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JURISDICTION OVER CRIMES

I

THE TERRITORIAL COMMISSION THEORY

ALBERT LEVITT*

The criminal law is that portion of the legal ordering of society which deals with offenses against the state. A criminal activity is one which injures the state, is proceeded against by the state, and the punishment for which cannot be avoided without the consent of the state.¹

The function of the criminal law is to protect organized society, the individuals who compose it,² and the institutions which have been created for their organization and control.³

The criminal law has three distinct sections, substantive, procedural and therapeutic. The substantive part deals with the types of conduct which organized society has forbidden as inimical to its welfare. The procedural part deals with the apprehension of an alleged offender and the determination of his guilt or innocence. The therapeutic part deals with the treatment of the offender whose guilt has been determined.⁴ The principles and theories of jurisdiction over criminal offenses form part of procedural criminal law.

ELEMENTS OF A CRIMINAL OFFENSE

Criminal offenses are composed of many elements and differ from each other in varying ways. Some, like the larcenies and homicides, are closely akin. Others, like champerty and abortion are quite dissimilar. Certain elements, however, are common to them all. These are of importance in a study of jurisdiction over criminal offenses because the courts will inquire into some or all of them before they will assume or reject jurisdiction over a particular offense.

1. The first common element is that there can be no criminal offense without an offender. He must be legally capable of committing

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¹R. R. Cherry, "Growth of the Criminal Law in Ancient Communities," p. 2; Cf. Stephen, "History of the Criminal Law," Vol. I, pp. 2-4.

²See Levitt, "Some Societal Aspects of the Criminal Law," 13 Journal of Criminal Law and Criminology 90.

³Pound, "The Future of the Criminal Law," 21 Columbia Law Rev. 1.

⁴Levitt, "Some Societal Aspects of the Criminal Law" supra, note 2. See also "Report of the Cleveland Crime Survey, 1922."

the offense. He must be of sound mind, have reached an age when he may be presumed to have attained to discretion and understanding, and must not be within a relation or status which negatives criminal capacity.⁵ He must, also, have the mental attitude toward the thing done, the consequences produced, or the victim of his activities, which the criminal law considers culpable.⁶

2. The second common element is that the offender must have done that which he was under a duty not to do, or failed to do that which he was under a duty to do. He must have been guilty of a forbidden act or omission.⁷

3. The third common element is that the act or omission must have had injurious consequences.⁸ The function of the criminal law, *inter alia*, is to shield society from harmful consequences of human activities. Not that the criminal law is concerned, in a given prosecution, with attempting to ascertain and nullify *all* the consequences of the offender's activities, but that the criminal law does deal, in a specific prosecution, with those consequences which stretch between the offender's specific illegal acts and the victim's definite injury. Most offenses are really consequential offenses and many states will punish offenders if the consequences of the offenders' activities occur within their territorial limits.⁹

4. The fourth common element is that no criminal offense exists unless the act (or omission) or the consequences of the act, or both have been forbidden by the sovereign having control of the territory where they occur.¹⁰ Privileged acts or privileged consequences cannot constitute a criminal offense. Somewhere in the chain of cause and effect stretching between the activities of the offender and their results

⁵1 Bishop, "Criminal Law," Sec. 346-396 (5 Ed. 1872); 1 Wharton, "Criminal Law," Ch. 2 (5 Ed. 1861); 1 Russell on "Crimes," 58 et seq. (7 Ed. 1909); Harris, "Criminal Law," p. 14-24 (13 Ed. 1919); Roscoe "Criminal Evidence," Part II (14 Ed. 1921).

⁶Roscoe, "Criminal Evidence," 25, 358-9; Harris, "Criminal Law," Ch. 2; 1 Bishop on Criminal Law, Ch. 11; Cf. Levitt, "Origin of Doctrine of Mens Rea" 17 Ill. Law Rev. 117 (1922), and Levitt, "Extent and Function of the Doctrine of Mens Rea," 17 Ill. Law Rev. 578 (1923).

⁷Beale, "Recovery for the Consequences of an Act," 9 Harvard Law Rev. 80 (1895); Levitt, "Cause, Legal Cause and Proximate Cause," 21 Michigan L. Rev. 34, 163 (1922); Beale, "The Proximate Consequences of an Act," 33 Harvard Law Review, 633 (1920).

⁸*Ibid.*

⁹For example, when the offense of abortion is deemed to be committed in the place where the foetus is voided and not in the place where the noxious drug is administered. *Edge v. State*, 117 Tenn. 405, 99 S. W. 1098.

¹⁰In the United States criminal offenses are creations of statutes. In the District of Columbia common law offenses still exist. *Tyner v. U. S.* 23 App. D. C. 324.

a prohibited link must occur or the criminal law will not take cognizance of the injury.

5. The fifth common element is that the act or consequence must injure, threaten, or be likely to injure or threaten, someone whom society wishes to protect. There can be no criminal offense without an actual or potential victim.

6. The final two common elements are concerned with the time when and the place where the other elements exist. An act on the planet Mars a thousand years ago, or a consequence likely to occur on Halley's comet, on its thirteenth passing through the orbit of the earth are of no importance to the present criminal law, although the development of aviation may make them of importance in some future age. But acts and consequences within the territorial limits of any given sovereign are of importance to his criminal law; and the time when they occur may determine what action he will take against those who caused them. What might have been considered dangerous to society in one decade may have been found by experience to be harmless. On the other hand acts considered harmless when done may be of the type that society wishes to prohibit for the future. Under constitutional provisions against *ex post facto* laws past acts cannot be considered as criminal. The place where an act, or its consequences, occurs may determine its dangerousness. If a man yells "fire" while in swimming half a mile from shore, his act will probably be innocuous. But if he yells "fire" in a crowded theater he is very likely to start a panic. In the water the act is harmless; in the theater the act is criminal. Acts may take on a criminal character because of the place where they occur and the circumstances which surround them. Joining these common elements together, it would seem accurate to say that a criminal offense exists when a person produces a forbidden act (omission) or consequence at a time and in a place where someone whom society wishes to protect is injured or threatened with harm.

The existing theories of jurisdiction over criminal offenses emphasize, as we shall indicate later, some or all of these common elements as being essential before jurisdiction will be exercised. The courts stress what they call "the gist of the offense." By the "gist of the offense" they mean those elements of a given crime without which the existence of that crime cannot be demonstrated. Their primary problem, so far as jurisdiction over criminal offenses is concerned, is to determine whether the gist of the offense occurred in such a place that they have the legal power to take cognizance of that offense. The purpose of this article is to indicate the principles which govern the determination of this problem, and the theories of jurisdiction over crim-

inal offenses which grow out of the existing constitutional provisions, statutes and decisions dealing with this problem.

PRINCIPLES OF JURISDICTION

In a wide sense "jurisdiction" means the power of control which the sovereign of a given territory has over the persons, property and institutions within that territory. Subject to such restraints as are imposed by the law of nations and the legal system which he adopts the sovereign may do as he pleases within his territory. He may also delegate his powers to others. He may give them wide or narrow spheres of activity. Within their spheres the sovereign's agents may act to the extent which they have power to act. We are concerned here only with the agent known as the criminal courts, and with the power they may have to deal with criminal offenses and offenders. For our purposes the following definition of jurisdiction will be found adequate and accurate: *Jurisdiction over criminal offenses means the power of a given court to inquire into and determine whether or not an alleged offense has been committed by a designated accused person,¹¹ and to apply the penalty for an offense so determined.* With this definition in mind certain principles which indicate the extent of jurisdiction which criminal courts have will be noted.

1. *The jurisdiction of any court varies with its position in the hierarchy of tribunals.* The lower courts are given jurisdiction within very narrow limits, while the higher courts have general jurisdictional capacities. Criminal offenses may be tried in tribunals presided over by city officials, justices of the peace, police magistrates and special and general judicial officers. The usual rule is to allow appeals to be taken from the lower courts in the hierarchy to the highest courts in the sovereign's territory.¹²

2. *The jurisdiction of a court may be limited by the character of the offense committed.* Petty larcenies, breaches of the peace, and peculiarly local offenses may be tried first in the lower courts. They would have jurisdiction over such offenses. But offenses of a more serious nature, like rape, arson, murder, conspiracy, etc., would lie outside of the jurisdiction of the lower courts and would be cognizable only in county, district or state courts.¹³

¹¹Bouvier's Law Dictionary Tit., "Jurisdiction." Cf. *Lamar v. U. S.*, 240 U. S. 60 (1916).

¹²General Statutes of Connecticut, Revision of 1918, Ch. 337, is a good example of the usual situation.

¹³Code of Criminal Procedure of New York (Gilbert, 1919), part 1.

3. *The character of the penalty to be imposed may delimit the jurisdiction of the courts.* Some of them have jurisdiction to try offenses where the penalty for their commission is a jail sentence or a small fine, but they do not have jurisdiction to try offenses the penalty for which is imprisonment in the penitentiary or a fine of considerable proportions or above a designated amount.¹⁴

4. *The territory where the offense was committed limits jurisdiction.* City courts have jurisdiction to try offenses committed within the city limits, but not those committed within other parts of the county in which the municipality is situated. The county courts usually have jurisdiction over offenses committed within their county, but not those committed in other counties unless a change of venue has been secured in legal fashion. Some courts, however, have jurisdiction over offenses committed anywhere within the territory belonging to their sovereign.¹⁵

5. *The personality of the sovereign offended limits jurisdiction.* An offense against the laws of the United States is within the jurisdiction of a federal court. Yet it may not be cognizable within a state court. Offenses against foreign governments may or may not be within the jurisdiction of local state courts and federal courts.¹⁶

6. *The character of the accused may determine jurisdiction.* Certain courts have jurisdiction over juvenile offenders; and others have jurisdiction over female offenders.¹⁷ No courts have jurisdiction over foreign sovereigns and their personal representatives.¹⁸

7. *Statutes of limitation may bar jurisdiction.* Courts may have jurisdiction within the time limits indicated by the statute of limitations and cease to have it when the indicated time has run.¹⁹

8. *The repeal of a penal statute may oust jurisdiction.* Up to the time when final judgment has been given, the repeal of a statute against which an offense was committed, will deprive the court of power to go on with the trial of the offender.²⁰

9. *The assumption of jurisdiction by one court may bar another court from exercising jurisdiction over the same offense.* Where jurisdiction over an offense is within the concurrent jurisdiction of two or

¹⁴Ibid.

¹⁵Ibid.

¹⁶1 Bishop, "Criminal Law," Bk. 2, sec. 99, et seq.

¹⁷Nearly all the states in the United States have domestic relations courts now. The matter is covered by statutes which differ in the several states.

¹⁸*Mighell v. Sultan of Jahore*, L. R. (1894), Q. B. D. 1, 149.

¹⁹2 Russell on "Crimes," 1920, where will be found a table of statutes of limitations on criminal prosecutions in England.

²⁰Levitt, "Repeal of a Penal Statute and Its Effect Upon Pending Prosecutions," 9 Journal of the American Bar Assoc. 715 (1923).

more courts the one first taking jurisdiction may keep it. The other courts cannot oust it of its jurisdiction.²¹

10. *The presence or absence of the offender may determine jurisdiction.* The principle is absolute in Anglo-American law that the accused must be present in court at the time he is being tried.²² There must be control over the person of the accused at time he is being tried. Subject to the provisions of statutes of limitation it is immaterial when such control was obtained. Nor does it matter how such control was secured.²³ If the offender was within the territory, within which the court may function, when he committed the alleged offense, the court has jurisdiction over the offense.²⁴ If the offender was without the territory at the time the offense was committed, but he acted or produced consequences within the territory by means of an agency or an innocent or guilty agent, who was within the territory at that time, the courts have jurisdiction.²⁵ Jurisdiction in the last case is predicated upon the rule of "the constructive presence of the offender."²⁶ The rule is based upon three theories. The first is taken from the law of agency.²⁷ The principle *qui facit per alium facit per se* is invoked. The act of the agent is deemed to be the act of the offender and the presence of the agent is construed to be the presence of the offender. The second theory is that a person is deemed to be constructively present at the place where the force or agency he has employed to perpetrate the offense has operated.²⁸ The third theory is that if the offender sends into the territory that which is used to consummate the offense, it is as though he were himself bringing the object used into the territory and remaining there at the time the use of the object he has sent occurs.²⁹

If the offender leaves the territory to do that which would be an offense if done within the territory, and in order to evade the laws of the territory, he will be deemed to have been within the territory at the time he committed the offense.³⁰ This principle may be looked upon as an extension of the rule as to constructive presence of the offender, or

²¹*Richardson v. State*, 36 Ark. 347 (1892).

²²Constitutional provisions giving the accused the right of confrontation of witnesses against him make this principle absolute. Cf. Beale, "Criminal Pleading and Practice," 240.

²³*Matthews v. State*, 198 Pac. (Okl.) 112 (1921).

²⁴*Green's Case*, 66 Ala. 40 (1880).

²⁵*Reg. v. Barrett*, 6 Cox Cr. Cases 260 (1853); *Queen v. Bull and Schmidt*, 1 Cox Cr. Cases 281 (1845).

²⁶*Barkhamstead v. Parsons*, 3 Conn. 1 (1819).

²⁷*Ibid.*

²⁸*State v. Hall*, 114 N. C. 909 (1894).

²⁹*State v. Morrow*, 18 S. E. 853 (S. C. 1893).

³⁰*Comm. v. Collier*, 204 S. W. 74; 181 Ky. 319 (1918) *semble*.

it may be predicated upon the theory that the sovereign of the territory will not permit any one to flout his dignity and law and then return to live under their protection. The second commends itself as the more reasonable, and therefore as the better, view.

If the rule as to constructive presence is adopted it means that the offender, his acts and their consequences are hauled into the territory on the back of a fiction. That seems to be a rather heavy burden for a non-existence to carry. There is no need to employ a fiction if a more rational theory will serve. It is more rational to punish a person who evades the laws of the place where he lives, whether the evasion be by leaving the territory temporarily for the purpose of doing that which the laws forbid, or by doing illegal things in secret, than to punish him for fictitious acts within the territory. It must, of course, be admitted that the courts which adopt this principle are really punishing a person for things he has done outside of their sovereign's territory, which activities are not necessarily offenses against the laws of the territory where they occurred.³¹ There is really an extension of the penal laws of one territory to cover acts done in another territory. There are, of course, analogous situations. The laws against treason and counterfeiting are given extraterritorial effect on the grounds of self-defense and necessity. The same grounds can be urged in the instant situation.

11. *The citizenship of the offender may limit jurisdiction.* All persons within the territory where the court functions are amenable to the laws of that territory whether they are citizens of that territory or of foreign territories.³² Jurisdiction will be exercised over such persons if they offend against the criminal laws of the territory.

This principle is based upon the needs of self-defense. The laws of a given territory are made because the needs of the community call for them. They are protective measures. It would be subversive of the function of the state within this territory to allow persons to act in ways harmful to the community and then claim that the laws do not apply to them because they are citizens of another country. Sovereignty means control and direction of all things and persons within the territory of the sovereign. Subjects of other sovereigns are under no duty to enter the territory, but if they choose to do so they must abide by the laws of that territory.

Courts have jurisdiction over citizens of the territorial sovereign in regard to several offenses, even though the subjects' activities occur

³¹Ibid.

³²1 Russell on "Crimes," 19.

outside of the realm.³³ If a citizen offends against his duty of allegiance it is immaterial where the offense is committed. Treason or conspiracy against the well-being of the sovereign in any way, can occur anywhere, yet the courts will take jurisdiction over the offender when he appears within their territories. Persons committing offenses on vessels flying the flag of the court's sovereign are within the jurisdiction of the court no matter where the vessel may have been at the time the offense was committed, when such persons come or are brought into the territory of the sovereign.³⁴

The details of this principle will be worked out later. It is sufficient for our purposes here to indicate that a sovereign will throw the protection of his laws about any of his ships, so long as his law does not clash with the laws of the sovereign of the territory where the ship may actually be. So that a person on board a foreign sovereign's ship cannot set up his own citizenship as a bar to the functioning of the sovereign's laws. One sovereign is the equal of another sovereign, but the individual subject of a sovereign is not the equal of another sovereign. This is definitely shown by the fact that a foreign sovereign is not amenable to the criminal law of the territory where he may be while his subjects are, and by the rule that seamen and passengers on board ships are governed by the "law of the flag." The old idea was that a ship upon the high seas was "a floating island," and was part of the territory of the sovereign whose flag was flown. The notion was a fiction. Islands do not float. They are not ships. The modern rule is that the sovereign whose flag the ship flies will inquire into and regulate events and activities which occur on board the ship.

Persons who go to barbarous countries are deemed "to take their national law with them."³⁵ That is, whatever they do in those countries will be scrutinized and judged by their national law, which will be applied to their activities so far as the application is not unjust when the circumstances and conditions surrounding the activities are considered. Citizenship gives jurisdiction in such cases.

Persons who are citizens of no country may be subject to the jurisdiction of the courts of all sovereigns. The outstanding example of this is piracy.³⁶ A pirate is a man without a country. He is deemed an enemy of all mankind. The courts of any territory where the pirate is found have jurisdiction over him no matter where his offenses may have been committed. The position of an expatriated person, however,

³³*Reg. v. Lynch* (1903) 1 K. B. 744; (1543) 35 Henry VIII, Ch. 12.

³⁴Merchant Shipping Act (1894), 57 and 58 Vict., c. 60:1.

³⁵The jurisdiction exercised by consular courts under treaties is an example of this principle in operation.

³⁶1 Russell on "Crimes," 257.

is probably like that of all other legally recognized persons within the territory.³⁷

The above principles are generally accepted wherever Anglo-American law is in force. They present no practical difficulties in the administration of justice. They *all assume* that the various elements of an offense are present within the territory where the court functions. But what of the cases where the elements of an offense are *not all within the territory where the court functions*? Suppose that each of the elements occurs in a different judicial unit: which court has jurisdiction over the offense? The attempt by legislatures and courts to answer this question has given rise to various theories of jurisdiction which will now be considered. For want of better names the theories may be called (1) The Territorial Commission Theory, (2) The Territorial Security Theory, (3) The Cosmopolitan Justice Theory. These theories are not mutually exclusive; nor do they indicate hard and fast boundary lines. They shade into each other by almost imperceptible degrees and it is difficult at times to know just where to place a given rule as found in the statutes or decisions. But they do indicate different methods of dealing with similar sets of facts. In the following pages the various theories will be discussed with reference to a single question: To what extent does the particular theory aid in fulfilling the function of the criminal law?

THE TERRITORIAL COMMISSION THEORY

The territorial commission theory of jurisdiction over criminal offenses is based upon an examination into *the location of the offense*. The rule applied is this: *Every offender must be prosecuted for his offense in the place where the offense was committed; and he cannot be prosecuted in any place where the offense was not committed.*

The *locus* of the offense fixes jurisdiction. Find that and you have the territory within which the courts have jurisdiction. To find the *locus* you must find where the gist of the offense occurred. Wherever occurs the element of the offense, which the substantive criminal law calls the gist of the offense, the offense is deemed to occur. The courts within the territorial unit where the offense occurred are the *only* courts that can take jurisdiction over the offense.

The territorial unit has no inherent characteristics. It is any political division or subdivision which the sovereign may create as a jurisdictional unit. It may be a borough, city, town, county, state or country. The usual jurisdictional unit is the county. The territorial

³⁷Otherwise they would be subject to no law whatever, which is practically unthinkable. See Beale, "Treatise on Conflict of Laws," Part One.

theory is usually expressed in this way: Jurisdiction over an offense shall be in the county where the offense was committed. The statement of the theory may vary, but the general notion is that no offense is judicially cognizable outside of the territory where it was committed. The history of the theory is somewhat different in England and the United States.

FOUNDATIONS OF TERRITORIAL COMMISSION THEORY

There are two foundations for the territorial theory in England. The first is an historical one and the second is a metaphysical one.

A. *The Historical Foundation.*

The historical foundation consists of three elements. These are (i) the survival of primitive religious idea, (ii) notions of community responsibility for the activities of a member of the community, and (iii) early methods of procedure, by the community, against the individual offender.

(i) *Religious Ideas.* Primitive religious ideas are static. They are rooted in fear and held with a tenacity which is commensurable only with the instinct of self-preservation. They grow out of man's inability to understand the physical forces which surround him and his desire to placate those forces which he feels are inimical to him. In the earliest forms of religions, fetichism, totemism and animism, the habitations of divine beings (be they spirits, goblins, demons, jinni, gods) are sacred places and thus tabu. They must not be defiled nor desecrated. The gods must not be insulted or annoyed. Human activities which are normally harmless and proper if done outside the sacred places become offenses against the gods, and thus are likely to call down their wrath upon the actor, if they are done in the sacred grove, on the banks of a sacred stream, upon a mountain top, or within a temple. Homicide, thieving, rape, trickery, and the violation of the rules of hospitality are not looked upon with displeasure by primitive communities. They are the normal methods of self-preservation. But homicide committed within a sacred grove is sacrilege; stealing from a worshipper in a temple of the gods is impiety. They are offenses against the gods who will punish such acts. It is the place where the deed is done which makes the deed an offense. If the deed was done within the territory where the deity lived, or over which he had extended his protection (in the later development of religious ideas) the doer was amenable to the wrath of the outraged deity. But if the deed occurred outside such territory the deity was not concerned in the matter. Pan did not avenge wrongs done to Neptune; and, although

Zeus had supreme authority over all of Greece, still Appolo had concurrent jurisdiction over acts done within the Temple of Music. The motto was: Every god to his own bailiwick!

All of the tribes and nations which contributed to and developed into the English people had this notion of the territorial jurisdiction of the gods. They incorporated their religious idea into their legal codes. The transference of the idea to the common law was simple and natural.

(ii) *Community Responsibility for Offenders*: The gods of ancient peoples were tribal gods. They protected and punished their own. Offenses against them by those within their jurisdiction called forth not only punishment of the individual offender, but also punishment of the offender's family and even the entire tribe. If the tribe or the community shielded the offender, knowingly or unknowingly, the wrath of the god was visited upon the entire group. They were under a duty to avenge the insult to their god. To placate the deity or to avert his wrath they must find the offender and punish him. The community and not the individual was held responsible.

This idea is also carried over into primitive and early legal systems. All the systems which contributed to the common law had this idea. The family of an offender had to pay bot, wer and wite for him. The Hundred had to track an offender through its territory and show that he was not within it if it wanted to be free from imputation of guilt by reason of his activities. Later on offenses against the king called forth punishment against the town or borough of which the offender was an inhabitant unless the offender was punished or delivered up to the king. But a community was not accountable for events outside of its territory by persons not a member of the community. The territorial group was accountable for its own members; it was not responsible for the deeds of a member of another territorial group. The jurisdiction of the group was delimited by the territorial area which it inhabited. Nottingham paid no attention to what occurred in Gloucester; and the courts in Sussex did not inquire into happenings in Northumberland. The judicial functioning of the territorial unit ceases at its boundary lines.

(iii) *Trial of the Offender*. When an offense was committed within a given territorial area the entire community took cognizance of that offense. The individual had to justify, or make compensation for, his actions to the social group of which he was a part. The history of the development of the methods of procedure in Anglo-Saxon law and in earliest common law times is outside the province of this article. All with which we are here concerned is the fact that the method of

trial by jury did develop. It is upon this institution that the territorial theory is mostly founded.

Trial by jury meant that the offender was brought before members of his own community who were to decide whether he was guilty of the alleged offense and if so to what extent. The jurymen were originally the witnesses. They had to testify to what had occurred. Their testimony must be based upon their own knowledge. They were practically eye and ear witnesses. The elements of the offense occurred in their presence. They saw the acts of the alleged offender; they heard the cries of the victim; they were present when the thief was caught or the stealing occurred or the homicide was committed. These things occurred within their community. They were members of the community. They lived in the vicinage of the crime. What they knew the community knew; what they decided the community decided. Trial by jury was a community trial. The witnesses were community-men.

When the character of the jurors changed from witnesses to triers of testimony, the community nature of the trial remained. That which the jurors decided to be the facts, was acted upon by the community which the jurors represented in an inquisitorial capacity. The inquisitorial range of the jury was limited to the territorial area inhabited by the community. It was for this reason that the dead body of the victim of a homicide had to be before the jury if the jury was to adjudge an alleged offender to be a murderer. If the body of the victim was in another county the jury did not have all the facts before it. They could not say that the man was dead. They did not know. They had to view the victim before they would know. They could not see over a boundary line. Whatever happened outside of the territorial area of their community did not exist for them. Community responsibility ceased at the boundary line; and where responsibility ceased jurisdiction ceased.

When, in the course of time, the territorial unit called the county, became the judicial unit which was to take cognizance of offenses, the jury became a county jury. Venue and jurisdiction were the same. Juries drawn from the county decided what was to occur in regard to offenses committed within the county. The theory worked both ways. Inhabitants from one county could not try cases in another county. They could not represent the community which was responsible. Offenses in one county could not be tried in another county. A community was not responsible for what occurred in another community. All the elements of a criminal offense had to be within the territorial area of the community before the community would take responsibility for the offense and inquire into it. This was the general rule which

had grown up and of an amalgamation of primitive religious ideas and community responsibility for individual activities.

B. *The Metaphysical Foundation.*

The territorial theory of jurisdiction had another foundation in the metaphysical notion which later grew into the doctrine that one sovereign will not enforce the penal laws of another sovereign. The notion was that the overlord had a dignity which was not to be flouted within his domain. Whatever occurred within his domain concerned him and his honor. He made the laws which were to govern his domain. They were to be obeyed within. Offenders against his laws were amenable to him. He was supreme—within his domain. But outside of his territory he was without legal power. Another territory had another over-lord who was supreme within it. He would enforce his laws within his domain. But neither one was concerned about enforcing the laws which the other one had promulgated. Each over-lord looked after his own domain and let the domain of another overlord severely alone unless he felt strong enough to back up his meddling with armed forces.

As an over-lord extended his domains he extended the jurisdiction of his laws. The development of the king's peace is an excellent example. It began with the theory that brawling must not occur, even between the most powerful princes, within the precincts of the king's house. With the extension and growth of the king's political power, backed as it always was by the physical power of the king's armies, the king's peace was extended to his forests, whether they were adjacent to his castle or in places where the king rarely or ever visited, and then to the highways which he built, or traveled, or declared to be under his protection, and then to various and sundry places, towns, churches, and the domains of those whom he especially took under his protection. Finally the king's peace extended over the entire kingdom under his control; the king's law held sway over his dominions; and the king's will was enforced throughout the territory which belonged to him. But at no time did the king, any more than did his subordinate princes and over-lords, concern himself with enforcing the laws of another king who ruled over another territory. He was not worrying himself about maintaining the dignity of the other man. But he would brook no indignity to himself. His honor must be kept clear at all costs.

When you add to the theory of the personal dignity of the king the ecclesiastical idea that the king rules by divine right and as the temporal representative of omnipotent deity you emphasize once more the primitive religious notions of the community. For once again it becomes

impious to interfere with the king's will; it is sacrilege to offend against the laws; evil doing in his domain is tabu. "Such divinity doth hedge a king" that it sanctifies his territorial domains. The king and his lands are one. His laws represent the divine will. He who flouts them offends against heaven. All who are within his domains are subject to his will; he must protect them from harm. He will redress injuries and do justice between man and man. It was the establishment of this idea which made it possible for the territorial security theory of jurisdiction over offenses to emerge when the theory of county jurisdiction was found to be totally inadequate for the protection of the king's subjects.³⁸

C. *Federal Law.*

In the United States the territorial theory is the predominant one in both the federal law and the laws of the several states.

In the federal law the theory is based upon constitutional provisions. Article Three of the Constitution provided that an offender was entitled to a jury trial in the state where he committed the offense with which he was charged. The Sixth Amendment modified this and gave jurisdiction to the courts of the judicial district within which the offense was committed, provided that the district had been created prior to the commission of the offense. If the district was created after the offense was committed the proper place for trial was in the previously existing district or state. The district must be created by congress and not by the courts for their own convenience.

The above provisions relate only to offenses committed within a state or judicial district. If they are committed outside of a state or judicial district the offender may be tried wherever "Congress may by law direct." If the offense is a capital offense the offender must be tried "within the county where the offense was committed, where that can be done without great inconvenience."³⁹

These provisions mark an attempt to adapt the common law territorial theory to conditions in the United States. The federal government had no territory of its own excepting the small section given by Maryland and Virginia as a site for the national capital. There were

³⁸The writer is keenly aware of the fact that such broad historical generalizations as are enunciated in the immediately foregoing paragraphs should be buttressed with authoritative references. But the material is entirely too voluminous for presentation in this article. The reader is referred to Muller, "Sacred Books of the East," Frazer, "The Golden Bough," Spencer and Gillan's writings on the Australian aborigines and the other recognized authorities in anthropology and ethnology. At some future time, *Dei volenti*, the writer purposes to bring out part of a more pretentious work on criminal law in which the details which are here missing will be fully set out.

³⁹Act of March 3, c. 231, 1911; 36 Stat. 1087, par. 40.

no counties of the United States. Independent states were the only territorial units in existence, outside of the District of Columbia. They were, therefore, the only judicial districts at first created and recognized.⁴⁰ Later on when some districts were divided into divisions for practical reasons the county idea was reverted to and offenders triable in the division where they committed their offenses. The provision in regard to capital offenses is a complete throwback to the common law idea of county jurisdiction over offenses. On the other hand the power of congress to fix the jurisdiction over offenses committed outside of any state is the natural result of the legal non-existence of the several states so far as international relations are concerned. The authority of each state reached to its boundary lines and no farther. Offenses might be committed on the high seas, or in foreign countries (treason, for example), or within the District of Columbia, or within any territory which the nation might acquire after the adoption of the federal Constitution. Such offenses ought to be cognizable somewhere. The several states had no jurisdiction. Only the United States had jurisdiction if any existed, and Congress was the legislative body to indicate where the jurisdiction should be exercised. It followed, therefore, that if congress did not indicate where the offender was to be tried, and no judicial district had jurisdiction, an offender could not be tried anywhere by the federal courts.

Just so soon as territories were added to the domain of the United States the territorial commission theory was applied to them, and when territories were made into states the territorial commission theory of the state was substituted for the federal territorial commission theory.

D. *Jurisdiction and Venue.*

It is to be noted that a distinction was clearly made between jurisdiction over offenses and the common law notion of venue. Venue deals with the place from which the jury is to be summoned. Jurisdiction deals with the place where the trial is to occur. At common law the jury was summoned from the county within which the trial was to be held; but in our federal procedure the jury could be summoned from any part of the judicial district in which the offender was tried.⁴¹ As a district might, and in most cases does, include an entire state, the offender might be tried in one county and the jurors come from all the other counties in the state.⁴² The accused had no right to be tried by a jury from any particular county, not even the county in which he

⁴⁰1 Statutes at Large 73 (1798).

⁴¹*Clement v. U. S.*, 149 Fed. 305 (1906).

⁴²*Spencer v. U. S.*, 169 Fed. 562 (1909).

committed the offense. Even when a district is divided into divisions, the jurors may be summoned from any part of the district.⁴³ So long as the jurors come from the district the constitutional requirements are met. The entire matter rests within the discretion of the trial court. It can designate certain localities within the district as being the places from which the jurors shall be called; or it can order that jurors from certain localities shall not be called. This discretion is limited only by the requirement that an impartial, fair and intelligent jury should be impaneled. If this is done, the accused cannot be heard to complain.⁴⁴

It should also be observed that if the offense was not committed within a judicial district it could not be taken cognizance of in that district unless Congress had expressly directed such action.⁴⁵ That is, the territorial commission theory is strictly applied in both its affirmative and negative aspects.

E. *Law of the Several States.*

The strict territorial commission theory of jurisdiction over criminal offenses is also the predominant theory in the laws of the several states of the United States. It is found to govern most of the offenses which can be committed against the laws of each state. An offender must be tried in the county where he commits the offense, unless he calls for a change of venue, for good and sufficient reasons, or, in some states, unless the state calls for a change of venue because a fair trial cannot be had in the county where the offense was committed.

The theory was taken over in toto from the common law which was in force at the time our nation was founded. The general idea is that the common law rules were to apply as far as they reasonably could. Only one state, Maryland,^{45a} has made this idea explicit in its constitution, so far as trial by jury is concerned. In many states constitutional provisions as to trial by jury have been interpreted to mean trial by jury as it was known at common law, and thus a trial in the county where the offense was committed.⁴⁶ That is, the political unit

⁴³Ibid.

⁴⁴*U. S. v. Ayers*, 46 Fed. 651 (1891); *U. S. v. Standard Oil Co.*, 170 Fed. 988 (1909).

⁴⁵*Neeley v. Henkel*, 21 Sup. Ct. Rep. 302 (1901); *Vernon v. U. S.*, 146 Fed. 121 (1906); *U. S. v. Richards*, 149 Fed. 443 (1906); Cf. *U. S. v. Sutherland*, 214 Fed. 320 (1914).

^{45a}Declaration of Rights, Art. 21 and Art. 5.

⁴⁶*People v. Potwell*, 87 Calif. 348; 25 Pacific 481 (1891), is an example of this. The constitutional provisions of the several states are not all uniform. Fifteen kinds of phrasing is employed, as the following table shows:

I. The accused is entitled to a "speedy public trial by an impartial jury." No mention of the county or district in which the trial must take place is made. Fourteen states have this provision. They are California, Connecticut, Delaware, Georgia, Idaho, Iowa, Michigan,

of the county was held to be the jurisdictional unit in criminal trials. This jurisdictional unit cannot be enlarged by the courts, according to decisions in some states, and in one state the constitutional prohibition seems to prohibit the legislature from enlarging it. In Louisiana a recent change in the constitution gives the legislature some slight leeway in enlarging the jurisdictional unit for prosecutions of criminal offenses.

The result is that the courts have been mostly concerned with trying to find out just where the offense was committed, before they could determine questions of jurisdiction. In homicide, for example, it has

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- Nevada, New Jersey, New York, North Carolina, North Dakota, Rhode Island, Texas.
- II. The accused must be tried in "the county where the offense was committed." Seven states—Florida, Indiana, Mississippi, Oregon, South Carolina, Oklahoma, Tennessee.
 - III. The accused shall be prosecuted in "the county or district" in which the offense has been committed. One state—Alabama.
 - IV. The accused shall be tried in "the county or district where the offense was committed, which shall previously have been ascertained by law." Three states—Arkansas, Minnesota and Wisconsin.
 - V. Offenses shall be tried "in the county in which the offense is alleged to have been committed." Four states—Arizona, Colorado, Illinois, Washington.
 - VI. The accused shall be tried in the "county or district in which the offense is alleged to have been committed." Eight states—Kansas, Montana, Nebraska, New Mexico, Ohio, South Dakota, Utah, Wyoming.
 - VII. Prosecutions are to be held in the "county where the alleged offense was committed." One state—West Virginia.
 - VIII. In Louisiana the constitution provides that "all trials shall take place in the parish in which the offense was committed, unless the venue be changed, provided further that the legislature may provide for the venue and prosecution of offenses committed within one hundred feet of the boundary line of a parish."
 - IX. In Massachusetts the Bill of Rights declares that "in criminal prosecutions the verification of the facts in the vicinity where they happen is one of the greatest securities of life, liberty and property of the citizen."
 - X. The constitution of New Hampshire provides that "in criminal prosecutions the trial of facts in the vicinity where they happen is so essential to the security of life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county than that in which it was committed, except in cases of general insurrection in any particular county, when it shall appear to the judges of the superior court that an impartial trial cannot be had in the county where the offense may be committed, and, upon their report the legislature shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained."
 - XI. In Missouri the accused is entitled to a "speedy public trial by an impartial jury of the county."
 - XII. The accused is entitled to a "speedy public trial by an impartial jury of the vicinage." Three states—Pennsylvania, Virginia, Kentucky.
 - XIII. The constitution of Vermont provides for "a speedy, impartial trial by an impartial jury of the county."
 - XIV. In Maine the accused is entitled to a trial before "a jury of the vicinity."
 - XV. The constitution of Maryland provides for a jury trial in accordance with the common law of England if that law "is found applicable."

been held that the delivery of the mortal stroke or other cause of the death is the element of the offense which fixes the jurisdiction of the courts.⁴⁷ The statutes of many of the states read in such a way as to justify such a holding. On the other hand, some courts have decided that the death of the victim is the gist of the offense, and that the trial of the offender must occur in the county where the death occurred. There are statutes which make such decisions tenable.^{47a} In regard to the crime of abortion, there is a square division of opinion. It has been held that the offense is committed in the place where the instruments or drugs which are to produce the abortion are used⁴⁸; and also that the abortion occurs where the foetus is discharged. The first holding is reached by looking at the place where the effective, causal agencies are utilized. The second holding is reached by looking at the place where the consequence occurred. Another example is found in prosecution for failing to support one's family. Is the offense committed where the delinquent father or husband resides or where the wife and children become dependent? The courts have gone both ways. Some look at the place where the cause of the omission was^{48a}, and others look at the place where the consequences of the omission become manifest.^{48b} And Louisiana has gone so far as to say that even though both omission and its consequences occur within the same state, and, by logical inference, within the same county the offense is not perpetrated unless the accused knew of the presence within the state, if not within the county, of the victims who felt the results of his omissions.⁴⁹

F. *Defects of Territorial Commission Theory.*

1. These examples indicate the outstanding defect of the strict territorial commission theory. Unless offender's or victim's acts and consequences are all within the spatial limits of the territory, be it county, state or nation, the courts are driven to artificial analysis and reasoning. They must either make use of fictions, as they do in regard to larceny, or else they must stress one of several, or many, elements in a criminal offense and ignore the others, as they do in homicide or abortion. Life cannot be encompassed by imaginary lines. Human events ignore metaphysical entities. Criminals are not always obliging enough to confine their activities completely to the limits of territorial sub-divisions. Libels are circulated in many counties and poisoned

⁴⁷Green's Case, 66 Ala. 40 (1880).

^{47a}Wisconsin Statutes of 1921, section 4679, is an example.

⁴⁸*Comm. v. Bengaman*, 51 Pa. Ct. 336 (1912).

^{48a}*Poindexter v. State*, 137 Tenn. 386 (1917).

^{48b}*State v. Peebles*, 99 S. E. 813 (1919).

⁴⁹*State v. Clark*, 80 Sou. 778 (1919).

candy is sent from California to New Jersey. Criminal offenses may extend over a continent by reason of the agencies which are used, consequences which are produced, and persons who may act. The modern world is a spread-out world. The modern criminal is a diffusive animal. You cannot protect the modern world from the modern criminal by setting up arbitrary limits to places where he can be punished. On the contrary, the criminal is aided and encouraged in committing his offenses because he knows that in most instances he will not be punished for his offenses if he stays away from the place where he committed them. All he needs to do is to step over a boundary line and he can thumb his nose at those who pursue him. Rendition or extradition proceedings may be started, to be sure, but by that time the criminal may have committed another offense and have stepped across another boundary line to a new haven.

2. Another defect in the territorial commission theory of jurisdiction as applied to counties, at least, is its utter artificiality. There is no relation between the size of the county and the protection to be afforded to the county from criminal offenses, nor to the protection afforded the criminal when he is placed on trial. For example: At the place where New Jersey, New York and Pennsylvania meet, a criminal can stand in A county, New York, shoot across the entire width of B county, at that point, in New Jersey, and kill a man in C county in Pennsylvania. No matter how large C county is, its size does not protect it; nor is it protected by the entire extent of B county. Imaginary lines are non-existent protection. Furthermore, Rhode Island has four counties and Connecticut twice that many. Yet both states can be put very comfortably into one county in Texas. And see the result. An offense committed in a county in the northern part of Rhode Island cannot be punished in the southeastern county in Connecticut, yet if the offense is committed in the northeastern part of Pecos county, Texas, where Rhode Island would be if placed in Texas, it could be punished in the southwestern part of Pecos county, where Connecticut would be if it could be placed there alongside of Rhode Island. If the offender committed an offense in Providence county, Rhode Island, the jury would come from a distance of not more than thirty miles from the scene of the offense. If he committed an offense in Pecos county, Texas, the jury to try him might come from as far as one hundred and fifty miles from the place where the crime was committed. The Rhode Island offender would be just as likely to get an impartial jury from Connecticut as the Pecos county offender would be to get one from the other end of that county.

Counties are not laid out with any regard for the punishment of criminal offenders. Political considerations are paramount when a state is divided into counties. Sometimes the natural configuration of the terrain is utilized. Rivers, mountains and lakes may be made a boundary line between counties. But even such things are ignored when partisan politics run high. The famous "shoe-string" district in Pennsylvania and Tom Green county in Texas show what is likely to happen when counties are laid out. Usually a state is laid out into as many equal subdivisions as possible, and each division is called a county. To insist that criminal offenders should be tried only in the county where the offense is committed because that happened to be the rule five hundred years ago in England is nothing less than stupidity. Conditions are different now from what they were then, even in England. New times call for new protective measures. If an old rule fails to fulfill its function it should be abolished.

G. *Transition to Territorial Security Theory.*

Offenses on Boundary Lines. Indeed the strict territorial commission theory has been departed from since very early times in regard to offenses committed on a boundary line. In such cases it is very likely that the offense might have been committed on either side of the line, and so in either county. The doubt is resolved in favor of the state and against the offender, and the rule is that offenses committed on a boundary line are triable in the county on either side of the line. The same rule applies where the exact location of the boundary line is uncertain or unknown.

These exceptions to the strict territorial theory mark the beginning of a transition from the strict territorial commission theory to the territorial security theory of jurisdiction over criminal offenses.

For, when once it was allowed that an offense committed in one county *could* be prosecuted in the adjacent county because the position of the boundary line was indeterminate, it was easy to raise this question: How far within the territory of one county may an offense be committed and still be within the jurisdiction of an adjacent county? This question has been answered in various ways.

1. Some courts have insisted that no variation from the strict rule can be permitted. It is argued that if the legislature can indicate that territory fifty feet from a boundary line and in one county should be within the criminal jurisdiction of an adjacent county, it could also indicate that crimes committed within one, three or fifty miles from the boundary line should be within the criminal jurisdiction of an ad-

jacent county. This would be absolutely contrary to the rights of the accused to have a trial in the county where he committed the offense. Hence statutes which give jurisdiction to adjacent counties when offenses have been committed within specified distances of the boundary line are held to be unconstitutional and void.

2. Other courts take the position that such legislation is not unconstitutional even when the strict territorial theory is applied. They argue that the creation of judicial districts is within the power of the legislature. They can be extended or contracted as the legislature wills. When the legislature states that offenses committed within fifty feet of a boundary line may be tried in either of the adjacent counties they are creating a judicial district one hundred feet wide and as long as the boundary is long. Over this judicial district the courts of the adjacent counties are given concurrent jurisdiction. Analogies to this are found in the rule that offenses committed on boundaries which are highways may be tried in either county, and that states may give each other concurrent jurisdiction over offenses committed anywhere on a river which separates them from each other. That is, the courts argue, in fact, that the political subdivision of the territory of the state need not be the only jurisdictional unit.

The jurisdictional unit may be composed of territory lying within two or more political units.

In Colorado,⁵⁰ when one county is attached to another for judicial purposes, offenses which are committed in one county may be prosecuted in either county. In Connecticut⁵¹ offenses committed on any "waters adjacent to a town but not wholly within it" are held to be done within the town, and so may be prosecuted in the town courts. The most striking instance of this theory is found in Minnesota,⁵² where the route of a railroad is made into a judicial district and offenses committed on trains may be punished in any county into or through which the trains run.

3. Another theory is that the statute which gives concurrent jurisdiction to courts of adjacent counties over offenses committed within designated distances of the boundary line, is that the legislature has extended the territory of each county for the designated distance into the territory of the other county so far as criminal prosecutions are concerned. The strip of territory on either side of the boundary line belongs to both counties. It is a joint, or community, ownership. Therefore the courts of each have jurisdiction over it.

⁵⁰Mills Annotated Statutes, 1912, section 2099.

⁵¹Statutes, 1918, section 6567.

⁵²General Statutes, 1913, sections 8506, 9151, 9152.

Result. Whichever theory is accepted, the fact remains that nearly all of the states allow for the prosecution of offenses committed near a boundary line in either of the adjacent counties. The distance from the boundary line within which the offense must be committed varies from fifty feet to eight hundred rods. The usual distance is five hundred rods. The acceptance of this rule by so many of the states marks a step away from the strict territorial theory and the beginning of the general security theory.

Offenses in Two Courts. Another step in the same direction is the rule allowing for the prosecution in either county of offenses which were committed partly in one county and partly in another county. The reason why this rule was adopted is, probably, that many offenders escaped punishment because it could not be shown that the offense with which they were charged had been committed in the county where they were tried. If an offense is committed only in part in a county it cannot be said that it was committed wholly therein, unless indeed the part which was committed was the gist of the offense. It often happened that the gist of the offense was not committed in the county where the offender was tried and he would escape punishment even though he had killed a man or burned a barn. Another reason is that the courts began to see that an offense consists of several elements. Causes have effects, acts have consequences. The cause may occur in one place and the consequence in another. The offense may begin in one county and be consummated in another. It took the parts to make the whole, but if there was no punishment for the part performance of a crime, nor for all the part performances if they occurred in separate counties, there would be no punishment for the entire offense, and thus no protection to the community against repetitions of the offense or part of the offense.

To meet this situation two theories are adopted and followed.

The first is that a part of the offense will be considered as the whole of the offense, whether such part is the gist of the offense or not. The second is that the place where a part of a crime occurs will be considered as the place where the whole of the crime occurred. The second theory is the one more generally adopted.

II—THE TERRITORIAL SECURITY THEORY

In the preceding section the writer indicated that the earlier theory of jurisdiction over criminal offenses was the territorial commission theory. According to that theory the matter of primary importance is the determination of the place where the offense was committed. The rule is that every offender must be prosecuted in the place where the offense was committed and could not be prosecuted in any other place. It is the *locus* of the offense which fixes the jurisdiction of the courts over the offense and the offender. To determine where the locus was you had to determine where the "gist of the offense" had occurred. By "gist of the offense" is meant that element of the offense without which it cannot be said that a crime has been committed. The courts within the territorial unit where the gist of the offense occurred are the only courts which have jurisdiction over the offense. The territorial unit has no inherent characteristics. It may be a borough, town, city, county, state or country. As a result of historical development the usual territorial unit for purposes of jurisdiction over crimes is the county. The territorial commission theory is usually expressed by saying that jurisdiction over an offense shall be in the county in which the offense was committed. The statement of the theory may vary, but the fundamental idea is that a crime is judicially cognizable only within the territory in which it was committed. The courts were more interested in a theory of sovereignty than in the control of one who had manifested anti-social tendencies. The crime and not the criminal was the center of attention.

THE TERRITORIAL SECURITY THEORY

With the passage of time it was seen that the strict territorial commission theory of jurisdiction over criminal offenses was inadequate to meet the needs of the communities which made up the nation. Offenses were committed on or near the boundaries between counties or judicial districts and it was impossible to prove that they had been committed in one or the other of the counties. Or offenses were committed partly in one and partly in another county and it could not be said with legal exactness that the entire offense had been committed in any one county. Or, offenders would commit crimes in one county and hasten away to another county and never return to the county within which they had committed the offense. Injuries could be done to persons and property with practical impunity. The law was flouted because it was not feared. It was not feared because it could not be enforced.

Soon, however, it was seen how stupid it was to allow the general security of life and property to be impaired because of a theory of territorial jurisdiction. To allow an offender to escape punishment because he acted upon one side rather than on another side of an imaginary line was seen to be useless, particularly when taken in connection with the idea that the sovereign's law existed on both sides of the line. Then it was realized that it was most important to get control of the offender no matter where he might be within the realm of the sovereign. Having broken the laws in one part of the realm, he was likely to break them in another part. It was not the *place where* they were broken, but the fact *that they had been broken*, which was of primary concern. The offender must be taken into custody wherever he could be found if the safety of property and persons was to be assured.

A. ENGLISH LAW.

In England the general security theory was established, first, by a fiction, then by a theory of the continuity of an offense, and finally by definite statutory fiat. It was thus made possible to take control of a person who was a menace to the general security not only in the place where he committed his offense, but also in any place where he might be found to be in custody.

1. *The Fiction.* The fiction arose in connection with the crime of larceny.¹ It was early held at common law that if a person stole goods in one county and carried them into another county, he committed a new theft in the county into which he brought the stolen goods. The fiction was patent. It was impossible for the offender to steal from the victim that which the victim no longer possessed. Nor can the fiction be rationalized by means of the idea that the possessor of stolen goods is under a duty to return them to the owner. If the duty does exist, then it could be argued that the failure to return amounted to keeping the goods out of possession of the true owner and so it was practically the same as taking the goods from him. The omission had the same result as an act of taking would have had. But failure to return stolen goods to the owner was not a crime at common law, although a civil action would lie, and a civil wrong could not be made the basis for a criminal prosecution.

2. *Theory of Continuing Offense.* The theory of a continuing offense appears to have two aspects. The first is connected with lar-

¹³ Const. 113; 1 Hale, P. C. 507; 2 Hale, P. C. 163; 1 Hawkins P. C. c. 33 s. 52; 4 Black. Com. 304; 2 East P. C. 771.

ceny.² If the same kind of commodity, like illuminating gas, is stolen in a series of takings, but by means of the same instrument, it is not necessary as a matter of pleading for the prosecuting witness to elect which of the particular takings is to be the basis for the prosecution. He may just indicate what the instrumentality used in the stealing was and within what time limits the thefts occurred. The courts seem to think that the continued existence of the instrumentality, such as a pipe attached to a gas main at one end and to the gas pipes within the house at the other end, is enough to make the offense of stealing of gas for illuminating purposes, although the house is illuminated only at certain times of the day, a continuing offense. If the gas main was in one county and the house was in another county the continuing offense of stealing the gas would seemingly be held to occur in the county where the house was, although the larceny of the gas could only occur in the county where the gas main was.

The second aspect seems to depend upon the fact that the court focuses its attention upon the consequences of the act of the offender and looks to see where they occurred. An example of this is what the courts call continuing false pretenses.³ If A induces B by false pretenses to build and deliver to A a van, and B does so, A is guilty of obtaining goods by false pretenses even though the goods were not in being at the time of the pretenses and A has cancelled the order prior to the delivery of the van. The building and delivery were induced by the false pretenses made by A; therefore, the offense continues from the time of the making of the pretenses until the time when the goods are delivered.

It appears to the writer that there is no need for this theory so far as the offense of obtaining goods by false pretenses is concerned. The gist of this offense is the obtaining. The time which elapses between the making of the pretenses and the receipt of the goods is immaterial. That the goods were not *in esse* at the time the pretenses were made is also immaterial. That the false pretense continues is true only as it is true that every fact once created continues, in the sense that it cannot be undone, and it is immaterial whether it continues or not. The pretense may be completely wiped out after it has been made, yet if the goods were obtained by reliance upon it, the crime is committed.

²*R. v. Firth*, L. R. 1 C. C. R. 172 (1869).

³*R. v. Martin*, L. R. 1 C. C. R. 56 (1867).

Another example is that of inducing a girl to leave her home in one country and come to another for immoral purposes.⁴ Where the girl was induced to leave Scotland and come to England, the court held that although the inducement occurred in Scotland the offense was a continuing one in England and therefore England had jurisdiction over the offense.

It is difficult to sustain this case in reason unless one frankly admits that the gist of the offense consists of the consequences resulting from the inducement. And indeed that is what the purpose of the law governing the offense is. It wishes to prevent the use of women for immoral purposes. It is not concerned simply with the enticing of the women from their homes. Other statutes deal with that offense. To say that the inducing continues into England is hardly reasonable. To say that if persons help to produce immoral relations between men and women in England they shall be punished in England for their activities seems sensible. The court is really looking at the offender and the consequences of his activities. It is not really concerned with the spatial position of the act of inducing. If it were and then applied the strict territorial commission theory it would have to say that the offense had been committed in Scotland and therefore the English court had no jurisdiction over the offense.

3. *Statutory Jurisdiction.* The statutes giving jurisdiction to the courts of the places where the offender may be found or apprehended as well as where the offense was committed do not cover all the penal offenses, but only a small percentage of them.

These are the offenses of forgery, uttering forged matter, bigamy, perjury, subornation of perjury, larceny and murder and manslaughter by a British subject on land outside of the United Kingdom, the plundering of wrecks, interfering with salvaging operations, offenses committed on a journey and breaking jail. The same theory is behind statutes giving jurisdiction to all of the counties on or near the boundaries of which offenses were committed, or within which offenses were partly committed. Examples of offenses covered by such statutes are conspiracy, the uttering of counterfeit money, and jurisdiction over accessories.

B. FEDERAL LAW.

In the United States the general security theory is found implicitly in constitutional and statutory provisions. If an offense is committed outside of a state or district, Congress may indicate where the offender

⁴*R. v. McKenzie*, 27 T. L. R. 152 (1911).

may be tried. Congress may act according to its discretion in response to the needs of the nation. Acting in accordance with its power, Congress, in various paragraphs in the judicial and penal codes and in statutes dealing with some specific offenses, has given the federal courts jurisdiction over various offenses no matter where they may have been committed. The federal courts have also developed this theory in applying the doctrine of a "continuous offense" to criminal conspiracy.

C. LAW IN THE SEVERAL STATES.

1. *Offenses on Public Carriers.* In the several states statutes are common which provide that offenses which are committed on railroad trains or water-craft during a trip or voyage, may be prosecuted in any county into or through which the train or craft may come in the course of the voyage or trip, or in the county in which the voyage or trip may terminate. The strict territorial commission theory cannot be applied because it is often impossible to ascertain in which county the offense was committed. If the offense is larceny, it can usually only be shown that the goods were aboard the train in a certain county and were then found in the possession of the accused in another county. Just where the appropriation occurred is beyond proof.

So far as larceny is concerned, of course, the fiction that every asportation is a new taking might be applied. But that fiction has not been extended to offenses other than larceny. The theory of a continuing offense cannot be applied because it is not known where the offense commenced.

From a purely analytical position it is obvious that the offense was committed in some county along the route traversed by the train or ship. It might have occurred in any county. Therefore, to make assurance doubly sure, all counties along the route are given jurisdiction over the offense.

Furthermore, such a rule gives greater protection to the traveling public than the strict territorial commission theory. Modern life entails a great deal of traveling about for social, political and commercial reasons. Means of transportation should be made safe from aggressors. People who are compelled, or desire, to travel about should be as secure as they would be if they remained in one locality. The legal system is meant to protect people within the state no matter where they are. The law broods over the railroad as well as over the farmhouse. One who commits an offense while on a public conveyance should be punished wherever he may be caught or found as well as in the place where the offense occurs.

Maryland allows the most sweeping jurisdiction in regard to the crime of disorderly conduct if committed on a public conveyance. The offender may be tried and punished practically anywhere within the state.⁵ Idaho does the same thing in regard to persons stealing rides.⁶ Maine, for offenses upon tide waters, allows considerable leeway of jurisdiction.⁷

The Maryland rule as to disorderly conduct should be extended to all offenses which can be committed in moving vehicles. In these days of common use of high-power automobiles, offenses of all kinds can be, and are, committed while travelling over the ground at a great rate of speed. County, state and national boundary lines mean nothing. Offenses may be begun in one county, continued in other and consummated in another state or country.

The same thing applies to aeroplanes. They are being used more and more for commercial purposes. Passenger service is regular and schedulized. They differ, so far as criminal offenses are concerned, from railroads and water-craft only in that the medium through which they travel is the air and not the water or land. As the rights of the state extend *ad caelum*, its duty to protect should be co-extensive.

2. *Transitory Crimes.* A number of crimes are considered as transitory because of their nature.

(a) The earliest transitory crime, was, probably, larceny. The common law fiction gave way to the statutory enactment that he who stole could be prosecuted for larceny in any county into or through which the property was brought or where it was possessed. This rule was extended, in the course of time, to the offenses of robbery, burglary, embezzlement and receiving stolen goods. Massachusetts⁸ applies the same rule to the offense of obtaining goods by false pretenses.

It is to be regretted that occasionally a court will see fit to adhere to the fiction connected with larceny and declare that the rule cannot apply to the crime of burglary, for that can be committed but once, as the essence of it is the breaking and entry and this can occur only where the place broken into and entered is situated. The purpose of the rule is to give more protection to property by permitting the punishment of the offender wherever he can be found. Modern conditions call for the rule, and a too meticulous application of an anti-

⁵Maryland Statutes, sec. 102.

⁶Compiled Stats., 1919, sec. 8445.

⁷Statutes, 1916, ch. 133, sec. 4.

⁸General Laws, 1921, sec. 59.

quoted fiction and an outworn theory of jurisdiction is hardly in keeping with the needs of the time.

(b) Some offenses against the person are transitory. The abduction, decoying and enticing of children may be punished in the county where the offense is committed or where the victim may have been taken or brought. The same rule applies to procuring, in any way, females for purposes of prostitution, concubinage or other immoral purposes. Practically all states have statutes embodying this rule of jurisdiction.

Some courts say that the offenses are continuing ones. Others say that the offense is partly committed in every county where the victim is taken. But whatever the theories of the court may be, the obvious fact is that the purpose of the statutes is to apprehend the offender wherever anything connected, in almost any way, with the offense was done or produced. The legislators are not focusing their attention so exclusively upon the place where the offense was committed, but are beginning to pay some attention to the offender himself. He looms up as a more important factor than heretofore in determining jurisdiction over his offenses.

(c) *Bigamy, Polygamy and Incest.* This is more clearly shown by the rule governing the offenses of bigamy, incest and, in Maine, polygamy. These offenses may be prosecuted in the county where they occur, where the offender resides, or where he is apprehended. Here definitely the territorial commission theory, if not abandoned, has been added to in order to secure greater protection from offenders. This is shown by the rule as applied to incest. For incest can be committed only in the place where the incestuous intercourse occurs. It cannot be a continuing offense, although incestuous cohabitation, which does not appear to be forbidden anywhere by statute, may be. Yet, nearly all of the states which forbid incest allow the offender to be punished in the county where he is apprehended as well as where the offense is committed. This is explicable only on the theory that the statute is aimed at the offender and not at the offense alone. The idea seems to be that a person who is guilty of incest is too much of a menace to be at large anywhere. He must be punished wherever you can get him. The last mentioned theory would also apply to persons guilty of bigamy and polygamy.

The rule as applied to these latter offenses, however, may be the outcome of the desire to combine two theories which resulted in opposite holdings in the state where the strict territorial commission theory was followed. Some of these courts have held that the offense

was committed at the place where the unlawful marriage ceremony occurred. Others have held that the offense was committed in the place where the illegal cohabitation took place. All of them have put their attention on the place where the offense occurred and seem to have overlooked the fact that the word "marriage" is sometimes interpreted to mean the marriage *ceremony* and sometimes the marriage *status*. If bigamy means a second ceremony, the offense is committed at the place where the ceremony was performed. If bigamy means cohabiting, as if a legal entrance had been made into the marriage status, the offense is committed wherever the parties live together, or wherever they hold themselves out as being married. If the first meaning is adopted, then the crime is really an offense against the laws dealing with the capacity to go through a valid marriage ceremony, for a married person cannot be a party to a valid marriage ceremony. It is in its essence an illegal attempt to enter into the marriage status. The strict territorial commission theory would give jurisdiction over the offense to the county where the attempt occurred. If, however, the second meaning is adopted, then the object of the statutes prohibiting bigamy is to protect a social institution, and the result of violating the statute is that the stability of the social institution is threatened. The menace exists wherever the person illegally holding himself out to be within the status may be. Even under the strict territorial commission theory the offense would be a continuous one. It would be within the jurisdiction of any county where the offender would reside or be found. Combining these two theories we get the rule as laid down, more or less generally, throughout the United States.

(d) *Bastardy Proceedings*. In bastardy proceedings the putative father may be prosecuted in the place where the act of begetting is charged or where he resides (according to the rule in New Hampshire),⁹ or where the child is born, even though the begetting was in another county or outside the state (according to the Pennsylvania rule).¹⁰

The purpose of bastardy statutes is to aid in preventing the birth of illegitimate children. The New Hampshire rule looks to the offender. It wants to get him wherever he may be. The Pennsylvania rule looks to the consequences of the offender's acts. Punish him wherever the consequential birth occurs. Both rules are for the purpose of protecting some incidents of the social institution of marriage. The New Hampshire rule is, probably, more efficacious than the Pennsylvania

⁹Public Statutes, 1901, ch. 87, sec. 1.

¹⁰Statutes of 1920, sec. 7866.

rule. A combination of them would be better than either one alone to carry out the purpose of the statutes.

(e) *Libel*. Libel and the sending of criminal letters through the mail are transitory in many states. They may be punished where the libellous matter is printed, published, circulated, mailed or received. The purpose seems to be to protect the victim wherever possible injury may come to him and to punish the offender wherever the results of his activities become manifest.

(f) *Rape*. The Texas statute as to rape¹¹ is a definite expression of the territorial security theory. The person who commits rape can be punished where the nearest judge resides. Some respect is paid to the territorial commission theory, because the place where the offense occurred is used as the point from which to measure toward the nearest judge. But it is most obvious that county lines, or boundaries of judicial districts, must not interfere with the punishment of offenders.

(g) *Conspiracy in Texas*. A further step is taken in regard to conspiracy. A conspirator who enters into a conspiracy outside of the state to do an illegal things within the state may be punished in the county where the offense *was to have been committed* (although nothing has as yet been done there, apparently) or in any county where he may be found, or in *the county where the seat of government is located*.^{11a}

No doubt an overt act would have to occur somewhere within the state to complete the offense, but it seems as though just the likelihood that harm would come within the state gives jurisdiction over the offense. The provision that the prosecution may occur in the county where the seat of government is located indicates that as the function of the government is to protect the inhabitants of the state it should have the privilege of dealing with those who threaten the security of the state in the place where the state governmental agencies and officials are situated.

(h) *Cruelty to Animals*. Maine has an unique statute which deals with cruelty to animals.¹² It provides that one who is accused of being cruel to an animal may be prosecuted in any county where the *animal* may be found. Jurisdiction is fixed, apparently, by the spatial position of the victim. In this respect the statute is like the statutes which permit a homicide to be prosecuted in the county where the victim dies. But a difference can be taken in this way. The homicide statutes are

¹¹Revised Criminal Statutes, 1920, sec. 254.

^{11a}See note 17 infra.

¹²Statutes, 1916, sec. 66, ch. 126.

concerned with the results of the offenders' acts. But the Maine statute seems not concerned with the results of the cruelty, but with the place where the victim is.

It may be, of course, that the presence of an abused animal in a community is an affront to the moral sensitivities of that community, that the one who was cruel to the animal in that far contributed to the affront, that the statute is designed to protect the general security of the moral sentiments of all communities, and that the offender really produced results in the community where the animal is and so should be prosecuted there.

(i) *Prize-Fighting*. The statutes, found in many states, which forbid prize-fighting and give jurisdiction over it to the counties into or through which the offenders may pass, or be, or are apprehended, are also designed to protect the social interest in the peace and morals of the state.

(j) *Law Enforcement*. Some offenses are transitory because they interfere with the enforcement of the law, even though no particular individual may be injured.

(1) *Escape*. Breaking out of jail or escaping from prison are, in many states, punishable in any county in the state. In these cases no particular individual is injured, but the entire law is flouted. An escaped convict is, or may be, a menace to every community in the state. Every community is given the authority to protect itself from the presence of such a menace. The general security of the state is furthered by such a rule.

(2) *Lynching*. The crime of lynching is another example. The rule in Indiana¹³ is that lynching is a continuous crime from the moment of its inception to the moment of its consummation, and that anyone connected in any way, in any county of the state, with the mob that does the lynching, may be prosecuted in the county where he contributed to the lynching as though the lynching had occurred in the county where the contribution was made.

It is true that when a lynching occurs, an individual is the victim and suffers hurt through it, but the purpose of the statute primarily is not so much to punish the mob for the death of the victim, as to punish it for taking the law into its own hands, and interfering with the proper administration of justice. The offense is against the due process of law. The law exists throughout the state. An offense against it extends throughout the state and may be prosecuted anywhere within the state.

¹³Burn's Annot. Indiana Statutes, sec. 1874.

(k) *Treason*. The rule as to treason is of the same character. It can be punished anywhere in the state, because it aims at the existence of the entire state and defensive measures against it are properly allowed anywhere within the state. The general security of the whole is threatened. Any part of the whole may protect the whole from a general danger.

(1) *Counterfeiting*. Another example is the Texas rule as to counterfeiting.¹⁴ The offense may be prosecuted where the counterfeit coin is made, where it is passed or attempted to be passed. The general security of all commercial relations is based upon a valid and legal medium of exchange. The existence of counterfeit coin threatens the security of business dealings throughout the state, for modern business is not confined to local political units, and what is an economic danger to the entire state calls forth preventive measures throughout the state. The Texas rules as to perjury and false swearing, though not so sweeping as the above, are of the same character. The general security of commercial and legal transactions must be protected throughout the state.

It is to be observed and noted that the attention of legislators is being focused less and less upon the place where a criminal offense is committed and more and more upon the place where the offender can be apprehended. The realization is growing that not the crime but the criminal is the most important factor to be considered in the protection of society. The *presence* of the offender and not the *locus* of the offense is coming more and more to be the determinant of jurisdiction over criminal offenses. Although at the present time only a few offenses are considered to be transitory, it may confidently be expected that an increase in their number will be made in the near future as the criminal law becomes more responsive to the needs of modern civilization.

NATIONAL SECURITY.

The preceding examples of the application of the general security theory of jurisdiction over criminal offenses have been concerned with the protection of the individual members of the state or nation. But the theory is also applied so as to protect the state or nation as a whole.

1. *Protection of Administrative Agencies*. In the first place this is done so as to protect the administrative agencies of the government.

¹⁴Revised Criminal Stats., sec. 258.

These agencies are the army, the navy, the customs department, the excise department, the post office department, and any other departments which are necessary for the proper administration of the functions of government.

England. In England, offenses committed by officials of the crown outside of the realm, and acts of aggression aimed at the security of the state, like treason and the betrayal of official secrets, are within the jurisdiction of any court which gets physical control of the offender. The offender can be prosecuted where he committed the offense, or where he is apprehended, or where he is in custody, or where his activities resulted in an interference with the proper functioning of an administrative agency.

United States. In the United States whoever interferes with the working of the revenue and post office departments can be prosecuted where he acted, or where he caused consequences to occur, or where the lives or where he can be found.

2. *Protection of National Honor and Dignity.* In the second place, the general security theory is applied so as to protect the honor and dignity of the sovereign of the state or nation. This application is an outcome and development of the metaphysical basis of the strict territorial commission theory of jurisdiction.

Sovereigns. When the sovereign of one domain visited or passed through the domains of another sovereign he commanded such respect as his power and prestige procured for him. He had no legislative powers within the domain of another, but he was exempt from the operation of the laws of that domain. If the visiting sovereign offended against the laws of his host, redress came through an appeal to force. The offending sovereign could be expelled, imprisoned or killed. But these were warlike measures. The offender was outside the legal control of his host.

Representatives of Sovereigns. With the continued development of relations between sovereigns, those who represented the sovereigns began to receive the same honors and courtesies as the sovereign would have received had he been present himself. "The King Ambassadors" were the king. So, too, were the lesser officials of the sovereign when on official business and when provided with official credentials. These credentials were of many kinds: rings, signets, tokens, livery, colors, standards and flags. Wherever the credentials were displayed, they indicated that the accrediting sovereign protected the persons and places that displayed them.

Commercial Protection. With the development of commerce and trade it became customary for merchants to place themselves under the protection of some powerful person, so that they and their property would be free from assaults and dangers in whatever regions they might travel. Those who asked for protection gave tribute or allegiance. They were subjected to the rules which their protector laid down for their guidance and control. Letters patent, charters, and such like are examples of the way in which protection was overtly established.

Law of the Flag. In maritime commerce the flag became the symbol of the protecting sovereign. "The law of the flag" means that rules and regulations established by the sovereign whose flag is flown will govern all activities on the ship over which the flag flies. The flag will protect all those who are upon the ship.

The corollary of protection is submission. Submission may be express or tacit. To remain in a place over which protection was extended by a sovereign is a tacit submission to it. To enter into a place where a sovereign's protection existed is an express submission to it. Once a person comes within the sphere of protection he enters into the sphere of submission, which the protecting sovereign creates and indicates. Activities within the protected sphere are subject to the laws which are operative within that sphere. Offenses against those laws are offenses against the protecting sovereign. They may be prosecuted wherever the law of that sovereign operates. For this reason, activities on ships are subject to the "law of the flag" no matter where the ships may be. Offenders against that law can be prosecuted wherever the sovereign wishes to prosecute within his own domain. The theory is: *Whom the law protects it can punish.* Admiralty jurisdiction is based on this theory. So, too, is the jurisdiction exercised by the criminal courts over offenses committed outside the territorial domains of the sovereign, but within his sphere of protection, by subjects and non-subjects alike.

The converse of this theory is also true: *Whom the law does not protect it will not punish.* This is amply demonstrated by the facts that offenses committed, against foreign laws, in foreign territories and on foreign ships in foreign waters are almost entirely outside the jurisdiction of the courts.

Bases for Jurisdiction. The territorial security theory of jurisdiction operates with reference to several factors in a criminal offense. The offender owed a duty of compliance with the sovereign's law which he breached. The victim was entitled to protection and did not receive it. The prestige of the sovereign is impaired to some extent because

of his failure to protect the victim. The acts and consequences or either of them occurred within the sphere of protection and so were amenable to the laws operative within the sphere of protection. This application of the theory, therefore, utilizes some of the notions of the territorial commission theory of jurisdiction as well as those of territorial security theory. Ships are something like territory in that they are physical objects with definite dimensions and boundaries, and also because they can become part of a territory by incorporation. Then, too, persons who entrust themselves, and objects which are entrusted, to instruments of commerce must be kept secure, or commercial and trade relations will suffer and, perhaps, be destroyed. When a sovereign states that certain ships and territories are his, he asserts that he will protect all those who enter upon them with his permission. He guarantees, practically, that there will be no breaking down of his legal system and his governmental functioning, and that the security of the individual will be maintained. The individual is assured that he can rely upon the protection of the sovereign wherever the law of the sovereign is held out to be in force. He who puts his trust in the sovereign will not find his trust betrayed. Anything, therefore, which interferes with the maintenance of this protection is an injury to the dignity and prestige of the protection-promising sovereign and must be prevented. To aid in such prevention, jurisdiction over offenses is given, in England, to the admiralty courts and the Central Criminal Court, and, in the United States, to the federal courts.

3. *Comity between Nations.* In the third place, the general security theory is applied so as to maintain friendly relations between states and nations.

Extradition and Interstate Rendition. Extradition treaties are examples of this; so are the provisions in the constitution of the United States making interstate rendition obligatory upon the several states of the Union.

Affirmatively stated the principle is that jurisdiction will be assumed over a person who has committed an offense against domestic or foreign laws either at home or abroad if such action will foster and maintain friendly relations with a foreign sovereign. Offenders against foreign laws in foreign territory who come to this country will be handed over to the offended sovereign according to the terms of the extradition treaty made with him. Otherwise the territory of one sovereign may become an asylum for those who break the laws of another sovereign. This might lead to resentment on the part of the latter and

induce him to engage in reprisals which may bring on a war. It is better policy to surrender those who have violated the laws of a foreign sovereign to him than to protect them against him. Reciprocal active assistance in the enforcement of territorial sovereignty is better than mutual passive resistance to the punishment of the law breakers. Neighborly protection is better than neighboring danger.

On the other hand, if the assumption of jurisdiction over a foreign subject, or foreign sovereigns, will cause a rupture of friendly relations with other countries jurisdiction will not be exercised. It is for this reason that sovereigns and their representatives are exempt from the application of the penal laws of any foreign territory where they may be. No nation will imprison or otherwise punish visiting sovereigns or their official representatives unless the needs of self-defense are so imperative that they outweigh the desire for peace and the evils of war.

4. *Creating a Forum.* In the fourth place, the theory has been applied by the United States Supreme Court to provide a forum for the trial of offenses against the laws of the United States, when Congress has not done so. This was done in the case of *United States v. Bowman*, which was decided in 1922.¹⁵

The principle laid down in that case was this: If a statute creates an offense but does not indicate the place where the offense shall be tried, you can find that place by looking at the nature of the offense and determining its purpose and scope. If the offense can be committed only within certain territorial limits, the courts of that territory only can have jurisdiction. But if the offense can be committed anywhere, and is committed outside of any territorial limits of the United States, the federal courts will have jurisdiction over the offense no matter where it was committed. If the purpose of the statute was to protect a given locality within the territory of the United States, the courts of that locality should take jurisdiction over the offense. But if the purpose of the statute was to protect the nation taken as a whole, every federal court can take jurisdiction over the offense and the courts of the district in which the offense is first found or brought has jurisdiction over the offense. Necessity overrides all theories of jurisdiction which interfere with national self-preservation.

This theory indicates an attempt to carry out, albeit in a very conservative and limited way, the function of the criminal law; i. e., the protection of society from actual or potential evils no matter where those evils may appear. It looks to the consequences of activities and

¹⁵260 U. S. 94; 43 Sup. Ct. Rep. 39 (1922).

not to the activities themselves. If the consequences of activities include harm to the nation, the actor will be amenable to the national jurisdiction. The spatial position of the actor at the time he acts, the spatial position of his acts or instrumentalities and the existence of foreign control over the territory wherein the activities of the actor occur are all immaterial. The nation is the victim. That is enough to confer jurisdiction on the nation's courts.

Federal Penal Code. The instant case was decided under section 35 of the federal penal code. The principle it enunciates, however, applies to many other sections of the penal code. Chapter 1 deals with offenses against the existence of the government. Sections 1 to 5, inclusive, would be governed by the instant case. Chapter 4 deals with offenses against the operation of the government. The principle case would apply to sections 27 to 30, inclusive; sections 32 to 44, inclusive; sections 60, 61 and 63; sections 66 and 67; sections 70 to 79, inclusive, and section 82. Chapter seven deals with offenses against the currency and the coinage of the United States. The following sections would come within the principle case: sections 148 to 154, inclusive; sections 162 to 169, inclusive, and section 178. Certain sections of the chapter are expressly excluded from the operation of the principle cause because they refer to persons "within the United States or any place subject to the jurisdiction thereof" and thus invoke the strict territorial theory of jurisdiction. Sections 156 to 161 come within the exclusion. So do sections 170 and 171.

It is to be regretted that Mr. Chief Justice Taft saw fit to make a distinction between injuries to the United States and injuries to individual citizens or inhabitants of the United States. It is submitted with all due deference, that the function of the criminal law is not only to aid in protecting the state as a juristic person, but also to aid in protecting the individuals who compose the state, and that this function is only partially fulfilled if theories of jurisdiction prevent the protection of the individuals within a given territory.

For example, Mr. Chief Justice Taft excludes the crime of murder from the operation of the principle he enunciated. But surely the murder of a subject is an "obstruction" of the government if only for the reason that a potential fighter and protector is destroyed.

And, again, the distinction between public and private injuries leads to difficulties, needless difficulties, it is submitted, in dealing with offenses against public justice as treated in chapter 6 of the federal penal code. Section 126 will illustrate this point. It reads: "Whoever shall procure another to commit any perjury is guilty of suborna-

tion of perjury . . . etc." Suppose that a subject of the United States while in South America, there hires a person to come to the United States and testify falsely in a civil suit between private persons which is pending in New York City. The person does so testify. Is the perjury directed against the government in that it interferes with the administration of justice, or is it directed against the rights of the private persons who are parties to the civil suit? It is submitted that it is both; that the destruction of private rights is an interference with function of the government whose duty it is to protect the individual members of the nation. And the same reasoning holds true of the offense like embezzlement, fraud, arson and burglary. The theory of the principle case should be extended to cover injuries to individuals as well as injuries to the state as a juristic person. This, however, has not yet been done.

TRANSITION TO COSMOPOLITAN THEORY OF JURISDICTION OVER CRIMES.

Finally, it is to be noted that there are provisions in the penal codes of several of the states of the United States which mark, rather definitely, the beginning of a transition from the territorial security theory of jurisdiction over criminal offenses to a theory of jurisdiction based upon cosmopolitan justice.

This transition is very well illustrated by the provisions in the Penal Code of New York and in similar provisions in the criminal law of a number of states which have followed New York in the codification of their laws. An analysis of the New York Code will represent, in practically every point, an analysis of similar provisions in the laws of these other states as well.

1. *Penal Code of New York.* The Penal Code of New York, in Article 174, sections 1930 and 1933, deals with the persons who will be punished for the commission of criminal offenses. Five situations are presented. Each will be discussed in turn.

(i) If a person commits within the state any crime, in whole or in part, he may be punished within the state. The local jurisdiction would be in any county in which the offense was committed, partly committed or consummated. This provision may be subsumed under the strict territorial theory or the general security theory of jurisdiction. The offense is committed within the state; the acts of consequences are dangerous to the state, and the offender must be punished where the offense was committed or the consequences are felt.

(ii) The second situation presented is that of a person outside of the state getting some one else to commit a crime within the state. The language used is: "A person who being without the state causes, procures, aids or abets another to commit a crime within the state." This provision can be brought under the strict territorial theory of jurisdiction only by the use of principle of agency law *qui facit per aliam facit per se*, or the notion that the person punished is constructively present within the state when the offense is committed. Each of these is fictitious. Punishment for crimes cannot be evaded by pleading the relation of principle and agent. It is physically impossible for a person to be inside the state at the time that he is outside of it. The Code is really concerned with trying to prevent the commission of crimes within the state by the use of agencies and instrumentalities of various kinds, on the part of persons who are physically outside of the state and who, therefore, cannot be reached by a strict territorial theory of jurisdiction. The general security theory is really being adopted. If the consequences occur within the state, and these consequences are harmful, the one that brings the consequences about will be punished, as principle of accessory. But the offense must be committed *within* the state. Offenses committed *outside* of the state are not within the purview of this provision.

(iii) But the third situation provided against deals definitely with offenses committed outside of the state. Three crimes are mentioned. These are larceny, abduction and kidnapping.

If an offense is committed outside of the state which would be the offense of larceny if done inside of the state and the offender is found in the state with any of the feloniously appropriated property, he will be punished for larceny. The provision represents, of course, the codification of the common law rule governing larceny. Only the fiction that every new asportation is a new taking is definitely abandoned. But the common law rule has not been taken over *in toto*. It has been modified. The felonious taking need not be a larceny in the place where it occurred. It must be an offense against the law of that place. But it can be "*any offense*," although it must be that which would be larceny by the law of New York had the offense really occurred therein.

It is obvious, of course, that New York does not desire to become a dumping ground for mis-appropriated goods, nor a haven for those who offend against the property laws of another state. It may be that the purpose of the law is to keep thieves out of the state. But it may also be that New York does not wish to have within its limits any of

the consequences growing out of the commission of an offense in another state.

The provision dealing with abduction and kidnapping would give added weight to this last idea. For if the person who is guilty of the crime of abduction or kidnapping "brings, sends or conveys" the victim into New York, he may be punished for kidnapping or abduction. Here it is to be noted that the offense is made out if the offender is guilty of a crime according to the law of the foreign state. The activity of the offender does not need to be *contra* the abduction or kidnapping laws of New York. His punishment is based upon the fact that the victim was introduced into the state. New York does not want to harbor abducted or kidnapped persons. Such consequences of criminal activities abroad it tries to prevent. Nor will it matter that the victim is most innocent or harmless. The law is not directed against the victim but against the offender. The offender must keep his victims and *himself* out of New York. The general security may be threatened by the presence of the victims, for some of them may be dangerous to New York, but the general security *is* threatened by the presence of the offender. If he kidnaps a person in another state, he is likely to try and kidnap a person in this state. So that if he ever comes into the state he will be punished. His offense consists of two parts: abducting or kidnapping a person in another state and being connected with the introduction of the victims into this state. The law of the foreign state is broken by the first factor. The law of New York is broken by the two factors. But punishment is not yet meted out simply for offenses against the laws of a foreign state.

(iv) The fourth situation presented deals flatly with acts done outside the state which produce illegal consequences within the state. The language is "A person who, being out of the state, and with intent to cause within it a result contrary to the laws of this state does an act which in its natural and usual source results in an act or effect contrary to its laws." The legality or illegality of the act outside of the state is immaterial. An innocent or guilty act, plus *mens rea*, plus illegal results within the state gives the basis for punishment by this state. Harmful result within the state is all that is required. The rest may occur outside the state.

(v) But the provision dealing with the fifth situation stresses the *act* which is done *outside* of the state, and makes the act punishable because of its injurious effects within the state. Section 1933 says that "a person who commits an act without this state which affects persons or property within this state, or the public health, morals or de-

gency of this state, and which if committed within this state would be a crime, is punishable as if the act were committed within this state." This section applies even when the act done outside of the state is legal where done. In it New York is saying to the rest of the world that if anything is done outside of New York which could not legally be done inside of New York, and injury results to persons, property, health, morals or decency in New York, the actor will be punished if he ever comes into New York.

This is the territorial security theory of jurisdiction pushed to its logical limit. Whatever hurts the community will be punished no matter where the activities occur which produce the hurt. All that is required is a showing that the foreign activities would have been forbidden in New York and had harmful results in New York, and punishment will be inflicted in New York. But it is also the beginning of cosmopolitan justice. Activities abroad may be criminal by foreign law and may be criminal if done in New York. Activities abroad may affect persons, property, health, morals and decency in New York. This would be always a matter of fact. But if the connection between criminal activities abroad (which would have been criminal activities in New York, had they occurred there) and harmful effects in New York is made out, then New York *would punish offenses committed abroad because of the consequences occurring in New York*. That the consequences are harmful to New York does not alter the fact that the activities are crimes *abroad*. New York will punish foreign offenses when they affect her citizens. Modern life is so complex, modern states are so inter-connected and inter-related, that whatever occurs in one state has potentialities for good and evil in all the other states. All foreign crimes are potentially affective in New York. All foreign crimes are potentially punishable in New York. What is true of New York is true of all the states which have adopted, practically, the New York code.

It is a far cry from the strict territorial theory of the Common Law to the provisions we just have been considering. The next step will be to punish those who commit crimes abroad, even if the effects of the crimes are not definitely felt at home, other than that the presence of one who has committed a crime abroad may be looked upon as being an injury, actual or potential, to the state where he may go after he has committed the crime abroad. Indeed, one wonders if the step has not already been partly taken when one considers some of the statutes found in the several states. The following examples will indicate the existent provisions.

Texas. The Texas code of criminal procedure provides that "prosecutions for offenses committed wholly or in part without, and made punishable by law within, this state may be commenced and carried on in any county in which the offender is found."¹⁶ Two things are to be noted. The presence of the offender gives the locus of the jurisdiction, and the offense may be entirely committed outside of the state. So long as the offender has done outside of the state that which he could not legally have done within the state, and then comes into state he is amenable to punishment in any county where he may be. The statute as to conspiracy, in Texas also, provides that "when the conspiracy is entered into in another state, territory or county, to commit an offense in this state, the offense (of conspiracy) may be prosecuted in the county where such offense (the crime to be committed) was agreed to be committed, or in any county where any one of the conspirators may be found, or in the county where the seat of government is located."¹⁷ Here the crime is committed outside of the state and the presence of the offender is the only thing which gives jurisdiction to the courts of the state. That the peace and dignity of the state was threatened seems to be enough to make the offenders amenable to punishment.

There is also a section dealing with offenses committed by state officials outside of the state. It provides that "offenses committed out of this state by a commissioner of deeds, or other officer acting under the authority of this state, may be prosecuted in any county of this state."¹⁸ It is not quite clear just what this statute means. It may mean that the officers of the state will be punished for doing that which is a crime according to Texas law. In that case the statute must be deemed to have ex-territorial force, and follows the official wherever he may go. Or it may mean that Texas will consider itself so outraged when one of its officials commits an offense against the laws of another state that they will punish the official as though he had committed a like offense within the state. The dignity of the state must not be impaired by representatives of the state. If it is impaired the representatives will be punished. Here again it is to be noticed that though the real offense is committed in another state, the official position of the offender is the basis for the prosecution.

Other States. In many states there are provisions in the statutes permitting the prosecution of persons who leave the state to do that which is forbidden to be done within the state. The statutes usually

¹⁶Sec. 237, Rev. Criminal Statutes.

¹⁷Sec. 253, Revised Criminal Statutes.

¹⁸Revised Cr. Statutes, sec. 249.

refer to duelling and prize-fighting, but liquor-selling and betting, have, by judicial construction, been treated in like manner. They can be explained only on the ground the states which have such laws will not tolerate having in their territory persons who will claim the protection of such of the laws as they like, and then step across a boundary to avoid the duty of obeying the laws they do not like, and then return for further protection.

Massachusetts has a statute¹⁹ which purports to give jurisdiction over offenses committed on the "sea" within a marine league of the shore, to the county adjacent to the water on which the offense was committed. This statute appears to be the only one of its kind. Whether a state may exercise concurrent jurisdiction with the United States over offenses committed on the marginal seas may be open to some question. But be that as it may, it is interesting to find such a statute, because it definitely purports to take cognizance of offenses committed outside of the state's territory, and to punish the offenders committing them. How the statute would be interpreted is a matter of pure conjecture, as no case has been found connected with it. But its phrasing is quite sweeping. It may mean that Massachusetts courts are to take cognizance of offenses against the Law of Nations, against the laws of the several nations as well as against the laws of Massachusetts. Or it may mean simply that Massachusetts law extends a marine league out from shore. The latter is the more likely meaning.

The statutes dealing with jurisdiction over offenses committed on the St. Francis and Mississippi Rivers are the most interesting of all those dealt with in this section. According to these statutes all offenses committed on the St. Francis River, where it is a boundary line between Arkansas and Missouri, may be prosecuted in either state; and all offenses committed on the Mississippi River, where it is a boundary line between Arkansas, Mississippi, Missouri, and Tennessee, may be prosecuted in the states which are separated by it.²⁰ Each state will take cognizance, of course, of offenses against its own laws only. But, none the less, two complete systems of law are in force at the same time on the rivers. Tennessee law is enforced in Missouri; Arkansas law is enforced in Tennessee. The penal code of one state operates in another state. It is not true, so far as these states are concerned, that jurisdiction stops at the boundary line of the state.

[To be concluded in the next number.—Ed.]

¹⁹Laws, 1921, sec. 57.

²⁰Statutes of Arkansas, 1921, secs. 2857, 2858; Acts of Missouri, 1911, p. 202; Laws of Mississippi, 1910, ch. 141; Tennessee Code, 1917, secs. 80a-1.