 438 (1883); U. S. v. Newton, 52 Fed. 275 (D.C., S.D. of Ia., 1892); Insurance Cos. v. State, 75 Mass. 24, 22 So. 99 (1897); Hyde v. Shine, 199 U.S. 62, 25 S. Ct. 760, 50 L. Ed. 90 (1904); People v. Murray, 95 N.Y. Supp. 107 (1905); Arnold v. Weil, 157 Fed. 429 (D.C., E.D. of Wis., 1907); Hughes v. State, 29 Ohio C.C. 237 (1907); Robinson v. U. S., 172 Fed. 105 (C.C.A, 8, 1909); U. S. v. Wells, 192 Fed. 870 (C.C.A. 2, 1912); Hyde & Schneider v. U. S., 225 U.S. 347, 32 S. Ct. 793, 56 L. Ed. 1114 (1912); Brown v. Elliot, 225 U.S. 392, 32 S. Ct. 812, 56 L. Ed. 1136 (1912); State v. Mardesich, 79 Wash. 204, 140 Pac. 573 (1914); Grayson v. U. S., 272 Fed. 553 (C.C.A. 6, 1921); Lucas v. U. S., 275 Fed. 405 (C.C.A. 8, 1921). See also dicta in People v. Mather, 4 Wend. 229, 259 (N.Y., 1830). Of course, the accused cannot be tried in a jurisdiction where neither the conspiracy or any overt act toward carrying it out occurs. Rex. v. O'Gorman, 18 Ont. Law 427 (1909), a venue case.

[236] In Tellinghast v. Richards, 225 Fed. 226 (D.C., D. of R.I., 1915), the accused was arrested in Rhode Island for removal to New York, where he had been indicted for conspiracy to avoid the manufacturer's tax on oleomargarine. The oleomargarine was manufactured in Rhode Island, and the conspiracy occurred there. Oleo oil was purchased in New York. In habeas corpus proceedings the prisoner was ordered released on the ground that the act of purchasing oleo oil was not done to carry out the conspiracy and had no relation to the crime.

[237] The King v. Brisac and Scott, Commonwealth v. Gillespie, Noyes v. State, State v. Faunce, People v. Murray, U. S. v. Wells, supra.

[238] International Harvester Co. of America v. Commonwealth, 137 Ky., U. S. v. Linton, Ford v. U. S., supra.

[239] 152 U.S. 539, 14 S. Ct. 680, 38 L. Ed. 545 (1894).

[240] 18 U.S.C.A., sec. 88.

[241] Thompson v. State, 106 Ala. 67, 17 So. 512 (1894); Rex v. Bachrack, 28 Ont. Law 32 (1913). Venue cases: State v. Nugent, 77 N.J.L. 84, 71 Atl. 485 (1908); Hass v. Henkel, 216 U.S., 462, 30 S. Ct. 249, 54 L. Ed. 569 (1910); Baker v. U. S., 21 P.(2d) 903 (C.C.A. 4, 1927). But conspiracy in one state to do what is lawful in another does not violate the laws of the first, American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1908).

[242] 225 U.S. 347, supra, p. 82, note 35. This is a venue case, since only the law of the United States was involved. The court divided in the same way in Brown v. Elliot, notes 44, and 35.

[243] Hass v. Henkel, notes 45, and 41; Hyde v. Shine, notes 44, and 35, p. 82.

[244] Hyde v. Shine, 199 U.S. 62; Brown v. Elliot, 225 U.S. 392; U. S. v. Wells, 192 Fed. 870; supra, p. 82, note 35.

[245] Hass v. Henkel, 216 U.S. 462, supra, note 41.

[246] This is discussed supra, p. 50.

[247] [1909] V.L.R. 379. See also U. S. v. Worall, Fed. Cas. No. 16,766 (1798). There are two venue cases holding that the attempt is triable in the county where an effect would have been produced if the attempt had been successful. Griffin v. State, 26 Ga. 493 (1858); Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899). See 1 Wharton on Criminal Law, 8th Ed., sec. 195, 12th Ed., sec. 234. In People v. Grubb, 24 Cal. App. 604, it was held that the venue was in either place under a particular venue statute.

[248] Esser's Case, 2 East P.C. 1125 (1767); The King agt. Girwood, 1 Leach 142 (1776). Accord: People v. Griffin, 2 Barb. 427 (N.Y., 1848); Commonwealth v. Morton, 140 Ky. 628, 131 S.W. 506 (1910). Contra: Landa v. State, 26 Tex. App. 580 (1888).

[249] 6 East 1412; not a venue case if Ireland was governed by separate laws as claimed by the accused.

[250] The accused was afterwards convicted. See 7 East 65.

[251] 1 Camp. 215.

[252] 2 Camp. 505.

[253] 4 B. & Ald. 95 (1820).

[254] See 3 B. & Ald. 717 for the first part of counsel's argument.

[255] Best, J., said at page 126, "It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word publication.... So in the case of libel publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus poenitentiae, his offense is complete, all that depends upon him is consummated and from that moment, upon every principle of common sense he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy; who is the publisher, the boy who perhaps can not read or is ignorant of its contents, or the man who has put it up in the envelope? The boy who carries it is merely an innocent instrument; there can be no other publisher but the person who sent it, and who publishes it when he delivers to the boy. If the sending of a letter by the post be not a publication in the county from whence it is sent, how is a libeler to be punished who sends his libel by the post to some foreign county for circulation? The libeler will not go to the foreign country that he may be punished there.

If the sending it from England be not a publication (as it is contended at the bar), can it be insisted when the libel is completed by publication that such a libeler can nowhere be punished?"

[256] See State v. Berry, 112 Maine 501, 92 Atl. 619 (1914), a venue case holding accused could not be tried for "printing" in county where libel circulated when printing was in another county.

[257] Commonwealth v. Blanding, 3 Pick. 304 (Mass., 1825); State v. Piver, 74 Wash. 96, 132 Pac. 858 (1913). See also State v. Kountz, 12 Mo. App. 511 (1882),. where accused wrote an article in Missouri which he sent to a paper in Pennsylvania. It was printed in the paper and a copy sent to a person in Missouri as requested by accused. Accused was indicted in Missouri for "causing to be published" and was convicted. The conviction was sustained on the ground that the paper was published in Missouri rather than on the fact that accused was there when he "caused" the libel to be published. Venue cases in accord: Belo & Co. v. Wren, 63 Tex. 686 (1884); State ex rel. Taubman v. Huston, 19 S.D. 644, 104 N.W. 451 (1905); Alsup v. State, 91 Tex. Cr. 224, 238 S.W. 667 (1922).

[258] Notes 59 and 60, immediately following.

[259] Commonwealth v. Dorrance, 14 Phil. 671 (1879); People v. Bihler, 154 App. Div. 618, 139 N.Y. Supp. 819 (1913). See also the headnote to Mills v. State, 18 Neb. 575 (1886). Venue cases in accord applying specific statutes or constitutional provisions: Shields v. Commonwealth, 55 S.W. 881 (C.A. Ky., 1900); People v. Wakoa, 33 Cal. App. 454, 165 Pac. 720 (1917).

[260] U. S. v. Smith, 173 Fed. 227 (D.C., D. Ind., 1909). Venue case: State v. Moore, 140 La. 281, 72 So. 965 (1916). See also State v. Boss, 97 Maine 484, 54 Atl. 1113 (1903), where the crime charged was "publishing" a newspaper containing advertisements for the sale of intoxicating liquor.

[261] See quotation from the opinion of Best, J., in The King v. Burdett, note 55 supra, p. 87, and Commonwealth v. Dorrance, supra, note 59.

[262] See State ex rel. Taubman v. Huston, supra, p. 88, note 57.

[263] Commonwealth v. Dorrance, People v. Bihler, supra, note 59.

[264] See the cases cited supra, p. 88, note 57.

[265] Sec. 245 of the New York act provides, "To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself." Applied in U. S. v. Press Publishing Co., 219 U.S. 1, 31 S. Ct. 212, 55 L. Ed. 65 (1910). Sec. 2426 of the Washington statute provides, "Any method by which matter

charged as libelous may be communicated to another shall be deemed a publication thereof." Applied in State v. Piver, 74 Wash. 96, 132 Pac. 858 (1913).

[266] Belo & Co. v. Wren, 63 Tex. 686 (1884), supra, p. 88, note 57.

[267] Cf. supra, p. 61, note 67.

[268] U. S. v. Smith, State v. Moore, supra, p. 89, note 60.

[269] State ex rel. Taubman v. Huston, supra, p. 88, note 57. See also State v. Piver, in the same note 57. In The King agt. Carlisle, 1 Chitty 451 (1819), it was held that every copy of the same libel sold by the defendant was a separate publication, for each of which he was liable to be prosecuted criminally.

[270] 1 Esp. 62.

[271] 4 B. & Ald. 95 at 179.

[272] No report of this case has been found.

[273] 30 Geo. II ch. 24 (1757).

[274] Notes 75 and 76, immediately following.

[275] Cases in which the accused was personally in both states: Commonwealth v. Van Tuyl, 1 Met. 1 (Ky., 1858); The Queen v. Ellis, [1899] 1 Q.B. 230; State v. Marshall, 77 Vt. 262, 59 Atl. 916 (1905). Venue case in accord: State v. House, 55 Iowa 466 (1881). Cases in which the property was said to have been obtained in the state although the accused was never there: People v. Adams, 3 Denio 190 (1846), aff'd 1 N.Y. 173 (1848); H. M. Advocate v. Witherington, 8 Scotch Sess. Cas. 41 (Rettie, 1881); The Queen v. Nillins, 53 L.J.M.C. 157 (1884); State v. Devot, 66 Utah 319, 242 Pac. 395 (1925); Updike v. People, 92 Colo. 125, 18 P.(2d) 472 (1933). Venue cases in accord: State v. Lichliter, 95 Mo. 402 (1888); Commonwealth v. Karpowski, 167 Pa. 225, 31 Atl. 572 (1895); In re Stephenson, 67 Kan. 556, 73 Pac. 62 (1903); State v. Briggs, 74 Kan. 377, 86 Pac. 447 (1906); State v. Roy, 155 La. 238, 99 So. 205 (1924); Pepper v. People, 75 Colo. 348, 225 Pac. 846 (1924).

[276] Case in which the accused was personally in both states: Stewart v. Jessup, 51 Ind. 413 (1875). Cases in which the property was said to have been obtained in another state although the accused was never there: Reg. v. Jacobi and Hiller, 46 L.T. 595, note; State v. Shaeffer, 89 Mo. 271 (1886); Bates v. State, 124 Wis. 612, 103 N.W. 251 (1905). Venue cases in accord: Norris v. State, 25 Ohio St. 217 (1874); Connor v. State, 29 Fla. 455, 10 So. 891 (1892); Graham v. People, 181 Ill. 477, 55 N.E. 179 (1899).

[277] Express statement in Stewart v. Jessup, note 76, immediately supra.

[278] In The Queen v. Ellis, supra, p. 92, note 75, Willes, J., said at page 237, "The making of false pretenses is antecedent to and not a part of the obtaining the goods. The gist and kernel of the offense is the obtaining of the goods by improper means, not in using the improper means whereby goods were obtained and there was therefore an entire offense within the one country though the circumstances which stamped it with illegality took place beyond the jurisdiction ... it can make no difference that the material circumstance which stamped an otherwise innocent transaction with the character of crime took place outside the jurisdiction of the English courts. It is ... reduced to a mere piece of evidence necessary to constitute the offense."

[279] People v. Zayas, 217 N.Y. 78, 111 N.E. 465 (1916); State v. Sheehan, 33 Idaho 553, 196 Pac. 532 (1921); People v. Chapman, 55 Cal. App. 192, 203 Pac. 126 (1921); People v. Lakenan, 61 Cal. App. 368, 214 Pac. 1021 (1923). People v. Zayas overrules People v. Arnstein, 211 N.Y. 585, 105 N.E. 814 (1914), where the court interpreted the statute as abolishing the rule against enforcing the criminal laws of other states as to crimes partly committed in the state and that therefore the accused's act must be shown to be criminal by the foreign law and by the local law. Under some venue statutes the venue may be in either county. Reg. v. Leech, 7 Cox C.C. 100 (1856); State v. Gibson, 132 Iowa 53, 106 N.W. 270 (1906).

[280] See note 278, on this page.

[281] People v. Chapman, supra, p. 93, note 79.

[282] See Penal Code of California 1931, sec. 793, and Idaho Code 1932, sec. 19-315, for such provisions.

[283] Note 75, p. 92, except the first four cases, and note 76, p. 92, except the first case.

[284] Section I B 3 e (V), Mail, Telegraph, and Carrier.

[285] Reg. v. Kilham, State v. Anderson, Canter v. State, People v. Rae, State v. Loser, notes 86 and 87, immediately post.

[286] Reg. v. Kilham, 11 Cox C.C. 561 (1870); State v. Anderson, 47 Iowa 142 (1877); Canter v. State, 75 Tenn. 349 (1881); State v. Loser, 132 Iowa 419, 104 N.W. 337 (1906).

[287] Cline v. State, 43 Tex. 494 (1875); Miller & Smith v. Commonwealth, 78 Ky. 15 (1879); People v. Rae, 66 Cal. 423 (1885); People v. Shaw, 57 Mich. 403 (1885); People v. Shaughnessy, 110 Cal. 598, 43 Pac. 2 (1895); State v. Loser, note 86, immediately supra.

[288] There are several cases holding that the accused is subject to the law of the state where an effect is produced. H. M. Advocate v. Allan, 2 Couper 402 (Scotland, 1872); Strassheim v. Dailey, 221 U.S. 280, 31 S. Ct. 558, 55 L. Ed. 735 (1911).

[289] State v. Thatcher, 35 N.J.L. 445 (1872); State v. Porter, 75 Mo. 171 (1881); State v. Holmes, 98 Kan. 174, 157 Pac. 412 (1916). Contra: Rex v. Danger, Dearsley & Bell 307 (1857). See also People v. Stone, 9 Wend. 182 (N.Y., 1832). and L.R.A. 1916E 1106, note.

[290] Tarbox v. State, 38 Ohio St. 581 (1883).

[291] The place of trial depended upon the place where the instrument was obtained in Commonwealth v. Wood, 142 Mass. 459 (1886); Updike v. People, 92 Colo. 125, 18 P.(2d) 472 (1933). Venue case: State v. Briggs, 74 Kan. 377, 86 Pac. 447 (1906). It was held to depend upon the place where money was obtained upon the instrument in The Queen v. Holmes, 12 Q.B. Div. 23 (1883); Bates v. State, 124 Wis. 612, 103 N.W. 251 (1905); State v. Smith, 162 Iowa 336, 144 N.W. 32 (1913). Venue case: People v. Steffner, 67 Cal. App. 1, 227 Pac. 690 (1924). In Updike v. People, supra, the check was mailed in Colorado to accused in Idaho, who obtained the money upon it when he sold it to his bank there. Accused was tried in Colorado for obtaining: the money, and the court held he could be tried there because the check was obtained there. Three judges dissented on the ground that he was not indicted for obtaining the check.

[292] Note 90, supra.

[293] U. S. v. Watkins, Fed. Cas. No. 16,649 (1829); U. S. v. Plympton, Fed. Cas. No. 16,057 (1833).

[294] Reg. v. Garrett, 6 Cox C.C. 260 (1853); In re Carr and Dillon, 28 Kan. 1 (1882); State v. Smith, 162 Iowa 336, 144 N.W. 32 (1913).

[295] Note 2, post, p. 98.

[296] Notes 97, 98, 99, and 1, immediately following.

[297] Note 99 post, p. 98. Venue case in accord, State v. Swank, 99 Ore. 571, 195 Pac. 168 (1921).

[298] In re Carr and Dillon, 28 Kan. 1 (1882), and case in note 1, p. 98, post. Venue case in accord: Thulemeyer v. State, 34 Tex. Cr. 619, 31 S.W. 659 (1895).

[299] People agt. Flanders, 18 Johns. 164 (N.Y., 1820). See Allston v. State, 134 Tenn. 604, 185 S.W. 706 (1915), for dicta to this effect in a venue case.

[[300] – No note for this number.]

[301] Newby v. State, 75 Neb. 33, 105 N.W. 1099 (1905).

[302] 13 Tex. App. 289 (1882). See also Ex parte Rogers, 10 Tex. App. 655 (1881), where the accused, while in Texas, procured another to forge a deed to Texas land. The

accomplice forged the deed while in Illinois. The accused assisted him by procuring genuine signatures for the accomplice to copy, and by recording the deed in Texas. He was indicted for forgery in Texas and convicted. Had he been indicted for being an accessory before the fact, Texas law would clearly have been applicable. The court sustained jurisdiction on the ground that there was a conspiracy and an overt act in the state, although accused was not indicted for that. Cf. The Lady Newman & Shyriff's Case, 3 Leonard 170 (1587).

[303] Compare note 13, supra, p. 6.

[304] See note 14, supra, p. 6.

[305] U. S. v. Britton, Fed. Cas. No. 14,650 (C.C., D. Mass., 1822). Venue cases: Spencer's Case, 2 Leigh 751 (Va., 1830); State v. Morgan, 2 D. & B. 348, 19 Maine 332 (1837); Bland v. People, 4 Ill. 364 (1842); State v. Poindexter, 23 W. Va. 805 (1884); State v. Forbes, 75 N.H. 306, 73 Atl. 929 (1909). Contra, venue case: Commonwealth v. Fagan, 2 Pa. Dist. 401 (1893). Evidence that an accomplice uttered the forged instrument in the county not sufficient to justify the jury in inferring that the accused forged it there. The King v. Parkes and Brown, 2 Leach 776 (1796). Evidence that the instrument was uttered in the county or that the accused had possession of it there, is not sufficient to justify the inference that the accused forged it there when the name of another county appeared in the date line or the instrument bore a date when the accused was shown to have been in another county. Rex v. Crocker, 2 Bos. & P. (N.R.) 87 (1805); Commonwealth v. Parmenter, 5 Pick. 279 (Mass., 1827).

[306] Notes 7, 8, 9, and 10, immediately following, and the following cases: McGuire v. State, 37 Ala. 161 (1861); People v. Ballas, 55 Cal. App. 748, 204 Pac. 401 (1921).

[307] Perkin's Case, 2 Lewin's C.C. 150 (Lancaster Summer Assizes, 1826), a venue case. In People v. Sansom, 37 Cal. App. 435, 173 Pac. 1107 (1918), the accused in Mexico sent the instrument to his bank in California, which sent it to a bank in Arizona for collection. The court held that the instrument was uttered when mailed by the bank in California which was the agent of the accused.

[308] U. S. v. Wright, Fed. Cas. No. 16,773, 2 Cranch C.C. 296 (1822).

[309] Reg. v. Taylor, 4 P. & F. 510 (1865); Lindsey v. State, 38 Ohio St. 507 (1882). Venue cases: Harvey's Case, VIII American Jurist 69 (Boston Municipal Court, 1828); People v. Rathbun, 21 Wend. 509 (1839); Bishop v. State, 30 Ala. 34 (1857); Fonte v. State, 15 Lea 712 (Tenn., 1885); State v. Hudson, 13 Mont. 112 (1893).

[310] Jessup v. State, 44 Tex. Cr. 83, 68 S.W. 988 (1902). See also Commonwealth v. Fagan, 2 Pa. Dist. 401 (1893).

[311] Notes 57, 58, 59, and 60, supra, pp. 88 and 89.

[312] Note 13, immediately post.

[313] People v. Merrill, 2 Parker's Crim. 590 (N.Y., 1855); State v. Julien, 48 Iowa 445 (1878); O'Bannion v. Commonwealth, 113 S.W. 907 (Ky. App., 1908). Venue cases in accord: Roberson v. State, 3 Tex. App. 502 (1878); Duff Jr. v. Commonwealth, 24 Ky. Law Rep. 201 (1902); Davis v. State, 7 Ga. App. 332, 66 S.E. 960 (1909); Cody v. State, 69 Ga. 743 (1882).

In Huddleston v. Commonwealth, 171 Ky. 310, 188 S.W. 398 (1916), the accused was held subject to Kentucky law and triable in Kentucky for the violation of a statute prohibiting sales, when the sale was made in Tennessee on the ground that otherwise the law could be evaded by soliciting sales in Kentucky and stepping across the line to complete the transaction. The decision is obviously unsound, since the legislature could have made the solicitation of sales in Kentucky a crime.

[314] State v. Hughes, 22 W. Va. 743 (1883); Brechwold v. People, 21 Ill. App. 213 (1886); People v. Nogueras, 23 Porto Rico 309 (1915); Commonwealth v. Weaver, 10 Pa Dist. 533 (1901), all venue cases. In Newsome v. State, 1 Ga. App. 790, 58 S.E. 71 (1907), where the statute made it a crime to "sell or cause to be sold or *furnished"* it was held that where intoxicating liquor was mailed in one county to a minor in another, the accused was triable in both, in the county where it was mailed because title would have passed and the sale occurred there if the sale was valid and in the county where received by the minor because it was "furnished" there.

[315] Hopson *v*. State, 116 Ga. 90, 42 S.E. 412 (1902), a venue case.

[316] Delamater v. South Dakota, 205 U.S. 93, 27 S. Ct. 447, 51 L. Ed. 724 (1907). Venue cases contra: Ex parte Anixter, 166 Cal. 762, 138 Pac. 353 (1914); Golden & Co. v. Justice Court, 23 Cal. App. 778, 140 Pac. 49 (1914).

[317] Rose v. State, 4 Ga. App. 588, 62 S.E. 117 (1908). Venue cases in accord: Bissman v. State, 54 Ohio St. 242, 43 N.E. 164 (1896); Hayner v. State, 83 Ohio St. 178, 93 N.E. 900 (1910); Golden & Co. v. Justice Court, 23 Cal. App. 778, 140 Pac. 49 (1914).

[318] State v. Rice, 43 S.C. 200, 20 S.E. 986 (1894). Venue case in accord: State v. Perry, 87 S.C. 535, 70 S.E. 304 (1910). Cf. Whaley v. Lawton, 57 S.C. 256, 263 (1899).

[319] Anonymous Case, Year Book 7 Hen. IV 43, pl. 9 (1406). Translated in Beale's Cases on Criminal Law 595.

[320] Anonymous Case, Year Book 4 Hen. VII 5, pl. 1 (1489). Translated in Beale's Cases on Criminal Law 596.

[321] 1 Hale P.C. 507, 508 (1678). See also 2 Hale P.C. 163. Hale was undoubtedly influenced by dicta in Gawen & Hussee v Gibbs, 1 Dyer 38a at 39a and 40a (1538), and

Bulwer's Case, 7 Co. la at 2a (1584-7), which dealt with appeal of larceny and not with indictment.

[322] 4 Blackstone's Commentaries 305, 1 Hawkins P.C. c. 19, sec 52; 2 East P.C. 771-2.

[323] Rex v. County, 2 Russel on Crimes, 9th Amer. Ed 330 (1816); Parkin's Case, 1 Moody 45 (1824); The Queen v. Rogers, L.R. 1 C.C.R. 136 (1868), where the venue was based on the fact that the goods were afterwards brought into the county by an agent of the accused; Griffin v. Taylor, L.R. 2 C.P.D. 194, 202. The rule was held not to apply where the stolen property was taken into a county by the thief after his arrest in the company of and with the consent of the constable who had charge of him. Rex v. Simmonds, 1 Moody 408 (1834).

[324] Commonwealth v. DeWitt, 10 Mass. 154 (1813); Commonwealth v. Rand, 7 Metc. 475 (1844); Commonwealth v. Hayes, 140 Mass 366 (1886); Commonwealth v. Rubin, 165 Mass. 453, 43 N.E. 200 (1896); Commonwealth v. Cousins, 2 Leigh 708 (Va., 1830); State v. Douglas, 17 Maine 193 (1840); Haskins v. People, 16 N.Y. 344 (1857); Myers v. People, 26 Ill. 173 (1861); Aaron & Ely v. State, 39 Ala. 684 (1866); Hurt v. State, 26 Ind 106 (1866), State v. Margerum & Seymour, 56 Tenn. 362 (1878); State v. Lillard, 59 Iowa 479 (1882); Massie v. Commonwealth, 90 Ky. 485 (1890); Thomas v. Commonwealth, 15 S.W. 861 (Ky. App., 1891); Johnson v. Commonwealth, 154 Ky. 742, 159 S.W. 560 (1913); State v. McCoy, 42 La. Ann. 228 (1890). Contra: State v. Groves, 44 N C. 191 (1853).

Many states have statutes providing that the venue may be laid in either the county in which the original taking occurred or in any county into which the property is brought.

[325] Tippins v. State, 14 Ga. 422 (1854); McElmurray v. State, 21 Tex. App. 691, 2 S.W. 892 (1886). See also State v. Brown, 1 Haywood 100 (N.C., 1794) and Hurlburt v. State, 52 Neb. 428, 72 N.W. 471 (1897). Pearce v. State, 98 S.W. 861 (Tex. Cr., 1906) and People v. Carter, 72 Misc. 631 (N.Y., 1911), hold that there is only one crime. Cf. Roth v. State, 10 Tex. App. 27 (1881), and Clark v. State, 23 Tex. App. 612, 5 S.W. 178 (1887), where it was held that the character of the crime, whether felony or misdemeanor, depended on the value of the property brought into the county and not on the value of the property originally taken.

[326] Ryan & M. 295 (1825).

[327] Stated in The Case of the Admiralty, 13 Co. 51, 53.

[328] 2 East 772, c. 16, sec. 156, Carlisle Summer Assizes.

[329] 13 Geo. III, c. 31, sec. 4 (1773). Reenacted 7 Geo. IV, c. 29, sec. 76 (1827). Applied to all parts of the United Kingdom 24 & 25 Victoria, c. 96, sec. 114 (1861, 1862).

[330] Rex v. Prowes, 1 Moody 349 (1832); Reg. v. Madge, 9 Car. & P. 29 (1839); Reg. v. Debrueill, 11 Cox C.C. 207 (1861); Reg. v. Carr, 15 Cox C.C. 131n (1877).

[331] Rex v. Peas, 1 Root 69 (Conn., 1789); Cummings v. State, 1 Harris & Johnson 340 (Md., 1802); Worthington v. State, 58 Md. 403 (1882); Commonwealth v. Cullins, 1 Mass. 116 (1804); Commonwealth v. Andrews, 2 Mass. 14 (1806); Commonwealth v. Holder, 75 Mass. 7 (1857); Commonwealth v. White, 123 Mass. 430 (1877); U. S. v. Tolson, 1 Cranch 269, Fed. Cas. No. 16,530 (C.C., Dist. of Col., 1803); U. S. v. Hankey, 2 Cranch 65 Fed. Cas. No. 15,328 (C.C., Dist. of Col., 1812) (both cases overruled Brown v. U. S , 35 App. Cas. 548, Ann. Cas. 1912A 388 (Dist. of Col., 1910)); State v. Ellis, 3 Conn. 185 (1819); State v. Bartlett, 11 Vt. 650 (1839); State v. Morrill, 68 Vt. 60, 33 Atl. 1070 (1896); Hamilton v. State, 11 Ohio 435 (1842); State v. Underwood, 49 Maine 181 (1858); Watson v. State, 36 Miss. 593 (1859); State v. Bennett, 14 Iowa 479 (1863); State v. Leander, 2 Ore. 115 (1864); Stinson v. People, 43 Ill. 397 (1867); State v. Newman, 9 Nev. 48 (1873); State v. Bouton, 26 Nev. 34 (1900); State v. Hill, 19 S.C. 435 (1883).

[332] State v. Brown, 1 Haywood 100 (N.C., 1794); State v. Buchanan, 130 N.C. 660, 41 S.E. 107 (1902); People v. Gardner, 2 John. 477 (N.Y., 1807); People v. Schenk, 2 John. 479 (1807); Simmons v. Commonwealth, 5 Binney 617 (Pa., 1813); Simpson v. State, 23 Tenn. 455 (1844); Commonwealth v. Uprichard, 69 Mass. 434 (1855); Beal v. State, 15 Ind. 378 (1860); State v. Le Blanch, 31 N.J.L. 82 (1864); People v. Loughbridge, 1 Neb. 11 (1871); Van Buren v. State, 65 Neb. 223, 91 N.W. 201 (1902); Stanley v. State, 24 Ohio St. 166 (1873); Lee v. State, 64 Ga. 204 (1879); Territory v. Hefley, 4 Ariz. 74, 33 Pac. 618 (1893); Strouther v. Commonwealth, 92 Va. 789, 22 S.E. 852 (1895); Brown v. U. S., 35 App. Cas. 548, Ann. Cas. 1912A 388 (Dist. of Col., 1910).

[333] 1 Root 69 (Conn ).

[334] 1 Haywood 100 (N.C.).

[335] Cummings v. State, 1 Harris & Johnson 340 (Md., 1802).

[336] Commonwealth v. Cullins, 1 Mass. 116 (1804).

[337] U. S. v. Tolson, 1 Cranch 269, Fed. Cas. No. 16,530 (Dist. of Col. The date of this case is reported as 1803 but Commonwealth v. Cullins, supra, reported to have been decided in 1804, is relied upon). Overruled in Brown v. U. S., 35 App. Cas. 548, Ann. Cas. 1912A 388 (Dist. of Col., 1910).

[338] 3 Conn. 185 (1819).

[339] Foreign law must be proved: State v. Morales, 21 Tex. 298 (1858); Watson v. State, 36 Miss. 593 (1859). In the latter the court upheld the trial court in admitting evidence of the accused's relation to the goods in Alabama on the ground that it was admissible to show the intention with which the goods were brought into Mississippi. The court also

regarded the original taking in Alabama as a violation of "natural law." See also Rice, J., dissenting in State v. Underwood, 49 Maine 181 (1858). Local law governs: People v. Staples, 91 Cal. 23 (1891); State v. Kief, 12 Mont. 92, 29 Pac. 654 (1892).

[340] Commonwealth v. Uprichard, 69 Mass. 434 (1855); Stanley v. State, 24 Ohio St. 166 (1873).

[341] See Mack v. People, 82 N.Y. 235 (1880), a venue case.

[342] Applied in Commonwealth v. Gaines, 2 Va. Cases 172 (1819) (the statute was immediately repealed, see Strouther v. Commonwealth, 92 Va. 789, 790); Ferrill & Bullard v. Commonwealth, 62 Ky. 154 (1864); Sullivan v. State, 109 Ark. 407, 160 S.W. 239 (1913); Barclay & Brummelt v. U. S., 11 Okla. 503, 69 Pac. 798 (1902). In Foster v. State, 62 Fla. 52, 56 So. 945 (1911), the court applied a statute authorizing trial of an accused for a crime committed elsewhere which is consummated in the state.

[343] State v. Seay, 3 Stewart 123 (Ala., 1830); People v. Burke, 11 Wend. 129 (N.Y., 1834); Hemmaker v. State, 12 Mo. 295 (1849); Morrissey v. People, 11 Mich. 327 (1863) (court equally divided); People v. Williams, 24 Mich. 157 (1871); McFarland v. State, 4 Kan. 57 (1866); State v. Butler, 67 Mo. 59 (1877); State v. Goldfarb, 97 N.J.L. 489, 117 Atl. 698 (1922). Contra: Territory v. Hefley, 4 Ariz. 74, 33 Pac. 618 (1893).

[344] Note 39, supra, p. 110.

[345] Note 12, supra, p. 5.

[346] Note 14, supra, p. 6.

[347] Gawen & Hussee v. Gibbs, 1 Dyer 38a, 39a.

[348] Bulwer's Case, 7 Co. 1a at 2a.

[349] Dilligent research has failed to reveal such a case.

[350] "If A. robs B. in the county of C. and carries the goods into the county of D., A. cannot be indicted of robbery in the county of D. because the robbery was in another county"; 2 Hale P.C. 163 (1678).

[351] "but if he be indicted of robbery, it must be in the county of C. where the force and putting in fear was," 1 Hale P.C. 507, 508 (1678).

[352] The King v. Thomas, 2 Leach 634, 2 East P.C. 605 (1794); Rex. v. Thomsen, Hil. T., 1795, m. s. Bayley, J., 2 Russel on Crimes, 9th Amer. Ed. 328.

[353] Smith v. State, 55 Ala. 59 (1876); Gage v. State, 22 Tex. App. 123 (1886).

[354] See note 55, immediately post. Contra: Powell v. State, 52 Wis. 217 (1881). See also People v. Scott, 74 Cal. 94, 15 Pac. 384 (1887).

[355] State v. McGraw, 87 Mo. 161 (1885); State v. Carroll, 55 Wash. 588, 104 Pac. 814 (1909); Martin v. State, 176 Ind. 317, 95 N.E. 1001 (1911).

[356] See Hale, op. cit.; Haskins v. People, 16 N.Y. 344 (1857). In the latter the court said, "At common law the burglary could only have been prosecuted in the county where it was committed, but when accompanied with larceny, the latter could be prosecuted in any county into which the prisoner took the stolen property."

[357] 65 W. Va. 97, 63 S.E. 758 (1908). See Sweat et al. v. State, 90 Ga. 315, 17 S.E. 273 (1892), sustaining venue in Ware County, where the victim gave defendants fifty dollars for his release after he had been kidnapped in Pearce County.

[358] Supra, note 57, p. 115.

[359] Supra, I B 3 1 Larceny.

[360] 4 Bl. Com. 219.

[361] Turbet v. Dassigney, 2 Show. 221, Sir T. Raym. 474 (1683); The King and Willmore, Skin. 47 (1682-1683). In Rex v. Baily, Comb. 10 (1685-1686), also cited, the facts are not reported.

[362] 3 Texas 282 (1848).

[363] 8 N.H. 550 (1837).

[364] See Ex parte McDonald, 50 Mont. 348, 146 Pac. 942 (1915). For a different definition see II Bishop on Criminal Law (9th Ed.), sec. 756a.

[365] 2 Harrington 538 (Del., 1836).

[366] Supra, pp. 72, notes 6, 7, and 8; but see entire discussion under "Crime by Agent," I B 3 e.

[367] 1 Fed. 676 (C.C., S.D., N.Y., 1880).

[368] 29 Mont. 523, 75 Pac. 201 (1904).

[369] Notes 70 and 71, immediately post.

[370] State v. Wyckoff, 31 N.J.L. 65 (1864). Venue cases in accord: People v. Stakem, 40 Cal. 599 (1871); Allison v. Commonwealth, 83 Ky. 254 (1885); State v. Rider, 46 Kan. 332, 26 Pac. 745 (1891).

[371] U. S. v. Mortimer, 1 Hayw. & H. 215, Fed. Cas. No. 15,821 (1845); State v. Stimpson, 45 Maine 608 (1858); People v. Goldberg, 39 Mich. 545 (1878); State v. Suppe, 60 Kan. 567, 57 Pac. 106 (1899); Curran v. State, 12 Wyo. 553, 575, 76 Pac. 577 (1904); In re Loomis, 84 Neb. 493, 121 N.W. 456 (1909). Venue cases in accord: Holford v. State, 2 Blackf. 103 (1827); Campbell v. People, 109 Ill. 565 (1884); Licette v. State, 75 Ga. 253 (1885).

[372] Commonwealth v. Andrews, 2 Mass. 14 (1806); Reg. v. Debrueill, 11 Cox C.C. 207 (1861); Reg. v. Carr, 15 Cox C.C. 131n. (1877); Commonwealth v. White, 123 Mass. 430 (1877); Golden v. State, 2 Ga. App. 440, 58 S.E. 557 (1907).

[373] 84 Neb. 493, 121 N.W. 456 (1909), note 71, immediately supra.

[374] "The act of the legislature in either case is not obnoxious to the rule that one state will not administer the penal laws of another, for the act denounced is one committed within the state, though the property received its taint outside of its bounds. What the legislature sought to prevent was the trade and commerce in stolen goods in this state. It had the right to make it a crime to receive goods of this character with the intent to defraud the owner, and this is the gist of the offense. It is immaterial that the owner may reside in another state. The prisoners are not charged with the infraction of the laws of South Dakota but with the infraction of the laws of this state. It may or may not be necessary for the prosecution in its effort to establish the class to which the goods are alleged to belong to show that their original taking was in violation of the laws of South Dakota but however this may be, it does not alter the fact that the offense described in the statute is one committed against the laws of this state." p. 497.

[375] In Dawson's Case, Yelv. 5, decided in 1602, it was held that one who bought stolen goods knowing them to be stolen was not an accessory to the theft because he did not receive or abet the thief himself. The rule established by this unsound decision worked so badly that by 3 and 4 Wm. & Mary, c. 9, sec. IV (1691), it was enacted that persons buying or receiving stolen goods knowing them to be stolen should be deemed accessories after the fact and punished as accessories to the felony. Since an accessory could not be tried until after the principal had been convicted, it was enacted by 1 Anne Stat., 2 c., IX sec. II (1702), that buyers or receivers of stolen goods could be punished by fine and imprisonment for a misdemeanor, although the principal felon had not been convicted, and that conviction should be a bar to prosecution as an accessory. These provisions were incorporated in 5 Anne, c. 31, sec. V & VI (1706). Most of the statutes of the American states are of the type of that of 1 Anne except that the crime may be made a felony, i.e., they do not refer to the wrongdoer as an accessory. Vide Cahill's Consolidated Laws of N.Y. (1923), sec. 1308; Compiled Laws of Michigan (1929), sec. 16,902; R.S. of Mo. (1929), sec. 4083.

[376] See note 6, supra, p. 72.

[377] In re Loomis, 84 Neb. 493, 121 N.W. 456 (1909), supra.

[378] See note 18, supra, p. 76. See State v. Ward, 49 Conn. 429 (1881), a venue case, holding that under a statute providing for the punishment of the receiver as a principal in the crime of larceny, the venue was in the county where the theft occurred. See also Commonwealth v. Laudermilch, 1 Pa. Dist. 460 (1892), applying a statute fixing the venue for the trial of accessories after the fact in the court having jurisdiction of the principal felon; overruled in Commonwealth v. O'Neill, 10 Pa. Dist. 227 (1901), holding that a receiver was not an accessory after the fact under the statute providing for the punishment of the crime of receiving stolen goods.

[379] Roach and Emanuel v. State, 5 Cold. 39 (Tenn., 1867); State v. Pray, 30 Nev. 206, 94 Pac. 218 (1908); Thurman v. State, 37 Tex. Cr. 646, 40 S.W. 795 (1897). See also People v. Disperati, 15 Cal. App. 120, 113 Pac. 889 (1910). Contra by express statutory provision: Wells v. People, 3 Parker's Cr. 473 (N.Y., 1857); Polk v. State, 60 Tex. Cr. 150, 131 S.W. 580 (1910).

[380] Lovelace v. State, 12 Lea. 721 (Tenn., 1883); State v. You, 20 Ore. 215, 25 Pac. 355 (1890). Venue cases in accord: Rex v. Taylor, 2 Leach 974 (1803); Reg. v. Murdock, 2 Den. C.C. 298, 5 Cox C.C. 360 (1851); People v. McKinney, 10 Mich. 54 (1862); Stedham v. State, 40 Tex. Or. 43, 48 S.W. 177 (1898); Spalding v. People, 172 Ill. 70 (1898); State v. Hengen, 106 Iowa 711 (1898); Territory v. Hale, 13 N. Mex. 181, 81 Pac. 583 (1905); Cohoe v. State, 82 Neb. 744, 118 N.W. 1088 (1908); People v. Geyer, 132 App. Div. 790, 117 N.Y. Supp. 662 (1909), reversed on other grounds, 196 N.Y. 364, 90 N.E. 48; U. S. v. Cardell, 23 Philippine Reports 207 (1912).

[381] State v. Reonnals, 14 La. Ann. 278 (1859). Venue cases in accord: People v. Murphy, 51 Cal. 376 (1876); Reg. v. Treadgold, 39 L.T. (N.S.) 291, 14 Cox C.C. 220 (1878); State v. Hatch, 91 Mo. 568, 4 S.W. 502 (1887); Dix v. State, 89 Wis. 250, 61 N.W. 760 (1895); Abbey v. State, 35 Tex. Cr. R. 589, 34 S.W. 930 (1896); Yost v. State, 38 S.W. 192 (Tex. App., 1896); Knight v. State, 147 Ala. 104, 41 So. 911 (1906); Rarden v. State, 1 Ga. App. 532, 57 S.E. 989 (1907); People v. Meseros, 16 Cal. App. 277, 116 Pac. 679 (1910). Contra: The King v. Oliphant, [1905] 2 K.B. 67 (falsification of accounts); Ex parte Hedley, 31 Cal. 108 (1866); Saule v. State, 71 Ga. 267 (1883). Venue cases contra: Rex v. Hobson, Russ. & Ry. 56 (1803); The Queen v. Rogers, 3 Q.B. Div. 28 (1877); State v. Small, 26 Kan. 209 (1881); State v. Bailey, 50 Ohio St. 636, 36 N.E. 233 (1893); People v. Mitchell, 49 App. Div. 531, 63 N. Y. supp. 522 (1900), aff'd 168 N.Y. 604, 61 N.E. 182; State v. Hoshor, 26 Wash. 643, 67 Pac. 386 (1901); Mangham v. State, 11 Ga. App. 427, 75 S.E. 512 (1912). These contra decisions in most cases resulted from the application of express statutory provisions.

[382] Campbell v. State, 35 Ohio St. 70 (1878); State v. Sullivan, 49 La. Ann. 197, 21 So. 688 (1897); Steadham v. State, 40 Tex. Cr. 43, 48 S.W. 177 (1898); Rarden v. State, 1 Ga. App. 532, 57 S.E. 989 (1907). Contra: State v. Small, 26 Kan. 209 (1881).

[383] Campbell v. State, 35 Ohio St. 70 (1878); State v. Sullivan, 49 La. Ann. 197, 21 So. 688 (1897); Steadham v. State, 40 Tex. Cr. 43, 48 S.W. 177 (1898).

[384] The King v. Oliphant, [1905] 2 K.B. 67 (falsification of accounts). Venue cases: Reg. v. Murdock, 2 Den. C.C. 298, 5 Cox C C. 360 (1851); The Queen v. Rogers, 3 Q.B. Div. 28 (1877); Reg. v. Treadgold, 39 L.T. (N.S.) 291 (1878).

[385] venue cases: State v. Hengen, 106 Iowa 711, 77 N.W. 453 (1898); U. S. v. Cardell, 23 Philippine Reports 207 (1912).

[386] Venue case: Henderson v. State, 129 Ala. 104, 29 So. 799 (1901).

[387] State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905). Venue cases: Henderson v. State, 129 Ala. 104, 29 So. 799 (1901); Dix v. State, 89 Wis. 250, 61 N.W. 760 (1895); Ex parte Palmer, 86 Cal. 631, 25 Pac. 130 (1890); Schiveir v. State, 50 Tex. Cr. 119, 94 S.W. 1049 (1906) (statute).

[388] State v. Haskell, 33 Maine 127 (1851); State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905); Hylton v. Commonwealth, 91 S.W. 696 (Ky. App., 1906); Woodward v. U. S., 38 Dis. of Col. App. 323 (1912). Venue cases: State v. New, 22 Minn. 76 (1875); Campbell v. State, 35 Ohio St. 70 (1878); Robson v. State, 83 Ga. 166, 9 S.E. 610 (1889); Ex parte Palmer, 86 Cal. 631, 25 Pac. 130 (1890); Wallis v. State, 54 Ark. 611, 16 S.W. 821 (1891); State v. Whiteman, 9 Wash. 402, 37 Pac. 659 (1894); State v. Sullivan, 49 La. Ann. 197, 21 So. 688 (1897); Steadham v. State, 40 Tex. Cr. 43, 48 S.W. 177 (1898); Hopkins v. State, 52 Fla. 39, 42 So. 52 (1906). In the last case the court said that venue need not be proved beyond a reasonable doubt.

[389] State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905); Hylton v. Commonwealth, 91 S.W. 696 (Ky. App., 1906); Woodward v. U. S., 38 Dis. of Col. App. 323 (1912). Venue cases: State v. New, 22 Minn. 76 (1875); Robson v. State, 83 Ga. 166, 9 S.E. 610 (1889); Ex parte Palmer, 86 Cal. 631, 25 Pac. 130 (1890); Wallis v. State, 54 Ark. 611, 16 S.W. 821 (1891); State v. Whiteman, 9 Wash. 402, 37 Pac. 659 (1894).

[390] Commonwealth v. Parker, 165 Mass. 526, 43 N.E. 499 (1895). Venue cases holding that the accused could be tried in the county into which the embezzled property was afterwards brought: People v. Garcia, 25 Cal. 531 (1864); Beatty v. State, 82 Ind. 228 (1882), applying statute; Cole v. State, 16 Tex. App. 461 (1884); Cohen v. State, 20 Tex. App. 224 (1886); Brown v. State, 23 Tex. App. 214, 4 S.W. 588 (1887); Pearce v. State, 50 Tex. Cr. 507, 98 S.W. 861 (1906); Burk v. State, 50 Tex. Cr. 185, 95 S.W. 1064 (1906); O'Marrow v. State, 147 S.W. 252 (Tex. Cr. App., 1912); McDaniel v. State, 186 S.W. 320 (Tex. Cr. App., 1916), all applying a Texas statute; State v. Allen, 21 S.D. 121, 110 N.W. 92 (1906), applying statute.

[391] See discussion under Larceny.

[392] 1 Sid. 171. See also J. Kelyng 79, 1 Hale P.C. 692-693, 1 East P.C. 465.

[393] People v. Mosher, 2 Parker's Cr. 195 (1855); State v. Barnett, 83 N.C. 530 (1880); Commonwealth v. Perrell, 3 Ky. Law 693, 11 Ky. Op. 566 (1882); Johnson v.

Commonwealth, 86 Ky. 122, 5 S.W. 365 (1887); Commonwealth v. Huckel, 4 Pa. Co. 576 (1888); McBride v. Graeber, 16 Ga. App. 240, 85 S.E. 86 (1915); State v. Stephens, 118 Maine 237, 107 Atl. 296 (1919); Wilson v. State, 16 Okla. Cr. 471, 184 Pac. 603 (1919).

[394] U. S. v. Jernegan, Fed. Cas. No. 15,477 (1830); Beggs v. State, 55 Ala. 108 (1876); Brewer v. State, 59 Ala. 101 (1877); Welty v. Ward, 164 Ind. 457, 73 N.E. 889 (1905).

[395] 9 Geo. IV, c. 31, sec. 22 (1829).

[396] McLeod v. A. G. for New South Wales, [1891] A.C. 455.

[397] state v. Cutshall, 110 N.C. 538, 15 S.E. 261 (1892); State v. Roy, 151 N.C. 710, 66 S.E. 204 (1909), admitting that State v. Long, 143 N.C. 670, 57 S.E. 349 (1907), was contra, and in effect overruling it.

[398] [1901] A.C. 446.

[399] Note 96, supra, p. 126.

[[400] – No note for this number.]

[401] Rex v. Fraser, 1 Mood. 407 (1834); Regina v. Whiley, 1 C. & K. 150 (1840); Houser v. People, 46 Barb. 33 (1866); State v. Sweetsir, 53 Maine 438 (1866); Collins v. People, 1 Hun 610 (1874); King v. People, 5 Hun 297 (1875); State v. Fitzgerald, 75 Mo. 571 (1882). In State v. Damon, 97 Maine 323, 54 Atl. 845 (1903), venue in the county where the second marriage took place was sustained on the ground that the statute was only permissive.

[402] Walls v. State, 32 Ark. 565 (1877); State v. Smiley, 98 Mo. 605, 12 S.W. 247 (1889).

[403] See notes 5 to 8, inclusive, immediately post.

[404] 2 C.J. 12-13. For example, see R S. Mo. (1929), sec. 4265

[405] State v. Palmer, 18 Vt. 570 (1846).

[406] Missouri R.S. (1929), sec. 4258, and see Cox v. State, 117 Ala. 103, 23 So. 806 (1897), and State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917), applying similar statutes.

[407] State v. Johnson, 12 Minn. 378 (1866); Cathron v. State, 40 Fla. 468, 24 So. 496 (1898).

[408] State v. Stewart, 194 Mo. 345, 92 S.W. 878 (1906); State v. Moon, 178 N.C. 715, 100 S.E. 614 (1919).

[409] Finney v. State, 3 Head 544 (Tenn., 1859); Williams v. State, 44 Ala. 24 (1870). Cf. State v. Griswold, 53 Mo. 181 (1873).

[410] 13 Howell's State Trials 451.

[411] Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 3 et seq.

[412] Cf. text supra, at notes 3 and 17, pp. 2 and 7.

[413] Fed. Cas. No. 16,175 (D.C., D.S C., 1799).

[414] 8 Op. Atty. Gen. 73 (1856), and see cases cited in notes 15 and 16, immediately post.

[415] Reg. v. Lopez, Reg. v. Sattler, 7 Cox C.C. 431 (Ct. of Cr. App., 1858); Reg. v. Leslie, Bell 220, 8 Cox C.C. 269 (Ct. of Cr. App., 1860); U. S. v. Beyer, 31 Fed. 35 (C.C., S.D. Ga., E.D., 1887). In Miller v. U. S., 242 Fed. 907 (C.C.A. 3d, 1917), cert. den. 245 U.S. 660, the accused was indicted for the larceny of fish from a pound in the open ocean outside of the three-mile limit. It was held that the laws of the United States applied, although it does not appear what the nationality of the boat from which the accused operated was. Undoubtedly it was an American small boat. The court said that the law of the United States protected the fish in the pound. There is nothing in the opinion to justify the view taken in the syllabus that this was because the fish were the property of American citizens. Certainly the law applicable to theft does not depend upon the citizenship of the owners of the property stolen.

[416] U. S. v. Robbins, Fed. Cas. No. 16,175 (D.C., D.S.C., 1799); Reg. v. Serva and Nine Others, 2 Car. & K. 54 (Exeter Assizes, 1845); Reg. v. Lewis, Dears & B. 525, 7 Cox C.C. 277 (Ct. of Cr. App., 1857); Reg. v. Bjornsen, Leigh 545, 10 Cox C.C. 74 (Ct. of Cr. App., 1865); U. S. v. Lewis, 36 Fed. 449, 13 Sawy. 532 (D.C., D. Ore., 1888). See also The Queen agt. Dillon, 11 N.B. 61 (1864).

[417] U. S. v. Palmer, 3 Wheat. 610 (1818); U. S. v. Brune, Fed. Cas. No. 14,677 (C.C., E.D. Pa., 1852), statute making it a crime to aid and abet in confining any negro on board any vessel owned wholly or in part by American citizens; U. S. v. Demarchi, 5 Blatch. 84 (C.C., S.D., N.Y., 1862); Reg. v. Bjornsen, Leigh 545, 10 Cox C.C. 74 (Ct. of Cr. App., 1865).

[418] U. S. v. Demarchi, 5 Blatch. 84 (C.C., S.D., N.Y., 1862); U. S. v. Brune, Fed. Cas. No. 14,677 (C.C., E.D. Pa., 1852). In U. S. v. Assia, 118 Fed. 915 (C.C., E.D., N.Y., 1902), the indictment was for manslaughter for a killing which occurred on board a ship registered in Cuba while it was in a Haitian port. The court held that at the time of the conduct in question, the accused was not subject to American law, putting it on the ground that the vessel was Cuban. It is stated that the ship was "operated by persons residing in New York." What is meant by this is not clear. It does not necessarily mean ownership. Nor are persons residing in New York necessarily citizens. It would seem that

the registry was the only evidence of ownership and the case might be put upon the ground that this made out a prima facie case of ownership by Cuban citizens.

[419] Reg. v. Bjornsen, Leigh 545, 10 Cox C.C. 74 (Ct. of Cr. App., 1865); U. S. v. Assia, 118 Fed. 915 (C.C., E.D., N.Y., 1902), discussed immediately supra in note 18, semble. Contra: U. S. v. Brune, Fed. Cas. No. 14,677 (C.C., E.D. Pa., 1852).

[420] 18 U.S.C.A., sec. 441 (Criminal Code, sec. 272), provides that the crimes defined in chapter 11 shall be punished if committed on any vessel belonging "... to any corporation created by or under the laws of the United States, or of any State, Territory or District thereof."

[421] 3 Wheat. 610 (1818).

[422] Fed. Cas. No. 15,528 (C.C., D. Pa., 1829).

[423] A federal statute applied in U. S. v. Brune, Fed. Cas. No. 14,677 (C.C., E.D. Pa., 1852), made it a crime and piracy to aid and abet in confining any negro on board any vessel owned wholly or *in part* by American citizens (italics the author's).

[424] Cf. text at notes 3 and 17, supra, pp. 2 and 7.

[425] 18 U.S. 412 (1820). Accord U. S. v. Demarchi, 5 Blatch. 84 (C.C., S.D., N.Y., 1862).

[426] 2 Car. & K. 54 (1845).

[427] 245 U.S. 122, 38 S. Ct. 28, 62 L. Ed. 189 (1917).

[428] The Louisa Simpson, 2 Sawy. 57 (D.C., D. Ore., 1871); Cunard Steamship Co. Ltd. et al. v. Mellon, 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922); Gillespie v. U. S., 13 F.(2d) 736 (C.C.A. 2d, 1926); Alkane v. U. S., 39 F.(2d) 62, 68 (C.C.A. 1st, 1930); Await et al. v. U. S., 47 F.(2d) 477, 478 (C.C.A. 3d, 1931; Callahan v. U. S., 53 P.(2d) 467, 468-469 (C.C.A. 3d, 1931). However, smuggling or clandestinely introducing without paying or accounting for the duty cannot be committed until the shore is reached because it is not required that the goods be declared or the duty paid until then. Keck v. U. S., 172 U.S. 434, 19 S. Ct. 254, 43 L. Ed. 505 (1899).

[429] 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922).

[430] 140 U.S. 453, 11 S. Ct. 897, 35 L. Ed. 581 (1891).

[431] See discussion, post, II C 1 b "In Territorial Waters."

[432] By the Act of April 30, 1890, secs. 8 and 9, 1 Stat. 113, now obsolete, piracy was made to include murder.

[433] Early writers and decisions, define piracy as robbery or forcible depredation upon the high seas. 4 Bl. Comm. 72; 2 East P.C. 796; U. S. v. Smith, 5 Wheat. 153, 159 (1820); 3 Story, Comm. on the Constitution 53; Dole et al. v. New England Mutual Marine Ins. Co., 2 Clif. 394, 415 et seq. (C.C., D. Mass., 1864). Story, in deciding U. S. v. Smith, supra, did not perceive the ambiguity in the term "forcible depredation." According to Blackstone's definition, piracy was any act done on the high seas which, if done on land, would amount to a felony. He says, "The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there." It has since been held that murder upon the high seas was not included within the term "piracy," as it was understood at common law and in international law. U. S. v. Furlong, alias Hobson, 5 Wheat. 184, 18 U.S. 184 (1820); Atty. Gen. for the Colony of Hong Kong v. Kwok-a-Sing, L.R. 5 P.C. 179 (1873). It, therefore, seems that a forcible depredation other than robbery is no longer piracy. In U. S. v. Brig. Malak Adhel, 2 Howard 210 (1844), Story, J., said that the wanton sinking of a vessel would be piracy. The contrary was held in U. S. v. Kessler, Fed. Cas. No. 15,528 (C.C., D. Pa., 1829).

[434] The term "high seas" is ambiguous. In U. S. v. Bowers & Mathues, 5 Wheat. 188 (1820), it was held to include waters within the three-mile limit. Whether the term would include inland navigable waters so as to bring robbery there within the definition of piracy is apparently an open question, no cases having been found on the point.

[435] Post, note 48, p. 140, and note 57, p. 142.

[436] Post, note 58, p. 142.

[437] Bradley, J., in The Lottawanna, 21 Wall. 558, 572 et seq. (1874).

[438] The penalty in England is death or imprisonment in the discretion of the court. The Piracy Act of 1837, 7 Wm. IV. and 1 Vict, c. 88, as modified by the Penal Servitude Act of 1857, 20 and 21 Vict., c. 3. The penalty in the United States is life imprisonment. 18 U.S.C.A., sec. 481.

[439] U. S. v. Hudson and Goodwin, 7.Cranch 32 (1812). See Clark & Marshall on Crimes (3d Ed.), p. 21.

[440] 3 Inst. 113.

[441] 4 Bl. Comm. 71.

[442] 3 Story Comm. on the Constitution 53.

[443] U. S. v. Palmer, 3 Wheat. 610 (1818).

[444] Italics the author's.

[445] 18 U.S.C.A., sec. 481

[446] 5 Wheat. 153 (1820).

[447] 3 Wheat. 610 (1818). Accord: U. S. v. Howard, Fed. Cas. No. 15,404 (C.C., D. Pa., 1818); U. S. v. Kessler, Baldwin 15, Fed. Cas. No. 15,528 (C.C., D. Pa., 1829). Contra: U. S. v. Brush, Fed. Cas. No. 14,677a (C.C., E.D., S.C., 1820). In U. S. v. Howard, supra, at p. 392, Bushrod Washington said, "The opinion which has been entertained by some persons that the courts of the United States might take cognizance of robberies and other piracies committed on the high seas by non commissioned sea rovers and others, contrary to the general law of nations, has never received the countenance of any of the courts of the United States."

[448] 5 Wheat. 184 (1820).

[449] 5 Wheat. 144 (1920).

[450] Accord: U. S. v. Smith, 5 Wheat. 153 (1820); U. S. v. Bowers and Mathues, 5 Wheat. 188 (1820); U. S. v. Holmes et al., 5 Wheat. 412 (1820). See also U. S. v. Gilbert et al., 2 Sumn. 19 (C.C., D. Mass., 1834).

[451] "It is, we think, the obvious import of these words, that to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs must be, at the time, in point of fact, as well as right, the property of the subjects of a foreign state, who must have, at the time, in virtue of this property, the control of the vessel." P. 151.

[452] "Upon the most deliberate reconsideration of that subject, the court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the 8th section, by persons on board of a vessel, not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the courts of the United States. Persons of this description are proper objects for the penal code of all nations; ..." p. 152. Note the looseness of this language. Persons within the territory of a country owe obedience to its laws whether they *"acknowledge"* it or not.

[453] Supra, p. 131, note 17.

[454] 5 Wheat. 412 (1820).

[455] Supra, p. 140, note 48.

[456] 5 Blatch. 84 (C.C., S.D., N.Y., 1862).

[457] The Marianna Flora, 11 Wheat. 1, 40-41 (1826); U. S. v. Brig. Malek Adhel, 2 Howard 210 (1844); Adams v. People, 1 N.Y. 173, 177 (1848); The Chapman, 4 Sawy. 501, Fed. Cas. No. 2602 (1864); Dole et al. v. The New England Mutual Marine Insurance Co., 2 Clif. 394, 415 (C.C., D. Mass., 1864).

[458] L.R. 5 P.C. App. 179 (1873). The other case is Re Ternan and others, 9 Cox C.C. 522 (Q.B., 1864).

[459] Trial of Joseph Dawson and others, 13 Howell's State Trials 451 (Old Bailey, 1696), supra, p. 129, note 10.

[460] Notes 8 and 12, supra, pp. 3 and 5.

[461] Note 9, supra, p. 4.

[462] Reg. v. Cunningham and Two Others, Bell C.C. 72, 8 Cox C.C. 104 (Ct. Cr. App., 1858); 15 Op. Atty. Gen. 178 (1876); Wildenhus' Case, 120 U.S. 1, 7 S. Ct. 385, 30 L. Ed. 565 (1886); Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891); Cunard Steamship Co. Ltd. et al. v. Mellon, 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922). Cf. the following civil cases: U. S. v. Diekelman, 2 Otto 520, 23 L. Ed. 742 (1875); Patterson v. Bark Eudora, 190 U.S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1902). In The Queen v. Keyn, L.R. 2 Exch. Div. 63, 13 Cox C.C. 403 (1876), the Court of Criminal Appeal by a seven to six decision held that the criminal law of England did not apply on foreign ships within the three-mile limit, in waters which were not intra fauces terra. The majority conceded that English law applied on foreign vessels in port or in waters intra fauces terra, so that the decision is not authority for the proposition that the law of the ship applies in English territorial waters. Their view was that the sea beyond low watermark and not intra fauces terra was not English territory because never so treated by Parliament nor by the courts. Parliament promptly enacted the Territorial Waters Jurisdiction Act, 41 and 42 Vict., c. 73 (1878), which provided that the criminal law should apply to territorial waters and defined territorial waters as such part of the sea adjacent to the coast of the United Kingdom or its dominions as was deemed by international law to be within its territorial sovereignty.

[463] U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196 (C.C., D.R.I., 1813); U. S. v. Keefe, 3 Mason 475, Fed. Cas. No. 15,509 (C.C., D. Mass., 1824); Rex v. Allen, 1 Moody 494, 7 Car. & P. 664 (Cent. Cr. Ct., 1837); U. S. v. Roberts, Fed. Cas. No. 16,173 (C.C., S.D., N.Y., 1843); U. S. v. Seagrist, 4 Blatch. 420, Fed. Cas. No. 16,245 (C.C., S.D., N.Y., 1860); U. S. v. Gordon, 5 Blatch. 18, Fed. Cas. No. 15,231 (C.C., S.D., N.Y., 1861); The Queen v. Anderson, L.R. 1 C.C. 161, 11 Cox C.C. 198 (1868); U. S. v. Bennett, Fed. Cas. No. 14,574 (D.C., D. Md., 1877); The Queen v. Carr & Wilson, L.R. 10 Q.B. Div. 76 (1882); U. S. v. Rodgers, 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893); Wynne v. U. S., 217 U.S. 234, 30 S. Ct. 447, 54 L. Ed. 748 (1910); U. S. v. Flores, 289 U.S. 137, 53 S. Ct. 580, 77 L. Ed. 1086 (1933). In St. Clair v. U. S., 154 U.S. 134, 14 S. Ct. 1002, 38 L. Ed. 936 (1894), and Anderson v. U. S., 170 U.S. 481, 18 S. Ct. 689, 42 L. Ed. 1116 (1898), it was held that it was not necessary to allege the locality on the high seas where

the offense occurred, providing it was alleged to be on the high seas within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any state of the United States. In U. S. v. Pitman, Fed. Cas. No. 16,051 (D.C., D. Mass., 1852), the court went so far as to hold that a federal statute making it a crime to plunder vessels applied to the plundering of an American vessel beached upon the island of Sumatra, erroneously relying upon U. S. v. Coombes, 12 Pet. 72, 9 L. Ed. 634 (1838), where the vessel was beached on American soil and the federal jurisdiction was based upon the commerce clause. In U. S. v. Smiley, 6 Sawy. 640, Fed. Cas. No. 16,317 (C.C., N.D. Cal., 1864), it was held that the same statute did not apply to a sunken vessel less than three miles from the coast of Mexico.

[464] U. S. v. Hamilton, 1 Mason 152, Fed. Cas. No. 15,290 (C.C., D. Mass., 1816); U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 574 (1820); U. S. v. Robinson, 4 Mason 307, Fed. Cas. No. 16,176 (C.C., D.R.I., 1826); U. S. v. Morel, Fed. Cas. No. 15,807 (C.C., E.D. Pa., 1834); U. S. v. Jackson, Fed. Cas. No. 15,457 (C.C., S.D., N.Y., 1843); Mathues v. U. S. ex rel. Maro, 27 F.(2d) 518 (C.C.A. 3d, 1928). U. S. v. Gill, 4 Dallas 426, 1 Wash. C.C. 463, Fed. Cas. No. 15,676, was based on the erroneous idea (see discussion in text supra under the heading "Homicide — Place of Death") that the crime was committed on shore in a foreign land because the death occurred there, although the blow was struck while the accused was on an American vessel in foreign territorial waters. See also U. S. v. Assia, discussed supra, p. 131, note 18.

[465] In 1 Russel on Crimes (9th American Edition from the 4th English Edition), p. 153, the following statement is made: "If a robbery be committed in creeks, harbors, ports, etc. in foreign countries, the Court of Admiralty indisputably has jurisdiction of it and such offense is, consequently, piracy"; citing Rex v. Jemot, Old Bailey 28th Feb., 1812, MS. Jerv. Arch. 366, edit. 15. See also Rex v. Allen, U. S. v. Roberts, The Queen v. Anderson, The Queen v. Carr & Wilson, supra, p. 145, note 63.

[466] Hughes on Admiralty, p. 8. In the older cases the older test of jurisdiction is employed, i.e., all matters happening on the sea including all waters below bridges where the tide ebbs and flows. This would not include as many territorial waters as the navigable waters test.

[467] Panama Rd. v. Napier Shipping Co., 166 U.S. 280, 17 S. Ct. 572, 41 L. Ed. 1004 (1897).

[468] Smith et al. v. Condry, 1 How. 28 (1843); The Peerless, Lush. 16 (1860); The Guy Mannering, 7 P.D. 132 (1882); The Russian S.S. Yourri v. The British S.S. Spearman, 10 A.C. 276 (Privy Council, 1885); The Augusta, 6 Asp. M.C. 161 (Ct. of App., 1887); The Agnes Otto, 12 P.D. 56 (1887); S.S. Diana v. S.S. Clieveden, [1894] A.C. 625 (Privy Council); The Prius Hendrik, [1899] P.D. 177; Carr v. Fracis Times & Co., [1902] A.C. 176 (House of Lords); The Dallington, [1903] P.D. 77; Lovitt v. The Ship Calvin Austin, 9 Exch. Rep. of Canada 160 (New Bruns., 1904); The Arum, [1921] P.D. 12. See also The Scotland, 105 U.S. 24, 26 L. Ed. 1001 (1881); The New York, 175 U.S. 187, 20 S. Ct. 67, 44 L. Ed. 126 (1899); The Talbot, 15 P.D. 194 (1890); The Polynesian, [1910]

P.D. 28. Contra: The Eagle, 8 Wall. 15 (1868); The Avon, Fed. Cas. No. 680 (C.C., N.D. Ohio, 1873); The M. Moxham, 1 P.D. 43 (1875); Owners of S.S. Reresby v. Owners of the S. S. Cobetas, [1923] Scotch Law Times 719. In The Halley, 5 Moore P.C. (N.S.) 262 (Privy Council, 1868), the court refused to apply the foreign law on the ground that it was contrary to local public policy, apparently misunderstanding the foreign law. In The Kaiser Wilhelm der Grosse, [1907] P.D. 259 (Ct. of App.); The City of Berlin, [1908] P.D. 110 (Ct. of App.), and The Andoni, [1918] P.D. 14, the foreign law was not shown to be different from that of England, and the court presumed that it was the same.

[469] U. S. v. Gordon, U. S. v. Rodgers, Wynne v. U. S., U. S. v. Flores, supra, p. 145, note 63.

[470] See note 12, supra, p. 5, U. S. v. Jackson, Fed. Cas. No. 15,457 (C.C., S.D., N.Y., 1843).

[471] See note 14, supra, p. 6.

[472] U. S. v. Hamilton, U. S. v. Willberger, U. S. v. Robinson, U. S. v. Morel, U. S. v. Jackson, Mathues v. U. S. ex rel. Maro, supra, p. 145, note 64; Ex parte Byers, 32 Fed. 404 (D.C., E.D., Mich., 1887); Gray and Brown, dissenting in U. S. v. Rodgers, 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893).

[473] U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196 (C.C., D.R.I., 1813); U. S. v. Rodgers, 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893).

[474] See discussion in preceding paragraph.

[475] Wildenhus' Case, note 76 immediately following; U. S. v. Flores, 289 U.S. 137, 53 S. Ct. 580, 77 L. Ed. 1086 (1933). See also 15 Op. Atty. Gen. 178 (1876).

[476] 120 U.S. 1, 7 S. Ct. 385, 30 L. Ed. 565 (1886).

[477] Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891); Cunard Steamship Co., Ltd., et al. v. Mellon, 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922).

[478] 4 Stat. 115.

[479] U. S. v. Roberts, Fed. Cas. No. 16,173 (C.C., S.D., N.Y., 1843); U. S. v. Seagrist et al., 4 Blatch. 420, Fed. Cas. No. 16,245 (C.C., S.D., N.Y., 1860).

[480] Supra, pp. 149 and 150, notes 76 and 77.

[481] See discussion supra, p. 148, at notes 70 and 71.

[482] Cf. last paragraph under the heading "Larceny," supra, where similar clauses in statutes making it larceny to bring stolen property into the state are discussed.

[483] 18 U.S.C.A., sec. 451 (Criminal Code, sec. 272). This section applies only to the offenses dealt with in chapter 11. It does not apply to those in chapters 10 and 12. 18 U.S.C.A., sec. 490 (Criminal Code, sec. 299), dealing with breaking and entering a vessel, contains this clause though the other sections of chapter 12 do not.

[484] 217 U.S. 234, 30 S. Ct. 447, 54 L. Ed. 748 (1910).

[485] Accord: U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196 (C.C., D.R.I., 1813); U. S. v. Rodgers, 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893); U. S. v. Flores, 289 U.S. 137, 53 S. Ct. 580, 77 L. Ed. 1086 (1933). Contra: U. S. v. Morel, Fed. Cas. No. 15,807 (C.C., E.D. Pa., 1834), semble.

[486] Art. 3, sec. 2, cl. 2, "The judicial power shall extend ... to all cases of admiralty and maritime jurisdiction ..."

[487] Art. 1, sec. 8, cl. 3. In U. S. v. Coombes, 12 Peters 72, 9 L. Ed. 634 (1838), a federal statute was held to apply to conduct within the territorial waters of a state on the ground that it was a regulation of interstate commerce and therefore within the federal power.

[488] Art. 1, sec. 8, cl. 6.

[489] U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 231 (1818).

[490] Admiralty courts were deprived of the criminal jurisdiction which they formerly exercised in England by the statute of 28 Hen. VIII, c. 15 (1536). See the opinion of Cockburn, C.J., in The Queen v. Keyn, L.R. 2 Exch. Div. 63 at 169, 13 Cox C.C. 403 at 484 (1876). Congress has conferred admiralty and maritime jurisdiction upon the federal courts in civil causes only, 18 U.S.C.A., sec. 41 (3); Ex parte Ballinger, 88 Fed. 781 (D.C., D. Va., 1882). See discussion of Act of Sept. 24, 1789, post, "Admiralty Jurisdiction."

[491] Art. 1, sec. 8, cl. 1, "The Congress shall have power ... to define and punish piracies and felonies committed on the high seas and offenses against the law of nations."

[492] Supra, "High Seas."

[493] There is a dictum in U. S. v. Jackalow, 1 Black 484, 487, 17 L. Ed. 225 (1861), that it is competent for Congress to prescribe the punishment for territorial waters within the limits of a state. See also U. S. v. Bevans, 3 Wheat 336, 4 L. Ed. 231 (1818).

[494] Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891); People v. Welch, 74 Hun 474 (N.Y., 1893); Commonwealth v. Peters, 53 Mass. 387 (1847).

[495] For cases applying similar provisions in various federal statutes, see U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 231 (1818); U. S. v. Grush, 5 Mason 290, Fed. Cas. No. 15,268 (C.C., D. Mass., 1829); U. S. v. Davis, Fed. Cas. No. 14,931 (C.C., S.D., N.Y., 1841); Commonwealth v. Peters, 53 Mass. 387 (1847); Miller's Case, Fed. Cas. No. 9558 (D.C., E.D. Mich., 1867); Ex parte Ballinger et al., 5 Hughes 387, 88 Fed. 781 (C.C., D. Va., 1882); U. S. v. Peterson, 64 Fed. 145 (D.C., E.D. Wis., 1894); Ex parte O'Hare, 179 Fed. 662 (C.C.A. 2d, 1910).

[496] Murray v. Hildreth, 61 F.(2d) 483 (C.C.A. 5th, 1932).

[497] U. S. v. Bevans, 3 Wheat. 336, 4 L. Ed. 231 (1818), interpreting section 8 of the Act of April 30, 1790, 1 Stat. 113, the wording of which was, "... upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, ..."; U. S. v. Grush, 5 Mason 290, Fed. Cas. No. 15,268 (C.C., D. Mass., 1829); Commonwealth v. Peters, 53 Mass. 387 (1847); U. S. v. Peterson, 64 Fed. 145 (D.C., E.D. Wis., 1894); Ex parte O'Hare, 179 Fed. 662 (C.C.A. 2d, 1910), all interpreting section 22 of the Act of March 3, 1825, 4 Stat. 121, the wording of which was, "... upon the high seas, or in any arm of the sea or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state."

[498] See I B 1 "Jurisdiction of the Court," supra.

[499] 19 F.(2d) 387 (D.C., S.D. Cal., S.D., 1927). The plea was made by Kollberg and certain others. Those not joining in the plea were convicted, and their conviction was affirmed 27 F.(2d) 515.

[[500] – No note for this number.]

[501] 19 F. (2d) 925 (D.C., N.D. Cal., S.D., 1927).

[502] Supra, p. 10, note 21.

[503] See I B 1 "Jurisdiction of the Court," supra.

[504] L.R. [1917] 2 K.B. 99. See also 8 Op. Atty. Gen. 73 (1856).

[505] See the text supra, p. 30, at note 73.

[506] 3 Wheat. 246 (1818).

[507] Stone v. U. S., 167 U.S. 178, 17 S. Ct. 778, 42 L. Ed. 127 (1897); Chantangco v. Abaroa, 218 U.S. 476, 481, 31 S. Ct. 34, 54 L. Ed. 1116 (1910). For additional authorities see 34 C.J. 970.

[508] 4 How. 242 (1846).

[509] 112 U.S. 216, *5* S. Ct. 118, 28 L. Ed. 697 (1884).

[510] 125 U.S. 240, 8 S. Ct. 846, 31 L. Ed. 743 (1888).

[511] U. S. v. Three Tons of Coal, 6 Bissell 379 (B.C., E.D. Wis., 1875); U. S. v. Distillery No. Twenty Eight et al., 6 Bissell 483 (B.C., D. Ind., 1875); U. S. v. Mason, 6 Bissell 350 (D.C., N.D. Ill., 1875). Cf. U. S. v. McKee, 4 Dillon 128 (C.C., E.D. Mo., 1877).

[512] 116 U.S. 436, 6 S. Ct. 437, 29 L. Ed. 697 (1886).

[513] 116 U.S. 436, 443, 6 S. Ct. 437, 29 L. Ed. 684 (1886).

[514] 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[515] 167 U.S. 178, 17 S. Ct. 778, 42 L. Ed. 127 (1897).

[516] Sierra v. U. S., 233 Fed. 37 (C.C.A. 1st, 1916); U. S. v. Gully, 9 F.(2d) 959 (D.C., S.D., N.Y., 1922). Contra: Grain Distillery No. 8 v. U. S., 204 Fed. 429 (C.C.A. 4th, 1913). State court decisions are conflicting. Civil: State v. Derry, 171 Ind. 18, 85 N.E. 765 (1908); Hine v. Selden, 27 Conn. 384 (1858). Criminal: White v. State, 80 Ark. 598, 98 S.W. 377 (1906). In People v. Three Barrels Full, 236 N.Y. 175, 140 N.E. 234 (1923), the court refused to assess costs on the ground that the action was criminal. The same result was reached in Barnacoat v. Six Quarter Casks of Gunpowder, 1 Metc. 225 (1840), although the court said that the action was civil. In U. S. v. One Hundred and Fifty Head of Cattle and Fifty Two Calves, 3 Ariz. 134 (1889), the court refused to assess costs upon the successful claimant on the ground that they should be assessed against the loser.

[517] 2 Coke upon Littleton 391a; 4 Bl. Com. 387. Nothing could be forfeited as deodand until after a coroner's inquest had found death was caused by it. 1 Hawk. P.C., c. VIII, sec. 8. Title to personal property forfeited by suicide did not vest in the King until the fact of suicide had been found by some inquisition. 1 Hawk. P.C. c. DC, sec. 9.

[518] 2 Coke upon Littleton 391a; 1 Hale P.C. 362; 4 Bl. Com. 387; 2 Hawk. P.C., c. XLIX, sec. 30.

[519] 2 Coke upon Littleton 391a; 4 Bl. Com. 387.

[520] 2 Coke upon Littleton 391a; 1 Hale P.C. 362; 2 Hawk. P.C., c. XLIX, sec. 30; 4 Bl. Com. 387. The statute of 1 Richard III prohibited the seizure of goods prior to conviction.

[521] 1 Hale P.C. 362; 2 Hawk. P.C., c. XLIX, sec. 33; 4 Bl. Com. 387.

[522] 2 Coke upon Littleton 390b; 1 Hale P.C. 360; 2 Hawk. P.C., c. XLIX, sec. 30; 4 Bl. Com. 387; 3 Holdsworth, History of English Law 69.

[523] 3 Holdsworth History of English Law 69; 1 Hale P.C. 360.

[524] 12 Charles II, c. 18 (1661).

[525] 12 Mod. 92.

[526] 5 Term 112.

[527] 3 Cranch 337.

[528] 9 Wheat. 409 (1824).

[529] 8 How. 366 (1850).

[530] 8 Cranch 398 (1814). Similar interpretations based upon other provisions contained in the statute were made in U. S. v. Stevenson, 3 Bev. 119, Fed. Cas. No. 16,396 (D.C., and C.C., S.D., N.Y., 1869); Hobson v. Perry, 1 Hill 277 (S.C. Law, 1833); Fire Dept. of N. Y. v. Kip, 10 Wend. 266 (1833).

[531] Caldwell v. U. S., 8 How. 366 (1850); Henderson's Distilled Spirits, 14 Wall. 44 (1871); Thatcher's Distilled Spirits, 13 Otto 679, 26 L. Ed. 535 (1880); U. S. v. Stowell, 133 U.S. 1, 10 S. Ct. 244, 33 L. Ed. 555 (1889). Accord: U. S. v. Fifty Six Barrels of Whiskey, 1 Abb. 93, Fed Cas. No. 15,095 (D.C., D. Ky., 1866); The Rethalulew, Official No. 227,860, 51 F.(2d) 646 (C.C.A. 9th, 1931); McConathy et al. v Deck, 34 Colo. 461, 83 Pac. 135 (1905).

[532] See, for example, 28 U.S.C.A., sec. 751, R.S. 2d Ed. 938.

[533] Supra, p. 162, note 27.

[534] Dean v. Chapin, 22 Mich. 275 (1871).

[535] Rex and Regina v. Wilcox, 2 Salk. 458 (1689); Ashbrook v. Commonwealth, 64 Ky. 139 (1866); The Delaware Division Canal Co. et al. v. Commonwealth, 60 Pa. St. 367 (1869); State v. So. Ind. Gas Co., 169 Ind. 124, 81 N.E. 1149 (1907); Wright et al. v. State, 130 Tenn. 279, 170 S.W. 57 (1914).

[536] Munson v. People, 5 Parker's Cr. 16 (1860); State v. Noyes, 30 N.H. 279 (1855).

[537] 2 Salk. 458 (1689).

[538] See also 1 Bishop on Criminal Law (9th Ed.) 592.

[539] 2 Esp. 675 (1798).

[540] 17 Q.B. 504, 79 E.C.L. 504 (1851).

[541] 166 App. Div. 81 (N.Y., 1915).

[542] 1 Wash. 325 (1890).

[543] 8 Wash. 579 (1894).

[544] See the opinion of Cockburn, C.J., in The Queen v. Keyn, L.R. 2 Exch. Div. 63 at 169, 13 Cox C.C. 403 at 484 (1876).

[545] 1 stat. 76.

[546] The Harmony, 1 Gall. 123, Fed. Cas. No. 6081 (C.C., D. Mass., 1812); The Betsy, 1 Mason 354, Fed. Cas. No. 1365 (C.C., D. Mass., 1818); The Active, Deady 165, Fed. Cas. No. 33 (D.C., D. Ore., 1866); The James G. Swan, 50 Fed. 108 (D.C., D. Wash., 1892); Sierra v. U. S., 233 Fed. 37 (C.C.A. 5th, 1922); U. S. v. Gully, 9 F.(2d) 959 (D.C., S.D., N.Y., 1922). In U. S. v. Brig Malek Adhel, 2 Howard 210 (1844), the original pleading filed by the government is referred to as a libel. The amended pleading is referred to as an information.

[547] The Industry, 1 Gall. 114, Fed. Cas. No. 7028 (C.C., D. Mass., 1812); Mitchell v. Torup, Parker 227 (Exchequer, 1766). See also Boyd v. U. S., 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[548] The Palmyra, 12 Wheat. 1, 16 L. Ed. 531 (1837); Clifton v. U.S., 4 How. 242, 11 L. Ed. 957 (1846); U. S. v. Two Barrels of Whiskey, 96 Fed. 479 (C.C.A. 4th, 1899); U. S. v. One Black Horse, 129 Fed. 167 (D.C., D. Maine, 1904) "libel by information"; Sierra v. U. S., 233 Fed. 37 (C.C.A. 1st, 1916); The Dependent, 24 F.(2d) 538 (D.C., E.D. La., 1928).

[549] Boyd v. U. S., supra, p. 158, note 14; Sierra v. U. S., 233 Fed. 37 (C.C.A. 1st, 1916); U. S. v. Gully, 9 F.(2d) 959 (D.C., S.D., N.Y., 1922).

[550] 28 U.S.C.A., sec. 41 (9), (3).

[551] See Bishop's criticism of forfeitures, 1 Bishop on Criminal Law (9th Ed.), sec. 970.

[552] 4 Cranch 347 (1808). Cf. U. S. v. Graf Distilling Co., 208 U.S. 198, 28 S. Ct. 264, 52 L. Ed. 452 (1908).

[553] 1 Brock 347 (1818).

[554] Six Hundred and Fifty-One Chests of Tea v. U. S., 1 Paine 499, Fed. Cas. No. 12,916 (C.C., S.D., N.Y., 1826), aff'd 12 Wheat. 486; The Cargo ex Lady Essex, 39 Fed. 765 (D.C., E.D. Mich., 1889)

[555] Moody v. McKinney, 73 S.C. 438, 53 S.E. 543 (1905); Seignious v. Limehouse, Sheriff, 107 S.C. 545, 93 S.E. 193 (1917).

[556] 96 Fed. 479 (C.C A. 4th, 1899). Accord: The Calypso, 230 Fed. 962 (C.C.A. 9th, 1916).

[557] In addition to the cases subsequently considered in this section, see U. S. v. Two Horses, 9 Ben. 529, Fed. Cas. No. 16,578 (D.C., E.D., N.Y., 1878); U. S. v. Two Bay Mules, 36 Fed. 84 (D.C., W.D., N.C., 1888); U. S. v. One Black Horse, 129 Fed. 167 (D.C., D. Maine, 1904); Barnacoat & others v. Six Quarter Casks of Gunpowder, 1 Metc. 225 (1840).

[558] Parker 227.

[559] 12 Wheat. 1, 14.

[560] See 1 Bishop on Criminal Law (9th Ed.), secs. 827, 968 (2), for a discussion of the early English law of deodands.

[561] 2 Howard 210, 11 L. Ed. 239 (1844).

[562] 6 Otto 395, 24 L. Ed. 637 (1877).

[563] 133 U.S. 1, 10 S. Ct. 244, 33 L. Ed. 555 (1889).

[564] 254 U.S. 505, 41 S. Ct. 189, 65 L. Ed. 376 (1921).

[565] 272 U.S. 465, 47 S. Ct. 133, 71 L. Ed. 354 (1926).

[566] 282 U.S. 577, 51 S. Ct. 282, 75 L. Ed. 558 (1931). Accord: Saunders v. State, 2 Iowa 230, 278 (1855); U. S. v. Three Copper Stills, 47 Fed. 495 (D.C., D. Ky., 1890); U. S. v. One Distillery, 43 Fed. 846 (D.C., S.D. Cal., 1890); U. S. v. Olsen, 57 Fed. 578 (D.C., D. Colo., (1893).

[567] Supra, p. 157, note 12.

[568] Supra, p. 158, note 14.

[569] These cases may be found by running Goldsmith-Grant Co. v. U. S. in Shepard's Federal Citations.

[570] Property stolen from the owner, U. S. v. One Buick Roadster, 280 Fed. 517 (D.C., D. Mont., 1922); property loaned to smugglers by agent of the owner who exceeded his authority, U. S. v. Almeida, 9 F.(2d) 15 (C.C.A. 1st, 1925); act of passenger held not to subject innocent common carrier's vehicle to forfeiture, U. S. v. One Haynes Automobile, 290 Fed. 399 (D.C., N.D. Cal., 1923); Cadillac Automobile v. U. S., 7 F.(2d) 102 (C.C.A. 6th, 1925); The Dependent, 24 F.(2d) 538 (D.C., E.D. La., 1928); interests of innocent lienors in a ship not forfeited, The Thomaston, 26 F.(2d) 279 (D.C., D. Md., 1928); innocent lessor's premises not subject to padlocking, U. S. v. Schwartz, 1 F.(2d) 718

(D.C., D. Mass., 1924); independent power plant not subject to forfeiture for innocently furnishing current used in making liquor, Kohler Co. v. U. S., 33 F.(2d) 225 (C.C.A. 1st, 1929).

[571] As the Supreme Court held in Coffey v. U. S. and Boyd v. U. S., supra, pp. 157 and 158, notes 12 and 14.

[572] See I B 2 "Crimes Local Not Transitory."

[573] The view that the law of the place where the accused was at the time of the act or omission *is* the law to which he was subject at that time and which should be applied in determining whether or not his conduct was criminal. The view that the applicable law is the law of the state in which an effect or injury is produced would give a different result. See I B 3 "What Law Governs."

[574] As the Supreme Court held in Various Items of Personal Property v. U. S., supra, p. 173, note 66.

[575] 19 How. 92, 15 L. Ed. 531 (1856).

[576] Supra, p. 175, note 73.

[577] See I B 3 e "Crime by Agent."

[578] Cf. Kansas City Steel Co. v. Arkansas, 269 U.S. 148, 46 S. Ct. 59, 70 L. Ed. 204 (1925).

[579] 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375 (1932).

[580] 4 Cranch 241 (1808).

[581] 4 Cranch 293 (1808).

[582] In Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897 (1873), it was held that a judgment obtained in New Jersey which was relied upon in an action in New York might be attacked by showing that jurisdiction over the res was obtained in this way.

[583] The Fourth Amendment.

[584] The problem is only suggested because not within the scope of this book, but see U. S. v. Eight Packages and Casks of Drugs, 5 F.(2d) 971 (D.C., S.D. Ohio, W.D., 1910); U. S. v. Eighteen Cases of Tuna Fish, 5 F.(2d) 979 (D.C., W.D. Va., 1925).

[585] The Sixth Amendment.

[586] For example see the Constitution of Missouri (1875), Art. II, sec. 22.

[587] 3 Wigmore on Evidence (2d Ed.), secs. 1395 to 1399 inc.

[588] Mattox v. U. S., 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895); State v. McO'Blenis, 24 Mo. 402, 69 Am. Dec. 435 (1857). For other cases see 3 Wigmore on Evidence (2d Ed.), sec. 1398.

[589] So held in Fight v. State, 7 Ohio (part 1) 181 (1835); Price v. State, 36 Miss. 531 (1858); Hill v. State, 17 Wis. 697 (1864); Lynch v. Com., 88 Pa. 189 (1878); Barton v. State, 67 Ga. 653 (1881); Sahlinger v. People, 102 Ill. 241 (1882); State v. Kelly, 97 N.C. 404, 2 S.E. 185 (1887); Jackson v. State, 49 N.J.L. 252, 9 Atl. 740 (1887); State v. Hope, 100 Mo. 347, 13 S.W. 490 (1889). Contra: U. S. v. Shelton, 6 F.(2d) 897 (D.C., E.D. La., 1925).

[590] 284 U.S. 421, 440, 52 S. Ct. 252, 76 L. Ed. 375 (1932).

[591] Supra I. C. 1 d "In Territorial Waters."

[592] This has never been doubted. The law has been applied to conduct on such waters without objection in Sherrill v. State, 84 Ark. 470, 106 S.W. 967 (1907); People v. Russo, 8 Cal. App. 636, 97 Pac. 700; Maxfield v. State, 53 Tex. Cr. 452, 110 S.W. 452 (1908), and People v. Page, 173 App. Div. 422, 159 N.Y. Supp. 1008. See also 1 Oppenheim's International Law (4th Ed.), pp. 382 and 370; 1 Moore International Law Digest, sec. 135.

[593] See 1 Oppenheim's International Law (4th Ed.), sec. 199; 1 Moore's International Law Digest, sec. 128.

[594] Note 93, immediately supra.

[595] On the Great Lakes, Moore International Arbitrations, Vol. 1, chapters V and VI; and Vol. 6 (maps). See U. S. v. Rodgers, 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893); cited in note 63 supra, p. 145.

[596] Courts apply the law of their own state to the conduct of persons on its side of the center of the river, Phillips v. People, 55 Ill. 429 (1870); State v. Cooper, 93 N.J.L. 13 (1919); and refuse to apply it to the conduct of persons beyond the center of the river, State v. Burton, 105 La. 517, 29 So. 970 (1901).

[597] Courts of the state whose territory includes the river, apply the law of their own state to conduct on the river, Keeter v. State, 19 Okla. Cr. R. 35, 196 Pac. 970 (1921). Courts of the state whose territory does not include the river, refuse to apply its law to the conduct of persons on the river, State v. Babcock, 30 N.J.L. 29 (1862).

[598] See State v. Plants, 25 W. Va. 119 (1884), and the opinions of Judges Scott, Baker, Robertson, and McComas in Commonwealth v. Garner, 3 Gratt. 655 (Va., 1846).

[599] See the opinion of Judge Lomax in Commonwealth v. Garner, 3 Gratt. 655 (Va., 1846).

[[600] – No note for this number.]

[601] See State v. Plants, 25 W. Va. 119, 124 (1884).

[602] Handley's Lessee v. Anthony, 5 Wheat. 374, 5 L. Ed. 113 (1820), a civil case. See also the opinion of Judges Johnson, Clopton, Wilson, and Taliaferro in Commonwealth v. Garner, 3 Gratt. 655 (Va., 1846).

[603] See Commonwealth v. Frazee, 5 Amer. Law Reg. 167 (Pa., 1856).

[604] See Hendricks v. Commonwealth, 75 Va. 934, 939 (1882).

[605] Carlisle and Another v. State, 32 Ind. 55 (1869); Dougan v. State, 125 Ind. 130, 25 N.E. 171 (1890); Welsh v. State, 126 Ind. 71, 25 N.E. 883 (1890); State v. Mullen, 35 Iowa 199 (1872); State v. Moyers, 155 Iowa 678, 136 N.W. 896 (1912); State v. Metcalf, 65 Mo. App. 681 (1896); State v. Seagraves, 111 Mo. App. 353, 85 S.W. 925 (1905); State v. Kurtz, 317 Mo. 380, 295 S.W. 747 (1927); Lemore v. Commonwealth, 127 Ky. 480, 105 S.W. 930 (1907); State v. Savors, 33 Ohio C.C. 224 (1911); Brown v. State, 109 Ark. 373, 159 S.W. 1132 (1913); Padgett v. State, 151 Ark. 290, 236 S.W. 603 (1922).

[606] In re Mattson, 69 Fed. 535 (C.C., D. Ore., 1895); Ex parte Desjeiro, 152 Fed. 1004 (C.C., D. Ore., 1907); Neilson v. Oregon, 212 U.S. 315, 29 S. Ct. 383, 53 L. Ed. 528 (1908).

[607] Hendricks v. Commonwealth, 75 Va. 934 (1882); State v. Faudre, 54 W. Va. 122, 63 L.R.A. 877 (1903). See also State v. Cunningham, 102 Miss. 237, 59 So. 76 (1912). In McFall v. Commonwealth, 2 Metc. 394 (Ky., 1859), the court held that Kentucky law applied in spite of Ohio's concurrent jurisdiction, because Ohio had not enacted legislation extending its laws over the river. Contra: State v. Moyers, 155 Iowa 678, 136 N.W. 896 (1912).

[608] State v. Cunningham, 102 Miss. 237, 257, 59 So. 76 (1912), relying upon a statement in Rorer on Interstate Law (2d Ed.), p. 439. The authorities cited by Rorer are not in point.

[609] Commonwealth v. Frazee, 5 Amer. Law Reg. 167 (Pa., 1856).

[610] Phillips v. People, 55 Ill. 429 (1870). See also State v. Brown, discussed at note 34, supra, p. 109, and Marshall v. State, 6 Neb. 120 (1877), cited in note 17, supra, p. 7.

[611] State v. George, 60 Minn. 503, 63 N.W. 100 (1895); Commonwealth v. Shaw, 22 Pa. Co. 415 (1899).

[612] Means v. State, 118 Ark. 362, 176 S.W. 309 (1915); Goodman v. State, 153 Ark. 560, 240 S.W. 735 (1922). Cf. State v. George, note 11, immediately supra.

[613] State v. Keane, 84 Mo. App. 127 (1900).

[614] Rorer's Interstate Law (2d Ed.), p. 438.

[615] See note 5, supra, p. 99.

[616] Jessup, The Law of Territorial Waters and Maritime Jurisdiction, ch. 1; 1 Oppenheim's International Law (4th Ed.), p. 393; Hall's International Law (8th Ed.), p. 189, and cases cited in note 25, p. 187, and note 28, p. 188, post.

[617] The Queen v. Keyn, L.R. 2 Exch. Div. 63, 13 Cox C.C. 403 (1876).

[618] 41 & 42 Vict., c. 73.

[619] Hall's International Law (8th Ed.), p. 193; Hurst, Territoriality of Bays, 1922-1923 British Yearbook of International Law 42, and cases cited in note 26, post, p. 187. Cf. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, ch. VIII; 1 Oppenheim's International Law (4th Ed.), p. 406.

[620] Black's Law Dictionary (2d Ed.).

[621] 1 Op. Atty. Gen. 33 (U.S., 1793); U. S. v. Robinson, 4 Mason 307, Fed. Case No. 16,176 (C.C., D.R.I., 1826); U. S. v. Grush, 5 Mason 290, Fed. Case No. 15,268 (C.C., D. Mass., 1829); Reg. v. Cunningham and Two Others, Bell C.C. 72, 8 Cox C.C. 104 (Ct. Cr. App., 1858); The Louisa Simpson, 2 Sawy. 57 (D.C., D. Ore., 1871); The Kodiac, 53 Fed. 126 (D.C., D. Alaska, 1892); Mortensen v. Peters, 14 Scots L.T.R. 227 (High Court of Justiciary, 1906); Ex parte O'Hare, 179 Fed. 662 (C.C.A. 2d, 1910). In U. S. v. Beyer, 31 Fed. 35 (C.C., S.C., Ga., E.D., 1887), the mouth of the La Plata River where it is thirty miles wide with Argentina on one shore and Uruguay on the other, was held not to be intra fauces terrae.

[622] For other tests for determining: what bays are to be considered part of the land territory of a state, see Jessup, The Law of Territorial Waters, c. VIII.

[623] Jessup, The Law of Territorial Waters, p. 358 et seq.

[624] Jessup, op. cit., lists the following: Azuni, Droit Maritime de l'Europe (1805), p. 254; Von Liszt Dos Volkerrecht (5th Ed., 1907), p. 91.

[625] The Ann, 1 Gall. 62, Fed. Case No. 397 (C.C., D. Mass., 1812); Cunard Steamship Co. Ltd. et al. v. Mellon, 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922). See also Reg. v. Cunningham, Bell C.C. 72, 8 Cox C.C. 104 (Ct. of Cr. App., 1858); Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891).

[626] Reg. v. Cunningham, Bell C.C. 72, 8 Cox C.C. 104 (1858); The Louisa Simpson, 2 Sawy. 57 (D.C., D. Ore., 1871); Manchester v. Massachusetts, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1891); The Kodiac, 53 Fed. 126 (D.C., D. Alaska, 1892). See also 1 Op. Atty. Gen. 33 (1793); Mortensen v. Peters, 14 Scots L.T.R. 227 (High Ct. of Justiciary, 1906).

[627] 15 Op. Atty. Gen. 178 (1876); Wildenhus' Case, 120 U.S. 1, 30 L. Ed. 565, 7 S. Ct. 385 (1886); Cunard Steamship Co. Ltd. et al. v. Mellon, 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1922). See also Manchester v. Massachusetts, notes 25 and 26, immediately supra. Cf. U. S. v. Grush, 5 Mason 290, Fed. Case No. 15,268 (C.C., D. Mass., 1829); Ex parte O'Hare, 179 Fed. 662 (C.C.A. 2d, 1910).

[628] U. S. v. Palmer, 3 Wheat. 610 (1818); U. S. v. Furlong, alias Hobson, 5 Wheat. 183 (1820); U. S. v. Kessler, Baldwin 15, Fed. Case No. 15,528 (C.C., D. Pa., 1829); The La Ninfa, 75 F. 513 (C.C.A. 9th, 1896). See also Mortensen v. Peters, 14 Scots L.T.R. 227 (High Ct. of Justiciary, 1906); The Over The Top, 5 F.(2d) 838 (D.C., D. Conn., 1925). Cf. I C 1 a (III) Piracy.

[629] See the discussion in the rest of the paragraph and cases cited there.

[630] Note 35, post, p. 189.

[631] 143 U.S. 472, 12 S. Ct. 453, 36 L. Ed. 232 (1891).

[632] 143 U.S. 513 (D.C., D. Alaska, 1892).

[633] 50 Fed. 108 (D.C., D. Wash., N.D., 1892).

[634] 60 Fed. 914 (D.C., D. Alaska, 1894). Reversed, 75 Fed. 519 (C.C.A. 9th, 1896), after the decision in The La Ninfa.

[635] 1 Moore's International Arbitrations, pp. 755, 914, and 920. See Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 54 et seq.

[636] 75 Fed. 513 (C.C.A. 9th, 1896). See also Whitelaw v. U. S.. 9 F.(2d) 103 (D.C., N.D. Cal., 1925).

[637] 2 Cranch 187 (1804).

[638] 57 Fed. 706 (D.C., D. Alaska, 1893).

[639] 77 Fed. 744, 23 C.C.A. 438 (1896).

[640] 279 Fed, 537 (CC.A. 5th, 1922).

[641] 1 Moore's International Law Digest 731.

[642] 3 F.(2d) 145 (D.C., E.D., N.Y., 1924).

[643] The Over The Top, 5 F.(2d) 838 (D.C., D. Conn., 1925); Hennings v. U. S., 13 F.(2d) 74 (C.C.A. 5th, 1926); The Sagatind, 11 F.(2d) 673 (C.C.A. 2d, 1926); U. S. v. Archer, 12 F.(2d) 137 (D.C., S.C. Ala., S.D., 1926). Cf. The Panama, 6 F.(2d) 326 (D.C., S.D. Tex., 1925).

[644] 273 U.S. 593, 47 S. Ct. 531, 71 L. Ed. 793 (1926).