

TERCERA PARTE

REPORTE SOBRE EL DELITO EXTRATERRITORIAL

REPORT

ON

EXTRATERRITORIAL CRIME

AND

THE CUTTING CASE.



WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1887.

DEPARTMENT OF STATE,
Washington.

SIR:

In accordance with your request, I have the honor to report to you the results of an examination of the jurisdictional claim made by the Mexican Government in the case of A. K. Cutting, a citizen of the United States, arrested at Paso del Norte, Mexico, on the 23d of June, 1886, on a charge of having published in El Paso, in the State of Texas, a libel against a Mexican.

On the 19th of July, 1886, there was sent to Mr. Jackson, Minister of the United States at the City of Mexico, the following telegram:

You are instructed to demand of the Mexican Government the instant release of A. K. Cutting, a citizen of the United States, now unlawfully imprisoned at Paso del Norte.

BAYARD.

The facts upon which this demand was based may briefly be summarized:

On the 1st of July, 1886, Mr. Brigham, Consul of the United States at Paso del Norte, Mexico, wrote to the Department of State at Washington that A. K. Cutting, a citizen of the United States, had been arrested in Paso del Norte on the 23d of the preceding month by the direction of the judge of a local court for the publication in Texas of a libel against a Mexican citizen. When arrested Mr. Cutting had, it was stated, been about eighteen months a resident of Paso del Norte, engaged in editing a newspaper called *El Centinela*, in a recent number of which he had reflected upon the character and questioned the good faith of one Emigdio Medina, a Mexican, who proposed to start a rival newspaper in the same town. For this publication Mr. Cutting was, at the instance of Medina, arrested, brought before a local court, and required to sign a "reconciliation," which is in the nature of a compromise or settlement between the parties, in consideration of which the party who feels himself aggrieved abandons penal proceedings.

What occurred after the “reconciliation” may be related in Mr. Brigham’s own words:

Under the law here, when the parties agree to and sign a “reconciliation,” the case is dismissed, which was done in this instance, Mr. Cutting being required by the court to publish it [the “reconciliation”] in his paper, which he did.

On the 18th day of June Mr. Cutting proceeded across the Rio Grande River to the United States, to El Paso, Texas, and published a card in the *El Paso Herald*, in which he reiterated his former charges, and made some others, branding Medina’s conduct as contemptible and cowardly, &c. * * *

When Mr. Cutting returned to Paso del Norte he was again arrested, presumably at the instance of Medina, and taken before the judge of the second court. Before this court Mr. Cutting was refused counsel and an interpreter, both of which he requested, and with closed doors, no one being present but the judge, the court interpreter and the accused, the so-called examination of the case was proceeded with, which resulted in the committing of Mr. Cutting to jail. (Mr. Brigham to Mr. Porter, July 1, 1886; Ex. Doc. (H. R.) 371, 49th Congress, 1st Sess).

Mr. Cutting at once appealed to the United States Consul for protection, stating that he had been cast into jail

...for an alleged offense committed in Texas.” On the receipt on this communication, continued Mr. Brigham, I proceeded to the office of the official interpreter of the court to ascertain the exact charges against Mr. Cutting, and was informed that he was arrested for the publication in the *El Paso (Texas) Herald*; that he was examined upon this charge alone, and committed to jail on the same. * * *

Mr. Cutting still (July 1) languishes in jail, having been thus confined for more than one week. Hail was refused him, which he was prepared to give in any reasonable amount.

Accompanying this despatch of Consul Brigham, which was received at the Department of State on the 17th of July, were affidavits of the consul and other persons substantiating his statements. Among these affidavits is one of A. N. Daguerre, a Mexican, who accompanied Mr. Brigham’s clerk to the court-room on the 24th of June, the day following the arrest, in order to inquire as to the progress of the case, and who deposed that the judge stated, in reply to a question of the clerk, that Mr. Cutting was held for the publication in Texas.

In addition to showing that Mr. Cutting was held for the publication in Texas, the affidavits accompanying Mr. Brigham’s despatch alleged great

cruelty in the manner of the prisoner's confinement; that the place of his incarceration was "loathsome and filthy;" that he was "locked up with eight or ten other prisoners * * in jail for various offenses * * in one room, 18 by 40 feet, with only one door, which is locked at night, making it a close room in every respect, there being no other means of ventilation," and compelled to endure other grievous hardships.

On the 16th of July a despatch was received at this Department from Mr. Jackson enclosing correspondence with Mr. Mariscal, the Mexican Minister for Foreign Affairs. This correspondence disclosed the fact that Mr. Jackson had, on the 6th of July, called Mr. Mariscal's attention to the circumstances of Mr. Cutting's imprisonment, the nature of the charge—"an offense committed upon the soil of Texas,"—the manner of his confinement, and the fact that he had offered ample bail, which was refused. Mr. Jackson stated, however, that his purpose was not to discuss the question of jurisdiction, which had been referred to the Department of State at Washington, but to direct the attention of the Minister for Foreign Affairs

...to the fact that an American citizen, of respectable character, charged with no serious crime, but with acts which, even if he be guilty, constitute the simplest of misdemeanors, is now undergoing a very severe punishment before conviction, and after offering the best of security for his appearance to stand his trial; and that his health, and even his life, are placed and held in jeopardy, despite of the efforts of an official representative of his country in his behalf. But for this serious aspect of the case, said Mr. Jackson, I should have awaited 'instructions from my own Government before approaching your excellency on the subject, and do so now only for the purpose of praying that proper relief may be extended to Mr. Cutting at the earliest moment and through the speediest practicable channel. (H. Ex. Doc., 371, 49th Cong. 1st Sess., p. 12).

To this note Mr. Mariscal replied, on the 7th of July, saying:

By advice of the President I to-day address the Governor of the State of Chihuahua, recommending him to see that prompt and due justice be administered to the alleviation of the rude situation in which Mr. Cutting is found, as well as all else permitted by the laws. (*Ibid*, p. 12).

On the 17th of July, when all the facts above detailed were before the Department of State, a telegram was received from Mr. Brigham, saying that Mr. Cutting was still in prison, and that nothing had been done by the local authorities for his relief. (*Ibid*, p. 13).

The release of Mr. Cutting was then demanded, as appears by the telegram of July 19, above quoted.

On the 20th of July, the day after the date of the demand, Mr. Bayard sent to Mr. Jackson a full statement of the grounds thereof. After summarizing the facts, Mr. Bayard declared that

...the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible, and is peremptorily denied by this Government. It is equivalent to asserting that Mexico can take jurisdiction over the authors of the various criticisms of Mexican business operations which appear in the newspapers of the United States. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the Government of the United States nor the governments of our several States will submit. They will each mete out due justice to all offenses committed in their respective jurisdictions. They will not permit that this prerogative shall in any degree be usurped by Mexico, nor, aside from the fact of the exclusiveness of their jurisdiction over acts done within their own boundaries, will they permit a citizen of the United States to be called to account by Mexico for acts done by him within the boundaries of the United States. On this ground, therefore, you will demand Mr. Cutting's release.

But there is another ground on which this demand may with equal positiveness be based. By the law of nations no punishment can be inflicted by a sovereign on citizens of other countries unless in conformity with those sanctions of justice which all civilized nations hold in common.

Among these sanctions are the right of having the facts on which the charge of guilt was made examined by an impartial court, the explanation to the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases not capital to go at large on bail till trial, the due production under oath of all evidence prejudicing the accused, giving him the right to cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered. All these sanctions were violated in the present case. Mr. Cutting was summarily imprisoned by a tribunal whose partiality and incompetency were alike shown by its proceedings. He was refused counsel;

he was refused an interpreter to explain to him the nature of the charges brought against him; if there was evidence against him it was not produced under oath, with an opportunity given him for cross-examination; bail was refused to him; and after trial, if it can be called such, violating, in its way, the fundamental sanctions of civilized justice, he was cast into a “loathsome and filthy cell,” where, according to one of the affidavits attached to Mr. Brigham’s report, “there are from six to eight other prisoners, and when the door is locked there are no other means of ventilation, “an adobe house, almost air-tight, with a dirt floor;” he was allowed about “81/2 cents American money for his subsistence;” he was “not furnished with any bedding, not even a blanket.” In this wretched cell, subjected to pains and deprivations which no civilized government should permit to be inflicted on those detained in its prisons, he still languishes, and this for an act committed in the United States, and in itself not subject to prosecution in any humane system of jurisprudence, and after a trial violating the chief sanctions of criminal procedure. (*Ibid*, p. 13).

Under date of the 27th of July Mr. Bayard sent to Mr. Jackson another communication, from which may be quoted the following pertinent passages:

On Saturday last, the 24th instant, I was called upon by Mr. Romero, the minister from Mexico at this capital, in relation to the case referred to.

Mr. Romero produced to me the Mexican laws, article 186, whereby jurisdiction is assumed by Mexico over crimes committed against Mexicans within the United States or any other foreign country; and under this he maintained the publication of a libel in Texas was made cognizable and punishable in Mexico. And thus Mr. Cutting was assumed to be properly held.

This claim of jurisdiction and lawful control by Mexico was peremptorily and positively denied by me, and the statement enunciated that the United States would not assent to or permit the existence of such extraterritorial force to be given to Mexican law, nor their own jurisdiction to be so usurped, nor their own local justice to be so vicariously executed by a foreign government.

In the absence of any treaty of amity between the United States and Mexico providing for the trial of the citizens of the two countries respectively, the rules of international law would forbid the assumption of such power by Mexico as is contained in the Penal Code, article 186, above cited. The existence of such power was and is denied by the United States.

Mr. Romero informed me that the local or state jurisdiction over Cutting’s case did not allow interference by the national Government of Mexico in the matter, and that it was this conflict that had induced delay in responding to the demand of this Government for Mr. Cutting’s release. (*Ibid*, p. 17).

On the 2d of August the President of the United States, in response to a resolution of the Senate, transmitted to that body a report from the Secretary of State, in which the jurisdictional issue was again defined, as follows:

A copy of article 186 of the Mexican code, which was handed to the undersigned by Mr. Romero in support of the claim of Mexico to take cognizance of crimes of which Mexicans were the subject in foreign countries, is herewith appended.

This conflict of laws is even more profound than the literal difference of corresponding statutes, for it affects the underlying principles of security to personal liberty and freedom of speech or expression, which are among the main objects sought to be secured by our framework of Government.

The present case may constitute a precedent fraught with the most serious results.

The alleged offense may be—and undoubtedly in the present case is—within the United States held to be a misdemeanor, not of high grade; but in Mexico may be associated with penal results of the gravest character. An act may be created by a Mexican statute an offense of high grade, which in the United States would not be punishable in any degree. The safety of our citizens and all others lawfully within our jurisdiction would be greatly impaired, if not wholly destroyed, by admitting the power of a foreign state to define offenses and apply penalties to acts committed within the jurisdiction of the United States.

The United States and the States composing this Union contain the only forum for the trial of offenses against their laws, and to concede the jurisdiction of Mexico over Cutting's case, as it is stated in Consul Brigham's report, would be to substitute the jurisdiction and laws of Mexico for those of the United States over offenses committed solely within the United States by a citizen of the United States.

The offense alleged is the publication in Texas, by a citizen of the United States, of an article deemed libelous and criminal in Mexico.

* * * * *

Under this pretention, it is obvious that any editor or publisher of any newspaper article within the limits and jurisdiction of the United States could be arrested and punished in Mexico if the same were deemed objectionable to the officials of that country, after the Mexican methods of administering justice, should he be found within those borders.

Aside from the claim of extraterritorial power thus put forth for the laws of Mexico and extending their jurisdiction over alleged offenses admittedly charged to have been committed within the borders of the United States, are to be considered the arbitrary and oppressive proceedings which, as measured by the constitutional standard of the United States, destroy the sub-

stance of judicial trial and procedure, and to which Mr. Cutting has been subjected. (*Ibid*, p. 3.)

Article 186 of the Mexican Penal Code, translated, is as follows:

Penal offenses¹ committed in a foreign country by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans, may be punished in the Republic (Mexico) and according to its laws, subject to the following conditions:

I. That the accused be in the Republic, whether he has come voluntarily or has been brought by extradition proceedings.

II. That, if the offended party be a foreigner, he shall have made proper legal complaint.

III. That the accused shall not have been definitively tried in the country where the offense was committed, or, if tried, that he shall not have been admitted, included in an amnesty, or pardoned.

IV. That the breach of law of which he is accused shall have the character of a penal offense, both in the country in which it was committed and in the Republic.

V. That by the laws of the Republic the offense shall be subject to a severer penalty than that of *arresto mayor*.²

Such are the provisions of article 186, which expressly asserts the jurisdictional claim of Mexico against which the Government of the United States protested and in denial of which Mr. Cutting's release was demanded.

It will now be seen that this jurisdictional claim was actually enforced by the Mexican court by which Mr. Cutting was tried.

On the 21st of July Mr. Jackson telegraphed to Mr. Bayard that Mr. Cutting's instant release was refused, and that reasons therefor were given. These reasons, communicated to Mr. Jackson by Mr. Mariscal on the 21st of July, were received at the Department of State on the 31st of the same month. They alleged the impossibility of compliance with Mr. Bayard's demand, owing to the inability of the Federal Executive to interfere with the authorities of the State of Chihuahua. The question of jurisdiction was not touched; but, as will hereafter be seen, Mr. Mariscal subsequently defended the claim asserted in article 186 (H. Ex. Doc. 371, 49 Cong., 1st Sess., pp. 19, 20).

Immediately after the demand for Mr. Cutting's release, and pending the correspondence that ensued, the authorities of Chihuahua hastened

¹ *Delito*, defined by Escriche as *la infracción de la ley penal*.

² *Arresto mayor* is detention for from 1 to 11 months, as distinguished from *arresto menor*, which lasts from 3 to 30 days.

to bring the case to trial; and, on the 6th of August, Judge Zubia, of the Bravos District, before whom the case had been brought for trial, rendered a decision sustaining the jurisdiction of Mexico, and sentenced the prisoner to a year's imprisonment at hard labor, to pay a fine of \$600, or, in default thereof, endure one hundred days' additional imprisonment, and to pay a civil indemnity to Medina.

The complete official text³ of Judge Zubia's decision is given in Exhibit A. Translated, it reads as follows:

In view of the present suit instituted against A. K. Cutting, who declares himself to be unmarried, 40 years of age, a native of the State of New York, a resident of this town, and editor of the newspaper *El Centinela*, for the offense of defamation:

In view of the preliminary statement of the accused, the petition of the district attorney, the statement made by the complainant, Emigdio Medina (the civil party to the suit), the defense of the prisoner's attorney, Jesus E. Islas, and all else which appears from the proceedings and was proper to be seen:

It appears, 1. That in No. 14 of the newspaper called *El Centinela*, published in this place, under date of the 6th of June last, there appeared a local item in English, in which there was criticised as fraudulent a prospectus published in El Paso, Texas, announcing the appearance of a newspaper called *Revista International*.

It appears, 2. That Emigdio Medina, considering himself alluded to and aggrieved by that paragraph, appeared before the second *alcalde*, acting in turn as criminal judge in this town, and asked for a judgment of conciliation against A. K. Cutting, as responsible editor of *El Centinela*.

It appears, 3. That the parties being present before the mediating judge, agreed on the publication in the same newspaper, *El Centinela*, of a retraction which was written by Medina and corrected by Cutting, the publication to be made four times in English, and, if Mr. A. N. Daguerre, an associate editor of the paper, would allow it, also in Spanish.

It appears, 4. That Cutting, instead of complying with the agreement as stipulated in the conciliation, published on the 20th of the same month of June a retraction only in English in *El Cantilena*, in small type and with material errors that rendered it almost unintelligible, and published on the same day a notice or communication in the *El Paso Sunday Herald*, in which he ratified and enlarged the defamatory statements which were published against Medina, and denounced as contemptible the agreement of conciliation which had taken place before the second *alcalde* of this town.

³ Correspondencia diplomática sobre el caso del ciudadano de los Estados-Unidos de America A. K. Cutting, published by the Mexican Government.

It appears, 5. That the plaintiff then appeared and in due form accused Cutting of the penal offense of defamation, in conformity with articles 643 and 646,⁴ section 2 of the Penal Code, for which cause the corresponding order of arrest was issued.

It appears, 6. That on the 22d of the same month the plaintiff enlarged the accusation, stating that although the newspaper, the *El Paso Sunday Herald*, is published in Texas, Cutting had had circulated a great number in this town and in the interior of the Republic, it having been read by more than three persons, for which reason an order had been issued to seize the copies that were still in the office of the said Cutting.

It appears, 7. That according to law the preliminary statement of the accused was taken, in which he denied the jurisdiction of the court, on the ground that the act had been committed in Texas, placing himself under the protection of the consul of the United States, and the warrant for his arrest in due form was ordered to be issued and communicated to the proper parties.

It appears, 8. That, having followed the examination through all its details, the accused insisted on his former answer, and when notified to appoint a person to defend him, as the citizen licentiate,⁵ Jose Maria Barajas, had declined to serve, he refused to do so, whereupon the citizen, A. N. Daguerre, a partner of the said Cutting in the editing of *El Centinela*, was officially appointed; but, as he also resigned, the appointment fell upon the citizen, Jesus E. Islas, who conducted the case up to the presentation of his brief of defense.

It appears, 9. That, in virtue of the opinion of the district attorney that the charge was well founded, the suit was duly advertised in the office of the clerk of the court for the term provided in article 409,⁶ as amended, of the Code of Criminal Procedure, and that time having elapsed without any exception being filed, the parties to the controversy were summoned for the discussion which took place on the 5th instant in the form and terms prescribed by the same code, the proceedings closing with the summons for sentence.

Considering, therefore, 1. That, in conformity with article 121 of the Code of Criminal Procedure, the foundation of the criminal proceeding is the proof of the act which the law accounts a penal offense, and that in the present case the existence of this fact is fully proved, as it consists of the publication appearing in *El Centinela* on the 6th of June last, characterizing as fraudulent

⁴ Article 646 provides that “defamation” shall be “punished with a penalty of from six months detention to two years’ imprisonment and a fine of from \$300 to \$2,000, when there is imputed a crime, act, or vice, which may occasion to the offended party dishonor or serious prejudice”.

⁵ May here be translated as attorney-at-law.

⁶ Article 409 (amended) provides that, after the preliminary examination and the formulation of the charge by the district attorney, the proceedings shall be placed in the office of the clerk of the court for three days, in order that exceptions may be taken by the defense.

the prospectus which was issued to announce the publication of the *Revista internacional*.

Considering, 2. That although it is true that there was in regard to this matter an act of conciliation, which would have satisfied the plaintiff if it had been carried out, it is also true that the terms of this act were not complied with, and that, for this reason, the responsibility of the penal offense remains the same.

Considering, 3. That the proof of the lack of fulfillment of the compromise entered into in the judgment of conciliation is actually in the communication published by Cutting in the *El Paso Sunday Herald*, in which he ratified the original assertion that Emigdio Medina was a fraud and a swindler, and at the same time in the article published in *El Centinela* of the same date, leaving out all the capital letters and putting the name of Medina in microscopic type in order to make the reading of it difficult.

Considering, 4. That ratification, according to the dictionary of Escriche, is the confirmation and sanction of what has been said or done, it is retroactive and by consequence does not constitute an act different from that to which it refers: *Ratihabitio retrotrahitur ad initium*, nor does new responsibility, distinct from that which originally existed, arise therefrom.

Considering, 5. That this being so, the criminal responsibility of Cutting arose from the article published in *El Centinela*, issued in this town, which article was ratified in the Texas newspaper, which ratification, however, did not constitute a new penal offense to be punished with a different penalty from that which was applicable to the first publication.

Considering, 6. That even on the supposition, not admitted, that the defamation arose from the communication published on the 20th of June in the *El Paso Sunday Herald*, article 186 of the Mexican Penal Code provides that—

“Penal offenses committed in a foreign country by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans,” may be punished in the Republic and according to its laws, subject to the following conditions:

1. That the accused be in the Republic, whether he came voluntarily or has been brought by extradition proceedings;
2. That if the offended party be a foreigner, he shall have made proper legal complaint;
3. That the accused shall not have been definitively tried in the country where the offense was committed, or, if tried, that he shall not have been acquitted, included in an amnesty, or pardoned;
4. That the breach of law of which he is accused shall have the character of a penal offense both in the country in which it was committed and in the Republic;
5. That by the laws of the Republic the offense shall be subject to a severer penalty than that of *arresto mayor*—requisites which have been fully met in the present case: for Cutting was arrested in the territory of the Republic; there is complaint from a proper legal source—that of Medina, who presented his complaint in the form prescribed by law; the accused has not been definitively tried, nor acquitted, nor included in an

amnesty, nor pardoned in the country in which he committed the offense; the penal offense of which Cutting is accused has that character in the country in which it was committed and in the Republic, as can be seen in the penal code in force in the State of Texas, articles 616, 617, 618, and 619, and in the Penal Code of the State of Chihuahua, articles 642 and 646; and according to this latter article, section 2, the breach of law in question is subject to a heavier penalty than that of *arresto mayor*.

Considering, 7. That according to the rule of law, *Judex non de legibus, sed secundum leges debet judicare*, it does not belong to the judge who decides to examine the principle laid down in said article 186, but to apply it fully, it being the law in force in the State.

Considering, 8. That this general rule has no other limitation than that expressed in article 126 of the General Constitution, which says: "This Constitution, the laws of the Congress of the Union passed in pursuance thereof, and all the treaties made or to be made by the President of the Republic with the approval of the Congress, shall be the supreme law of the whole Union. The judges of each State shall act according to said Constitution, laws, and treaties, notwithstanding the existence of contrary provisions in the constitutions or laws of the States."

Considering, 9. That the said article 186 of the Penal Code, far from being contrary to the supreme law or to the treaties made by the President of the Republic, has for its object, as is seen in the expository part of the same code, page 38, "the free operation of the principle on which the right to punish is founded, to wit, justice united to utility."

Considering, 10. That even supposing, without conceding it, that the penal offense of defamation was committed in the territory of Texas, the circumstance that the newspaper, *El Paso Sunday Herald*, was circulated in this town, of which circumstance Medina complained, and which was the ground of ordering the seizure of the copies which might be found in the office of Cutting, in this same town, properly constituted the consummation of the crime, conformably to article 644 of the Penal Code.⁷

Considering, 11. That, according to the amended article 7 of the General Constitution, penal offenses committed by means of printing are to be tried by the competent Federal or State courts, in conformity with their penal laws.

Considering, 12. That the publication by Cutting in *El Centinela*, ratified subsequently in the *El Paso Sunday Herald* and in the *Evening Tribune*, on file in the case, attacks the private life of Emigdio Medina by attributing to him the penal offense of fraud and of swindling, and is therefore comprised in the restriction placed on the liberty of the press by the said article of the constitution.

⁷ This article provides that defamation is punishable when committed by writing, printing, &.

Considering, 13. That as acts consummated in the territory of the Canton of Bravos, State of Chihuahua, are in question, it is incumbent on the judge, whose name is hereto subscribed, to pass upon them conformably to the laws in force in the said State, especially in view of the fact that the accused resides in this town, where he has had his domicil for more than two years, as appears from the declarations made on folios 20, 21, and 22 of this case, a statement not contradicted by Cutting, who on folio 19 declares that he resides on both sides, that is, in Paso del Norte, Mexico, and in El Paso, Texas, without a fixed residence on either of the two sides.

Considering, 14. That to show this more fully, Cutting expressly recognized the jurisdiction of the authorities of this town by appearing before the second *alcalde*, acting in turn as criminal judge, and answering the demand for conciliation, which was made against him by Medina for defamation.

Considering, 15. That the responsibility of Cutting is fully proved, since it appears in credible documents which have in nowise been contradicted by their author; and, if any doubt should exist respecting the malicious intent with which the first publication was made, it would disappear in view of the subsequent ratifications made in the *El Paso Sunday Herald* and in the *Evening Tribune*, in which Cutting expressly says that Emigdio Medina is a fraud, swindler, coward and thief;⁸ the requisites specified in article 391 of the Code of Criminal Proceedings being thus fully met.⁹

Considering, 16. That in order to fix the penalty which ought to be enforced, it must be borne in mind that, although the change imputed to the offended party causes him dishonor and serious prejudice, and there are no extenuating circumstances, the crime under consideration is of a private character between two editors, in which the only aggravating circumstances that exist are those referred to in the 7th¹⁰ and 11th¹¹ sections of article 44 and articles 656¹² and 657,¹³ section 4 of the Penal Code, it does not appear that the other aggravating circumstances mentioned by the district attorney are fully proved; for, although it is true that the present case has caused great

⁸ The epithets applied by Cutting to Medina in the card published in Texas, as appears from a copy of the card now before the writer, were "fraud" and "dead beat".

⁹ Article 391 relates to proof of malicious intent.

¹⁰ Circumstances: that the delinquent is an educated person; 4. That he has violated more than one provision of the penal code; 5. That publicity is an aggravation in defamation; "that defamation is public when printed, etc., and distributed or exposed to the public, or shown to six or more persons.

¹¹ NOTA DEL EDITOR: en el original aparece una llamada a nota al pie de página, pero la nota no aparece.

¹² NOTA DEL EDITOR: en el original aparece una llamada a nota al pie de página, pero la nota no aparece.

¹³ NOTA DEL EDITOR: en el original aparece una llamada a nota al pie de página, pero la nota no aparece.

alarm in the community, this is not attributable to the penal offense imputed to Cutting, but to the inadequate means which have been taken for his defense; this being exactly the case provided for in the final part of article 66 of the said code;¹⁴ and

Considering, finally, 17. That the person responsible for a penal offense is also responsible for its consequences, being likewise bound to make civil indemnity in the terms provided in articles 326¹⁵ and 327¹⁶ of the Penal Code.

THE SENTENCE

In view of the foregoing article 646, section 2, and articles 661,¹⁷ 119¹⁸ and 218,¹⁹ the said code, it is ordered and adjudged as follows:

First. For the penal offense of defamation committed against the person of Emigdio Medina, A. K. Cutting is sentenced to serve a year at hard labor and pay a fine of \$600, or, in default thereof, endure additional imprisonment of a hundred days.

Second. He is also sentenced to pay the civil indemnity, to be fixed according to the provisions of article 313²⁰ of the Penal Code.

Third. Let the defendant be admonished not to repeat the offense for which he is sentenced, and advised of the penalties to be incurred in that event.

Fourth. This sentence shall be published in the manner specified in article 661 of the said code.

Fifth. The case shall be sent to the supreme court of justice, for the purposes to which the final part of the petition of the district attorney refers, relative to the intervention of the American consul in this suit.

Sixth. Let the interested parties be notified, and the prisoner be advised of the length of time he has to appeal from this sentence.

Lic. Miguel Zubia, judge of the Bravos District, has so decreed definitively, in the presence of witnesses.

Miguel ZUBIA

Witnesses: L. Flores and S. Vargas.

¹⁴ Giving certain discretion to the judge as to severity of penalty.

¹⁵ The defendant is bound to make civil indemnity, if his act caused damage; 3. And for this indemnity he shall be held liable, whether criminally absolved or not.

¹⁶ NOTA DEL EDITOR: en el original aparece una llamada a nota al pie de página, pero la nota no aparece.

¹⁷ Requiring publication of sentence, at defendant's cost.

¹⁸ As to penalty of additional imprisonment, in default of payment of the fine imposed.

¹⁹ Defendant must be admonished not to repeat the offense, and informed of the penalty imposed for such repetition.

²⁰ By agreement between the parties.

From this decision the following facts appear: 1. Premise 6 discloses that the original ground on which Mr. Cutting was held to answer the charge of defamation was the publication of the card in the *El Paso* (Texas) *Herald*.

2. Consideration 3 discloses that the publication of the card in the Texas newspaper was treated as a breach of the “conciliation,” which, having once been entered into, must have been violated by Cutting before Medina could have maintained a criminal suit for the defamation in *El Centinela* of June 6. It thus appears that the “conciliation” was held to be binding on Cutting in Texas, and consequently to have extraterritorial effect.

3. Consideration 6 discloses that Mr. Cutting was also held on the ground that the publication in Texas constituted of itself a distinct and complete offense, punishable under article 186 of the Penal Code.

4. Consideration 6 also discloses that in order to bring the case within the provisions of article 186, the Texas Code was introduced to show that the publication in the Texas newspaper constituted a penal offense in that State. Thus Judge Zubia became the vicarious interpreter of the Texas criminal law, and substituting himself, by authority of article 186, for the judge and jury required for the trial in that State of the alleged violation of its laws, decided that such violation had been committed.

The importance of this observation can be appreciated only when we take into account that under section 229²¹ of the Texas Code, “*it is no offense to publish true statements of fact as to the qualification of any person for any occupation, profession, or trade;*” and that, under the Constitution of Texas (Art. 1, Sec. 6), “*in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.*” Under these legislative and constitutional provisions it would be impossible for any judge, domestic or foreign, to say, or for any expert to prove before a foreign tribunal, that the publication of the statement in question was a criminal libel in Texas. Yet, notwithstanding the rule that no penal law is extraterritorial, and in spite of the consideration that for a foreign tribunal to undertake to execute penally a law of the United States against a citizen of the United States, may justly be, and in the case in question actually was, regarded as an offense against the United States, the Mexican judge not only undertook to interpret and apply the Texas law of criminal libel against a citizen of the United States, but interpreted and applied it in a manner flagrantly at variance with the methods and guarantees of the fundamental law of the State that enacted it.

²¹ NOTE. Premise 6 refers to “It appears, 6,” in decision; Consideration 3 & 6 refers to “Considering 3 & 6.”

It has sometimes been argued that the publication in the Texas newspaper of the card in relation to Medina gave the Mexican court unquestionable jurisdiction in the premises, because it was a violation of the “conciliation,” which, being in the nature of a contract, was binding on the parties everywhere; and that, had the court proceeded on this ground alone, the United States would have had no cause for complaint. The fallacy of this argument should seem apparent.

It is true that the proceeding defined in Mexican law as a “conciliation” imports an agreement between parties, and thus bears some formal analogy to a private contract; but it also imports a compromise of a preexisting criminal liability, which revives if the defendant violate the terms of the “conciliation.” To argue, therefore, that the fact of publication in the Texas newspaper was properly held to be a violation of the “conciliation,” and to be attended with all the consequences of such violation, is merely to concede, in another form, but to the full extent, the claim asserted in article 186, and enforced in the present case, that foreigners may incur liability to criminal prosecution in Mexico for acts wholly committed and consummated in a foreign country.

This conclusion is not affected by the fact, stated in Judge Zubia’s decision, that, where the terms of a conciliation have been violated, the prosecution relates back to the original offense; nor mitigated by the argument sometimes advanced, that the “act of conciliation” is purely voluntary. To the first suggestion it is sufficient to reply that the question whether the breach of a “conciliation” revives or creates liability to criminal prosecution is not material. It is enough that the breach restores that liability, which the “conciliation” had removed. As to the second point, it is only necessary to advert to the fact that, while a defendant is not legally compelled to sign a “conciliation,” it may afford the means, and the only means, of escape from the uncertainties and tribulations of criminal prosecution and its possibly grave consequences.

To concede that a “conciliation” may have extraterritorial force would be to permit Mexico to impose upon citizens of the United States, while in Mexico, the burden of continued obedience to Mexican penal law even after their return to their own country. From this burden their only escape would be to renounce the benefits of the provisions of Mexican law relating to the “act of conciliation” and undergo criminal prosecution.

The only incident of the trial of Mr. Cutting that now remains to be considered is the decision of the Supreme Court of Chihuahua, pronounced on the 21st of August, 1886, releasing the prisoner. Translated, this decision reads as follows:

The second *alcalde* of the Canton of Bravos, acting in turn in the penal branch, began the trial of the present cause at the instance of the proper party against A. K. Cutting, who is unmarried, forty years of age, a native of the State of New York, a resident of Paso del Norte, and the editor of a weekly paper, *El Centinela*, which is published in that town, for the penal offense of defamation committed against the citizen Emigdio Medina. By virtue of the corn plaint presented by the offended party, criminal proceedings were instituted and were afterwards continued by the law judge of that district in the manner prescribed by the Penal Code, until definitive sentence was pronounced, the accused being condemned to suffer a year of imprisonment at hard labor and to pay a fine of \$600, and being obliged in addition to pay a civil indemnity upon the terms prescribed by law. The defense was not satisfied with this decision, and having interposed its right to an appeal, the records in the case came to this second chamber, the appeal having been duly admitted.

In order that the appeal might have due course, the prisoner was notified to name a person to defend him in this second case; and the civil party was given a term of five days, at the end of which he should appear to assert his rights in the appellate court.

A. K. Cutting refused to appoint a person to defend him, for which reason the defense of his rights was placed in charge of the official defender, the citizen Licentiate Joaquin Villalva; and Emigdio Medina, who had promised to appear, did not do so, but transmitted a document on the 16th of this month withdrawing from the action which he had brought.

Notwithstanding this withdrawal, which was at once admitted by the court, the court deemed it its duty to maintain in force the summons previously issued, in order that the present case might be decided in accordance with the requirements of justice.

In the public session which took place yesterday morning the state prosecuting attorney asked that the prisoner be declared guilty, and that his offense be considered as purged by the imprisonment already suffered, which petition was seconded by defendant's attorney; and the proceeding was concluded with a citation to the parties for the final trial.

Considering, 1, that article 658 of the Penal Code expressly provides that no proceedings shall take place against the author of a libel, defamation or calumny, unless on complaint of the person aggrieved, which provision is founded upon the fact that the principal party interested in the punishment of these offenses is the party aggrieved, and that by not presenting his complaint, or withdrawing therefrom, he renounces the right which the law gives him, and condones the offense.

2. Considering that on the supposition of the withdrawal of the party aggrieved, in the case of offenses which according to the Penal Code cannot be officially prosecuted, the right of society to punish such offenses is not so perfect nor so comprehensive as in those offenses in which a complaint is not

necessary; for there are cases in which the proceeding may be unjustifiable and improper, because the right of punishment might be confounded with revenge.

3. Considering that the reasons expressed in the two preceding considerations are made stronger by article 54 and 55 of the code of penal procedure, which code, in recognizing the right of the offended party to withdraw from the action brought, does not impose the actual obligation of continuing the accusation, this point remaining for the decision of the judges and the tribunals in the cases within their jurisdiction.

4. Considering that, as has been said before, the offended party, Emigdio Medina, has withdrawn from the action to which he had a right, as against A. K. Cutting, and therefore the principal motive of the suit does not exist; and as there is not, therefore, in the judgment of this court, sufficient ground to continue the case.

5. Considering, finally, that the withdrawal of the party offended is conceived to have had for its principal object the quieting of the alarm consequent upon his complaint, as the statements made on folio 8 of the second book give it clearly to be understood, and the continuation of the proceedings *on a point legally and accurately decided in the first instance*, would be not only to divest that laudable purpose of its effect, but would also be given beyond the requirements of the law and of the national dignity.

In view of the foregoing provisions, the court decides, in the name of the justice of the State, as follows:

1. The citizen Emigdio Medina is considered to have withdrawn to his own prejudice from the action brought by him against A. K. Cutting, who shall immediately be released.

2. Let the state prosecuting attorney, Licentiate Jose Maria Gandara, and the defendant's attorney, Licentiae Joaquin Villalva, be notified, and, after an examination of the first book of minutes, let the proper order be issued to the second minor judge of Bravos for its exact fulfillment. Let a certified copy be sent to the Governor of the State and let all the papers be filed.

From the decision of the Supreme Court of Chihuahua appear the following facts:

1. The decision of Judge Zubia was fully approved; but—

2. The prisoner was released on the ground that the plaintiff having withdrawn from the prosecution of the suit, the principal motive of its continuance had ceased to exist; it appearing, moreover, that the withdrawal had “for its principal object the quieting of the alarm consequent upon his complaint.”

The circumstances of the case of Mr. Cutting; the demand for his release; the jurisdictional claim of Mexico in denial of which the demand was made; the proof of that claim by Mr. Brigham; the implied avowal of it by the Mexican Government, and its enforcement by the Mexican courts, have been fully shown. Its express avowal and defense by that Government in the present case will be disclosed when we reach the consideration of the question whether the assertion by Mexico of a right to try a citizen of the United States, for an alleged offense against a Mexican, committed in the United States, was justly resisted by the Government of the United States.

It is proposed to discuss this question upon the principles of international law, and not as a matter of expediency, depending for its determination upon the answer to be given to the inquiry whether there may not be reasons for denying the jurisdictional claim of Mexico, which would not be so cogent if the same claim were to be put forward by some other countries. This is an important consideration, and not necessarily disrespectful to the administration of justice in Mexico. For it is patent that there are, as between the criminal laws of different states, fundamental differences which it is impossible to disregard, and of which a comparison of the trial of Mr. Cutting, from its inception to its end, with a criminal trial for the same offense in the United States affords an apt illustration.

But, before entering upon the discussion of the purely legal aspects of the case, it may not be out of place to advert to the fact that it has sometimes been urged that in not insisting upon Mexico's immediate compliance with its demand, the Government of the United States abandoned the position therein assumed. Such a contention is not sustained, either by the facts or by the reason of the case.

In the note to Mr. Jackson, dated July 21, and stating that Mr. Cutting could not be released, Mr. Mariscal alleged the following reasons:

Mr. Minister, these are delays that are inevitable in a country governed by institutions like ours, where the Federal Executive is unable to communicate directly with the local authorities of the States. Much less could it give them orders. To do thus would imply a positive offense, especially in the case of judges independent even of the administrative power of the State to which they belong, and that offense would be even more aggravated if designed to trample out and peremptorily stop a legal process, instituted by an interested party, as I understand the case of Mr. Cutting to be. (H. Ex. Doc. 371, 49th Cong., 1st Sess., p. 20.)

It thus appears that, although Mr. Mariscal has subsequently defended the validity of the jurisdictional claim of his Government, he did not then put its non-compliance with the demand of the United States on that ground.

It happened that the difficulty alleged by Mr. Mariscal was not without parallel in the history of the United States. Reference is made to the case of Alexander McLeod, arrested by the authorities of the State of New York in November, 1840, and held for trial on a charge of murder committed at the destruction of the steamer "Caroline," within the territorial jurisdiction of that State. On the 13th December, 1840, the British Government asked for his immediate release, on the ground that the destruction of the "Caroline" was "a public act of persons in Her Majesty's service, obeying the order of their superior authorities"; that it could, therefore, "only be the subject of discussion between the two national governments," and could "not justly be made the ground of legal proceedings in the United States against the persons concerned."

Mr. Forsyth, Secretary of State, replied on the 28th of December, with the declaration that no warrant for the interposition called for could be found in the powers with which the Federal Executive was invested, but at the same time denying that the demand was well founded. On the 4th of March, 1841, Mr. Webster succeeded Mr. Forsyth as Secretary of State, and on the 12th of the same month the demand for McLeod's immediate release was repeated. Mr. Webster's answer bore date the 24th of April, and, while admitting the grounds of the demand, declared that the Federal Government could not comply. In May McLeod was taken down to the city of New York, and was there brought before the Supreme Court of the State on a writ of *habeas corpus*. After a full argument, that tribunal, in July, refused to discharge him; and in the ensuing October, ten months after the first demand and seven months after the second, he was tried at Utica, and acquitted on proof of an *alibi*. This case led to the adoption by Congress in August, 1842, of an act to provide for the removal of cases involving international relations from the State to the Federal courts.

The course of the President of the United States in awaiting for one month the completion of judicial proceedings in the case of Mr. Cutting, instead of insisting on their abandonment, far from indicating a withdrawal of his demand, was a just and proper action, not only in the light of our former predicament, but as an exhibition of the friendly disposition of this Government toward Mexico.

It is not proposed to discuss the extent of the control of the Federal Executive of Mexico over the authorities of the States which compose

that Republic. This is a question of municipal law, which, in accordance with the rule that the authorities of a nation are the proper interpreters of its municipal regulations, may be left to the Mexican Government. But it should not be forgotten that, while a domestic difficulty may be accepted as a plea for delay, it cannot be set up as a bar to the ultimate performance of international obligations, and cannot, therefore, be held to prevent a demand upon a Government for the fulfillment of those obligations. To hold otherwise would be to assert the supremacy of municipal regulations, and permit each nation to prescribe the measure of its international duty.

The municipal law of every well regulated community, said Pinkney, in his great opinion in the case of the *Betsey*,²²

...in which the ends of social union, and the moral duties arising out of it, are understood, will furnish us with the axiom—*sic utere tuo ut alienum non laedas*. This axiom, although incorporated into the local code of many countries, belongs to and forms a part of the law of nature; and if such is the rule which natural as well as civil law prescribes to individuals in their social relations, it is not to be conceived that the law of nations, which considers States as so many individuals upon a footing of relative equality, communicates jurisdiction to any, without annexing a condition to the grant, that in its exercise it shall not trench upon the rights of any other member of the great society of nations.

Again, in the same opinion, he says:

It is obvious that between independent States, none of which can have authority over the others, one cannot assume to itself an exclusive power of interpreting the law of nations to the prejudice of the rest. So long as the interpretation put upon that law is a proper one, *and woks no injury to any other State or its citizens*, all are under a moral obligation to acquiesce in it, because all are bound by the rule itself; but surely if the rule is misconceived, *or if rules unknown to the law of nations are attempted to be introduced by one nation to the detriment of another*, the independence of nations is a term without a meaning, if this is to be submitted to.

It has constantly been held that neither the defective provisions nor the exaggerated pretensions of municipal legislation can be set up by a nation either to excuse the non-performance of its international duties, or to justify

²² This opinion was delivered by Mr. Pinkney as a member of the mixed commission under the seventh article of the treaty between the United States and Great Britain of 1794. See Wheaton's life of William Pinkney, p. 207.

its invasion of the rights and jurisdiction of other nations. Such was the position taken by the British Government and admitted by Mr. Webster in the case of McLeod. And such has constantly been the position taken by this Government in respect to claims against other Governments. To say that a nation may enforce upon foreigners within its territories whatever laws it may see fit to adopt, would exempt it from all the rules of international intercourse.

It is proper to state here, what may fairly be termed an incident of the Cutting case, that on the 14th of August, while the appeal was pending before the Supreme Court of Chihuahua, Mr. Mariscal, by direction of the President of Mexico, addressed to the Governors of the States of that Republic a circular enjoining that in future, in case of the arrest of a foreigner for any cause, especial care should be taken and a detailed report of the causes of action and the proceedings thereon sent to the Federal Government.

The argument has not infrequently been made that, although the original charge against Mr. Cutting was the publication of a libel in Texas, the demand for his release was invalidated by the addition to the original complaint of the charge that he had circulated the alleged libel in Mexico. The answer to this argument is, that it can be regarded as sound only in so far as it sustains the position heretofore taken as to the propriety of the President's course in not insisting upon the Mexican Government's putting an end to judicial proceedings in the State of Chihuahua. The charge of circulation in Mexico having been combined with that of publication in Texas, it could not be known until those proceedings were completed whether the latter ground would be maintained. But this question was settled by the judgment of the Supreme Court of Chihuahua, which, in affirming Judge Zubia's decision, fully sustained the enforcement of article 186.

We have seen that the sentence of Judge Zubia rested on the two-fold ground of the circulation of a libel in Mexico (as to the proof of which the sentence is not clear) and the violation of article 186 by the publication in Texas of a libel against a Mexican.

It has been much debated, both in the United States and in England, whether a general verdict on an indictment containing good and bad counts *charging the same offense* ought not to be reversed on error. The preponderance of authority in this country has been that a court of error will presume that the verdict was rendered on the good counts, and will so apply it; and such was the prevailing practice in England, until it was shaken by the case of O'Connell.²³

²³ Wharton's Crim. Pl. and Prac., S. 771, 8th Ed.; v. O'Connell, II Cl. Anf Fin. 15.

But this rule could not have been admitted to apply to the sentence of Mr. Cutting, because, in the first place, it continued expressly to rest, after appeal and final judgment, on what this Government held to be an inadmissible complaint. In the second place, the sentence was so framed, in the alternative, as to make it possible and even probable that it rested *wholly* on that charge.

We must, therefore, hold that the judgment of the Supreme Court of Chihuahua, in finally closing the door to judicial reversal or correction of Judge Zubia's sentence, consummated the wrong of which the United States complained, and, had Mr. Cutting not been released, would have left to this Government the alternative of either insisting upon or abandoning its original demand.

Viewing the matter generally, it would be strange, indeed, if the demand of a Government for the release of one of its citizens, held in a foreign country on an inadmissible charge, might be rendered nugatory by the answer that the invalid charge, however clear and unmistakable its enforcement, was accompanied by a valid complaint.

THEORIES OF CRIMINAL JURISDICTION

The various theories of criminal jurisdiction discussed in the books may conveniently be arranged as follows:

I. TERRITORIAL

1. Actual—

- a. Subjective: As to offenses committed by persons on the territory, except diplomatic officers.
- b. Objective: As to offenses committed within the territory by persons outside; *e. g.*, a shot fired on one side of the boundary and taking effect on the other; infernal machine, swindling letter, poisonous food, counterfeit money, &c., sent into country by person outside.

2. *Constructive*— Over offenses committed on vessels of country.

II. NON-TERRITORIAL.

1. Personal, over citizens:

- a. generally;
- b. in particular places, *e. g.* barbarous lands,
- c. as to particular acts.

2. *As to particular offenses*, whether by citizens or foreigners.

- a. Piracy.
- b. Where two countries by convention agree to punish the citizens of each other, *e. g.*, conventions for suppression of slave trade. c. Against safety of state; counterfeiting or forging national seals, papers, moneys, bank bills authorized by law.

3. Offenses committed abroad by foreigners against citizens.

4. All offenses, wherever and by whomsoever committed.

It is unnecessary for our present purpose to discuss in detail all the theories of criminal jurisdiction which are stated in the foregoing synopsis. The right of every nation, in the exercise of its sovereignty, to punish acts committed on its soil and in violation of its laws by persons within its territory, may be conceded. The right of a nation to punish offenses committed on its vessels, national or private, which for most purposes are considered as part of the national territory, is also admitted. Such offenses, it has been held, may be punished by the vessel's sovereign even when they were committed on a merchant vessel in the ports of another sovereign, provided the latter did not take jurisdiction. And it may also be granted that a nation may, under proper limitations, punish offenses committed within its territory by persons corporeally outside.

It is true that in the case of an offense committed within the territory of one state by a person corporeally within the territory of another state, there may sometimes be concurrent jurisdiction—the former state having jurisdiction by reason of the locality of the act, the latter by reason of the locality of the actor. In such case the latter state may punish the perpetrator, or may give him up to the other state; or, if it see fit, may decline to do either. But the fact that a state may be unable to obtain jurisdiction of the offender is not a test of its jurisdiction over the offense, for such inability may exist where the person who committed the offense was, at the time of

its commission, within the territory, but subsequently fled to the jurisdiction of another country.

The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.

Its logical soundness and necessity received early recognition in the common law. Thus it was held that a man who erected a nuisance in one county which took effect in another was criminally liable in the county in which the injury was done. (*Bulwer's case*, 7 co., 2 b., 3 b.; *Com. Dig. Action*, N. 3, 11.) So, if a man, being in one place, circulates a libel in another, he is answerable at the latter place. (*Seven Bishops Case*, 12 State Trials, p. 331; *Rex v. Johnson*, 7 East, 65.) The same rule applies to obtaining money or goods by false pretences; but it must appear that the false pretences were actually made at the place where the prisoner is held, and not merely that the pretences, which were made elsewhere, resulted in defrauding some one at the place of trial. (*Reg. v. Garrett*, 6 Cox C. C., 260.) So, if persons outside of a country procure therein the making and engraving of a plate for purposes of forgery, they are indictable there. (*Queen v. Bull & Schmidt*, 1 Cox C. C., 281.) Likewise, for cheating by false papers. (*King v. Brisac & Scott*, 4 East, 164.)

The same principle obtains in the United States. Thus a man may be convicted of subornation of perjury in the State in which, through the agency of a person there resident, the offense was committed, though he was himself in another State. (*Com. v. Smith*, 11 Allen, 243.) So, where a citizen and resident of Ohio obtained money in the State of New York by a fictitious receipt signed by him in Ohio, but sent to the city of New York to be fraudulently used, it was held that, being in that State, he was liable to trial and punishment; and the court observed—

It is not necessary to notice the peculiar relation which a citizen of one of the United States sustains to the other States; for if a subject of the British crown, while standing on British soil in Canada, should kill a man in this State, by shooting or other means, I entertain no doubt that he would be subject to punishment here whenever our courts could get jurisdiction over his person. * * * If our courts cannot get jurisdiction over his person they cannot try him. But that is no more than happens when a citizen, who has committed an offense within the State, escapes, and cannot be found. Jurisdiction of the

offense or subject matter and jurisdiction to try the offender are very different things. The first exists whenever the offense was committed within this State, and the second when the offender is brought into court, and not before. (Bronson, J., in *Adams v. The People*; Comstock's, R. (N. Y.), 173, 179.)

The same principle has also been held to apply as to nuisances. (*Stillman & Co. v. White Rock Mfg. Co. et al.*, 3 Woodbury & Minot, C. C. Rep., 538.) So if a person forge notes in one place and utter them in another, using for that purpose the mails, he is answerable in the latter place for the utterance of the forged papers. (*The People v. Rathbun*, 21 Wend, 509; Supreme Court of New York.) But where, under a statute providing that "every person who shall sell or in any manner transfer the services of any black, who shall have been forcibly taken, inveigled or kidnapped from this State (New York) to any other State, place, or country, shall, upon conviction, be punished," a person was indicted not only for inveigling a free negro from the State of New York with intent to sell him, but also for *the actual sale* of him in another State, it was held that the counts in the indictment relating to the latter charge were bad, the court saying: "It cannot be pretended or assumed that a State has jurisdiction over crimes committed beyond its territorial limits." (*People v. Merrill*, 2 Parker's Crim. Rep., 590.)

It has been held by the Supreme Court of Connecticut that where an inhabitant of Massachusetts sent some paupers into Connecticut in charge of his son, who, by direction of his father, left them there, in contravention of the statute of Connecticut forbidding the bringing of paupers into the State, under penalty of a fine, the father was answerable under the statute. (*Barkhamsted v. Parsons*, 3 Conn., 1.) The same principle was applied in the case of the *State v. Grady*, 34 Conn., 118, the court at the same time saying:

It is undoubtedly true, as claimed, that the courts of this State can take no cognizance of an offense *committed* in another State. Such was the decision in *Gilberts. Steadman*, 1 Root, 403. But it is true, and universally conceded, that if an offense is *committed* in this State by the procurement of a resident of another State, who does not himself personally come here to assist in the offense, * * * such non-resident offender can be punished for the offense by the courts if jurisdiction can be obtained of his person.

On the principle of causal connection it is provided in the Penal Code of New York of 1881, that if a person without the State commits an act which affects persons or property within the State, or the public health, morals, or decency of the State, he is punishable therefor in the State of New York. On this principle also rest the provisions of the Texas code for

the punishment of persons who, outside of that State, forge titles to land within the State.²⁴

The principle of the liability of persons outside of a State for acts caused by them within the State was early established in Pennsylvania by the decision of the Supreme Court in the case of the *Commonwealth v. Gillespie et al.*, 7 Sergeant and Rawle, 469, decided in 1822. The facts in this case, which came up on a motion for a new trial, were that a lottery office was kept in Philadelphia in a house rented by *Gillespie*, one of the defendants and a resident of New York; that a lad named *Gregory*, the other defendant, kept the office and sold lottery tickets there as the agent of *Gillespie*, who

²⁴ So it has been held by the Texas courts. In the case of *Hanks v. The State* (13 Tex. Appeal, 289, decided in 1882), the question was fully discussed, and I quote from the opinion of the court the following passages, which speak for themselves:

“Appellant and one P. F. Dillman were jointly indicted in the district court of Travis County (Texas) for the forgery of a transfer of a land certificate for a league and labor of land in the State of Texas. It is alleged in the indictment that the acts constituting the forgery were all committed in Caddo Parish, in the State of Louisiana. No act or thing connected with the execution of the forgery is charged to have been done in Texas; but the crime and injury, so far as this State is concerned, are averred to consist in the fact that the said forgery in Louisiana ‘did then and there relate to and affect an interest in land in the State of Texas, * * * and would, if the same were true and genuine, have transferred and affected certain property, to wit, a certain land certificate, number 222, for one league and labor of land in the State of Texas,’ &c.

“This indictment was brought under article 451 of the Penal Code.

“By article 454 of the code it is declared that ‘persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter *which do not in their commission necessarily require a personal presence in this State*, the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without this State,’ &c.

“It was made a ground both in the motion to quash the indictment and in arrest of judgment, and is again urgently insisted upon in the able brief of counsel for appellant, that the facts alleged, if true, would constitute an offense against the sovereign State of Louisiana alone, and one of which the courts of this State would have no jurisdiction.

“If the position thus assumed in behalf of the appellant be correct, then the legislature had no authority to pass the act quoted, and the same is an absolute nullity. * * * We can see no valid reason why the Legislature of the State of Texas could not assert, as it has done in article 454 *supra* her jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation within or without her territorial limits. Such acts are offenses against the State of Texas and her citizens only, and can properly be tried only in her courts. It may in fact be no crime against the State in which it is perpetrated; and if it is, under such circumstances we are considering, that other State would have no interest in punishing it, and would rarely, if ever, do so. When this forgery was committed in Louisiana, *eo instanti* a crime was committed against, and injury done to the State of Texas, because it affected title to lands within her sovereignty.”

occasionally visited the place; and that, in this capacity, Gregory sold at the office a New York lottery ticket, endorsed in the name of Gillespie and not authorized by the laws of Pennsylvania. The prisoners being indicted jointly as participants or conspirators in the crime, the court at the trial did not instruct the jury that Gillespie was criminally answerable for the act of his agent or servant, but left it to them to say whether, from the whole of the evidence, he was concerned in the sale of the ticket. The jury found that he was, and the Supreme Court sustained the verdict. This court said:

It makes no difference where Gillespie resided; if he conspired to sell New York lottery tickets in Pennsylvania, with his agent, and his agent effected the act, the object of unlawful conspiracy, he is answerable criminally to our laws. * * * It must be recollected, the conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place; and if the parties are linked in one community of design, and of interest, there can be no good reason why both may not be tried, where one distinct overt act is committed.

This doctrine has, since Gillespie's case, been applied again in Pennsylvania to an indictment for a conspiracy to cheat and defraud, which was executed in that State, in the case of the *Commonwealth v. Corliss et al.*, 3 Brewster's Rep. 575, decided in 1869.

These Pennsylvania cases were decided in accordance with the rule of the common law that where two or more persons conspire to do an unlawful act, each conspirator is responsible in any place where any overt act by any of his co-conspirators is done, as well as in the place where the crime is concocted and started. (Wharton's *Crim. Law*, 9th ed., Book 1, § 287.) So careful, however, have courts been to keep within what they deemed proper jurisdictional limits, that where, in the case of a felony, a person was guilty only as an accessory *before the fact*, as, for example, where a person counseled a felony to be committed, but was not present at its commission, it was held that he could be tried only in the place where his guilty act of accessory ship took place. This limitation never applied to treason and misdemeanors, in which all participants before or at the commission of the offense were regarded as principals. By statute in several of the United States the accessory before the fact may be tried in the place having jurisdiction of the principal act, and by statutes still more recent, making all accessories before the fact principals, the accessory before the fact, or instigator, is triable in the place where the crime is perpetrated. But, where no statute on the subject exists, it is still held that an accessory before the fact can be tried only in the place

of his accessory ship. Thus it has been held in Indiana that a person who, in the State of Ohio, counseled with and encouraged two persons to come into Indiana and commit larceny, could not be held in that State, there being no statute abolishing the distinction in such case between principals and accessories. (*Johns v. The State*, 19 Ind., 421.) So, where several persons entered into a conspiracy in Ohio to burn a steamboat, and the crime was executed in Arkansas, it was held by the Supreme Court of the latter State that one of the confederates, who remained in Ohio, was, by the law of Arkansas, merely an accessory before the fact, and could not be tried in that State. (*State v. Chapin*, 17 Ark., 561.)

The same rule was held to exist in New Jersey, in the case of *The State v. Wyckoff* (2 Vroom's Rep., 65), decided by the Supreme Court of that State in 1864. The defendant made arrangements in New York with one Kelly to go into New Jersey and steal certain articles, which he did, afterwards delivering them to the defendant in New York. Wyckoff never came into New Jersey, and it was held that as his offense merely constituted the crime of accessory ship before the fact, and this in New York, he could not be tried in New Jersey. Nevertheless the court said that it was a firmly established rule—

...that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime but no responsible criminal.

The decision just quoted speaks of an *innocent agent*, and implies that if a person outside of a State commits an act within it, through an agent who is cognizant of the character of the act which, as such agent, he performed, the principal cannot be held. This opinion rests on the doctrine of accessoryship, which, as has been seen, the New Jersey court recognized; the theory being that if the agent had a guilty knowledge of the character of his performance he became the principal offender in the place where he committed the act, and that the person for whom he acted was merely an accessory before the fact, and as such punishable only in the place of his accessoryship. But, as has been shown, the doctrine of accessoryship has been abolished by statute in many jurisdictions in which it formerly prevailed, and is condemned by many writers as unnecessary and unsound. Referring to accessories before the fact, Mr. Bishop says:

The distinction between such accessory and a principal rests solely in authority, being without foundation either in natural reason or in the ordinary doctrines of the law. The general rule of the law is, that what one does through another's agency is to be regarded as done by himself.

And on this point he cites Broom's *Legal Maxims*, 2 ed., p. 643; Co. Lit. 258a; and the opinion of Hosmer, C. J., in *Barkhamsted v. Parsons*, 3 Conn., 1, that "the principle of common law, *Qui facit per alium, facit per se*, is of universal application, both in criminal and civil cases."

Another jurisdictional question worthy of notice is that of the offense of larceny, where goods are stolen in one State or country and brought into another. It was held in England, and the decision has been widely followed in the United States, that in such a case an indictment will not lie for larceny in the country into which the goods were brought. These decisions rest on the ground that a person committing a larceny in one country cannot be punished for it in another jurisdiction. This may be regarded as sound, so far as it goes. But in some of the United States it has been provided by statute, as well as decided by the courts, that a person bringing stolen goods from one State into another may be indicted for larceny in the latter. And by a recent statute the same rule is in force in Canada in respect to persons bringing stolen goods into Canada from foreign jurisdictions.

This rule appears to rest on solid jurisdictional grounds. It does not imply a right to punish the offender for the taking in the foreign state, but only for his felonious act of holding in his custody in the punishing state with an intent to convert to his own use goods which he knows to be the property of another. This completely constitutes the crime of larceny in the latter state. For a clear and forcible exposition of the jurisdiction in such a case I quote from Bishop on *Criminal Law*, § 140, vol. 1, 7th ed., the following passage:

Though our courts are not permitted to recognize a foreign larceny and punish it, they can take cognizance of a foreign civil trespass to personal goods; and, if they obtain jurisdiction over the parties, they will redress the wrong done in the foreign country. The method under the common law procedure is by the familiar transitory action of trespass. Now, in every larceny there is a civil trespass as well as a criminal one. This civil trespass, when committed abroad, our courts can recognize, and practically enforce rights growing out of it to the same extent as if done on our own soil. So much is settled doctrine, about which there is no dispute. It is equally settled doctrine in larceny, that if one has taken another's goods by a mere civil trespass, even though

it was unintended, then, if finding them in his possession, the intent to steal them comes over him, and with such intent he deals with them contrary to his duty, this is larceny. Applying these two plain doctrines to the present case we have the result, that where a thief brings goods from a foreign State into ours our courts are required to look upon him as a trespasser; and, when he commits any aspiration of them here, such as he necessarily did in bringing them across the territorial line, the intent to steal impelling him, they should regard him as a felon under our laws.

An interesting case of the constructive presence and consequent criminal liability of an absent confederate in the commission of a crime, is that of the *State of Nevada v. Hamilton et al.*, 13 Nevada, 386, decided by the Supreme Court of that State in 1878. The circumstances of the case were that a plan was concocted between certain persons to rob the treasure box of a stage on the road from Eureka, in Eureka County, Nevada, to Nye County in the same State; that one of the confederates was to ascertain when the stage left Eureka, and to make a signal to his confederates in Nye County, thirty or forty miles distant, by building a fire on the top of a mountain in Eureka County, all of which he did. The question being whether this confederate could be held in Nye County for an attempt to rob there, he having been corporeally in Eureka County when his confederates attacked the stage, it was decided that he was properly so held, the Court adopting from Bishop's *Criminal Law*, sec. 650, vol. 1, the declaration that—

...where several persons confederate together for the purpose of committing a crime which is to be accomplished in pursuance of a common plan, all who do any act which contributes to the accomplishment of their design are principals, whether actually present at its consummation or not. They are deemed to be constructively present though in fact they may be absent.

A question which has given rise to much contrariety of opinion is that of the proper jurisdiction of the offense of murder, where the injury is inflicted in one place or state, and the victim dies in another place or state. In England it was once held that where a blow was struck in one county and death ensued in another county, the criminal could be tried in neither. To remedy this defect, the statute of 2 and 3 Edw. VI, chap. 24, A. D. 1549, was passed, after which it was held that the criminal could be tried in either county. But as this statute was adopted merely to remedy a defect in the common law procedure, by enabling juries in one county of the realm to take cognizance to a certain extent of facts that occurred in another county of the kingdom, it has frequently been asserted in the United States,

and is definitively settled in England, that where a blow is struck outside of the boundaries and jurisdiction of an independent state by a foreigner, the mere death of the victim, who subsequently to his injury has come or been brought into the state, does not give it jurisdiction of the crime. The decision of this question depends upon the view the court may take of the relation of the death to the infliction of the injury. The question was settled in England in the case of the *Queen v. Lewis*, 7 Cox C. C., 277, decided by the Court of Criminal Appeal in 1857. The prisoner, who was a Frenchman by birth, and a naturalized citizen of the United States, shipped at New York in December, 1856, as a seaman on board of an American ship, on a voyage from thence to Liverpool. On board of the vessel, and shipped for the same voyage, was a seaman named George, towards whom the prisoner, soon after the commencement of the voyage, began to exercise acts of cruelty. The last act proved was committed four days before the vessel arrived at Liverpool, and when she was on the high seas west of Cape Clear, Ireland. The vessel arrived in the Mersey on the morning of January 12, 1857, and George died at a hospital in Liverpool on the afternoon of the same day, in consequence of the cruelty and violence committed upon him by the prisoner during the voyage. The indictment was for manslaughter.

It was conceded by the counsel for the prosecution that by the common law the English courts would have had no jurisdiction, but he contended that it was conferred on them by the statutes of 2 Geo. II, c. 21, and 9 Geo. IV, c. 31. The former act provided that where any person, at any time after the 24th June, 1729, should be feloniously stricken or poisoned upon the sea, or at any place out of England, and should die of the same stroke or poisoning within England, or where any person should be feloniously stricken or poisoned within England and should die of the same stroke or poisoning upon the sea, or at any place out of England—in either of the said cases an indictment thereof found by the jurors of the county in England in which such death, stroke, or poisoning should happen, respectively, should be as good and sufficient as if such felonious stroke or poisoning, death thereby ensuing, had happened in the same county where the indictment was found. The statute 9 Geo. IV, c. 31, § 8, provided—

That where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, etc., in England, etc., every offense committed in respect of any such case, etc., may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, etc., shall happen, in the same manner, in all respects, as if such offense had been wholly committed in that county or place.

Notwithstanding the general words, especially of the latter act, the Court of Appeal held that the British courts had no jurisdiction, and said that—

That section (§ 8, 9 Geo. IV, c. 31) ought not, therefore, to be construed as making homicide cognizable in the courts of this country by reason of the death occurring here, unless it would have been so cognizable at the place where the blow was given; and the homicide in this particular case would have been by the 7th section so cognizable if the offender had been a British subject, but not otherwise.²⁵

An opposite view of the relation of the death to the mortal injury has been taken in the United States in the case of the *Commonwealth v. Macloon et al.*, 101 Mass., 1, decided by the Supreme Judicial Court of the State of Massachusetts in 1869. The defendants, one a citizen of the State of Maine and the other a British subject, were convicted in the Superior Court of Suffolk County, Massachusetts, of the manslaughter of a man who died in that county, in consequence of injuries inflicted on him by the defendants in a British merchant-ship on the high seas.

The statute of Massachusetts under which the defendants were tried and convicted provides that—

If a mortal wound is given, or other violence or injury inflicted, or poison administered, on the high seas, or on land either within or without the limits of this State, by means whereof death ensues in any county thereof, such offense may be prosecuted and punished in the county where the death happens. (Gen. Stats., c. 171, par. 19).

The decision of the Supreme Court, which was delivered by Gray, J., stated that the principal question in the case was “that of jurisdiction, which touches the sovereign power of the commonwealth to bring to justice the murderers of those who die within its borders.” It was not pretended that a foreigner could be punished in Massachusetts for an act done by him elsewhere. But it was held that where a mortal blow was given outside and death ensued within the State the offender committed a murder there. The court said—

Criminal homicide consists in the unlawful taking by one human being of the life of another in such manner that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice, express or

²⁵ See also *Hoog v. The Queen*, 7 Cox C. C., 489.

implied by law, it is murder; if without malice, it is manslaughter. * * * The unlawful intent with which the wound is made or the poison administered attends and qualifies the act until its final result. No repentance or change of purpose, after inflicting the injury or setting in motion the force by means of which it is inflicted, will excuse the criminal. If his unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result is not essential.

The same view of the crime of murder, and consequently of jurisdiction in a case where death occurs in an independent state from an injury committed outside, was taken by the Supreme Court of Michigan, in the case of *Tyler v. The People*, 8 Mich., 320, decided in 1860. Tyler was indicted under a statute of that State, which is substantially identical with the Massachusetts statute referred to in the case of *Macloon*; and it was held that although the mortal wound was given in Canada, the person inflicting the blow was indictable in Michigan, where the death occurred, notwithstanding that it did not appear by the evidence that he was a citizen of that State.²⁶ Manning, J., delivering the opinion of the majority of the court, said:

The shooting itself, and the wound which was its immediate consequence, did not constitute the offense of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder; *and would have been criminally accountable to the laws of Canada only*. But the consequences of the shooting were not confined to Canada. They followed Jones [the victim] into Michigan, where they continued to operate until the crime was consummated in his death.

Campbell, J., delivered a dissenting opinion of much force, in which he argued that the coming into the State was the act not of the wrongdoer but of the injured person, and therefore should not subject the former to the jurisdiction of Michigan merely because the latter happened to die there. This argument was adverted to in the case of *Macloon*, and the answer made by the Massachusetts court was that—

...it is the nature and the right of every man to move about at his pleasure, except so far as restrained by law; and whoever gives him a mortal blow assumes the risk of this, and in the view of the law, as in that of morals,

²⁶ Tyler was, in fact, a U. S. Marshal. His extradition was demanded by the British Government under the Treaty of 1842, for murder committed within British jurisdiction. But after his trial and conviction, the demand was permitted to rest. See Clarke upon Extradition, p. 68 *et seq.*

takes his life wherever he happens to die of that wound. (See *Com. v. Ma-
cloon, ante*).

In New Jersey, however, the contrary view was taken by the Supreme Court in the case of *The State v. Carter* (3 Dutcher, 499), decided in 1859. The defendant, who was assumed to be a citizen of New York, was indicted for homicide, by inflicting on the deceased in that State mortal wounds of which he afterwards died in New Jersey. The statute under which the indictment was found provided that—

...where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of the jurisdiction of this State, and shall die of the same stroke or poisoning within the jurisdiction of this State, * * * an indictment thereof found by jurors of the county within the jurisdiction of this State, in which such death, etc., shall happen, etc., shall be as good and effectual in the law, etc., as if such felonious stroke and death thereby ensuing, or poisoning and death thereby ensuing, etc., had happened in the same county where such indictment shall be found. (Nixon's Dig., N. J., p. 184).

Green, J., delivering the opinion of the court, said:

Nothing was *done* by the defendant in this State. When the blow was given *both* parties were out of its jurisdiction, and within the jurisdiction of the State of New York. The only fact connected with the offense alleged to have taken place within our jurisdiction is, that *after* the injury the deceased came into and died in this State. * * * Here no act is done in this State by the defendant. * * * The coming of the party injured into this State afterwards was his own voluntary act, and in no way the act of the defendant.

It was consequently held that the offender not being a citizen of New Jersey, the courts of that State were incompetent to try him, notwithstanding the general language of the act under which the indictment was found.

The preponderance of decisions of the American courts unquestionably sustains the doctrine that in murder the crime is committed where the blow is struck.²⁷ It is not, however, my purpose to discuss here the soundness or unsoundness of these opposing views. My object in the preceding discussion of the English and American cases has been, in the first place, to show that in no case has an English or an American court assumed jurisdiction, even under statutes couched in the most general language, to try and sentence a

²⁷ Wharton's *Crim. Law*, 292; Bishop's *Cr. Law*, 113, vol. I: *Riley v. State*, 9 Humph. (Tenn.), 646; *State v. Kelly*, 76 Maine, 331.

foreigner for acts done by him abroad, unless they were brought, either by an immediate effect or by direct and continuous causal relationship, within the territorial jurisdiction of the court. In the second place, I have sought to illustrate the various phases of this principle for the purpose of dissipating the notion that it in some way sustains the doctrine of article 186 of the Mexican Penal Code. The mere existence of the English and American cases negatives the claim made in that article. If a nation has jurisdiction of offenses committed and consummated by a foreigner outside of its actual or constructive territory, then all argument as to the place where his acts took effect is useless and irrelevant. It is only because such a pretension is denied and repudiated not only in England, but also in the United States, and as between the several States of the United States, united as they are by a supreme Federal Constitution, that the courts have inquired so constantly as to the locality of the crime.

Taking up the theories classified as non-territorial, we may first notice that which proposes the punishment by the state of its own citizens for acts done abroad.

This theory has been separated into three subdivisions, as follows:

(a) The punishment by the state of all acts of its citizens abroad, which, if committed within its territory, would constitute violations of its criminal law. This proposition makes the penal law of the state a personal statute binding upon its citizens everywhere.

(b) The punishment by the state of all acts of its citizens which may be committed in particular places, and which, if committed within its territory, would constitute violations of its criminal law.

(c) The punishment by the state of particular acts of its citizens abroad, which, if committed within its territory, would constitute violations of its criminal law, and which, by reason of their gravity, or the fact that, as is the case with political crimes, the foreign state may not punish them, it is the duty of the state, not only to mankind but to itself, to punish.

It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own citizens for such acts and in such manner as it may deem proper.

For the exercise of this right each state is responsible to itself alone, no other state being competent to intervene. Nevertheless, the subject has presented to publicists and legislators so many grave doubts on the score of expediency and justice, that few countries have attempted to require of their citizens a general observance of their criminal law outside of the national territory, except in particular places.

These exceptions are barbarous lands, in which local law does not exist, and to which the doctrine of the sovereignty of each nation over all persons within its territory does not completely apply; and Mohammedan and other non-Christian countries, in which the citizens of many states enjoy a conventional immunity from the local law. In such places it is not only proper but necessary for each state to subject its citizens to its own regulations. The argument of expediency may also be applied to the punishment of citizens for offenses of a high grade, such as murder, wherever committed. But, to quote the language of Sir George Cornwall Lewis²⁸—

...the system of tying the entire criminal law of a country round the neck of a subject, and of making him liable to its operation, in whatever part of the world he may be, converts the criminal law into a personal statute, and puts it on the same footing as the law respecting civil *status*.

The objection to this, as he states it, is that

...the personal statute of one country, in civil matters, is recognized by another, so that there is no conflict of laws. But if the criminal law were a personal statute a foreigner would at the same time be subject to two criminal laws—the criminal law of his own State and that of the State of his domicile. No text-writer and no State disputes the rule that all foreigners in a country are subject to its criminal law.

It is no answer to this cogent reasoning to say that the punishment of a citizen by the country in which the crime was committed would be a bar to his punishment at home for the same offense; for it may be very differently regarded by the two countries. The law of the sovereign of allegiance might punish it much more severely than the law of the country in which the offense was committed; and, were the case reversed, the punishment of the criminal in his own country would either guarantee him immunity from a greater penalty justly incurred in the state where the offense was committed, should he return thereto, or, assuming that the former prosecution could not be set up as a bar in the latter country, would leave him liable on such return to a second punishment for the same offense. I am aware that it has been proposed by some writers, and adopted as a rule in some codes, to apply to offenses committed outside of the state either the penalty attached to the act by the law of the place where it was committed, or that imposed by the law of the place of trial, whichever may be the less severe. But the

²⁸ *Foreign Jurisdiction and the Extradition of Criminals*.

general and more consistent rule is to apply the penalty prescribed by the law of the punishing state; for, as it is a universal principle that one state will not enforce the penal laws and judgments of another state,²⁹ it seems to be illogical to apply to a criminal act, although committed abroad, the penalty prescribed by a foreign law.

In addition to the inharmonious and conflicting results already noticed of the proposition generally to extend the operation of criminal law to citizens when abroad, it is obvious that if such a rule were enforced the trial of persons at a place far away from the *locus delicti* would often be productive of great hardships and injustice; and, if the law were not enforced, its inutility and the capriciousness of its enforcement would render its existence inexpedient and improper.

The second subdivision of non-territorial jurisdiction in our synopsis includes, first, the single crime of piracy. This offense has been placed by itself, because it is *sui generis*. The scene of the pirate's operations being the high seas, which it is not the special duty or right of any nation to police, and his crime being treated as a renunciation of the protection of the flag which he may carry, he is regarded as a complete outlaw, and may be punished by any nation that captures him. Such an exercise of jurisdiction is both logical and necessary, and is recognized by all nations as a common duty and a common advantage. It scarcely need be said that the exercise, as in the case of conventions for the suppression of the slave trade (non-territorial, 2, *b*), of criminal jurisdiction by one country over the citizens of another, under a special treaty between the two countries, presents no conflict of jurisdictions, and is simply a question of expediency to be considered by the parties to the agreement. The punishment by a nation of extraterritorial offenses against the safety of the state, and the counterfeiting or forging of national seals, papers, moneys, and bank bills authorized by law (non-territorial, 2, *c*) is, as will hereafter be seen, regarded as an exception to the general principles of criminal jurisprudence, and is placed by those who maintain and defend it upon the high ground of necessity and self-defense.

Our fourth subdivision of non-territorial jurisdiction proposes the punishment by each state of all offenses, wherever and by whomsoever committed. It is unnecessary to discuss this theory specifically, because, in the first place, it is so rhapsodical and cosmopolitan in its character, and, while intended to be benevolent, is so impracticable and intrusive, that it has never assumed a legislative guise; and, in the second place, its character will necessarily be disclosed in the consideration, immediately to follow,

²⁹ Foelix, *Droit International Privé*, tom. II, tit. IX, chap. IV.

of our third subdivision of non territorial jurisdiction, which proposes the punishment, by the state, of offenses committed abroad by foreigners against citizens, and which is found in article 186 of the Mexican Penal Code.

It has been constantly asserted both in the United States and in Mexico that this article is modeled on articles 5 and 7 of the French Code of Criminal Procedure; and in an editorial in *El Foro* of the 6th of August last, a “journal of legislation and jurisprudence” published in the city of Mexico, the Mexican law is elaborately defended on that ground. How far such a statement is borne out by the facts may readily be ascertained.

POSITIVE LEGISLATION RESPECTING EXTRATERRITORIAL CRIMES

Articles 5 and 7 of the French Code of Criminal Procedure³⁰ may be translated as follows:

ARTICLE 5. Every Frenchman who, outside of the territory of France, commits a *crime* punishable by the French law, may be prosecuted and judged³¹ in France.

Every Frenchman who, outside of the territory of France, commits an act defined as a *délit* by the French law, may be prosecuted and judged in France, if the act is punishable by the legislation of the country where it was committed.

Nevertheless, in the case of a *crime* or of a *délit*, no prosecution shall take place if the accused prove that he has been definitively judged in the foreign country.

In case of a *délit* committed against an individual Frenchman or foreigner, the prosecution can be instituted only at the request of the public ministry; it must be preceded by a complaint of the offended party or by an official denunciation to the French authorities by the authorities of the country where the *délit* was committed. No prosecution shall take place before the return of the culprit to France, except for the crimes enumerated in article 7, below.

ARTICLE 7. Every foreigner who, outside of the territory of France, shall be guilty of a *crime* against the safety of the State, or of counterfeiting the seal of the State, national moneys having circulation, national papers or bank bills authorized by law, may be prosecuted and judged according to the provisions

³⁰ Code d’instruction criminelle, dispositions préliminaires; see Codes Français et Lois Usuelles, par H. F. Riviere, Paris, 1876.

³¹ *I. e.*, tried, and acquitted or convicted.

of the French laws, if he is arrested in France, or if the Government obtains his extradition.

Such being the provisions of articles 5 and 7 of the French Code of Criminal Procedure, argument is unnecessary to show that they do not contain a single provision that can be construed as a precedent for the Mexican statute. Article 5 applies solely to offenses committed abroad by Frenchmen, and even as to those there are important limitations. Article 7 applies to offenses committed abroad by foreigners; but the jurisdiction is strictly confined to *crimes* against the safety of the state, and what may be termed the analogous *crimes* of counterfeiting the seal of the state, national moneys in circulation, national papers, and bank bills authorized by law. There is no suggestion of a claim to try foreigners for offenses committed abroad against a private person.

It has been seen that in respect to offenses committed abroad by Frenchmen article 5 makes a distinction between *crimes* and *delits*. These terms mark a distinction which may be likened to that denoted by the English words “felony” and “misdemeanor.” But, as *crime* and felony, as well as *delit* and misdemeanor, are technical terms, their correspondence, though general, is not exact. *Crime* is defined in the French Code³² as an offense which the laws punish with an afflictive or infamous penalty. Afflictive and infamous punishments are death, solitary confinement, imprisonment, hard labor for life or for a certain period, and transportation for life; punishments simply infamous are banishment and loss of civil rights.

Délit is defined as an offense which the laws punish with correctional penalties.³³ Such are imprisonment for a time in a house of correction, deprivation for a time of certain civic rights, and fines.

There is still another class of offenses called *contraventions*, which are defined as infractions of law punishable with police penalties.³⁴ Such are imprisonment for not less than a day nor more than a fortnight, or a fine of one to fifteen francs, inclusive. *Contraventions* are not punishable by the Code, when they are committed outside of France. There is, however, a law of June 27, 1866, whose operation is conditional, which provides for the punishment of *contraventions* as well as *delits* of certain kinds, when committed by a Frenchman in certain places outside of France. This law provides that

³² Code Penal, Art. 1. L'infraction que les lois punissent d'une peine afflictive ou infamante est une crime.

³³ Ib. L'infraction que les lois punissent de peines correctionnelles est tin délit.

³⁴ Code Penal, Art. 1, L'infraction que les lois punissent des peines de police est une contravention.

every Frenchman who commits either a *delit* or a *contravention* in respect to the forests, the country, the fisheries, the customhouses, or indirect taxes, on the territory of one of the contiguous states, may be prosecuted and tried in France, according to the French law, if the state in which the offense was committed authorizes the prosecution of its inhabitants for the same acts, when committed in France; and it is further provided that reciprocity shall be legally established by international conventions, or by a decree published in the bulletin of the laws.

In the French Code offenses against the safety of the state are divided into two classes, viz.: those against its exterior, and those against its interior safety. Among the former are machinations and holding communications with foreign powers, or their agents, to induce them to commit hostilities or enter upon war against France; committing hostile actions, not approved by the Government, which expose it to a declaration of war. Offenses against the interior safety of the state are attempts or plots directed against the governing powers, *crimes* tending to trouble the state by civil war, the illegal employment of an armed force, devastation and public pillage.

Germany. The Penal Code of the Empire of May 15, 1871,³⁵ as modified by the law of February 26, 1876, contains the following provisions:³⁶

§ 4. *Crimes and dilits* committed in a foreign country are not, as a rule, subjected to any prosecution. There can, however, be prosecuted according to the penal laws of the German empire:

1. Every *German* or *foreigner* who, in a foreign country, is guilty of high treason against the Empire of Germany or one of the States of the Confederation, or of counterfeiting money; or who has committed, in the quality of a functionary of the Empire of Germany or of one of the States of the Confederation, an act that the laws of the Empire define as a *crime* or *délit* committed in the exercise of public functions;

2. Every *German* who, in a foreign country, is guilty of high treason against the Empire of Germany or one of the States of the Confederation, or of an offense against a sovereign of the Confederation;

3. Every *German* who is guilty, in a foreign country, of an act defined as a *crime* or *délit* by the laws of the German Empire and punishable according to the laws of the place where it was committed. Prosecution can also take place when the criminal has not acquired the quality of a German until after the *crime* or *délit* has been consummated, provided, in the latter case, that the prosecution has been preceded by a complaint of the competent authority of the

³⁵ This code went into operation over the Empire on January 1, 1872.

³⁶ See Drage's *C. Code of the German Empire*. In translating the crim. codes of the continental nations, I have used the terms *crime* and *dilit*.

place where the act was committed. If the law of the foreign country imposes a lighter penalty, that law ought to be applied.

§ 5. In the case expressed by No. 3, § 4, the prosecution cannot take place:

1. If the foreign tribunals have decided on the offense by a judgment having the force of a final judgment, and if it has resulted in an acquittal or if the person convicted has undergone his penalty;

2. If the public action or the penalty falls under prescription according to the foreign law, or if the penalty has been remitted;

3. If the person offended has not formulated a complaint, in the case where the foreign legislation subordinates the prosecution to the existence of the complaint.

§ 6. *Contraventions* committed abroad are not punishable, except in the cases determined by special provisions of the law or of treaties.

§ 7. A punishment suffered in a foreign country is to be reckoned in considering the punishment to be awarded if a fresh condemnation ensues in the territory of the German Empire for the same act.

Austria. Part 1, chap. 2, of the Penal Code of the 27th May, 1852, contains the following provisions:

§ 36. *The subject of the Empire of Austria* who has committed a *crime* in a foreign country cannot on his arrival in his own country be surrendered to that foreign country; but he shall be treated conformably to the present Penal Code without regard to the laws of the country where the *crime* was committed.

If, however, he has already been punished in the foreign country on the charge of that violation of law, the penalty undergone shall be taken as part of that which is imposed by the present Penal Code. In no case can the judgments of foreign criminal jurisdictions be executed in this country.

§ 38. If a *foreigner* is guilty in a foreign country, either of the *crime* of high treason against the Austrian State, * * * or of the *crime* of falsifying papers of credit, or Austrian money, he shall be treated the same as a native, according to the present Penal Code.

§ 39. If a foreigner in a foreign country is guilty of any other *crime* than those specified in the preceding paragraph, he shall always be arrested on his arrival in this country; nevertheless, communication shall immediately be established in relation to the subject of extradition with the government of the country where the *crime* was committed.

§ 40. In case the foreign government refuses to accept the extradition, it shall then be proper, as a general rule, to proceed against the foreign criminal according to the provisions of the present Penal Code.

If, however, the law of the territory where the *crime* was committed is milder, it shall be proper to treat the culprit according to the milder law. The

judgment of condemnation shall pronounce, in addition, banishment after the expiration of the penalty.

Part 2, chap. 1:

§ 235. The *native* who shall be guilty of *délits* or *contraventions* in a foreign country can never, on his arrival in his own country, be extradited to that foreign country. But when he has not been punished or prosecuted in the foreign country he shall be treated conformably to the present Penal Code without regard to the laws of the country where the violations of law were committed.

This provision is equally applicable in the cases where a penalty has already been pronounced against a native Austrian in a foreign country on the charge of like *délits* *contraventions*, provided that the penalty has not been executed. In no case shall the judgments of foreign criminal jurisdictions be executed in this country.

Belgium. The law respecting the punishment of offenses committed in a foreign country is substantially identical with that of France, whose legislation on this subject Belgium has followed since 1794.³⁷

The law of 17th April, 1878, which is still in force, contains the following provisions:

ARTICLE 6. There may be punished in Belgium every *Belgian* who, outside of the territory of the kingdom, shall be guilty—

1. Of a *crime* against the safety of the state;
2. Of a *crime* or a *délit* against the public credit * * *,³⁸ if the *crime* or the *délit* has for its object moneys having circulation in Belgium, or bills, papers, seals, stamps, marks, or dies of the state or of the departments of government or public establishments of Belgium;
3. Of a *crime* or of a *délit* against the public credit * * * if the *crime* or *délit* has for its object moneys not having legal circulation in Belgium, or the bills, papers, seals, stamps, marks, or dies of a foreign country.

The prosecution in the latter case cannot take place, except on official notification given to the Belgian authorities by the authorities of the foreign country.

ARTICLE 7. Every *Belgian* who, outside of the territory of the kingdom, shall be guilty of a *crime* or of a *délit* against a Belgian may be prosecuted in Belgium.

ARTICLE 8. [This article provides that the prosecution of Belgians who, outside of the realm, shall have committed certain *crimes* or *délits* against a for-

³⁷ *Revue de Droit International*, vol. IX, p. 305.

³⁸ The omitted words relate to the definition, mode of proof, etc.

eigner, shall be based either on the complaint of the injured person or of his family, or on official notification of the foreign authorities to those of Belgium that the offense has been committed.]

ARTICLE 9. [This article relates to violations of forestry, rural, fishery laws, and is like the law of France noticed on p. 39.]

ARTICLE 10. There may be prosecuted in Belgium the *foreigner* who shall have committed, outside of the territory of the kingdom, a *crime* against the safety of the State; a *crime* or a *délit* against the public credit * * *,³⁹ if the *crime* or the *délit* has for its object moneys having legal circulation in Belgium, or national bills, papers, seals, stamps, marks, or dies.

ARTICLE 11. The foreign coadjutor or accomplice of a crime committed outside of the territory of the kingdom by a Belgian may be prosecuted in Belgium conjointly with the accused Belgian, or after his conviction.

ARTICLE 12. Save the cases specified in Nos. 1 and 2 of article 6 and in article 10, the prosecution of the violations of law of which the present chapter treats shall not take place unless the accused is found in Belgium.

ARTICLE 15. The preceding provisions shall not apply when the accused, having been judged in the foreign country on the charge of the same violation of law, shall have been acquitted.

He shall be in the same situation when, after having been condemned abroad, he shall have undergone or prescribed his punishment, or shall have been pardoned.

Every detention undergone abroad, in consequence of a violation of law which gives rise to a sentence of condemnation in Belgium, shall be deducted from the duration of the penalties carrying deprivation of liberty.

ARTICLE 14. In the cases defined in the present chapter, the accused shall be prosecuted and judged pursuant to the provisions of the Belgian laws.

Denmark. The Penal Code contains the following provisions:

§ 4. Every *Danish subject* who, for the purpose of avoiding a prohibitive law in force in Denmark, shall commit, outside of the frontiers of the kingdom, the act which that law penally forbids, shall be considered as having committed it in this country.

§ 5. Equally considered as having infringed the penal laws of the kingdom, is every *Danish subject* who, abroad, shall have been guilty of treason against the Danish State or of the crime of high treason, or who shall have counterfeited or altered Danish moneys, attacked or outraged, in the exercise of his functions, a Danish functionary located in a foreign country, or failed in any manner to perform any of the duties of loyalty and obedience to which he is held as a subject.

³⁹ The omitted words refer to other parts of code for definition, mode of proof, etc.

* * * * *

§ 6. When, outside of the cases mentioned, a Danish subject shall have committed a *dilit* in a foreign State, the minister of justice is authorized to prosecute him in the kingdom, and the accused shall be judged according to the present law.

Great Britain. British subjects are punishable who have committed, either as principals or accessories, in a foreign territory, or in the colonies, murder or manslaughter, whether against an Englishman or against a foreigner, or offenses against the enlistment act.

Provision is also made by the Merchant Shipping Act of 1854 for the punishment of the master, seaman, or apprentice of a British ship, who at any place out of her Majesty's dominions commit offenses against persons or property.

Special enactments also exist for the punishment of British subjects who commit crimes in uncivilized or uninhabited countries, or in countries where the British authorities exercise by treaty criminal jurisdiction. Laws have also been passed to execute the slave-trade treaties between Great Britain and certain powers, authorizing the creation of mixed courts for the adjudication of ships bearing the flag of either of the contracting parties. This, however, as is said by Sir G. C. Lewis,⁴¹ "is an arrangement which it is competent to independent states to make in common, with the assistance of their respective legislatures, and it does not affect the rights of any third power."

Hungary. Jurisdiction over offenses abroad is regulated by the Penal Code of 21 June, 1880, in force since 1 September of that year. Generally speaking, both Hungarians and foreigners are punishable for committing, outside of Hungary, high treason, violence against the king and members of the royal house, treason against the state, insurrection or disturbance, and falsification of metal or paper money accepted as a means of payment into the coffers of the Hungarian state, or of bills of public credit of Hungary. Trial and conviction abroad, even when the culprit has undergone the punishment there imposed, does not operate as a bar to trial and punishment in Hungary; nor does pardon, unless it was approved by a royal minister of Hungary. It is provided, however, that the punishment undergone abroad shall, as far as possible, be taken into consideration in applying the penalties of the Hungarian law.

⁴⁰ The omitted provisions relate to punishment of public functionaries of the kingdom for violations of official duty abroad.

⁴¹ *Foreign Jurisdiction*, p. 28.

Hungarians may be prosecuted for yet other crimes and offenses committed abroad; and it is provided that a foreigner, also, may be punished for a crime or offense committed abroad and not included in the category given above, when, according to treaties or actual usage, *there is no ground for extradition and the minister of justice orders the prosecution*. But it is further provided that such a crime or offense cannot be prosecuted in Hungary when the act is not punishable by the law in force at the place where it was committed, or by the law of Hungary, or when it has ceased to be punishable according to one of those laws, or even when the competent foreign authority undertakes to punish it. It is also provided that when the penalty applicable to the crime or offense by the law of the place where it was committed is less severe than that of the Hungarian law, the former penalty shall be applied; and if part of the penalty shall have been served abroad, such part shall be taken into account by the Hungarian tribunals.

A Hungarian subject can never be surrendered to the authorities of a foreign country.

A penal judgment rendered by the authority of a foreign country cannot be executed in the jurisdiction of Hungary.⁴²

Italy. Italian subjects may be punished who have committed on foreign territory *crimes* against the safety of the state, or counterfeited the seal, money, bills or obligations of the state, or its paper money (article 5), or who have committed on foreign territory a *crime* or a *delit* against an Italian or a foreigner (article 6). In the case, however, of a *delit*, complaint must be made by the injured party, and, if he is a foreigner, it must appear that the legislation of his country assures the same protection to Italians.

In respect to offenses committed abroad by foreigners, the Penal Code⁴³ contains the following provisions:

ARTICLE 7. There shall be judged and punished, according to the terms of the present code, the foreigner who, having committed on foreign territory either a *crime* against the safety of the State, or the *crime* of counterfeiting the seal, the moneys, bills or obligations of the State, or its paper money, shall be arrested in the kingdom or surrendered by another government.

ARTICLE 8. The foreigner who shall have committed on foreign territory, either against an Italian, or against another foreigner, one of the *crimes* indicated in articles 596 to 600, inclusive,⁴⁴ shall, if he happens to be arrested in the kingdom, or to be surrendered by another government, be judged and

⁴² Part I, chap. II, art. 7, Penal Code.

⁴³ Code of 20 November, 1859.

⁴⁴ Relating to highway robbery.

punished according to the provisions of article 6,⁴⁵ provided that the *crime* was committed at the distance of three miles at most from the Italian frontier, or, if the distance was greater, provided that the criminal has brought into the kingdom the money or the property obtained by his depredations.

ARTICLE 9. Besides the case indicated in the preceding article, the foreigner who shall have committed on foreign territory a *crime* to the prejudice of an Italian, shall be arrested if he comes into the kingdom. With the authorization of the king, his return shall be offered to the Government of the place where the *crime* was committed, in order that he may there be judged. If that Government refuses to receive him, the criminal shall be judged and punished in the kingdom, according to the provisions of article 6.

The same thing shall take place in the case of *delits* committed by a foreigner to the prejudice of an Italian on foreign territory, when, in the like case, the Italian would be punished in the country to which the foreigner belongs; except as to that which concerns the civil action.

Except in the case of offenses against the safety of the state, or counterfeiting the seal, money, bills or obligations of the state, or its paper money, persons guilty of offenses abroad cannot be tried in the kingdom, if they have been definitively judged in the country where the violation of law was committed, and, in case of condemnation, have undergone the penalty imposed.

Luxembourg. By the law of 18 January, 1879, it is provided that every subject of the Grand-Duke who, outside of the territory of the Grand-Duchy, commits a *crime* or a *delit* may be prosecuted and judged in Luxembourg, provided that, in case of a *delit*, the act is punished by the legislation of the country where it was committed. If the criminal has been tried in the foreign country for the offense of which he is accused, and has been either acquitted or condemned, and if the latter is the case, has either undergone or prescribed his penalty, or has been pardoned, he cannot be tried again.

Every detention abroad for the offense for which condemnation takes place in Luxembourg, is counted as part of the penalty there, so far as the deprivation of liberty is concerned.

In case of a *delit* committed against an individual subject of the Grand-Duke or a foreigner, the prosecution can be instituted only on the request of the public ministry, and should also be preceded by a complaint of the offended party, or by an official denunciation to the Luxembourg authorities by the authorities of the country where the *delit* was committed.

⁴⁵ Relative to punishment of Italians for offenses committed abroad against an Italian or, a foreigner. See *supra*.

The preceding provisions do not apply to political *crimes* or *delits* committed in a foreign country. Nevertheless, an attempt against the person of the head of a foreign Government or against that of the members of his family is not regarded as a political offense, nor as an act connected with such an offense, when that attempt constitutes the crime of murder, or of assassination, or of poisoning. The prosecution is instituted at the request of the public ministry of the place where the accused resides, or of the place where he may be found.

In respect to offenses committed abroad by foreigners, the law contains the following provisions:

ARTICLE 7. Every foreigner who, outside of the territory of the Grand-Duchy, shall be guilty, either as author or as accomplice, of a *crime* against the safety of the State, or of the counterfeiting of the seal of the State, of national moneys having circulation, of national papers, or of bank bills authorized by law, may be prosecuted and judged according to the provisions of the Luxembourg laws, if he is arrested in the Grand-Duchy or if the government obtains his extradition.

In respect to *delits* and *contraventions* by subjects of the Grand-Duke in matters relating to the forests, the country, the chase, the fisheries, custom-houses or indirect taxes, in the territory of contiguous states, the law of Luxembourg follows that of France and is founded on reciprocity and conventions.

Netherlands. By the Penal Code, as modified by the law of 15 January, 1886, foreigners, as well as subjects, may be punished who, outside of the territory of the kingdom, attempt to deprive the king of life, or to subvert the Government or the safety of the state, or who assault the king or queen, or the successor to the throne. Foreigners, as well as subjects, are also punished who, in another state, counterfeit the money and seals of the Netherlands, or bills of credit or certificates of debt of the Dutch Government or of the Dutch possessions, or of public institutions of the Netherlands.

Dutch subjects are punished for numerous other criminal offenses committed abroad.

Norway. Subjects are judged, according to the laws of Norway, for violations of law committed either within or outside of the kingdom.

Foreigners are likewise judged for offenses committed in the kingdom, and also for violations of law outside of the kingdom to the prejudice of Norway or of Norwegian subjects, *if the king orders the prosecution before the Norwegian tribunals.*

When an individual has been punished in a foreign country for a violation of law committed outside of the kingdom, dismissal from office or employment is the only penalty which can be pronounced against him for that same offense.

Portugal. Only Portuguese⁴⁶ are punishable for offenses committed outside of the state. They may be tried and punished for *crimes* committed abroad against the safety of the State, for falsification of the public seals, moneys, etc.; provided, however, that the criminals have not been judged in the country where they committed the offense. They may also be tried for *delits* committed abroad, provided the delinquent is found in Portugal; that the act of which he is accused is also defined as a *crime* or a *delit* by the legislation of the country where it was committed, and that the criminal has not been judged there.⁴⁷

Russia. The law of Russia in relation to criminal offenses committed outside of the national territory is fully set forth at p. 313 *et seq.* of vol. 11 (1879) of *Revue de droit international* in a communication of M. Tagantzeff, professor of penal law in the University of St. Petersburg, to Professor Fiore, of the University of Turin, published by the latter in that journal, and which may be translated as follows:

Articles 172, 173, and 174 of the code, edition of 1866, established the following system of penalties applicable to crimes committed outside of the limits of Russia, in case of the voluntary return of the culprits to their country or of their extradition:

1. *As regards Russian subjects:* The provisions differ here according as the crime committed has for its object Russia and Russian subjects, or else a foreign state and its subjects.

2. *Against Russia:* Article 173 applies in the case where the crime is directed against the sovereign power of the state, the integrity, the safety, and the prosperity of Russia, or where an attempt is made upon the life of one or more of its citizens.

According to the sense of the law and the explanations of the commentators, its application requires:

a. That the accused has done an injury to the rights of some individual—to his honor, his property, his liberty, his reputation, or his life; or else that he has committed an action directed against the government in force, or menacing the security and the tranquility of the state. Nevertheless, the Russian legislation does not admit the restrictions upon responsibility adopted by the

⁴⁶ Law of 1 July, 1869.

⁴⁷ See also, J. Domis de Semerpont on Extradition, etc.

French law of 1867 (the difference between *crimes, délits* and *contraventions*) and the German code of 1872, but does not make subjects responsible for the infraction, in a foreign country, of the regulations of Russian police, guaranteeing the interests of individuals, of the church, etc.;

b. That the criminal has not been punished in the place of the crime, or that his offense has not been legally effaced by prescription, according to the laws of the country. This rule applies equally in the case where the said crime is punished more severely by our code than by that of the country where it was committed. The supplementary penalties of which the German code speaks are not admitted in ours;

c. The institution of proceedings takes place on the general bases of the Code of Criminal Procedure of 1867 (the French code).

3. To the prejudice of a foreign state: The application of article 174, in this case, requires:

a. That the criminal shall have been delivered up by the state where the crime was committed, or that he shall have taken refuge in Russia;

b. That he has done injury to the person or to the property of some foreign subject, or else against the interior safety of the state in which he lives;

c. That his action is forbidden by the laws of the country where he committed it and by the Russian code;

d. That the criminal has not been punished, and that his act has not been effaced by prescription;

e. In the case where he has made an attempt against the interior safety of a foreign state, the criminal is punished according to the rules of article 260, code of 1866, relating to political crimes against foreign powers;

f. In order that the penalty may be applied, it is absolutely necessary that complaint shall have been made against the criminal on the part of those offended, or on that of the power on whose territory the crime was committed;

g. In case the crime is punished less severely by the local legislation than by the Russian Code, the penalty is mitigated in proportion.

According to article 172 of the code *foreigners* having committed crimes outside of Russia are not called before the Russian tribunals except in case of an attempt against the supreme power of Russia; that is to say, if they have participated in a plot tending to the overthrow of the existing government, or to that of the Emperor and of the imperial family, or else if they have attacked the personal and property rights of Russian subjects. As for other crimes committed to the prejudice of Russia or of other states and foreign subjects, they are not included in the Russian Penal Code.

As to the conditions under which the application of penalties takes place, they are the same as for Russian subjects who have committed crimes to the prejudice of Russia.

Sweden. Subjects are punished for violations of law committed outside of the kingdom, if the king, acting through the council of state or on the report of the minister of justice, orders proceedings to be instituted.

Foreigners also are punished for offenses committed outside of the kingdom to the prejudice of Sweden or of a Swedish subject, *if the king orders the prosecution.*

No one can be punished in the kingdom for an act in a foreign country for which he has there been punished, unless the act entail dismissal from office or civil degradation in Sweden, in which case such dismissal or degradation may be imposed.

Greece. Foreigners are punishable for committing outside of the state high treason against Greece, for falsifying and counterfeiting national moneys having circulation in the kingdom, counterfeiting the seals of the state, and for *crimes* or *delits* against a Grecian subject. Prosecution can take place only if the culprit has been delivered up to the justice of the state, or seized within the limits of the kingdom.

Hellenic subjects are never extradited except in cases provided for by international conventions. The circumstances and manner of extraditing foreigners may be defined by law.

Brazil. Both Brazilians and foreigners may be tried and punished, who, on a foreign territory, have committed a *crime* against the independence, integrity and dignity of the nation, against the constitution of the empire and the form of government, or against the head of the state, or who have committed the crime of falsifying money or public titles, or bills of banks authorized by the government. In such cases, however, the delinquent can be definitively judged only when he is actually in the empire, either as the result of extradition or having come voluntarily.

There may also be prosecuted and definitively judged in the empire, when they have reentered it voluntarily, Brazilians who, on foreign territory, commit against Brazilians or foreigners the *crimes* of forgery, perjury, or swindling, or any other offense not warranting bail.

Foreigners who have committed any of the *crimes* enumerated in the preceding paragraph and subsequently have come into Brazil, are extradited, if demanded; if not, they may be expelled from Brazilian territory, or punished conformably to the Brazilian law. It is, however, necessary, in the last case, that there shall have been a complaint or denunciation authorized by the Government, and that the laws of the criminal's country punish foreigners in similar cases.

Spain. Foreigners, as well as subjects, may be tried and punished who, outside of the territory of Spain, have committed offenses against the exterior

safety of the state, or the offenses of high treason, rebellion, counterfeiting of the royal signature or stamp, counterfeiting of the signatures of public ministers or of the public seals, counterfeiting that is directly prejudicial to the credit or interests of the state, and the introduction and issuance of anything counterfeited, counterfeiting of bank notes authorized by law and the introduction or issuance of such counterfeit notes, and offenses committed by public officers in the discharge of their public functions.

Except in the cases of treason and high treason, if a person has been tried and acquitted or convicted in a foreign country of any of the offenses mentioned above, he cannot be tried again in Spain for the same offense, unless, in case of conviction, he has not served out his sentence and has not been pardoned. In such case, he may be tried again in Spain; but any punishment he has actually undergone abroad is taken into account in adjusting the penalty in Spain. In all the cases indicated above, foreigners can be prosecuted only when they have been arrested on Spanish territory or when possession of them has been obtained by extradition. Spaniards may be punished who, in a foreign country, have committed offenses against other Spaniards, or against a foreigner, provided that in the latter case the offense was grave in character and was punishable by the law of the foreigner's country, as well as by the law of Spain.

Switzerland. By the Federal Penal Code of February 4, 1853, foreigners may be punished who, outside of Switzerland, commit offenses against the safety of the state, or contribute to the prejudice of the Confederation by the embezzlement, destruction or counterfeiting of official records, or by the violent overthrow of the constitution of the Confederation, or the violent expulsion or dissolution of its authorities; or who recruit Swiss citizens for a prohibited military service.

In addition to the offenses specified above, Swiss citizens are punishable for a limited number of other offenses.

The importance in the present discussion of the preceding examination of the laws of different states touching offenses committed on foreign territory may best be apprehended in a tabular statement showing to what extent such jurisdiction over foreigners is actually claimed. It is unnecessary to tabulate the legislation respecting citizens, because that is merely a question of expediency which each state may determine for itself, and not a matter of international right, concerning which other nations may have to be consulted. It is, however, to be observed that while in some of the codes that have been quoted the provisions respecting offenses committed abroad by citizens are general and sweeping in their character, in no case is a claim put forth to punish a foreigner for such

offenses, save under exceptional circumstances and in exceptional cases, which are supposed to justify the pretension.

FOREIGNERS ARE PUNISHED WHO, OUTSIDE OF THE NATIONAL
TERRITORY AND JURISDICTION, COMMIT OFFENSES

1. *Against the safety of the state:* (a) By France, Germany, Austria, Belgium, Hungary, Italy, Luxembourg, the Netherlands, Norway, Russia, Sweden, Greece, Brazil, Spain, Switzerland; (b) *not punished* by Denmark, Great Britain, Portugal.

2. Counterfeiting seals of the state, national moneys having circulation, national papers, or bank bills authorized by law: (a) Punished by France, Germany, Austria, Belgium, Hungary, Italy, Luxembourg, the Netherlands, Norway, Sweden, Greece, Brazil, Spain, Switzerland; (b) *not punished* by Denmark, Great Britain, Portugal.⁴⁸

3. *Other offenses:* (a) General jurisdiction of offenses committed abroad by foreigners against subjects is claimed by Greece and Russia; (b) such offenses are punished by Sweden and Norway, if the king orders the prosecution; (c) *crimes*, but not *delits*, committed by foreigners in another state are punished by Austria, provided that (except in the case of *crimes* specified under 1 and 2) an offer of surrender of the accused person has first been made to the state in which the *crime* has been committed, and has been refused by it; (d) criminal offenses committed abroad by foreigners are punished by Hungary, if the minister of justice orders the prosecution, provided that the act is punishable at the place of commission, that it has not ceased to be punishable there, and that the competent authority does not undertake to punish it; (e) criminal offenses committed by foreigners against Italians in another state are punished by Italy, but only when (except in the cases under 1 and 2) an offer of surrender of the person accused has been made to the state in which the *crime* was committed, and has been refused by it, unless the offense was committed within three miles of the frontier, or stolen property has been brought into the kingdom; (f) non-bailable offenses

⁴⁸ See, in this relation, *U. S. v. Arjona*, 120 U. S., 479, in which the Supreme Court, at its October term, 1886, held that the counterfeiting of foreign securities, whether national or corporate, which have been put out under the sanction of public authority at home, especially the counterfeiting of bank notes and bank bills, is an offense against the law of nations; and that, consequently, the Congress of the United States has authority, under its constitutional power to provide for the punishment of offenses against the law of nations, to enact laws to punish the counterfeiting of foreign securities in the United States.

committed abroad by foreigners are punished by Brazil, if the prosecution is authorized by the government, and the laws of the criminal's country punish foreigners in like cases; (g) criminal offenses committed outside of the state by foreigners against citizens or subjects are not punished under any conditions by France, Germany, Belgium, Denmark, Great Britain, Luxembourg, the Netherlands, Portugal, Spain, or Switzerland.

It is thus seen that among all the countries whose legislation has been examined, Russia and Greece are the only ones whose assertion of extraterritorial jurisdiction is as extensive and absolute in form as that of Mexico. For the question we are now considering is not that of the punishment of extraterritorial crimes against the safety of the state, or of coinage felonies, but of offenses, both *crimes* and *delits* (or felonies and misdemeanors,) committed outside of a country by foreigners against a citizen. The only limitation imposed by article 186 upon the jurisdiction of the Mexican tribunals over offenses of this character, is that they must be punishable with a severer penalty than *arresto mayor* by the law of Mexico, and as penal offenses by the law of the country in which they were committed. Thus offenses which by the law of Mexico are merely *delits* and by the law of the United States merely *misdemeanors*, may be punished under article 186. Not only is this the language of the law, but such was its interpretation by the Mexican court in the case in question; and by the law of Texas libel is not a felony, but only a misdemeanor. (*Smith v. The State*, 32 Texas, 594.)

The claim of Mexico is not only thus extensive, but it is also absolute. We have seen that it was held by Judge Zubia, whose decision was affirmed by the Supreme Court of Chihuahua, that according to the rule, *Judex non de legibus sed secundum leges debet judicare*, it did not belong to the judge to examine the principle laid down in article 186, but to apply it in all force, it being the law of the State of Chihuahua. And we have further seen that Mr. Mariscal disclaimed any power to interfere with the execution of the law by the judicial tribunals. Thus the Mexican claim is absolute. In this respect it goes beyond the jurisdictional lines laid down by Sweden and Norway, whose claims of jurisdiction are, after those of Russia and Greece, the most extensive of any that have been examined. In Sweden and Norway the foreigner may be punished for an offense committed in a foreign country against a Swedish or Norwegian subject, *if the king orders the prosecution*. This makes the prosecution discretionary and enables the government to meet any diplomatic question that may be raised in relation to the international right involved. The same thing may be said of the law of Hungary, where, in the case supposed, the prosecution must be ordered by the minister of justice. Austria punishes only *crimes*, not *delits* or misdemeanors, and then,

except in the case of *crimes* against the safety of the state, or coinage felonies, only after an offer of surrender of the accused person has been made to the state in which the *crime* was committed, and has been refused by it. The same principle is found in the law of Italy, with almost the same definition of jurisdiction. Brazil makes the assertion of extraterritorial jurisdiction over foreigners in similar cases depend upon the assertion of a like jurisdiction by the criminal's country.

I have said that crimes committed outside of the national territory by foreigners against citizens or subjects are not punished under any circumstances or conditions by France, Germany, Belgium, Denmark, Great Britain, Luxembourg, the Netherlands, Portugal, Spain, or Switzerland. Before showing this, I pronounced the Mexican contention, that the claim to punish foreigners for offenses committed against Mexicans outside of the national territory was sustained by the French Code, to be wholly unfounded. I shall now show that such a claim has been pronounced by the highest judicial tribunal in France to be unwarranted by the principles of international law.

I refer to the case of *Raymond Fornage*, decided by the Court of Cassation, or Supreme Court, of France, at Paris in 1873, and reported in the *Journal du Palais* (p. 299 *et seq.*) for that year. This court being the highest judicial tribunal in France, its decisions in respect to the French law are not to be questioned. The circumstances of the case of Fornage are as follows: The prisoner was indicted by the *Chambre des mises en accusation* (grand jury) of the Court of Appeal of Chambery for the crime of larceny, which was described in the indictment as having been committed in the Canton of Vaud, Switzerland; and the case was referred for trial before a jury to the Court of Assizes (composed, in departments where there are courts of appeal, of three judges of that court) sitting at Haute Savoie. The prisoner did not take an appeal, as he had a legal right to do, from the judgment of reference, but proposed before the Court of Assizes an exception to the competency of that court, based on the ground that, having the quality of a foreigner, the French tribunals could not try him for a crime committed in a foreign country. But the Court of Assizes, regarding itself as irrevocably clothed with jurisdiction by the judgment of reference from the Court of Appeal, which had not been attacked, declared that the exception of the accused was not receivable. Upon these facts the case was argued at length before the Court of Cassation by M. Requier, a counsellor and reporter of the court, and M. Bedarrides, advocate-general, both of whom, while admitting that the rule was settled that a Court of Assizes could not declare itself incompetent to take cognizance of a case of which it had

been possessed by a judgment of reference from which no appeal was taken within the periods established by law, nevertheless argued that there were considerations of a higher order in the case of Fornage, which ought to make it an exception to the general rule. In this relation I quote from the argument of M. Requier, the following passage:

The right to punish has no foundation except the right of sovereignty, which expires at the frontier. If the French law permits the prosecution of Frenchmen for crimes or misdemeanors committed abroad, it is because the criminal law has something of the character at the same time of a personal statute and of a territorial statute. A Frenchman, when he has reached a foreign country, does not remain the less a citizen of his own country; and, as such, subject to the French law, which holds him again when he reenters France. *But the law cannot give to the French tribunals the power to judge foreigners for crimes or misdemeanors committed outside of the territory of France; that exorbitant jurisdiction, which would be founded neither on the personal statute nor on the territorial statute, would constitute a violation of international law and an attempt against the sovereignty of neighboring nations.* There exists a single exception to that rule of the law of nations. When a foreigner has committed, even outside of the territory, a *crime* against the safety of the state, he can be prosecuted, judged and punished in France. But, save that exception, founded on the right of legitimate self-defense, foreigners are justiciable only by the tribunals of their own country for acts done by them outside of the territory. The French tribunals, in punishing an act of that nature, would commit a veritable usurpation of sovereignty, which might disturb the good relations of France with neighboring nations. * * * When a crime has been committed outside of the territory by a foreigner the culprit is not subjected by that act to the French law; the French tribunals have no jurisdiction over him; the incompetence is radical and absolute. The criminal court, in punishing the act, would commit an abuse of powers; it would usurp a right of sovereignty appertaining to a foreign power. Would it not be contrary to all the principles of justice to oblige the magistrates to render themselves guilty of an arbitrary act, of a violation of international law?

Not only did the Court of Cassation adopt this view, but in its judgment (the full text of which is given herewith as Exhibit B) the rule of international law, as laid down by the Government of the United States in the Cutting case, is expressed in terms which, for force, precision, and freedom from doubt or qualification, have not been surpassed. Translated, the material parts of the judgment are as follows:

Whereas, if, as a general principle, the Courts of Assizes, possessed of a case by a judgment of the chamber of indictments not attached within the times

fixed by article 296 of the Code of Criminal Procedure, cannot declare themselves incompetent, * * * this rule is founded on this, that the Courts of Assizes, being invested with full jurisdiction in criminal matters, can, without committing any excess of power and without transgressing the limits of their attributes, take cognizance of all acts punished by the French law; *but this jurisdiction, however general it may be, cannot extend to offenses committed outside of the territory by foreigners*, who, by reason of such acts, are not justiciable by the French tribunals; Seeing that, indeed, *the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory*; that, except in the cases specified by article 7 of the Code of Criminal Procedure, the provision of which is founded on the right of legitimate defense, *the French tribunals are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent; that it can be waived, neither by the silence nor by the consent of the accused*; that it exists always the same, at every stage of the proceedings * * *; Whereas, indeed, Raymond Fornage was brought before the Court of Assizes of Haute Savoie, accused of larceny committed in the Canton of Vaud, Switzerland; * * * and, in ordering the trial to proceed, without passing upon the question of nationality raised by the accused, it (the court) violated article 408 of the code, and disregarded the rights of the defense. Annul, etc.

This judgment may be regarded as finally and conclusively answering the contention that a precedent for article 186 may be found in the French Code.

PRINCIPLES OF AMERICAN LAW

In the United States the territorial principle is the basis of criminal jurisprudence, and the place of the commission of an offense is generally recognized as the proper and only place for its punishment. Article 6 of the Amendments to the Federal Constitution provides that—

...in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

A similar though less elaborate provision for the punishment at the *locus delicti* of offenses committed in the United States exists in the Constitution itself, which provides (article 3, sec. 2), that—

...the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed.

It is thus seen that notwithstanding the fact that the guarantees of the Federal Constitution to accused persons of a speedy and public trial; of trial by an impartial jury; of the right to know the nature and cause of the accusation; to be confronted with witnesses; to have compulsory process for obtaining witnesses for the defense, and to have assistance of counsel, operate over the whole territory of the United States, and are binding on all the courts, State as well as Federal, it was nevertheless regarded as essential to the administration of justice to provide for the trial of the person accused in the State or district where his offense should be alleged to have been committed. But, in order to insure the punishment of crime, there was embodied in section 2 of article 4 of the Constitution, the following provision:

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

These provisions of the Constitution apply to all offenses committed in the United States.

To the strict territorial principle, the laws of the United States furnish certain exceptions; but in no case is the exception of such a character as to involve or imply an assertion by the United State of jurisdiction over the territory of another nation.

The earliest bestowal by Congress upon the Federal courts of jurisdiction over offenses committed outside of the territory, actual or constructive, of the United States, was in the crimes act of 1790, which, as read in the text, has sometimes been supposed by writers to have conferred a far more extensive jurisdiction on the courts of the United States than the decisions of those tribunals have attributed to it. The eighth section of this act provides—

that if any person or persons shall commit, on the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offense, which, if committed within the body of a county, would by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship, or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

Under the provisions of this section several cases have been adjudicated by the Supreme Court. The first was that of *U. S. v. Palmer et al.*, 3 Wheaton, 610, decided in 1818. This case was certified from the Circuit Court of the United States for the District of Massachusetts, on a division of opinion between Mr. Justice Story, of the Supreme Court, and Judge Davis, of the District Court. The defendants were charged in the indictment with having committed a robbery on the high seas on a vessel belonging to persons unknown. There was no allegation that the defendants were citizens of the United States, two of them being described merely as “late of Boston,” in the State of Massachusetts, and the other “as late of Newburyport,” in the same State; and the goods were alleged to have been, at the time the defendants boarded the vessel and seized them, in the custody of “certain persons, being mariners, subjects of the king of Spain.” One of the questions certified from the Circuit Court was as follows:

Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, or board of any ship or vessel belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy, within the true intent and meaning of the said 8th section of the act of Congress aforesaid, and of which the Circuit Court of the United States hath cognizance, to hear, try, determine, and punish the same.

In response to this question, Chief-Justice Marshall, who delivered the opinion of the Supreme Court, said:

The question, whether this act extends further than to American citizens, or to persons on board American vessels, or to offenses committed against citizens of the United States, is not without difficulty. * * * The words of the

section are in terms of unlimited extent. The words ‘any person or persons’ are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. * * * The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.

Although the offense charged in *U. S. v. Palmer et al.* was robbery on the high seas, the Chief-Justice, to sustain the limitation placed in the opinion on the words “any person or persons,” as employed in the 8th section of the act of 1790, discussed the other provisions of the section as follows:

But these words (any person or persons) must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent, we must examine the law. The succeeding member of the sentence commences with the words: “If any captain or mariner of any ship or other vessel shall practically run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate.”

The words, “any captain or mariner of any ship or other vessel,” comprehend all captains and mariners as entirely as the words “any person or persons” comprehend the whole human race. Yet it would be difficult to believe that the legislature intended to punish the captain or mariner of a foreign ship who should run away with such ship and dispose of her in a foreign port, or who should steal any goods from such ship to the value of fifty dollars, or who should deliver her up to a pirate when he might have defended her, or even according to previous arrangement. The third member of the sentence also begins with the general words “any seaman.” But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offenses against the nation, under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offenses the punishment its own policy may dictate; and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government.

That the general words of the two latter members of this sentence are to be restricted to offenses committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of that sentence.

The question of robbery on the high seas, under the 8th section of the act of 1790, was again before the Supreme Court in the case of *U. S. v. Klintonck*, 5 Wheaton, 144, decided in 1820. This case was certified from the Circuit Court of the United States for Virginia, before which the defendant, a citizen of the United States, was charged with piracy committed in April, 1818, on a vessel called the “Norberg,” belonging to persons unknown. The facts found on the trial were that the defendant sailed as first lieutenant on a vessel called “The Young Spartan,” which was owned without the United States, and cruised under a commission from Aury, styling himself Brigadier of the Mexican Republic, which had revolted from Spain but was not yet recognized by the United States, and Generalissimo of the Floridas, a province then in the possession of Spain. “The Norberg,” which was a Danish vessel, was fraudulently seized by “The Young Spartan,” one of whose officers secreted Spanish papers on board of “The Norberg” and then claimed her as a Spanish vessel; her company were left on an island off the coast of Cuba; and the vessel herself was taken to Savannah, in the State of Georgia, where the captors, personating the Danish captain and crew, entered her as a Danish vessel. The opinion of the Supreme Court was delivered by Chief-Justice Marshall; and it was held, in the first place, that the commission, under which the defendant professed to have been cruising, did not protect him, the seizure of “The Norberg” having been made—not *jure belli*, but *animo furandi*. On this point the Chief-Justice said:

So far as this court can take any cognizance of that fact, Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea. Whether a person acting with good faith under such commission may or may not be guilty of piracy, we are all of opinion that the commission can be no justification of the fact slated in this case. The whole transaction taken together demonstrates that “The Norberg” was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas. And although the fraud practiced on the Dane may not of itself constitute piracy, yet it is an ingredient in the transaction which has no tendency to mitigate the character of the offense.

The Chief-Justice then reviewed the decision of the court in the case of *United States v. Palmer et al.*, as above quoted, which had been invoked by the counsel for defendant, to show that he was not guilty of piracy under section 8 of the act of 1790, which, it was contended, did not apply under the ruling

in Palmer's case to an American citizen entering on board of a foreign vessel exclusively owned by foreigners and committing piracy thereon.

On this point Chief-Justice Marshall said:

Upon the most deliberate reconsideration of that subject, the court is satisfied that general piracy, or murder, or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the courts of the United States. Persons of this description are proper objects for the Penal Code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offenses committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offenses committed against all nations, including the United States, by persons who, by common consent, are equally amenable to the laws of all nations.

The result of these two cases—*U. S. v. Palmer et al.* and *U. S. v. Klintock*—is that while general piracy was punishable under the 8th section of the act of 1790, and while in such case proof as to the nationality of the offender, or as to the origin of the vessel on which he sailed, was immaterial, a pirate being amenable to the jurisdiction of all nations alike, yet, where the offense charged under the section was not piratical in the general sense, but only by force of the statute, such averments must be made and such evidence produced as to the national character of the vessel on which the offense was committed, as would ordinarily give the courts of the United States jurisdiction. Such was the view announced by the Supreme Court in subsequent decisions. In *U. S. v. Pirates*, 5 Wheaton, 184, the court, while fully recognizing the decision in Palmer's case, said that—

...when embarked in a piratical cruise, every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.

In the case of *U. S. v. Holmes*, 5 Wheaton, 412, decided, as was also that of the *Pirates*, in 1820, the Supreme Court, speaking through Mr. Justice Washington, laid down, as the result of the preceding cases, the following rules:

If it (the offense) be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed, either by a citizen or a foreigner, on board of a piratical vessel, the offense is equally cognizable by the courts of the United States under the abovementioned law.

It is to be observed that Mr. Justice Washington was a member of the Supreme Court at and prior to the time of the decision of Palmer's case, in February, 1818, as well as during the period intervening between that decision and the case of Holmes, his opinion in which has just been quoted; and in that intervening period, in April, 1818, just after the decision in Palmer's case, he had occasion to consider that decision, and the true construction of the 8th section of the act of 1790, in the Circuit Court of the United States for the State of Pennsylvania, in the case of *U. S. v. Howard*, 3 Wash. C. C., 340. Referring to Palmer's case he said:

It was upon the whole decided that a robbery committed by any person on the high seas, on board of a ship belonging exclusively to a foreign State, or to the subjects thereof, or upon the person of a subject of a foreign State, in a vessel belonging exclusively to subjects of a foreign State, is not piracy within the true intent and meaning of the 8th section of that law. Although the offense of robbery is the only one stated in this decision; that being the only offense referred to in the question which was adjourned to the Supreme Court; yet there can be no doubt but that all the other acts of piracy, enumerated in that section, are included within the same principle.

It appears by this opinion, as well as by the opinion of Chief-Justice Marshall in *Klintock's case*, as above quoted, that the Supreme Court when the judgment in Palmer's case was rendered, understood it to decide not only that the general words employed in the act of 1790 in reference to statutory piracy must be restricted so as to apply only to offenses committed on board of American vessels, on the high seas, but also that the 8th section of the act did not include piracy by the law of nations, and, therefore, did not give the courts of the United States jurisdiction to punish it. We have seen that in *Klintock's case*, as well as in the other cases cited above from the decisions of the Supreme Court, it was subsequently held that that section did confer such jurisdiction; for, as it provided for the punishment of any person or persons for murder or robbery on the high seas, and as "the pirate is a man who satisfies his personal greed or personal vengeance by robbery

or murder in places beyond the jurisdiction of a state,”⁴⁹ it was well held in the case of *Klintock* and of the *Pirates*, that piracy by the law of nations was punishable under the terms of the section. It is, however, worthy of notice that in March, 1819, after *Palmer’s* case was decided, Congress passed a temporary act, which was subsequently renewed and made permanent, and is now substantially embodied in section 5368 R. S. of the U. S., expressly conferring on the courts of the United States jurisdiction of “piracy, as defined by the law of nations.”

No attempt was made to remove or correct the limitation placed by the Supreme Court on the general words of the act of 1790, so far as they related to statutory piracy. And although, as has been seen, the court itself, in 1820, in the cases of *Klintock*, the *Pirates*, and *Holmes*, held that the 8th section of the act of 1790, under which the indictments in those cases were framed, covered piracy by the law of nations, and was not repealed by the act of 1819, yet it never was intimated that the previous decision respecting municipal piracy, under the act of 1790, was wrong. Indeed, in the case of *Holmes*, the latest of the cases cited, we observe in the opinion of the court a decided affirmation of the view expressed by the Chief Justice in *Palmer’s* case, that the question of jurisdiction of acts of municipal piracy would be determined by the flag of the vessel on which the offense was committed. “If it [the offense] be committed,” said the court in *Holmes’* case, “on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails.” This principle was recognized by Congress in the act of the 3d of March, 1825, entitled, “An act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,” by which many of the provisions of different sections of the act of 1790 were replaced, as well as in the act of March 3, 1835, which, in substituting provisions for the punishment of revolt on shipboard, in place of those contained in the 8th section of the act of 1790, expressly restricted the jurisdiction of the courts to acts committed by “one or more of the crew of any American ship or vessel.”

It may, therefore, be said that in respect to offenses committed on the high seas, the jurisdiction exercised by the judicial tribunals of the United

⁴⁹ Hall’s *Int. Law*, 233 *et seq.* While piracy has been defined as robbery on the high seas, the more recent jurists hold that the depredation need not be *Inert causa*. Whart. *Cx. L.*, § 1860; Heffter, Volkerr, fl 104; Broglie, *Sur la piraterie*, iii, 135; Wheaton’s *Int. Law*, § 123, Dana’s ed., p. 195.

States, under the legislation of Congress and the decisions of the Supreme Court, does not exceed, if, indeed, in the case of citizens of the United States, it reaches, the limitations of criminal jurisdiction over the high seas as defined by Wheaton, who, in his “Elements of International Law,” lays down the following rules:

§124. Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be awfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals.

This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offenses which are made piracy by municipal legislation. Piracy, under the law of nations, may be tried and punished in the courts of justice of any nation, by whomsoever and whosoever committed; but piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction, and on board of whose vessels, the offense thus created was committed. There are certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification. It is not by force of the international law that those who commit these acts are tried and punished, but in consequence of special laws which assimilate them to pirates, and which can only be applied by the State *to its own subjects, and in places within its own jurisdiction*. The crimes of murder and robbery, committed by foreigners on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subject, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever, these crimes maybe punished as piracy under the law of nations, in the courts of any nation having custody of the offenders.⁵⁰

Mr. Dana, in a note citing these and other cases, states the following conclusion:

If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority, and the offender were secured and confined by the master of the vessel, to be taken home for trial,—this state of things would not authorize seizure and trial by any nation that chose to interfere, or within whose limits the offender might afterwards be found.

⁵⁰ Dana’s Edition, p. 193 *et seq.* Wheaton cites, as sustaining his views, the cases of *U. S. v. Klintonck* and *U. S. v. Pirates*.

In 1799 an act was passed by Congress, the provisions of which are now substantially embodied in section 5335 of the Revised Statutes, which reads as follows:

SEC. 5335. Every citizen of the United States, whether actually resident or abiding within the same, or in any foreign country, who, without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of, or resident within, the United States, and not duly authorized, who counsels, advises, or assists in any such correspondence, with such intent, shall be punished by a fine of not more than five thousand dollars, and by an imprisonment during a term not less than six months, nor more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government, or any of its agents or subjects.

The act of 1799, commonly called the “Logan” statute, after the person by whose informal diplomatic enterprises its enactment was suggested,⁵¹ applied in terms, as does the section above quoted, only to citizens of the United States. It raises, therefore, no question of jurisdiction as between nations, and is of no importance in the present discussion.

The same observation may be made on the laws passed by Congress in pursuance of treaties with China, Japan, Siam, Egypt, and Madagascar, to confer on the minister and consuls of the United States in those countries, or in any other countries with which the United States has similar treaties, jurisdiction “to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries.” (Sec. 4084 R. S.) Neither, as has heretofore been stated, is any international question raised by another provision of law (Sec. 4088 R. S.) conferring a similar jurisdiction over citizens of the United States upon “consuls and commercial agents of the United States at islands and in countries not inhabited by any civilized people, or recognized by any treaty with the United States.” In such places there being no system of law, or

⁵¹ See Lawrence’s *Wheaton*, ed., 1863, p. 1003; Wharton’s *Int. Law Digest*, § 109, and same author’s *State Trials*, pp. 20, 21.

courts of justice, to which foreigners may be held answerable, it is admitted that they must remain subject to the laws and authorities of their respective governments.⁵²

There is still another law, the act of Congress of August 18, 1856, section 24, now substantially embodied in section 1750 of the Revised Statutes, to which reference should be made. By this section secretaries of legations and consular officers of the United States in foreign lands are authorized, at their respective posts or places,

...to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States.

It is provided further that—

...every such oath, affirmation, affidavit, deposition and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer, when certified under his hand and seal of office, shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other (s/V) person within the United States duly authorized and competent thereto.

And it is finally provided that—

If any person shall wilfully and corruptly commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if such offense had been committed in the United States, before any officer duly authorized therein to administer or take such oath, affirmation, affidavit, or deposition, and shall be subject to the same punishment and disability therefor as are or shall be prescribed by any such act for such offense; and any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal and signature of the officer administering or taking the same in testimony thereof, shall be admitted in evidence without proof of any such seal or signature being genuine or of the official character of such person; and if any person shall forge any such seal or signature, or shall tender in evidence any such document with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be deemed and

⁵² See Lewis on *Foreign Jurisdiction*, p. 11.

taken to be guilty of a misdemeanor, and on conviction shall be imprisoned not exceeding three years nor less than one year, and fined in a sum not to exceed three thousand dollars, and may be charged, proceeded against, tried, convicted, and dealt with, therefor, in the district where he may be arrested or in custody.

I am not aware that any case has ever arisen to require a judicial construction of this act, but, as it is generally understood,⁵³ it is not confined in its operation to citizens of the United States, but applies as well to aliens committing the designated offenses; and it has sometimes been referred to as an instance of the assertion by the United States of a general international right to try and punish aliens for acts done in a foreign country. It is not difficult to show that such a view of the statute is not warranted either by its terms or by the scope or results of its operation. It is not even necessary to its justification, upon principles of international law, to adopt the reasoning of Attorney-General Williams (14 Op. 285), who, referring to the law in question, affirmed its international validity on the ground that “according to international law, the domicile of an ambassador, minister extraordinary, or consul is a part of the territory he represents for many purposes.” This is unquestionably so. But the international validity of the act of 1856 does not, in my judgment, rest solely, nor even in the main, on that ground.

It is to be observed that the act relates solely to certain officers, known to international law, who, upon the recognition and with the consent of the governments of foreign countries, discharge there the functions of official representatives of the Government of the United States. One of those functions is the performance of the official acts enumerated in the statute of 1856, namely, the taking of oaths, etc., and the performance of notarial acts, for use in the United States. And as these acts are performed under the laws of the United States, not only does the person who appears before a secretary of legation or a consular officer for any of the purposes enumerated in the act of 1856 submit himself to the laws of the United States to that extent, but if he swears falsely or does any other thing in contravention of the act, he violates a law to whose execution in its territory the foreign government has consented. The act contains, therefore, neither an assertion of a general right to punish aliens for acts done by them outside of the United States, nor even an assertion of such a right to punish them for acts so done against the Government of the United States, to say nothing of acts merely against its citizens.

⁵³ Wharton's *Cr. Law*, § 276; Williams, Attorney General, 14 Op. 285.

The general rule that the laws of a nation have no binding force, except as to citizens, outside of the national territory, actual or constructive, was again laid down by the Supreme Court in 1824, in the case of the Apollon, 9 Wheaton, 362. In that case, Mr. Justice Story, speaking for the court, said:

The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted, in construction, to places and persons upon whom the legislature have authority and jurisdiction.

In a still later case heard before him in the Circuit Court of the United States at Boston,⁵⁴ Mr. Justice Story again had occasion to consider and decide the question of jurisdiction over offenses committed outside of the national territory. In this case the defendant, the master of an American whale ship, was indicted for manslaughter, by shooting at and killing a man on board of another and foreign vessel in the Society Islands. It appeared that the shot was fired by the defendant from his own vessel, and took effect as above described. Taking the view that, although the shot was fired from the American vessel, the crime was, in contemplation of law, committed “where the shot took effect,” the learned judge said:

Of offenses committed on the high seas on board of foreign vessels not being a piratical vessel, but belonging to persons under the acknowledged government of a foreign country, this court has no jurisdiction under the act of 1790, ch. 36, § 12. That was the doctrine of the Supreme Court in *United States v. Palmer* (3 Wheat., R. 610), and *United States v. Klintock* (5 Wheat., 144), and *United States v. Holmes* (5 Wheaton, 412); applied, it is true, to another class of cases; but in its scope embracing the present. *We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen.* We decide the case wholly on the ground that the schooner was a foreign vessel, belonging to foreigners, and at the time under the acknowledged jurisdiction of a foreign government.

It would be useless to attempt to collect all the declarations and applications by the State courts of the principle that penal laws have no extraterritorial force; and I shall quote the language of only a few cases, to mark the uniform current.

⁵⁴ *U.S. v. Davis*, 2 Sumner’s C.C. 482; decided in 1837.

In the case of *Gilberts. Stedman* (1 Root, 403), which was a *qui tam* action for stealing goods from the plaintiff's shop, in Massachusetts, and for receiving and concealing them, knowing them to be stolen, it was held by the Supreme Court of Connecticut, in 1792, that the declaration was insufficient because it alleged neither the stealing of the goods nor the concealment of them in Connecticut. And the court said:

The crime charged was committed in the State of Massachusetts, and out of the jurisdiction of this court.

In the case of the *State v. Grady*, decided by the Supreme Court of same State in 1867 (34 Conn., 118), it was declared to be "undoubtedly true," "that the courts of this State can take no cognizance of an offense committed in another State."

In New York the line of decisions has also been unbroken. In the case of *The People v. Wright*, decided in 1804 (2 Caine's R., 213), the Supreme Court said—

We have no jurisdiction over offenses committed in other States.

In *Charles v. People*, decided in 1848 (1 Comstock, 180), the court again declared—

Our legislature has no extraterritorial jurisdiction; and when it forbids, in unqualified terms, the doing of an act, it must always be understood that the thing is only forbidden within this State. It cannot be pretended or assumed that a State has jurisdiction over crimes committed beyond its territorial limits. (*People v. Merrill*, 2 Parker's *Crim. Rep.*, 590.)

In *People v. Noelke*, 94 N. Y., 137 (A. D. 1883), the court, referring to the case of *Van Voorhis v. Brintnall*, 86 N. Y., 18, in which it was held that a marriage contract made in another State and there valid, was valid in New York, although it would have been invalid if made in New York; and to the case of *Ormes v. Dauchy*, 82 N. Y., 443, in which it was held that a contract made in relation to a lottery in a State in which lotteries were permitted, could be enforced in New York, where lotteries are prohibited, said:

Both cases rested upon the undeniable truth that our law could have no extraterritorial operation.

Said the Supreme Court of Alabama, *Green v. The State*, 66 Ala., 40, decided in 1880:

It is a safe principle, perhaps, to be asserted, that a crime committed in a foreign country, and in violation of the laws thereof, cannot by mere legislative fiction or construction be constituted an offense in another country.

In the case of the *State v. Knight* (*Taylor's Rep.*, 65), decided in North Carolina in 1799, the court said:

The States are to be considered with respect to each other as independent sovereignties, possessing powers completely adequate to their own government in the exercise of which they are limited only by the nature and objects of government by their respective constitutions and by that of the United States. Crimes and misdemeanors committed within the limits of each are punishable only by the jurisdiction of that State where they arise. * * * Our legislature may define and punish crimes committed within the State, whether by citizens or strangers; because the former are supposed to have consented to all laws made by the legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws, as long as they remain in the State; but they cannot define and punish crimes committed in another State, the citizens of which, while they remain there, are bound to regulate their civil conduct only according to their own laws.

In New Jersey the Supreme Court, in the case of *The State v. Carter* (3 Dutcher, 499), decided in 1859, said:

There cannot be two sovereignties supreme over the same place, at the same time, over the same subject-matter. The existence of theirs is exclusive of ours. We may exercise acts of sovereignty over the wastes of ocean or of land, but we must necessarily stop at the boundary of another. The allegation of an act done in another sovereignty to be a violation of our own, is simply alleging an impossibility, and all laws to punish such acts are necessarily void.

Said the Supreme Court of Indiana:⁵⁵

It may be assumed as a general proposition that the criminal laws of a State do not bind and cannot affect those out of the territorial limits of the State.

Said the Supreme Court of Arkansas:⁵⁶

The laws of this State have no extraterritorial operation. Each State possesses the exclusive power to provide for the punishment of crimes committed

⁵⁵ *Johns v. The State*, 19 Ind., 421, A. D. 1862.

⁵⁶ *State v. Chapin*, 17 Ark., 561, A. D. 1856.

within its limits, except so far as this power may have been surrendered to the Government of the United States by the Federal Constitution.⁵⁷

MEXICO'S DEFENSE

Having sufficiently disclosed the positive legislation of different countries, and its judicial construction, in respect to extraterritorial crime, I proceed to examine the arguments put forth by the Mexican Government in support of article 186 of the Penal Code. These arguments, which were communicated from time to time to this Department by Mr. Romero, Mexican Minister at this Capital, are before me in three versions—Spanish, French, and English—the first and second published in pamphlet form by the Mexican Government, and the third made in this Department from the Spanish text communicated by the Mexican Minister.

The first of these arguments is in a note addressed to Mr. Bayard by Mr. Romero, on the 7th of August, 1886, while Mr. Cutting was still in prison. This note opens with a statement of the circumstances of the case, derived, as Mr. Romero states, from private reports received by him from Paso del Norte. The only point I shall notice in this statement is the allegation that Mr. Cutting “distributed in Paso del Norte, Mexico, several copies of the *Sunday Herald* (the Texas paper) containing his article against Medina,” and that, “for this cause, the following day, June 21, he was summoned anew by Medina for defamation, in conformity with articles 642 and 186 of the Mexican Penal Code.” As has been shown, article 642 merely defines defamation; and as, by Mr. Romero’s statement, the only other law invoked was article 186, the inference is that the warrant issued for Mr. Cutting’s arrest was based on the publication of the alleged libel in Texas, and not, as Mr. Romero’s information led him to suppose, on a charge of circulating that libel in Mexico. But we are not compelled to resort to inference, for it is stated in Judge Zubia’s decision that on the 22d of June the plaintiff appeared and “broadened” his original accusation, on which the warrant of arrest had been issued, by the allegation that the defendant had circulated the *Sunday Herald* in Mexico.

After summarizing the facts, Mr. Romero proceeds to discuss the legal aspect of the case, as follows:

The Government of the United States believes that Cutting is under trial in El Paso solely because of an article published in El Paso, Texas, in

⁵⁷ See also *Haven v. Foster*, 9 Pick. (Mass.), 112; *State v. Moore*, 6 Foster (N. H.), 448; *In re Carr*, 28 Kansas, 1.

compliance with article 186 of the Mexican Penal Code, and it considers that article incompatible with the principles of international law.

I think it proper to state, with reference to the first point, that as I understand it, Cutting is on trial for the publication in *El Centinela*, a periodical published in Paso del Norte, Mexico, of an article against Medina which is deemed defamatory, and although there may have been adduced as an aggravating circumstance the publication of the other article in El Paso, Texas, I do not think that this is the principal crime of Cutting.

And to sustain this view, Mr. Romero argues that the “conciliation” signed by Medina and Cutting on the 14th of June did not terminate the prosecution of Cutting absolutely, but only on condition of his complying with the terms of the agreement.

This argument has already been noticed, and it has been contended that to treat the publication by a citizen of the United States of a libel in Texas as a branch of a “conciliation” in Mexico, and as consequently subjecting the publisher to criminal liability in Mexico, is the same thing in principle as the claim made in article 186 of a right to regulate and punish in Mexico the acts of foreigners in their own country, provided a Mexican is concerned. This, it is conceived, would be a sufficient answer to Mr. Romero’s argument, even if it had not appeared that the sentence imposed on Cutting by Judge Zubia, and subsequently adopted and sustained by the Mexican Government, as will hereafter be more fully shown, rested not only on the ground that the publication in Texas violated the terms of the “conciliation” and restored Cutting’s liability to criminal prosecution, but also distinctly and in the alternative on the ground that the publication in Texas created an original liability to prosecution and punishment under article 186.

Mr. Romero then takes up this article, and says that the Penal Code in which it is found, “was drawn up by a commission of distinguished Mexican lawyers who threw on the subject the light of a special study of penal legislation, and who adopted from the European codes all that appeared to them most advanced and adaptable to the circumstances of Mexico”; and in support of this he cites the Penal Codes of Belgium, France and Italy, and argues that the present tendency of criminal law is in the direction of a wider jurisdiction. On this subject more will be said hereafter. And I will now pass to another branch of Mr. Romero’s argument, which, translated, reads as follows:

The system of punishing crimes committed in foreign parts, especially when these, although perpetrated abroad, have their complement or realization

or produce their effects in the country which punishes them, is in practical application in several countries, not merely in the provisions of their penal codes, but in the trials daily conducted and in the doctrines of various modern criminal authorities.

It is true that, under the laws (common law) of the United States and England, there is no jurisdiction to take cognizance of crimes committed in a foreign land; yet, in spite of this, there has just occurred a trial for libel, in London, on suit instituted by Mr. Cyrus Field against Mr. James Gordon Bennett, editor of the *Herald*, of New York, by reason of articles published in New York in Mr. Bennett's paper, which Mr. Field regarded as defamatory of himself, and in which Mr. Bennett was condemned by the English courts to pay \$25,000 for the damages and injuries occasioned to Mr. Field by the aforesaid articles, notwithstanding that they had been published in New York and not in London. It should, moreover, be borne in mind that Mr. Bennett is not a resident of London, as Mr. Cutting is of Paso del Norte.

It is true that the basis of judgment of the English courts appears to be: that, although the offense was committed in New York, its effects were produced in London, where the *New York Herald* circulates; but precisely the same reason exists in the case of Cutting, in the supposition that although the article was published in El Paso, Texas, it circulated in Paso del Norte, Mexico, where Medina was known, and where it may be said that it produced its effect.

Several writers on the American and English Penal Code maintain doctrines similar to those put forth in article 186 of the Mexican Penal Code.

Joel Prentiss Bishop, in his *Commentaries on the Criminal Law*, 7th edition, 1882, vol. I, chapter VI, section no, page 59 (Boston: Little, Brown & Co.), says as follows:

“One who is personally out of the country may put in motion a force which takes effect on it; and in such a case he is answerable where the evil is done though his presence is elsewhere. Thus, murder, *libel*, false pretenses, &c, * * If a man standing beyond the outer line of our territory, by discharging a ball kills another within it, or himself being abroad circulates through an agent, libels here * * * or does any other crime in our own locality against our laws, he is punishable, though absent, the same as if he were present”.

In support of this doctrine, Bishop cites various American and English authorities, who sustain the principles enunciated by him.

This same doctrine is maintained by Bishop in his work entitled: *Criminal Procedure or Commentaries on the Law of Pleading and Evidence and Practice in Criminal Cases*. (Third edition, 1880, vol. I, Book II, Chapter IV, Section 53, page 27, Boston: Little, Brown & Co.), wherein he says as follows:

“*Personal presence.* The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even, in this way, he may commit an offense against a State or country upon whose soil he never set his foot, as explained in criminal law.”

Bishop then goes on to mention defamation (*libel*) among the crimes which are punished in the place where they produce their effects, even though the party responsible does not reside there, and he cites various authorities to support his theory.

The only observation I desire to make on this argument is that it blends two wholly distinct, and indeed antagonistic, principles of criminal jurisdiction, and treats them as if they were the same. It is one thing to say that a man who, outside of the territory of a country, commits a criminal act within it, may be punished by its courts, if brought within reach of their process; it is quite another thing to say that a man can be punished by the courts of a country for acts done outside of it, merely because the object of those acts happens to be one of its citizens. The Government of the United States has never intimated that if Cutting had been arrested and tried on the charge of circulating, which in law would have been “publishing,” a libel in Paso del Norte, the Mexican courts would not have had a right to punish him for having done so, merely because the printing was done in Texas. In law the circulation of a libel is a publication of it; it is “published” whenever and wherever it is circulated; and whenever and wherever a man actually circulates a criminal libel he commits a substantive criminal offense, whether he is corporeally present or no. The malicious intent, the guilty will, accompanying a lawless act, makes the actor, although not corporeally present at the place where his act takes effect, just as much a criminal there as if he were physically present.

The quotations made by Mr. Romero from Bishop’s works on *Criminal Law and Criminal Procedure*, to show that it is held in England and the United States that corporeal presence is not always essential to the commission of crime, may be accepted as legally and logically sound, and as lucid, forcible, and satisfactory statements of a general legal principle.

Opposed to this is article 186, against the principle of which it would be difficult to find more decided and more effective argumentative opposition than is contained in the works of Mr. Bishop, from which Mr. Romero has quoted. Article 186 asserts that a foreigner, who, in a foreign country, commits an act there against a Mexican, may afterwards be punished for it in Mexico. It discards both the locality of the act and the locality of the

actor, one of which, at least, must, according to the theory propounded by Mr. Bishop, have been within the territorial limits of the country, in order to give its court jurisdiction over a foreigner. In section 110 of the 1st volume of his Criminal Law, and immediately preceding the quotation made by Mr. Romero from that section, Mr. Bishop declares it to be a general principle, "that no man is to suffer criminally for what he does out of the territorial limits of the country." Adverting in section 115 to the same question, he says:

When the citizen abroad commits an offense it is competent and consistent with the law of nations, and in every respect just, for his own government to provide for his own punishment through its own courts. But in most other circumstances one government has no just right to punish what is done within the territorial limits, or the ships on the high seas of another government.

Not only is Mr. Bishop clear on this point, but he holds that where a statute is couched in such general terms as to include offenses committed abroad by foreigners it is the duty of the court to construe the statute in accordance with the law of nations. In section 112, volume I, of his *Criminal Law*, he says:

Doubtless, if the legislature, by words admitting of no interpretation, *commands a court to violate the law of nations*, the judges have no alternative but to obey. Yet no statutes (*I. e.* in England and the United States) have ever been framed in a form thus conclusive; and, if a case is *prima facie* within the legislative words, still a court will not take jurisdiction should the law of nations forbid.

Discussing, in his work on statutory crimes, the same subject, he says:

Statutes in terms binding persons beyond the territorial jurisdiction are, in the construction, *restricted where the law of nations limits the right, as extending only to the subjects of the government legislating.* (*Stat. Crimes*, 2d ed., § 141, p. 129.)

Although the judgment in the civil suit of *Field v. Bennett et al.*, to which Mr. Romero refers, was a judgment by default, and has, since the date of his note, been set aside by the Queen's Bench Division of the Supreme Court of Judicature, it is proper to advert to the fact that the rules governing the jurisdiction in civil and in criminal cases are founded in many respects on radically different principles, and that an assumption of jurisdiction over an alien in the one case is not to be made a precedent for a like assumption in the

other. In the first place, civil proceedings are instituted only at the suit of private persons for the enforcement of private rights; criminal proceedings are conducted by the public authority for the vindication of the national sovereignty and control. In civil suits, the courts of a nation will enforce foreign laws and foreign judgments; in criminal matters, it is a universal rule that the courts of one country will not enforce the laws of another. Thus in the protection and enforcement of private rights national boundaries are in a great measure obliterated; while, in criminal proceedings, they define the only jurisdiction in which, unless by treaty, the law can be enforced.

Taking these principles into consideration, the case of *Field v. Bennett et al.* could not have been regarded as an authority in favor of extraterritorial criminal jurisdiction, even if the defendant had come within reach of the process of the court and the judgment against him had not been reversed by the Queen's Bench. But, as the case now stands, it cannot be regarded as a precedent for extraterritorial claims of any kind.

The facts are⁵⁸ that there had appeared in the *New York Herald*, a paper published by the defendant, Bennett, in New York, and having an office in London and circulating in large numbers in Great Britain, certain paragraphs alleged by the plaintiff to be false and libellous, and to have done him great injury. One of these paragraphs read as follows:

London, Feb. 4, 1885. —Mr. William Abbott, broker and operator, Tokenhouse-yard, supported by many stockholders of the Anglo-American Cable Company, announces that at the Friday meeting of the directors of the company he will introduce a resolution to expel Mr. Cyrus W. Field from the directorship, on the ground that he is unworthy of any position of confidence and trust.

The other read as follows:

At a meeting of the company (meaning the Anglo-American Cable Company), held last week, Mr. William Abbott moved that Mr. Cyrus W. Field should not be re-elected. This worthy philanthropist, it would appear, was concerned with Jay Gould in the issue of Wabash preference stock, on which sham dividends were paid until the British public had been induced to buy it, when it fell from 92, the issue price, to about 12. According to American newspapers, Mr. Cyrus Field made by this operation about one million sterling. In these circumstances Mr. Abbott was right in opposing the re-election of this gentleman.

⁵⁸ See London *Times*, July 27, 1886.

The plaintiff testified that he was a special partner in the firm of Field, Lindley & Co., the largest shippers of grain from America to Europe, and having agencies in London, Liverpool, Glasgow, Bristol, and other British and continental ports. He was besides director of ten large corporations, seven of which were in America and three in London. For some years past he had spent more than half his time in England, where he had a great many friends. There was not a shadow of foundation for either of the libels, and they were calculated to do him immense injury.

On these facts the jury at the Middlesex sheriff's court, before which, the judgment having been allowed to go by default, the case came for the assessment of damages, rendered a verdict for the plaintiff of £5,000.

The question raised before the Queen's Bench was whether the defendant had ever been properly brought within the jurisdiction of the English courts. It was admitted that since the institution of the suit he had not been in England, and the process was served, not on him personally, but, under an order of the Court of Appeal, on the other defendant, named Hall, who acted as Mr. Bennett's counsel in London, and was joined in the action as a co-defendant. The judgment of the Queen's Bench Division, consisting of the Lord Chief-Justice Coleridge and Mr. Justice Denman, was delivered by the Chief-Justice. In the course of the opinion, he said:⁵⁹

It is hardly contended before us that this was a case in which service of a writ or notice of a writ out of the jurisdiction could have been allowed if the application had been originally made for such service so noticed. The action is for libel; the defendant is neither a British subject nor in British dominions, and service of a writ therefore upon him is forbidden by the order. [Referring to order 67, rule 6, and order 11, rules 1 and 6, regulating service of process.] * * * Hut it is contended that, although the writ itself could not be served, there may be a substituted service of it ordered under order 68, rule 6. We doubt whether this rule has any application for service out of the jurisdiction. But if it has, it is limited in terms to cases where the writ itself can be personally served, as matter of law; but where it cannot from circumstances be promptly served personally, in matter of fact. It is only in such cases that substituted service of the writ or the substitution of notice for service is permitted by the rules. But this is no such case; and it seems to us that in allowing substituted service the Court of Appeal acted beyond their powers. It follows that all the proceedings, beginning from and including the order of the Court of Appeal, must be set aside with costs.

⁵⁹ See London *Times*, Dec. 16, 1886.

It thus appears that the only point decided by this case is that the process of the British courts has no extraterritorial force as to foreigners.

The next argument on the part of the Mexican Government is in a communication from Mr. Mariscal to Mr. Romero, dated the 12th of August, 1886, and transmitted by the latter to the Department of State on the 30th of the same month. When this paper was despatched by Mr. Mariscal Judge Zubia had, as we have seen, just delivered his decision, in which article 186 was sustained and enforced. Mr. Mariscal, therefore, made only a passing reference to the question of the breach of the “conciliation,” but proceeded directly to the defense of article 186, and devoted his observations chiefly to that subject. The substance of his argument is that the doctrine that crime is local is peculiar to the common law; that in countries which have derived their legal institutions from the Roman system of jurisprudence the territorial principal is not acknowledged; that even in England and the United States there exist important exceptions to the theory of the common law; and that the question of the punishment of foreigners for offenses committed outside of the national territory “depends upon the principle which may have been adopted touching the competence in general over certain offenses perpetrated abroad; since it does not seem just to impose penalties therefor upon citizens and leave the foreigner in like circumstances unpunished.”

Now, it is true that the territorial theory of criminal jurisdiction is more strictly carried out in England and the United States than in any other country, because in the common law, which prevails in both, criminal offenses whether by citizens or by foreigners, are considered as purely local. And it may readily be admitted that, as Wheaton says in a passage quoted by Mr. Mariscal, “this principle is peculiar to the jurisprudence of Great Britain and the United States,” and that “even in these countries it has frequently been disregarded by the positive legislation of each.”

But the simple answer to the inference Mr. Mariscal seeks to draw from this fact is, that the controversy raised by the Cutting case is not as to the expediency or in expediency, or as to the prevalence or non-acceptance, of the strict local theory of criminal offenses. When Wheaton says that this principle is peculiar to the common law, he does not refer to any question of right on the part of a nation to punish foreigners for acts committed outside of its territory. As we shall hereafter see, he utterly repudiates the notion that such a right exists in international law. The idea in his mind was the local principle of criminal offenses as applied to citizens. This he called peculiar to the common law. Like Mr. Bishop, who, as has been shown, also denies the extraterritorial principle in respect to foreigners,

while advocating it in respect to citizens, Wheaton did not, as will hereafter be seen, doubt the right of a nation to punish its own citizens for offenses committed abroad. This is a matter which each nation may regulate as it deems expedient. The local principle of the common law is not due to any doubt as to the right of a Government to punish its own citizens, but solely to the manner in which the criminal branch of that law was developed. The most ancient part of English criminal legislation was that which regulated the procedure. The country was divided into counties, in each of which there were juries, grand and petit. The grand juries, or *jurys d'accusation*, were supposed to know what passed in their own county, and nothing else. They held to this rule with such rigor that if a man was wounded in one county and died in another, the criminal sometimes escaped prosecution, and it was to remedy this defect that the Act of 1549, 2 and 3 Edw. VI, c. 24, was passed, the result of which was to make the criminal justiciable in either country. (Sir J. F. J. Stephen, in *Journal du droit int. privé*, 1887, p. 129.) It was simply a matter of procedure and convenience involving no question of sovereign right or of international law, and the statutory modifications of the ancient practice, which have from time to time been made in respect to British subjects, have no significance in the present discussion.

As having relevance to the present case Mr. Mariscal cites the opinion of the Attorney-General in relation to the civil suit for damages brought in a Pennsylvania court in 1794 against a Frenchman, then lately governor of Guadalupe, for an alleged wrongful seizure and condemnation by him of a vessel belonging to the plaintiff. The French minister asked that the suit might be stopped, *not on the ground that the defendant, being a foreigner, was not subject to suit on civil process*, but on the ground that, as the act on which the suit was founded was done by him in virtue of his authority as governor, he was not personally liable to suit for it. The question having been referred to the Attorney-General, Bradford, he gave an opinion, saying that “with respect to his suability, he (the late governor) is on a footing with any other foreigner (not a public minister) who comes within the jurisdiction of our courts;” and that “if the circumstances stated form of themselves a sufficient ground of defense, they must, nevertheless, be regularly *pleaded*.”

The bearing of this case on the jurisdictional claim asserted in article 186 of the Mexican Penal Code is not apparent. As has heretofore been stated, jurisdiction in civil suits and in criminal prosecutions rests on different grounds and proceeds upon opposite principles. While it is a universal principle, admitted even by those countries which have gone farthest in the direction of punishing extraterritorial crime, that the courts of one nation will neither enforce the penal laws nor the penal sentences of the tribunals

of another nation, yet this territorial circumscription of the operation of law is so far discarded in civil cases that it may be said that the principal basis of civil responsibility as between persons in different places is the recognition and enforcement by the courts of one country, in civil matters, of the laws and judgments of other countries. So far has this rule been carried that it has lately been held in England⁶⁰ that a foreign judgment affecting the succession to property in that country would be enforced, and could not be impeached or reviewed there, although it involved a question of English law which was misconstrued. The civil liability of man to man is not circumscribed by national boundaries; the subjection of a foreigner to the sovereignty of a state exists only when by his own acts he brings himself within the territorial operation of its laws.

Mr. Mariscal further argues that the principle of article 186 “is not only in accord with the most authoritative doctrines of private international law, but also with the positive legislation of several nations which command respect in such a matter, such as France and Austria, where such offenses [by foreigners outside of the country] are punished if they have been committed against the nation; Prussia, where they are all punished in conformity with the law of the country wherein they are committed; Bavaria and Norway, without this characteristic and without the requisites and conditions exacted by our code.” On the question of doctrine he cites by name Foelix, Voet, Boehmer, Martens, Saalfeld and Pinheiro-Ferreira, and says that Fiore might be added by reason of his general theories. The names of these writers, excepting the first and the last, are evidently taken from the work of the first named, Foelix, on private international law, published in 1866, in paragraph 574 of which they are, with the exceptions stated, given in the order in which they are found in the note of Mr. Mariscal. This paragraph, after stating that writers are not in accord on the subject in question, mentions by name Voet, Boehmer, Martens, Saalfeld and Pinheiro-Ferreira as advocates of various degrees of extraterritorial jurisdiction over foreigners; and Schmalz, Abegg, Feuerbach, Homan, Sumner⁶¹ and Rolin as opponents: and adds that Mittermaier does not contradict their opinion. It is not singular that the list of Foelix, published in 1866, and incomplete as it was then, does not contain the names of many high and recognized authorities on international law at the present day; nor that for the same reason Mr. Mariscal should have

⁶⁰ *In re Trufort*, before Mr. Justice Sterling, reported in London *Times*, July 27, 1887; following decision in *Castrique v. Imrie*, L. R., 4 H. L., 414; *Godard v. Gray*, L. R., 6 Q. B., 139.

⁶¹ The author doubtless referred to the opinion of Mr. Justice Story in the case of *U. S. v. Davis*, 1 Sumner's *Rep.*, p. 482. He refers to the Report, but gives the reporter as the authority.

been led into the error of citing the legislation of Bavaria and of Prussia, which has been superseded by the German Imperial Code of 1872, whose restriction of extraterritorial jurisdiction over foreigners to offenses against the safety of the state and coinage felonies has been seen. It will hereafter be shown that Fiore, while recognizing extraterritorial jurisdiction to that extent, refuses to admit the international validity of such a claim as that contained in article 186. Foelix, so far as I am able to ascertain, expresses no personal opinion on the subject; but, although he quotes the codes of Bavaria, Wurtemberg, Oldenburg, Hanover, Thuringia and Prussia, all of which, until superseded by the German Imperial Code of 1872, gave to the tribunals of the state jurisdiction of offenses committed outside of its territory by foreigners against subjects, he states, at the end of the paragraph above cited, that “positive legislations do not, as a general rule, admit the prosecution of a foreigner charged with *crimes* or *delits* in another state, save only in the case of a violation of law prejudicial to the state (considered as a whole), in the territory of which the prosecution is undertaken, or when it concerns *crimes* of the highest gravity.”

On the 13th of August, 1886, Mr. Mariscal despatched to Mr. Romero another communication, in continuation of that of the preceding day, which has just been examined. In this despatch of the 13th of August is enclosed a copy of *El Foro*, a legal journal published in the City of Mexico, containing an article on the Cutting case by Judge Jose M. Gamboa, of that city. To this article due reference will be made, after notice has been taken of the points in Mr. Mariscal’s despatch.

In continuation of the effort made in his preceding communication to sustain article 186 by the legislative example of other countries, Mr. Mariscal cites the French law of 1808, which was replaced by the law of 1866, now in force, but which, as he states, the latter did not greatly alter. We have seen how the Court of Cassation at Paris in the case of Fornage in 1873 construed the law of 1866, and repudiated the doctrine on which article 186 is bottomed. Turning now to the provisions of the law of 1808 for the punishment of foreign offenses, we find them to be as follows:

5. Every Frenchman who is guilty, outside of the territory of France, of an attempt against the safety of the state, of counterfeiting the seal of the state, national moneys having circulation, national papers, bills of banks authorized by law, may be prosecuted, judged and punished in France, according to the French laws.

6. This provision may be extended to foreigners who, being authors of, or accomplices in, the same crimes, shall have been arrested in France, or of whom the Government shall have obtained the extradition.

7. Every Frenchman who shall have been guilty, outside of the territory of the kingdom, of a *crime* against a Frenchman, may, on his return to France, be there prosecuted and punished, if he has not been judged and prosecuted in the foreign country, and if the offended Frenchman makes complaint against him. (French Criminal Code of 17 November, 1808, promulgated on the 27th day of the same month.)

In respect to offenses committed abroad by foreigners, it is seen that the provisions of this law are substantially identical with those of the law of 1866. It further appears that even in respect to French citizens, provision is made for their punishment for acts done outside of the state only when those acts amount to a *crime* (felony), and not when they constitute merely a *delit* (or misdemeanor). And so it was held by the Court of Cassation in 1864 (*Journal du Palais*, 1864, p. 404), in the case of Jacques Trottet, for reference to which, as well the case of Fornage, previously cited, I desire to acknowledge my obligations to the Marquis de Chambrun. The syllabus of this case reads as follows:

When an act referred to the Court of Assizes as constituting a CRIME committed in a foreign country by a Frenchman against another Frenchman, is reduced by the finding of the jury to a simple DÉLIT, the Court of Assizes ceases to be competent to take cognizance of it: Article 7, C. Crim. Procedure, according to the terms of which the Frenchman who is guilty of a crime against a Frenchman in a foreign country can be prosecuted and punished in France on his return, having no application to the case where the act has only the character of a DÉLIT.

The facts in the case were that Trottet, a Frenchman, having been indicted by the grand jury of the Imperial Court of Chambery for a willful assault and battery on another Frenchman, causing inability to work for more than twenty days, and with premeditation, which made the offense a *crime* (felony), the case was referred for trial to the Court of Assizes of Haute Savoie, sitting with a jury. On the trial the jury found the facts as alleged, except as to premeditation, which their verdict negatived, thus reducing the offense to a *delit* (misdemeanor). And the case having been finally brought before the Court of Cassation, that tribunal rendered the decision which is summarized in the syllabus above quoted.

With the exception of the brief mention of the French law of 1808, the rest of Mr. Mariscal's paper of the 13th of August is almost exclusively devoted to the praise of a draft of a penal code, a part of which was approved by the Italian Chamber of Deputies in 1877. This draft was principally the work of Professor Mancini, a former Italian minister of justice, and has undergone much discussion in Italy, both before and since its approval by the Chamber of Deputies. But even if it were identical, in respect to the punishment of foreigners, with article 186 of the Mexican Penal Code, it could hardly be contended that the doctrine had made much progress in Italy, where, both before and since its approval by the Chamber of Deputies it has not only been the subject of continual controversy, but where the work containing it, although begun more than twenty years ago, remains in effect a mere *projet*, and, as is admitted by Mr. Mariscal, is not yet in force.

It is, however, pertinent to observe that in the *projet* in question there are important qualifications of foreign jurisdiction, which escaped notice in Mr. Mariscal's paper of the 13th of August. For the purpose of showing these qualifications I shall not quote particular provisions of the *projet* itself, but shall avail myself of two admirable discussions of it—one by M. Alberic Rolin, an advocate of the Court of Appeal of Ghent, and secretary of the Institute of International Law, which was published in the *Revue du Droit International*⁶² in 1877; and the other by M. Fiore, the distinguished authority on international law and professor of that subject at the University of Turin, which was published in the same journal⁶³ in 1879. We learn from these sources that four *projets* have been discussed in Italy, which, because of their non-conformity in respect to the principles of international penal law, have provoked numerous controversies as to the limits of its extraterritorial authority. "The first *projet*" says M. Fiore, "of a penal code is that which was formulated in 1868 by the commission instituted for that purpose. That *projet* was the object, in 1870, of many modifications by a commission composed of three members. The Minister Vigliani introduced in it yet other modifications, and presented it to the Senate on the 24th of March, 1874. The Senate, after long discussions, modified it again on certain points. The Minister Mancini presented the fourth draft of the *projet* in November, 1876, and the first book has been adopted by the Chamber of Deputies." As to the application of the penal law on the territory, the four *projets* conformed, but in respect to the repression of offenses committed abroad they differed widely. By article 7 of the *projet* of 1868, it was proposed that if a foreigner, af-

⁶² Vol. XI, p. 461 *et seq.*

⁶³ Vol. XI, p. 308 *et seq.*

ter having committed abroad an offense punishable under the Italian law with imprisonment at hard labor, or with imprisonment or banishment, should enter the kingdom, he should, his extradition having first been offered to and refused by the government where he committed his offense, be tried and punished according to the Italian law. And in case of an offense punishable with less than five years imprisonment, it was provided that a complaint should be made by the injured party, or by the government of the country to which the offended person belonged. This theory was thought by the courts to be exorbitant, and “the court of Parma, among others,” says M. Fiore, “proposed that the citizen himself should not be punished for offenses committed abroad, save for those against the safety or economic life of the state. In pursuance of those observations, the theory of extraterritoriality was modified in all the other *projets*”.

A proposal was made by the Ministerial Commission in 1876 to revive the provisions of article 7 of the *projet* of 1868.

“But”, says M. Fiore,

...the magistracy, the law faculties and the colleges of advocates observed that there could be no interest in punishing the foreigner who, outside of the country, commits an offense to the prejudice of another foreigner, and that to meet every peril it would be sufficient to extradite or expel him. *The Minister Mancini*, in his *projet*, did not adopt in an absolute manner either the one or the other of the two systems; but proposed that prosecutions against the foreigner, in the cases in which he was justiciable, should be discretionary and before all preceded by an offer of extradition, and that, where the offer should not have been accepted by the government of the place where the crime was committed, the government should be free either to expel the foreigner from the kingdom, or else to arraign him in case the crime should be of the number of those prescribed in the convention of extradition, or one of the crimes against the law of nations, or against persons, property, or public credit, or else amounting to fraudulent bankruptcy or an outrage on good morals.

Such are the qualifications of the claim of extraterritorial jurisdiction, as proposed in the Mancini codification. And in regard to them, M. Rolin, in the article to which I have already adverted, says:

Crimes and délits committed by a foreigner outside of the territory are not judged and punished in Italy (by the Mancini *projet* as adopted by the Chamber of Deputies) save under a conjunction of exceptional circumstances. It is a great deal that they should ever be. We may say, it is true, that, when the party injured is an Italian subject, when extradition has been offered and refused, when the act is punished as well by

the Italian as by the foreign laws, it would be an outrage for a foreigner to be permitted to reenter Italy as if for the purpose of defying there its authority. *But if we are free to expel him*, it would be as hard to apply to him, for an act committed previously in a foreign country, under the empire of foreign laws, the penalties pronounced by the Italian laws which he did not know, *to which he was not subject on any ground, and which consequently he could not violate. Neither the system of territorial authority, nor that of the personal authority of the penal law, nor that which combines both*, could justify in such case the action of the national tribunals.

Mr. Mariscal supplements his argument of the 13th of August with a list of nations whose laws punish to a greater or less extent extraterritorial crime. To this list reference will be made hereafter. And I shall now proceed briefly to notice the argument of Judge Gamboa, without, however, referring to his citations from Foelix' work of 1866 of laws which have since become obsolete.

Judge Gamboa's argument opens with a statement of facts, which it is unnecessary to review, because, for the purposes of this report, the facts have been accepted as set forth in the decision of Judge Zubia.

The whole of Judge Gamboa's argument may be summed up in a single sentence, which he quotes from Foelix, and which reads as follows:

The competence of the authorities and the form of procedure before them are controlled by the law of the country where the action is instituted, whatever may be the law under whose empire have occurred the acts which give rise to such action.

As a general proposition this may be accepted as incontestable. The competence and forms of procedure of the judicial tribunals of a country are regulated and defined by its municipal law. There is no doubt that *under the law of Mexico* the courts of Chihuahua are competent to try a foreigner for offenses begun and consummated in his own country against a Mexican. But this is not the question raised by the United States in the case of Mr. Cutting. That question is whether the provisions of the law of Mexico, as contained in article 186 of the Penal Code, *are in contravention of the rules of international law*. And to this question the Mexican judicial tribunals are not competent to make a definitive reply. "According to the rule of law," said Judge Zubia, "*judex non de legibus sed secundum leges debet judicare*, it does not belong to the judge to examine the principles laid down in said article 186, but to apply it in all its force, it being the law in force in the State of Chihuahua." To this decision the Government of the United States has made no objection. It has not questioned the competency of the Mexican

court under the Mexican law. But it has held that that law, and consequently all proceedings under it, are in violation of the principles of international law.

All the salient points of the Mexican defense have now been examined, except the list (enclosed in Mr. Mariscal's paper of August 13,) of codes that provide for the punishment of extraterritorial crimes. It will be recollected that it has already been shown that the jurisdictional claim contained in article 186 is not sustained by the penal legislation of the present day. And we have seen how, notwithstanding the constant appeal, doubtless made under a misapprehension, to the Code of France, the Court of Cassation has peremptorily and completely repudiated the notion that, because of the *exceptional provisions* as to crimes against the safety of the state and against the currency, the French Code could be held in *principle* to assert criminal jurisdiction over foreigners for acts done outside of France. The principles of public law, so the court held, did not warrant such a pretension; and that this view is correct will hereafter be copiously proved by the opinions of the highest authorities on international law at the present day.

There being no principle of international law that permits the tribunals of a nation to try and punish foreigners for acts done by them outside of the national territory or jurisdiction, *it necessarily follows that any assumption to do so, in respect to particular crimes, must rest, as an exception to the rule, either upon the general concurrence of nations, in respect to the crimes in question, or upon an express convention.*

It follows, therefore, that it is not enough to quote, in favor of article 186, the law of France, or of any other country, whose legislation makes provision for the punishment of foreigners who, outside of the national territory and jurisdiction, commit offenses against the safety of the state, or coinage felonies, or other particular crimes. *It must be shown that article 186 is sustained both in amplitude of extent and in form by a general concurrence of positive legislation.*

This, as we have seen, cannot be done. And it will now further be shown, by the list of codes enclosed with Mr. Mariscal's communication of the 13th of August, that the claim set forth in article 186, of the right of a nation to punish a foreigner for an offense committed against one of its citizens outside of its territory, has been generally abandoned and may now be regarded as obsolete. The list contains merely the names of the countries and the dates of the codes cited, quotations from the provisions of some of them being made in the article of Judge Gamboa. Most of the codes are ranged under the head of "nations that punish crimes committed in foreign countries by their own subjects," and the rest under the head of "nations that punish, more or less, crimes committed in foreign countries by foreigners

when such foreigners enter their territory.” But as most of the codes ranged under the first head, the principle of which is not in dispute, are repeated under the second head—*e. g.* the Code of France—I shall place all in one list, and make, opposite each, appropriate explanations.

LIST OF CODES	COMMENTS
France, Law of 1866.	Still in force, but punishes only <i>crimes</i> against the safety of the state, and <i>crimes</i> of counterfeiting seals of state, national moneys, etc.
Austria, Code of 1872.	Still in force, but punishes only <i>crimes</i> , and not <i>delits</i> , and then, except in offenses against the safety of the state and currency felonies, only after offer of surrender.
Italy, Code of 1859.	Still in force, but substantially same as Austrian Code.
Belgium, Law of 3 October, 1836.	Replaced by law of April 17, 1878, which is substantially identical with that of France of 1866. But the law of 1878 made little change in Belgian jurisdiction, which since 1794 has closely followed that of France.
Portugal, Code of 1852.	Replaced by law of July 1, 1869, under which foreign jurisdiction extends only to Portuguese.
Greece, Code of 1834.	Punishes foreign <i>crimes</i> and <i>delits</i> against subjects, and is still in force.
Ionian Isles, Code of 1841.	
Holland, Penal Code. (No date given.).	The Dutch Code, which punished foreigners for assassination, arson, and certain other grave and enumerated <i>crimes</i> , committed abroad against subjects, was modified by law of January 15, 1886, which is substantially identical with French law of 1866.
Hanover, Penal Code. (No date given.).	As quoted by Foelix, in 1866, punished foreigners for offenses committed abroad against Hanoverians; <i>but this is superseded by German Imperial Code of 1872, which does not recognize this principle, and confines Jurisdiction of extraterritorial offenses of foreigners to crimes against safety of state and coinage felonies.</i>
Norway, Code of 1842.	Same provision as former Hanoverian law, <i>but prosecution is discretionary with the Government.</i>
Russia, Penal Code. (No date given.).	Bears date 1866, and punishes foreigners for offenses abroad against Russians.

LIST OF CODES	COMMENTS
Bavaria, Code of 1861. Prussia, Code 1851.	Punished foreigners for offenses abroad against subjects, <i>but is superseded by German Imperial Code of 1872.</i>
Wurtemberg, Code of 1839.	Same comment as on Bavarian Code.
Saxony, Code of 1838.	Same.
Baden, Code of 1845.	Same.
Oldenburg, Code of 1814.	Same.
Brunswick, Code of 1840.	Same.
Hesse, Code of 1841.	Same.
German Empire, Code of 1872.	See comment on Hanoverian Code.

Placing the Ionian Isles under the Greek system, it is seen that in the foregoing list there are only two legislative systems now in force which in extent and form sustain article 186; that of Russia, of 1866, and that of Greece, formulated in 1834. As for the rest, such of them as might have been cited to sustain the Mexican claim have been placed by time beyond the purview of the present discussion, except for the purpose of showing the rejection of their principle in positive legislation.

Nor is this principle sustained by the legislation of the Spanish-American republics.

In the Argentine Republic criminal jurisdiction in respect to foreigners is confined, as in the United States, to offenses committed where the Republic, or one of its states, has exclusive jurisdiction; save in the exceptional cases stipulated in treaties with foreign powers.⁶⁴

In Chili the territorial principle prevails, it being provided not only that foreigners, but also that Chilians, shall not be punished for crimes or offenses committed out of the territory of the Republic, save in the cases indicated by the laws.⁶⁵

In respect to offenses against the safety of the state committed outside of the Republic, article 106 of the Penal Code provides as follows:

⁶⁴ I desire to acknowledge my obligations for a written statement as to the Argentine laws to Mr. Severo Ygarzabal, of the Argentine Legation. See for specific provisions *Códigos y leyes usuales de la República Argentina*; Buenos Aires, 1884; especially § 77, 78, Penal Code.

⁶⁵ Article 6 of the Penal Code of 1874.

Any one who, within the territory of the Republic, conspires against its external security by inducing a foreign power to declare war against Chili shall be punished by imprisonment in the penitentiary for life. If hostilities have ensued he shall suffer the death penalty.

The provisions of this article shall be applied to Chilians even where the plots to induce a declaration of war against the Republic have been carried on outside of its territory.

It is thus seen that even in respect to crimes against the safety of the state the Chilean Code distinguishes between citizens and foreigners, and punishes the latter only when they carry on their conspiracies with foreign powers from the territory of the Republic, and are therefore within its territorial jurisdiction.

As to counterfeiting the currency, securities and certificates of debt, issued under Chilean law, article 174 of the Penal Code provides as follows:

Any one counterfeiting the shares or the promises to pay up the shares, of joint stock companies, bonds or other securities legally issued by municipalities or public establishments of whatever denomination, or interest coupons, or dividends belonging to these various securities, shall be punished by detention from its intermediate to its highest grade, and by a fine of from five hundred to a thousand dollars if utterance thereof has been made in Chili, and by detention in its intermediate grade, and by a fine of from one to five hundred dollars when the utterance has been in a foreign country.

Here again adherence to strict territorial theories is illustrated by the mitigation of the sentence where the utterance of the forgeries has been effected abroad; so that the punishment shall apply only to what was done within the national territory, namely, the forgery, and not to its foreign utterance.

Nor does the Penal Code depart from the territorial principle in respect to libels. On this subject article 425 provides as follows:

Concerning slanders or insults published by means of foreign newspapers, prosecutions may be instituted against those *who, from the territory of the Republic, have sent the articles, or given instructions for their insertion, or contributed to the introduction or circulation of those newspapers in Chili, with the manifest intent to spread the slander or insult.*

The Penal Code of Colombia of 1873 follows as to acts of foreigners committed outside of the national territory, the lines laid down in the French law of 1866, and in case of private injuries, confines the jurisdiction over

crimes and offenses to those committed by one native against another. On these subjects article 77 provides as follows:

Punishment shall be inflicted in conformity with this code, without the plea of ignorance of its provisions serving to exculpate, on natives and foreigners, who, *within the territory of the Republic*, commit any crime or offense, saving as regards the latter class of persons, the exceptions fixed by international law; on the diplomatic agents of the Republic who commit in a foreign country any crime or offense, and on the same or any other officials of the Government in a foreign country who commit any act of disobedience or unfaithfulness to the said Government, or any crime or offense in the exercise of their functions; on natives and foreigners who, out of Colombian territory, have become guilty as principals, accomplices or accessories of any crime against the security and tranquillity or the constitution of the Republic; who have counterfeited or introduced into Colombia counterfeit money of the nation; who have introduced into the country foreign counterfeit moneys which have legal circulation in Columbia; who have counterfeited or introduced counterfeit stamps or postage-stamps; who have counterfeited the great seal of the Republic, or those of the administrative department, or those which the courts and other authorities use conformably with the law, or instruments of public credit settled by, or admitted as a debt of, the nation, or bonds, warrants or receipts of the national treasuries, or other offices of the Treasury Department, which circulate under the government's guaranty, or the notes of legally incorporated banks; provided that in all these cases they have not been tried and sentenced in the nation in whose territory the offense was committed, and that they have been arrested in Colombia, or the Government has obtained their extradition.

On natives and foreigners who commit acts of piracy, and are arrested by the Colombian authorities, provided that they have not been tried and sentenced in another country for the said crimes.

On the commanders, officers, crew and marines of national war vessels who commit any crime or offense on the high seas or on board of their vessel in the waters of a foreign nation.

On the captains, passengers and crew of merchant vessels of Colombia, who commit any crime or offense on the high seas, or within the waters of a foreign nation, provided that, in the last case, they have not been tried and condemned in the nation within whose jurisdiction the offense has been committed.

On natives who have committed any crime or offense against a native in a foreign country, provided that they have not been tried and condemned for the said offense or crime in the nation in which it was committed, and provided that being in Colombia the action has been commenced against them by the parties interested in conformity with the law.

In respect to the law of Costa Rica, I find in Orozco's *Elements of the Criminal Law of Costa Rica*,⁶⁶ published in San Jose in 1882, the following statement:

The jurisdiction of the courts is thus limited to the territory of the nation, since offenses committed by natives of Costa Rica or foreigners outside of its jurisdiction are not subject to the punishments of the Penal Code. All the codes of the world recognize this theory, and ours declares it by saying that "crimes and offenses committed out of the territory of the Republic by Costa Ricans or foreigners shall not be punished in Costa Rica except in the cases provided by the law."⁶⁷

The exception to which this article refers, in harmony with the laws of other nations, is none other than the crimes or offenses committed by Costa Ricans or foreigners against the external safety of the Republic. As this class of offenses directly affects the independence and sovereignty of the nation, all legislators have conceded to the courts of the injured state the right to try and punish them whatever may have been the place of their commission, and without paying any attention to the question whether the latter belongs to a foreign nation, belligerent or neutral.

The collection before me of the laws of Peru is very incomplete, and I am therefore unable to speak with certainty as to recent legislation in that country. But in the Penal Code of 1863 the territorial principle was observed; and in respect to offenses by foreigners against the safety of the state, jurisdiction was confined to those who were in the Republic at the time of their criminal activity. (Article 114.)

The only assertion I have discovered in Spanish-American legislation (after a necessarily imperfect examination of it,) of the principle of article 186 of the Mexican Penal Code, is in the law of Venezuela, which provides for the punishment, under certain conditions, of foreigners who, having, outside of the territory, committed against a Venezuelan the crime of arson, of murder, of robbery, or any other crime subject to extradition, shall come to reside in the Republic. (Seijas' *Spanish-American Int. Law*, vol. I, p. 526 *et seq.*, Caracas, 1884.) This provision, it is true, is neither identical in extent nor in form with article 186, because the offenses that fall under the Venezuelan law are fewer in number and more restricted as to grade, than those that are reached by the Mexican statute; and the element of residence is lacking in the latter. I am unable, however, to see that this element affords ground for a distinction in principle between the Venezuelan and the Mexican law. The

⁶⁶ See p. 15 of work quoted.

⁶⁷ Article 6.

mere residence of a foreigner in a state to which he owes nothing but local allegiance cannot be conceded to create a retroactive criminal responsibility there for his previous conduct in other jurisdictions.

OPINIONS OF PUBLICISTS

It will now be shown that the pretension of a state to punish foreigners for offenses committed by them against its citizens outside of the national territory is condemned by the leading authorities on international law. In this relation I shall first cite Fiore, who, in his *Droit International Privé*, says:⁶⁸

Each state possesses and exercises, exclusively, jurisdiction over its own territory—

I. Over all persons found there, whether citizens, naturalized persons, or foreigners. * * * Jurisdiction extends outside—

1. Over certain places assimilated to territory, in pursuance of special conditions;

2. Over certain acts done outside the territory, in certain specified cases.

The right which pertains to every sovereign as regards *his own citizens* (allegiance, *sujétion*, *sudditanza*) and in virtue of which he may require obedience of them, is certain and uncontested. * * *

This is not to be understood in the sense that the sovereign of a state may coerce his own citizens to obey when they are in the territorial domain of another sovereign, or that he may there exercise *imperium* and *jurisdictio*. That would involve a parallel exercise of two jurisdictions within the same territory. Nevertheless a sovereign may, when *his men citizens* return to their native country, require them to render an account of their infractions of the laws which govern them, even if such infractions were committed in a foreign country; and when there is occasion therefor he may punish them, in case the right violated in a foreign country was protected by the national penal law. * * *

The rights of jurisdiction of territorial sovereignty as regards foreigners are exercised in the same manner as they are in regard to natives, so long as such foreigners reside within the territory of the state. They are in fact considered as temporary subjects. “A foreigner,” says Mangin, “becomes subject to the law of a country to which he goes; he is subject to the public power of that country. This is a principle of public law which is admitted among all nations.” * * *

What does not, however, appear to us to be clear, is the theory of those authors who would seek to extend the rights of territorial sovereignty over

⁶⁸ 2nd ed., Paris, 1885, vol. I, p. 408, *et seq.*

foreigners to the points of attributing to that sovereignty the full competence to put them on trial for any offense whatever, in whatever country committed. They say that their theory rests on the principle that important offenses infringe the rights of all mankind, and that, in consequence, every sovereign power has the right to punish them, on the sole condition of having the culprit in its power. "The penal laws," says Pinheiro-Ferreira, "do not punish the culprit because he has cast a stigma on this or that country by his crime, but because, in committing it, he has attacked, in the person of his victim, the whole human race; he is, therefore, justiciable by all tribunals, and, wherever he be, the public ministry should make it its duty to bring him before the judicial power of the country whose laws and whose magistrates he has insulted by flattering himself that, through the impunity they might accord to him, they would become the accomplices of his crime."

It seems to us that each sovereign power has the right to provide for the preservation of order in its own country and for the protection of the rights recognized and proclaimed by the constituted authorities as appertaining to the citizens of the state, with regard to the actual circumstances of the time and the place where they may be found; but we do not believe it allowable to regard the social powers as the mandataries of God, or that they have the power to punish invasions of the moral law. We do not thereby refuse to admit the principles of the moral law or to recognize that grave crimes are in contravention thereof; but we do not believe that human judges possess positive *criteria* for exactly estimating the moral wrong and proportioning the penalty to the aggression against the moral law. * * *

Now, in admitting the theory of Pinheiro-Ferreira and those who share his views, a contradiction is inevitable, because, on the one hand, it cannot be admitted that the tribunals of a state can adjudge and punish by the application of the foreign law which has been violated, for it is contrary to the independence of sovereign states to execute each other's penal laws; *and, on the other hand, those tribunals themselves could not apply the law of their own state, if that state did not possess the authority necessary to compel obedience from the accused in a foreign country, for we cannot admit that a rule of action may be violated which was not obligatory in the place where the offense was committed.*

Fiore refers for a more explicit discussion of this subject to his work entitled *Droit Penal International*. Adverting, in the second chapter of that work, to the theory that an individual is protected in all places by the laws of his country, and that consequently the tribunals of that country may take cognizance of acts committed to his prejudice in another state, he says:

We cannot admit that doctrine, for it does not seem to us that the extraterritoriality of penal law ought to depend on the quality of the person to the prejudice of whom the offense has been committed.

The learned author regards as punishable, when committed outside of the state, offenses against the safety of the state and against the public credit, and certain other offenses against rights which may be considered as protected by the laws of the state, whether committed by citizens or by foreigners. But in respect to other offenses he expressly declares that “no sovereign can exercise his repressive power on territory under the dominion of another sovereign”.⁶⁹

Phillimore says:⁷⁰

The general rule, Foelix remarks, adopted by the positive legislation of states on this subject, which is one of public law, is to permit the criminal prosecution of a foreigner on account of crimes committed in another state only in those cases in which either the state in which the prosecution is to be carried on has been in its collective capacity injured by the crime, or in which the crime has been of the gravest kind (*de la plus haute gravité*). The effect of this rule is to make the criminal law of a state a *personal statute* to its subjects, traveling with them, and inseparably attached to them, wherever they happen to be; and such is the doctrine of Paul Voet and others. It was the opinion of Bartolus that *if*, and *when*, a state did take cognizance of crimes committed by foreigners in a foreign state, it must proceed according to the criminal law of that state — *Ut possit contra eum procedi et punire secundum statuta sua civitatis; a proposition sufficiently impracticable, it should seem, to prove the wisdom and justice of abstaining altogether from such experiments.*

Wheaton says:⁷¹

The judicial power of every independent state, then, extends, with the qualifications mentioned —⁷²

1. To the punishment of all offenses against the municipal law of the state, by whomsoever committed, within the territory.
2. To the punishment of all such offenses, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports.
3. To the punishment of all such offenses by its subjects, wheresoever committed.
4. To the punishment of piracy, and other offenses against the law of nations, by whomsoever and wheresoever committed.

⁶⁹ *Droit Pénal International*, Paris, 1880, p. 94; *Droit International Privé*, ed. 1885, sec. 493.

⁷⁰ R. Phillimore, p. 707.

⁷¹ Page 180, Dana's edition.

⁷² These qualifications relate to the extraterritorial privileges of foreign sovereigns, ambassadors, and other privileged persons, who are exempted from local allegiance.

It is evident that a state cannot punish an offense against its municipal laws, committed within the territory of another state, unless by its own citizens.

Hall, a late and very able English authority, says:

Whether laws of this nature (punishing foreigners for offenses committed abroad) are good internationally; whether, in other words, they can be enforced adversely to a state which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. Putting aside the theory of the non-territoriality of crime *as one which unquestionably is not at present accepted either universally or so generally as to be in a sense authoritative*, it would seem that their theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive territorial jurisdiction of a state gives complete control over all foreigners not protected by special immunities while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other states as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support. It is at least as doubtful whether the voluntary concession of such a right would be expedient except under the safeguard of a treaty. In cases of ordinary crimes it would be useless, because the act would be punishable under the laws of the country where it was done, and it would only be necessary to surrender the criminal to the latter.⁷³

Story, in his work on the Conflict of Laws, says:⁷⁴

§ 620. The common law considers crimes as altogether local and punishable exclusively in the country where they are committed.⁷⁵ No other nation, therefore has any right to punish them; or is under any obligation to take notice of or to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed.⁷⁶ Hence it is that a criminal sentence of attainder in the courts of one sovereign, although it there creates a personal disability to sue, does not carry the same disability with the person into other countries. Foreign

⁷³ Hall's *International Law*, 2d ed., 1884, p. 190.

⁷⁴ 5th ed., 1857, p. 984 *et seq.*

⁷⁵ "Crimes," said Lord Chief Justice De Gray, in *Rafael v. Vreelst*, 2 Wm. Black, R. 1058, "are in their nature local, and the jurisdiction of crimes is local."

⁷⁶ Rutherf. Inst. B. 2, ch. 9, g 12; Martens, *Law of Nations*, B. 3, ch. 3, § 22, 23, 24, 25; Merlin, Repertoire, Souveraineté, J. 5, n. 5, p. 379 to 382; *Commonwealth v. Green*, 17 Mass. R., 515, 545, 546, 547, 548.

jurists, indeed, maintain on this particular point a different opinion, holding that the state or condition of a person in the place of his domicile accompanies him everywhere. Lord Loughborough, in declaring the opinion of the court on one occasion said: "Penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority. A fugitive who passes hither comes with all his transitory rights. He may recover money held for his use, and stock, obligations and the like, and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend." Mr. Justice Buller, in the same case, on a writ of error, said: "It is a general principle that the penal laws of one country cannot be taken notice of in another." The same doctrine was affirmed by Lord Ellenborough in a subsequent case. And it has been recently promulgated by Ixird Brougham, in very clear and authoritative terms. "The *lex loci*," says he, "must needs govern all criminal jurisdiction from the nature of the thing, and the purpose of the jurisdiction."

§ 621. The same doctrine has been frequently recognized in America. On one occasion, where the subject underwent a good deal of discussion, Mr. Chief-Justice Marshall, in delivering the opinion of the Supreme Court, said: "The courts of no country execute the penal laws of another."⁷⁷ On another occasion, in New York, Mr. Chief-Justice Spencer said: "We are required to give effect to a law (of Connecticut) which inflicts a penalty for acquiring a right to a *chose in action*. The defendant cannot take advantage of nor expect the court to enforce the criminal laws of another state. They are strictly local, and affect nothing more than they can reach."⁷⁸ Upon the same ground, also, the Supreme Court of Massachusetts have held that a person convicted of an infamous offense in one state is not thereby rendered incompetent as a witness in other states.⁷⁹ [So, in a late case in chancery,⁸⁰ a foreigner in England was not allowed to withhold certain documents, whose production was sought by a bill of discovery, upon the plea that their contents would render him liable to the penal laws of his own country; they having no such effect in England, and the courts of the latter country having no regard to the penal laws of a foreign state.]

§ 622. The same doctrine is stated by Lord Kames as the doctrine in Scotland. "There is not," says he, "the same necessity for an extraordinary jurisdiction to punish foreign delinquencies. The proper place for punish-

⁷⁷ *The Antelope*, 10 Wheat. R. 66, 123.

⁷⁸ *Scoville v. Canfield*, 14 Johns, R. 338, 340. See also *The State v. Knight*, Taylor's N. C. Rep. 65.

⁷⁹ *Commonwealth v. Green*, 17 Mass. R. 515, 540, 541, 546, 547. [Contra in North Carolina, *State v. Chandler*, 3 Hawks, 393; *Chase v. Blodgett*, 10 New Hampshire, 22.]

⁸⁰ *King of Two Sicilies v. Wilcox*, 1 Simons, N. S. 301.

ment is where the crime is committed. And no society takes concern in any crime but what is hurtful to itself".⁸¹

§ 623. The same doctrine is laid down by Martens as a clear principle of the law of nations. After remarking that the criminal power of a country is confined to the territory, he adds: "By the same principles a sentence, which attacks the honor, rights, or property of a criminal, cannot extend beyond the courts of the territory of the sovereign who has pronounced it. So that he who has been declared infamous is infamous in fact, but not in law. And the confiscation of his property cannot affect his property situated in a foreign country. To deprive him of his honor and property judicially there also would be to punish him a second time for the same offense."

§ 624. Pardessus has affirmed a similar principle. "In all the states of Christendom (says he) by a sort of general consent and uniformity of practice, the prosecution and punishment of penal offenses are left to the tribunals of the country where they are committed. The principle of the French legislation that the laws of police and bail are obligatory upon all, who are within the territory, is a principle of common right in all nations." Bouhier also admits the locality, or, as he terms it, the reality of penal laws; and of course he limits their operation to the territory of the sovereignty, within which they are committed.⁸²

§ 625. On the other hand Hertius and Paul Voet seem to maintain a different doctrine, holding, that crimes committed in one state may, if the criminal is found in another state, be upon demand punished there. Paul Voet says: *Statutum personale ubique locorum personam comitatur, &c, etiam in ordine ad poenam a cive petendam, si poena civibus sit imposita*. And he, as well as some others of the foreign jurists, enters into elaborate discussions of the question, whether, if a foreign fugitive criminal is arrested in another country, he is to be punished according to the law of his domicil, or according to the law of the place where the offense was committed. If any nation should suffer its own courts to entertain jurisdiction of offenses committed by foreigners in foreign countries, the rule of Bartulus would seem to furnish the true answer, *Delicta furni unter juxta mores loci commissi delicti, et non loci ubi delictum committitur*.

⁸¹ Kames on *Equity*, B. 3, ch. 8, § I. See also Ersk. Inst. B. 1, tit. 2, p. 23.

⁸² Bouhier, Cout. de Bourg. ch. 34, p. 588. See also Matthaci, Comm. ad Pand. lib. 48, tit. 20, § 17, 18, 20. Mr. Hallam has remarked: "The death of Servetus has, perhaps, as many circumstances of aggravation as any execution for heresy that ever took place. One of these, and among the most striking, is, that he was not the subject of Geneva, nor domiciled in the city, nor had the *Christianissima Restitutio* been published there, but at Vienne. According to our laws, and those, I believe, of most civilized nations, he was not answerable to the tribunals of the Republic." Hallam's *Introduction to the Literature of Europe*, vol. 2 (Lond. edit. 1839), cap. a, i 27, p. 109.

Bar, the distinguished professor of law in the University of Gottingen, who, since the first publication of his work on International Law in 1862, has seen the extraterritorial pretensions of the German States, which he condemned, swept away by the Imperial Code of 1872, defines⁸³ four theories of criminal jurisdiction of which the first three are as follows:

1. The theory that a criminal statute is limited to the territory for which it was enacted, and that any act committed in another country is beyond its influence.
2. The theory that the criminal law of a state applies not only to crimes committed there, but also to those committed by its citizens abroad.
3. The theory that proposes to extend still further No. 2, and lay down that the state has a right to protect itself and its subjects from injury, and is therefore privileged to visit any injury with punishment.

On the third theory, Bar says:

But although it is true that the protection of persons and property is secured by criminal law, the right to punish does not flow from the right to protect: the latter may justify any measures of defense or self-defense, but gives no right to correct. But even if a law of punishment could be derived from the right of defense and self-defense, yet, since the obligation to protect by punishment lies, in the first instance, upon the state in which the injured parties are, such a law would be subsidiary only, and the state whose permanent subjects those injured persons are, would primarily have no share in the matter, beyond supporting all other states in applying their criminal law. * * *

A union of such divergent principles (territoriality, personality and right to protect) must, at the same time, lead to the most manifold doubts and the most irreconcilable results. * * *

But⁸⁴ as regards the right of the state to punish foreigners who may commit in a foreign country acts prejudicial to the state or its subjects, it is to be remembered that foreigners are not bound to pay any heed to the ways and means which our state takes to attain the aim of its being; indeed, it may be that, as is the case in uncivilized states, they have views diametrically opposed to ours as to the means by which the individual may be perfectly developed within the state. If we propose to compel foreigners to respect our laws in their own country, this is simply to declare that the regulations by which we attain the final end of our state are the only justifiable regulations, *and to extend the territory of the state beyond its bounds.*

⁸³ P. 626 *et seq.*, Gillespie's translation, Edinburg, 1883.

⁸⁴ P. 654, edition referred to.

To this we must add that there is no obligation on a foreign state to suffer the presence of our subjects within its territory, and even if there were a complete obligation of such a kind, it could only be pressed against the state itself by means of public law, not against its individual subjects by means of criminal law. The foreign state has to fix under what conditions it will suffer the presence of our subjects within its territory, and what rules it will prescribe for the intercourse of its permanent or temporary subjects with our subjects.

As regards the case of an act which is prejudicial to a private person who belongs to our state, there cannot even be any considerations of expediency urged for the extension of the criminal law in such a case. Every civilized state punishes common crimes without caring whether they have been committed upon a foreigner or a native subject.

Field, in his International Code, proposes the following rules:

643. The criminal jurisdiction of a nation extends to foreigners—

1. Who commit theft beyond its limits, and bring, or are found with, the property stolen, within its limits; or,

2. Who, being beyond its limits, abduct or kidnap, by force or fraud, any person, contrary to the laws of the place where such act is committed, and send or convey such person within the limits of the nation, and are afterwards found therein; or,

3. Who, being within its limits, cause, or aid, advise or encourage, another person to commit any act, or be guilty of any neglect within the same, which is a criminal act or neglect according to the laws of the nation, and who are afterwards found within its limits. —*Penal Code, reported for New York, Sec. 15.*

644. The criminal jurisdiction of a nation extends also to foreigners found within its jurisdiction who have committed at any place beyond its territorial limits, either as principals or accessories, any of the following infractions of its criminal law:

1. A crime against its national safety; or,

2. Counterfeiting or forging its national seal, national papers, national money having currency within its limits, or bills of any bank authorized by its laws.

These provisions are taken from the law of June 27, 1866, amending articles 5, 6, and 7 of the *French Criminal Code*, vol. 9, p. 557.

Wharton, in defining, in his work on the Conflict of Laws, different theories of criminal jurisdiction, says:⁸⁵

⁸⁵ 2nd ed., 1881, § 809.

(b) That penal jurisdiction belongs to the country of arrest, provided such jurisdiction be necessary for the prevention of crime. That this view cannot be logically maintained is argued at large in another work, whose positions cannot, for want of space, be here recapitulated. (Whart. *Crim. Law*, 8th ed., §§ 2, *et seq.*)

(c) That penal jurisdiction belongs to the country of arrest, provided such jurisdiction is necessary to protect or indemnify parties injured. So far as concerns the question of prevention this position is blended with the last. So far as concerns jurisdiction for the purpose of binding over a dangerous person to keep the peace, it is what has always been exercised by justices of the peace under the English common law. Every justice of the peace is authorized by that law to require such persons, on cause being shown that injury to persons or things is justly to be apprehended from them, to give bail for good behavior, or, in default of such bail, to be committed to prison. The claim, however, put forward in this connection by several codes, goes beyond this. It assumes that criminal jurisdiction is based on the right of a sovereign, in order to protect his subjects from injury, or to indemnify them for injuries sustained, to penally prosecute the offender, whether he be subject or alien, or whether the offense was committed at home or abroad. Aside, however, from the objections noticed under the last head to the assumption of penal jurisdiction over aliens for offenses committed abroad against their own sovereigns, there are two special difficulties in the way of the reasoning on which this particular claim is advanced. In the first place, the right of protection, as such, justifies, not punishment of others, but simply defense of the party endangered. Secondly, to urge protection or indemnity as a ground of jurisdiction involves, as Bar acutely observes, a *petitio principii*. To assume that a sovereign has jurisdiction because one of his subjects is injured by the defendant, is to assume the defendant's guilt, concerning which it is the object of the procedure to inquire. And once more, if the government can only intervene to protect or indemnify subjects, a large class of offenses must go unpunished; such as those against foreigners, or those in which joint defendants, as in case of some sexual crimes, are equally guilty of the common wrong.

It is proper here to advert to the views of President Woolsey, as expressed in his work on International Law, which has been quoted against the position of the Government of the United States in the case under consideration. I shall quote from the last (the fifth) edition, revised and enlarged, as published in 1883. In § 76, which contains the passages that have been cited to sustain the Mexican law, the author says:

Each nation has a right to try and punish, according to its own laws, crimes committed on its soil, whoever may be the perpetrator. But some nations extend the operation of their laws so as to reach crimes committed by their

subjects upon foreign territory. In this procedure municipal law only is concerned, and not international; and, as might be supposed, laws greatly differ in their provisions. (1) One group of states, including many of the German states, some of the Swiss Cantons, Naples (once), Portugal, Russia and Norway, punish all offenses of their subjects, committed in foreign parts, whether against themselves, their subjects, or foreigners, and this not in accordance with foreign but with domestic criminal law. (2) At the opposite extreme stand Great Britain, the United States and France, which, on the principle that criminal law is territorial, refrain from visiting with penalty crimes of their subjects committed abroad. * * *

The same difference of practice exists in the case of crimes committed by *foreigners* in a *foreign* country against a state or one of its subjects, who are afterwards found by the injured state within its borders. England and the United States seem not to refuse the right of asylum, even in such cases. France punishes public crimes only, and such as Frenchmen would be liable for, if committed abroad. (See this § above.) So Belgium and Sardinia, but the latter state also, in the case of wrongs done to the individual Sardinian, first made an offer of delivering up the offending foreigner to the *forum delicti*, and if this was declined, then gave the case over to its own courts. Many states, again, act on the principle that it is right to punish a foreigner as a subject for foreign crimes against themselves or their subjects.

Nearly all states consider *foreign crimes*, against foreign states or their subjects, as beyond their jurisdiction. A few refuse sojourn on their soil to such foreign wrong-doers. A few go so far as to punish even here, in case the party most nearly concerned neglects to take up the matter. Thus Austria, if an offer of extradition is declined by the offended state, punishes and relegates the criminal.

From this exposition it is evident (1) that states are far from universally admitting the territoriality of crime. (2) That those who go farthest in carrying out this principle depart from it in some cases, and are inconsistent with themselves. To this we may add (3) that the principle is not founded on reason, and (4) that, as intercourse grows closer in the world, nations will the more readily aid general justice. Comp. § 20b.

This section (20b) is connected in its line of reasoning with section 20a, from which I will quote the following passage:

There must be a certain sphere for each state, certain bounds within which its functions are intended to act, for otherwise the territorial divisions of the earth would have no meaning. In regard to the right of *furnishing in any case* outside of the bounds of the state there may be rational doubts. Admitting, as we are very ready to do, that this is one of the powers over its subjects, we can by no means infer that the state may punish those who are not its subjects, but

its equals. And yet, practically, it is impossible to separate that moral indignation which expresses itself in punishment from the spirit of self-redress for wrongs. As for a state's having the vocation to go forth, beating down wickedness, like Hercules, all over the world, it is enough to say that such a principle, if carried out, would destroy the independence of states, justify the nations in taking sides in regard to all national acts, and lead to universal war.

In section 20b are found the following passages:

The inquiry, whether a state has a right to punish beyond its own limits, leads us to the more general and practically important inquiry, whether a state is bound to aid other states in the maintenance of general justice, that is, of what it considers to be justice. The prevalent view seems to have been that, outside of its own territory, including its ships on the high seas, and beyond its own relations with other states, a state has nothing to do with the interests of justice in the world. Thus laws of extradition and private international law are thought to originate merely in comity. * * * This is the most received, and may be called the narrow and selfish view. On the other hand, the broad view, that a state in getting justice done everywhere, if its aid be invoked, and even without that preliminary, would occasion more violence than could thus be prevented.

It is thus seen that while the learned author in § 76 criticises the doctrine of territoriality as “not founded on reason,” in § 20a, he says:

In regard to the right of *punishing in any case*,⁸⁶ outside of the bounds of the state, there may be rational doubts. Admitting, as we are very ready to do, that this is one of the powers of the state over its subjects, we can by no means infer that the state may punish those who are not its subjects but its equals.

The fair and just inference from these contrasted propositions is that, when in § 76 the learned author criticised the territorial principle as unreasonable, he was considering it solely in connection with the theory of *personal* jurisdiction, as applied to citizens or subjects of a state. Even on this supposition it is going a great way to characterize the territorial theory as unreasonable. It may not be expedient always to apply the strict rule of territoriality to citizens, but so general is the recognition of the *reason* of the doctrine that among the legislative systems in force to-day that punish extraterritorial offenses of citizens, there is, as we have seen, scarcely one, if any at all, that does not impose important limitations and conditions

⁸⁶ These are the learned author's italics.

upon the exercise of the power. And it is not too much to say that until the conditions of time and space shall have been overcome, and humanity shall have realized the millennial dream of the obliteration of national boundaries, and the unification of legal systems following the extinction of all diversity of creeds and aspirations, the penal law will continue to be essentially territorial.

The grounds of the territorial theory of criminal jurisdiction have been stated by Sir G. C. Lewis in a passage so remarkable for clear, condensed and cogent reasoning that it is well to quote it in this place. It reads as follows:⁸⁷

The system of tying the entire criminal law of a country round the neck of a subject, and of making him liable to its operation, in whatever part of the world he may be, converts the criminal law into a personal statute, and puts it on the same footing as the law respecting civil *status*. Now the personal statute of one country, in civil matters, is recognized by another, so that there is no conflict of laws. But if the criminal law were a personal statute a foreigner would at the same time be subject to two criminal laws—the criminal law of his own state and that of the state of his domicile. No text-writer and no state disputes the rule that all foreigners in a country are subject to its criminal law.

The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects or by domiciled aliens in his territory. But a sovereign government, which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task in which, even if undertaken with earnestness, it is sure to fail; but which will probably be performed in a careless, indifferent, and intermitting manner. A government has no substantial interest in punishing crimes in the territory of another state; it has not on the spot officers of justice to discover and arrest the criminal; the transport of witnesses to a distance is a troublesome and costly operation; the difference of language, law, and customs creates further impediments. A failure of justice, and an acquittal, is therefore likely to occur, even if the utmost diligence is used; but it may be assumed as certain that, unless some special motive exists, little diligence will be used. A government would feel, with respect to offenses committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone. The experience of this and other countries shows that a criminal law applicable to offenses committed in foreign lands (such as the act of 33

⁸⁷ *Foreign Jurisdiction*, p. 29 *et seq.*

Hen. 8 and 9 Geo. 4) is for the most part a *brutum fulmen*, and that it is rarely carried into execution. The slumber of the law is therefore in practice a sufficient security to the native subject against its oppression. But if a government was to set to work vigorously to execute such a system of foreign criminal law as that which is embodied in the Austrian and Prussian codes, the sense of insecurity would infallibly lead to loud complaints, and the legislature would be urged into the adoption of a less ambitious course. Guilty men might occasionally be brought to justice; but innocent men, charged with the commission of crimes in distant parts of the world, would be almost incapable of defending themselves against the accusation and of proving their innocence. Even an educated person, provided with money and friends, might find it difficult to extricate himself from such a position; but a poor, uneducated, friendless man might be almost at the mercy of a false accuser. Such a law, if a government afforded funds and encouragement for its enforcement, might be a formidable weapon in the hands of unscrupulous malignity.

It may, therefore, be laid down as a general principle, resting on grounds of the most enlarged expediency, that a criminal law ought to be local; that the sovereign ought to enforce it with respect to all crimes committed within his territory, and in national ships upon the high seas; but should not seek to apply it to crimes committed in the territory or ships of other civilized states.

But although, in explanation of the generalizations at the close of § 76 of President Woolsey's work, which appear to have had reference solely to the question of punishing the extraterritorial offenses of citizens, I have quoted his express condemnation elsewhere of the pretension of a state to punish foreigners for offenses committed abroad, it is necessary to notice the statement made in the same section that "many states, again, act on the principle that it is as right to punish a foreigner as a subject for foreign crimes against themselves or their subjects." It is observed that the only legislative systems referred to in this section (except those of Great Britain, the United States, France, Portugal, Russia, Belgium, Holland and Norway, of which only Russia and Norway, and the latter not in an absolute manner, assert a right to punish foreigners for offenses committed abroad against citizens or subjects,) are those of "many of the German states, some of the Swiss Cantons, Naples (once)" and Sardinia. The citation of the legislation of these states, which are the "many states" referred to, is accounted for by the learned author's statement, made in a note to § 76, that the facts therein set forth "are drawn from an essay, by R. von Mohl, in his *Staatsr. Volkerr. u. Politik*. vol. I, 644-649." This volume was published in 1860, and, as it antedated the unification of Italy and the formation of the German Empire, quoted the then independent legislation of Sardinia, and of

Hanover, Oldenburg, Prussia, Baden, Saxony and Coburg. It fails, however, to notice the Swiss Federal law of 1853, and cites many ancient cantonal statutes long antedating the formation of the Swiss Confederation.

Aside, however from President Woolsey's specific declarations of opinion, adverse to the right, which § 76 of his work has sometimes been quoted to sustain, of a nation to punish the extraterritorial offenses of foreigners, it would be difficult to find a stronger condemnation of such a pretension than is contained in § 77, which relates to extradition. In this section he says:

The considerations which affect the question, what a government ought to do in regard to fugitives from foreign justice, who have escaped into its territory, are chiefly these: *First*, that no nation is held to be *bound* to administer the laws of another, or to aid in administering them; *secondly*, that it is for the interest of general justice that criminals should not avoid punishment by finding a refuge on another soil, not to say that the country harboring them may add thereby to the number of worthless inhabitants; *thirdly*, that the definitions of crime vary so much in different nations that a consent to deliver up all accused fugitives to the authorities at home for trial, would often violate the feeling of justice or of humanity; and *fourthly*, that truth can be best ascertained and justice best administered near the *forum criminis*, and where the witnesses reside. There is also a substantial agreement among the most civilized nations in regard to proof and to penalty in criminal law. Some have contended for an absolute obligation to deliver up fugitives from justice; but (1) the number of treaties of extradition shows that no such obligation is generally recognized, else what need of treaties giving consent to such extradition, and specifying crimes for which the fugitive should be delivered up. (2) It may be said that the analogy of private international law requires it. If a nation opens its courts for the claim of one foreigner on another, and in so doing applies foreign law to the case, why should it not open them for claims of a foreign government against violators of its law? But the analogy fails. In *private* claims the basis of right is admitted with a general agreement by the law of all states. In *public* prosecution of criminals different views of right are taken, as it respects offenses, method of trial and degree of punishment.

Every consideration advanced by the learned author in respect to extradition is in direct antagonism to the claim of article 186 of the Mexican Penal Code. Extradition ought to be granted, so he argues, because it is for the interest of general justice that criminals should not avoid punishment by finding a refuge on another soil, and because truth can be best ascertained, and justice best administered, near the *forum criminis*, and where the witnesses reside:—all of which is sound territorial doctrine. But at the same time we are

to consider that to consent to deliver up all accused fugitives to the authorities at home for trial would often violate the feelings of justice and humanity!

To apply this argument to the case of Mexico, there exists between the United States and that country a reciprocal treaty of extradition, under which each government has agreed to deliver up to the other, persons who, after judicial examination, shall be found to have been duly charged with the commission, within the jurisdiction of the demanding government, of certain offenses enumerated in the treaty; but in no case is either government required to deliver up its own citizens. Among the offenses enumerated in the treaty, libel, the offense with which Mr. Cutting was charged, is not found. Hence the claim made by the Mexican Government in the Cutting case, under article 186 of the Penal Code, is not only to try and punish, according to its laws, a citizen of the United States (whose extradition could in no case have been required under the treaty), for an offense committed in his own country, but to try and punish him for an offense for which the surrender of a Mexican could not have been demanded by his government, even if he had committed it on Mexican soil. Surely such a claim may be said to “violate the feelings of justice and humanity.”

Heffter, in his work on the *International Law of Europe*, says:⁸⁸

As regards criminal jurisdiction the following principles are in the main to be recognized: I. It can only extend—

a. To crimes and offenses committed in the country by a person, whether native or foreigner, being in the said country;

b. To crimes committed in a foreign country by a subject against the laws of his own country, which are binding on him even in a foreign land.

While the second proposition is in theory often not admitted, and all right to inflict punishment in the case of offenses committed abroad denied to the state, yet the practice of individual states goes even further and permits each, by almost universal acknowledgment, to punish all those crimes which are committed by a foreigner in a foreign country against its existence and most important political interests. Formerly the exercise of the office of punishing on behalf of another perfectly competent state, when commissioned by the latter, was not regarded as inadmissible. Yet the constitutional principle which now prevails is opposed to this, namely, that no one should be withdrawn from the jurisdiction of his natural, *i. e.*, his constitutional judge.

⁸⁸ This work was first published in Germany in 1844, and new editions, with changes and additions to keep it abreast of the times, were issued in 1848, 1855, 1861, 1867 and 1873. Translations of it were published in France in 1857, 1866, 1873 and 1883, the last edition being copiously annotated by Geffcken. Heffter, who was a professor in the University of Berlin, an attorney for the crown, and a counsellor of the Supreme Court of Justice at Berlin, died in 1880. I quote from § 36 of the last German edition.

In support of the principles thus stated, Heffter refers to his work on Criminal Law, published in 1854, in which⁸⁹ he sustains his position with great clearness and conclusiveness of argument and with ample citation of authorities. He also refers to M. Faustin Hélie's *Traite de Instruction criminelle*, and to an opinion of the law faculty of Halle, given in 1832, in which it was held that, in order to render a person criminally liable for his conduct, there must be an *obligatio ex lege*, which does not exist in the case of a foreigner outside of the national jurisdiction. Like Bar, who still survives, Heffter lived to see the pretension of many of the German states to punish foreigners for offenses committed outside of the state against subjects, disappear before the Imperial Code of 1872.

In the great work of M. Faustin Hélie,⁹⁰ the subject of foreign jurisdiction is discussed with almost unequalled elaboration and completeness. And after arguing that, in respect to crimes against the safety of the state, the right of self-defense may be invoked to justify their punishment, he says that this argument cannot be extended to extraterritorial offenses by foreigners against citizens, for the following reason:⁹¹

The state to which the injured citizen belongs cannot invoke the right of defense, for its safety is not compromised by a private crime committed on one of its citizens; it cannot invoke the trouble caused by the presence of the criminal on its territory, for that is a matter for expulsion. And then, how is it possible to apply to that foreigner a law which did not govern him at the moment of the perpetration of the act? How can it be made to retroact to a period in which it could not touch him, since he was a foreigner and the crime was committed in a foreign country?

The question is examined by the learned author in all its bearings, and no ground whatever is found to justify the exercise by the state of such jurisdiction.

Pradier-Fodéré, the learned editor of Grotius, founder and honorary dean of the faculty of political and administrative sciences of the University of Lima, and honorary professor in the school of political science at Paris, in his recent work on Public International Law, European and American, says:⁹²

⁸⁹ §§ 25-27. Inclusive.

⁹⁰ *Traité* &c, vol. 2, §§ 127, 128.

⁹¹ *Id.* p. 591.

⁹² *Traité de Droit International Public Européen et Américain suivant les progrès de la science et de la pratique contemporaines* par P. Pradier-Fodéré, Paris, 1887, vol. 3, § 1840.

1840. Should the penal law of a state punish crimes committed outside of the territory of that state by foreigners against its own citizens? We must admit, at the outset, that it is the duty of the local sovereignty whose territory has been the scene of the crime to act first; this is demanded in the interest of the success of the preliminary examination, in the interest of the exemplary repression of crime, nay, in the interest of the proper administration of justice, for, in the locality in which the crime was committed the public will better appreciate the various circumstances which accompanied it, the consequences to which it has given rise, and the grounds of aggravation, mitigation, or of excuse that may exist; the seriousness of the social disturbance caused will also be more accurately measured in that locality. The territorial competence of the penal law becomes to such an extent obligatory, owing to its advantages, and the principle that a criminal act should be punished in the place where it is committed is so dominant that the state whose citizen or subject has been injured would have good ground to offer to the state in whose territory the crime was committed the extradition of the perpetrator of that crime, in case of his having taken refuge on the soil of the victim's country. It may happen, however, that the foreign state to which the criminal belongs, and in whose territory the crime was committed, refuses to prosecute, or that its judicial institutions furnish no guarantees.

Is a state that has been injured in one of its citizens then theoretically authorized to bring the guilty party to trial, if it has him in custody? The affirmative is taught by those philosophers who think that crimes should be considered as a violation of universal law, and that any jurisdiction is competent to repair the disturbance caused by them in the moral order of society; it is likewise maintained by those authors who consider that penal jurisdictions are instituted for the protection of those under them, by legally repressing unlawful acts of which they may be the victims, and the state to which the injured parties belong resumes all its rights, and should secure, as far as possible, the judicial repression which is indispensable to the security of those citizens when the authorities of the foreign country in which they have been the victims of a crime do not protect those who dwell in or cross the territory of that country, thus disregarding the reciprocity of protection and the solidarity of reparation and justice that should be a bond between civilized states. "Is it not a spectacle revolting to conscience and reason," said Bonjean, "to see this foreigner, who, after murdering a Frenchman on the soil of one of the neighboring states, comes to seek an asylum in the very country of his victim, insulting by his presence and his impunity the legitimate grief of the relatives and friends of the murdered man?"⁹³

These observations are certainly entitled to weight, but they cannot prevail against considerations which are not less weighty. As a general rule, with

⁹³ Bonjean, Report on the bill relative to crimes committed in a foreign country, p. 34.

very few exceptions, the law, as well as penal jurisdictions, is territorial, and the laws or customs under which the guilty party lived at the time when he committed the crime, cannot be set aside. How can we admit that a foreigner ought to be punished for having violated laws which he was in no way bound to obey? "I am obliged to obey the laws when I live under the laws, but when I do not live under them can they still be binding upon me?"⁹⁴ "It does not seem to us," says Pasquale Fiore, "that the extraterritoriality of penal law ought to depend upon the quality (citizenship) of the person to whose detriment the offense was committed. It is true that a man is born a citizen of a given country, and that he is subject, as such, to the social power of his native land, which, by its laws, secures to him the free exercise of his rights, and that he should everywhere be protected by the sovereignty of his country. On the other hand, however, he may remove from his country and enter the territory of another state; he may submit to a foreign social power, which, by right, takes the place of the social power of his native country as regards the protection of the persons and property of those who, living within the territory that is subject to it, have become its temporary subjects."⁹⁵ * * *

It will be observed that if a crime committed in a foreign country were due to the nationality of the victim, if it consequently menaced exclusively the safety of persons belonging to that nationality, and if it remained unpunished, or even without sufficient repression, this would be a subject for diplomatic representation. (*V. supra*, nos. 1363 *et seq.*)

OPINION OF THE INSTITUTE OF INTERNATIONAL LAW

The subject of criminal jurisdiction received the early attention of this learned association, and in a report⁹⁶ by M. Brocher, of the University of Geneva, at the annual meeting of the Institute in Paris in September, 1878, the following conclusions were stated;

1. The general principles of criminal law, and the exigencies of a good administration of repressive justice, unite in establishing, so far as is practicable, the supremacy of territorial jurisdiction.
2. (This jurisdiction covers all acts which invade rights in the territory of each particular state.

⁹⁴ Montesquieu, *Persian Letters*.

⁹⁵ Pasquale Fiore, *Treatise on penal international law*, Antoine's French translation, 1880, no. 81, p. 88.

⁹⁶ *Annuaire de l'Institut* for 1880, pp. 50 *et seq.*: Wharton's *Conf. of Laws*, § 810; 1 *Crim. Law Wag.*, 091 (1880).

3. The criminal jurisdiction of a state is not limited to cases in which the perpetrator was, at the time of the offense, on the soil of such state. It should extend to acts which, transpiring abroad, affect domestic peace and order.
4. This extension of territorial jurisdiction is correlative to facts which present themselves in various aspects. Among these maybe mentioned, (1) a shot on one side of a boundary taking effect on the other side; (2) swindling letters issued from one country and operating in another; (3) poisonous food sent into a foreign land addressed to a specific person; (4) forgery of commercial paper meant to operate extraterritorially; (5) treason and political offenses by subjects abroad, counterfeiting of public money and other securities; (6) acts committed abroad to elude home law, such as a duel arranged within the territory to take effect outside; (7) accessory help and co-conspiracy in cases in which the principal offender acts intra-territorially; (8) acts penetrating to the moral core of the state, such as bigamy, incest or adultery committed by two subjects abroad; (9) acts of piracy, and other acts of a similar class committed on the high seas or in barbarous lands on the ground that each state has territorial rights in such regions.
5. Simple residence in a country gives territorial jurisdiction of all things done by such resident in such country; though not of things done by him before his arrival.
6. Domicile, as distinguished from residence, does not usually impose subjection by the domiciled person to the state for acts done when he is absent from the state.
7. Nationality, in certain states, is a basis of criminal jurisdiction; all persons who are members of a nationality being subject, wherever they may be, to the laws of the nationality to which they belong. Such nationality, however, is not to be considered as a personal law, binding a citizen of a nation to obey its laws wherever he may be. Its extraterritorial effect should be limited to special cases; as, for instance, those in which the order of a state is assailed by its subjects abroad, and it has no other means of redress.

When this report came up for discussion at Brussels in 1879, it was advocated by its author, who claimed that each state, besides *territorial*, was entitled to exercise a *quasi-territorial* jurisdiction, authorizing it to assume, in all matters relative to its public order and security, jurisdiction over persons in foreign lands; and he cited several examples to show that this jurisdiction

could be sustained on neither the territorial nor the personal theory. It is true that in this way an offense might be subjected to two jurisdictions,— that of the country where the crime takes effect, and that of the country where it is concocted,—but for this purpose a hierarchy of jurisdiction should be recognized, to be graduated as follows: Where the act is concocted and takes effect exclusively in a particular territory, that territory should have jurisdiction; if in two territories, then the territory of concoction, as well as of execution, should have jurisdiction.

Professor von Bar replied that the scheme proposed would give each state almost universal jurisdiction, which would endanger the authority of other countries, as well as the security of individuals.

Mr. Westlake took the ground that the claim by a state of a right to punish the subjects of other states for acts committed by them outside of its territory, derogates from the security which a foreigner admitted within such territory ought to enjoy; and that this pretension would give rise to diplomatic collisions. He admitted the right of a state to punish for acts done on its territory, and also for acts done by its citizens abroad. An individual, he argued, is punished for violating the law of the country in which he lives, because he is bound to know this law; he cannot be punished for violating a foreign law, which he is not bound to know.

Prof. Goos, of the University of Copenhagen, also thought that M. Brocher went too far. He did not deny the competence of the state to prosecute for all the cases enumerated in the report. But he gave to the right of the state a different basis. He admitted the territorial competence and the personal competence; he rejected everything that went beyond that. Such was the system of the Danish Code of 1866, and it sufficed perfectly for the national security.

The president, M. Rolin-Jacquemyns, a Belgian jurist and statesman of eminence, and minister of the interior, questioned whether, in addition to territorial and personal jurisdiction, a third scheme, the quasi-territorial, could be recognized.

M. Asser, of Amsterdam, a professor of law in that city, and author of several learned papers on international law, did not think that the question should be presented in so absolute a manner. There were cases where a foreigner outside of the territory of the prosecuting country commits an attempt against that country; such is, for example, the case of a conspiracy against the safety of the state. Would they argue that in such case foreigners could not be prosecuted? He was convinced that MM. Westlake, de Bar, and Goos did not wish to go so far; they could without being illogical admit here an exception, since the prosecuting state would definitively limit itself

to exercising the right of legitimate self-defense. Besides, the prosecuted delinquent has committed an attempt, intentionally and knowingly, against the safety of the state, and violated laws which he knew.

Mr. Westlake and M. Goos refused to admit such an exception.

Prof. von Bar conceded that there would be jurisdiction in the attacked state when the state in which the offender resides will not interfere.

Prof. Neumann, of the University of Vienna, urged that public safety is a sufficient ground for punishment. The Austrian Code went still further, authorizing Austrian courts to punish a foreigner, resident in Austria, for an offense committed by him in a state which refuses to make a demand for his extradition.

The following proposition by Prof. von Bar was adopted by a vote of 19 to 7:

Each state has the right to punish for acts committed outside of its territory by foreigners, in violation of its penal laws, when these acts constitute an attack (*atteinte*) on the social existence of the state, compromising its safety, and which are not cognizable by the penal law of the country where they take place.

The president then put the question whether the “quasiterritorial” jurisdiction assumed was to include other acts than those determined by the proposition of Prof. von Bar—that is to say, whether a state can punish a foreigner who commits abroad offenses against its laws other than those designated in that proposition. This was answered in the negative by a vote of 17 to 9.

The subject came before the Institute for final resolution at its session in Munich in September, 1883, under the presidency of the Baron Holtzendorff, on a report presented by Dr. von Bar and M. Brusa. There were present at this session M. Arntz, professor in the University of Brussels; Dr. von Bar, of the University of Gottingen; M. Brusa, of the University of Turin; Dr. von Bulmerincq, a privy counsellor, and professor at the University of Heidelberg; M. Clunet, of Paris, manager of the *Journal du droit international privé*; M. Gessner, of Berlin; Prof. Goldschmidt, of the University of Berlin; Prof. Holland, of the University of Oxford; Baron Holtzendorff, of the University of Munich; M. Lueder, professor at the University of Erlangen; M. Marquardsen, member of the Reichstag of the German Empire, professor at the University of Erlangen; M. Martens, of the University of Saint Petersburg; M. Moynier, of Geneva; Baron Neumann, professor at the University of Vienna, member of the Chamber of Peers; M. Pierantoni, professor at the University of Rome, Senator of

the Kingdom of Italy; M. Renault, professor of law, of Paris; M. Rivier, professor at the University of Brussels; M. de Stein, of the University of Vienna; Sir Travers Twiss, of London; Mr. Westlake, of London; Prof. A. V. Dicey, of Oxford; M. Harburger, of the University of Munich; Count Kamarowsky, of the University of Moscow; Prof. Koenig, of the University of Berne; M. Lehr, counsel to the embassy of France in Switzerland, of Lausanne; Prof. Lyon-Caen, of the faculty of law and the school of political science, Paris; Prof. de Martitz, of the University of Tübingen; M. de Montluc, counsellor to the court of Angers; M. Perels, of Berlin; M. Prins, professor at the University of Brussels; M. Roszkowski, of the University of Leopold, Galicia; M. Sacerdoti, of the University of Padua.

Prof. Brocher had made a supplementary report at the session of the Institute at Oxford in 1880, but the question of extraterritorial jurisdiction, which was adjourned at the session at Brussels, was not formally discussed at Oxford, nor at the following session at Turin. But, at the latter place, MM. de Bar and Brusa were charged with the preparation of a report which the former presented at the meeting at Munich in 1883. The report contained fifteen propositions, covering the whole ground of criminal jurisdiction. But, although it would be of great interest to give them in full, together with the discussion upon each, I shall confine myself to such features as are strictly pertinent to the present question.

The report, in the first place, adopted as the basis of criminal jurisdiction the territorial principle. On this subject Prof. von Bar, in a separate report accompanying the propositions, said that history taught that penal law was derived from the law of revenge. In remote times the party injured pursued the criminal, and either slew him or accepted a ransom. At that epoch the difference between an intentional and an unintentional offense vanished. This point was clear; it was useless to give proofs; it was known to everyone who studied at all the history of law, or possessed any knowledge of the usages and manners of savage peoples of our own times. The great problem, however, of criminal law at the present day is to measure the injury according to the culpability of the agent. But there arise difficult questions of morality, of the influence of the mental condition, etc.

And there also arises, he continued, that other question, that of the competence of the penal law, it being admitted in our day that no one ought to be punished if he cannot know the penal law which punishes the act of which he is to undergo the penalty.

As it is clear that in general it is only when a person sojourns in a country or is a citizen of it that he can have knowledge of its penal laws, or else,

if knowledge of the law is not regarded as necessary, be imbued with their fundamental moral principles, according to the fundamental principle of culpability itself the competence of the penal law ought to be confined to acts committed in the territory or committed by citizens abroad. It may be said in reply that in the case of a sojourn more or less momentary in a foreign territory, where an individual of foreign origin does not or may not know the laws of the place where he sojourns, and that even in the case of a citizen sojourning in a foreign country, yet always preserving his nationality, there may be no knowledge of the national laws. These are very exceptional cases, in reference to which it is not possible to make the laws. Hut if the state wishes to punish acts committed by foreigners outside of its territory, it can do so only by discarding the principle of culpability and holding itself competent only on the principle of vengeance attenuated by humanitarian considerations. It is only in exceptional cases, of most urgent necessity, that the state ought to reserve to itself the right to punish acts committed abroad by foreigners.

In respect to the punishment of extraterritorial offenses by citizens, the 7th resolution reported by MM. de Bar and Brusa, read as follows:

Each state reserves the right to punish its citizens according to the penal laws of the nation. But, in general, it does not punish the acts of citizens committed abroad when those acts are not punishable by the law of the place. In punishing the acts of citizens committed abroad the state applies the penalty of the foreign law, if it is lighter. There are excepted from these rules the cases mentioned below in proposition eight.

The 7th proposition, after various objections, was displaced, and the following amendment, proposed by Mr. Westlake, was adopted in its stead:

Each state reserves the right to extend its national penal law to acts committed by its citizens abroad.

Proposition 8, which was intended to define the permissible extraterritorial jurisdiction over foreigners, read as follows:

Each state may punish, independently of the law of the place of activity of the culprit, and of his nationality, all violations of law against its own political security.

Equally *by simple exception*, in view of a practical necessity, and on condition of an express and formal sanction, the state may punish certain other acts committed in a foreign country, even when the territorial legislation does not consider these acts as punishable, or when it assures conditions reputed excessively favorable for its citizens.

MM. de Neumann and Prins wished to add the words *against the political and economic safety*, the public credit forming an essential element of the life of the state.

M. de Montluc objected to the words “economic safety” and “public credit.”

Dr. von Bar, yielding to the opinion of MM. de Neumann and Prins, proposed to add the words *crimes against the public credit*.

MM. Renault, Lyon-Caen and de Montluc proposed to strike out the word *political*.

Dr. von Bar then withdrew his amendment and went back to the terms of the resolution presented at Brussels in 1879, which, as has been seen, read as follows:

Each state has the right to punish for acts committed outside of its territory by foreigners in violation of its penal laws, when these acts constitute an attack (*atteint*) on the social existence of the state, compromising its safety, and which are not cognizable by the penal law of the country where they take place.

This resolution was adopted by a large majority, and without modification.

A final negative was given to M. Brocher’s proposition for a distinct ground of territorial jurisdiction, which was discussed at the session of 1879 as *quasi-territorial*. This negative answer was embodied in the following resolution, which was submitted to the Institute in the report of MM. de Bar and Brusa:

The penal justice of a country in the territory of which, according to the intention of the guilty person, the effects of his activity are, or ought to be, realized, is not competent by reason of those effects alone.

This resolution was adopted apparently without objection or division.

The argument of Dr. von Bar, in support of the resolution, and against the general quasi-territorial jurisdiction proposed by M. Brocher, was that to hold a man in all cases criminally liable in every place for the mere effects there of acts done in other countries, would not only be fraught with general danger to individuals, but would give room for vexations and extortions. No one could be sure of not committing an offense according to a foreign law, of not being unexpectedly arrested on a voyage, or of not having his fortune and his credits seized in a foreign land. He would have to consult the codes, the special laws even, of every country in the world. Police and

fiscal laws, he said, seem constantly on the increase, and the rules applied in them are naturally more or less arbitrary. A merchant writing a letter to a foreign correspondent and offering merchandise, could, for having written that letter, or for not having paid for a stamp, be brought before a foreign tribunal. The writer, the publicist, conforming to the laws of his country and of the place of publication, ought to dread to be prosecuted before foreign tribunals, which would perhaps rate a frankly-spoken word as an injury, and a scientific work as blasphemy.

We have now seen that the claim made in article 186 of the Mexican Penal Code of a right to punish foreigners for offenses committed abroad against Mexicans is neither sustained by positive legislation nor warranted by the recognized and established principles of international law. I shall now show that the denial of that right in the Cutting case was not merely supported but required by the traditions of the government.

INTERNATIONAL PRECEDENTS

It has been constantly laid down by the Executive Department of the Government of the United States, as a rule of action, that the criminal jurisdiction of a nation is confined to acts committed upon its actual or constructive territory. "We hold," said Mr. Calhoun, when Secretary of State⁹⁷—

...that the criminal jurisdiction of a nation is limited to its own dominions and to vessels under its flag on the high seas, and that it cannot extend it to acts committed within the dominion of another without violating its sovereignty and independence.

In his note to the Chevalier Hiilsemann, of the 20th of September, 1853, in relation to the case of Koszta, Mr. Marcy said:

The conflicting laws on the subject of allegiance are of a municipal character, and have no controlling operation beyond the territorial limits of the countries enacting them. All uncertainty as well as confusion on this subject is avoided by giving due consideration to the fact that the parties to the question now under consideration are two independent nations, and that neither has the right to appeal to its own municipal laws for the rules to settle the matter in dispute, which occurred within the jurisdiction of a third independent power.⁹⁸

⁹⁷ Mr. Calhoun to Mr. Everett, Sept. 25, 1844; Mss. Inst. Great Britain.

⁹⁸ Mss. Dept. State.

Mr. Cass, as Secretary of State, said:

By the laws of nations every independent state possesses the exclusive right of police over all persons within its jurisdiction, whether upon its soil or in its vessels upon the ocean, and this national prerogative can only be interfered with in cases where acts of piracy are committed, which, by the public law of the world, are cognizable by any power seizing the vessel, thus excluded from the common rights of the ocean.⁹⁹

The question of extraterritorial jurisdiction was discussed in Congress in the cases of Warren and Costello, two naturalized American citizens, who were tried and sentenced in Dublin, in 1867, for treason felony, on account of participation in the “Jacmel” (Fenian) expedition. It was proved that they had come over to Ireland in that vessel, and had cruised along the coast for the purpose of effecting a landing of men and arms in order to raise an insurrection. At the trial, in order to connect them with the Fenian conspiracy that existed at Dublin and to show their *animus* in cruising along the Irish coast, evidence was introduced of certain acts and declarations of the prisoners in the United States. It was ultimately shown that this evidence was introduced merely in proof of the criminal design with which the prisoners entered the British jurisdiction and of the criminal object of their acts there. But, while still under the impression that the acts and declarations in the United States were being made the foundation of a criminal prosecution in Dublin, the House of Representatives, on the 15th of June, 1868, adopted a resolution requesting the President to take such measures as should seem “proper to secure the release from imprisonment of Messrs. Warren and Costello, convicted and sentenced in Great Britain, for words and acts spoken and done in this country”, &c.

The position that the penal laws of a country have no extraterritorial force was taken by the Department of State, under the advice of the Attorney-General, in the case of Carl Vogt, in 1873. The facts were that Vogt, a Prussian subject, charged with the crimes of murder, arson and robbery, committed in Brussels, Belgium, fled to the United States, from which his extradition was demanded by the Government of Germany, under the provisions of the treaty between the United States and Prussia of June 16, 1852, by which the contracting parties engaged to deliver up to each other fugitives from justice charged with certain crimes, including those above mentioned, *committed within the jurisdiction of either party*.

⁹⁹ Instruction to Mr. Dallas, Great Britain, February 23, 1859.

Having been arrested, Vogt was brought on a writ of *habeas corpus* before Judge Blatchford, sitting in the Circuit Court of the United States at New York, who held that as the German Empire made provision by law for the punishment of its subjects for certain offenses committed outside of the territory, among which were those specified in the requisition, the prisoner was liable to extradition. The examination then proceeded before the commissioner and Vogt was committed for surrender.

The case was then referred by Mr. Bancroft Davis, Acting Secretary of State, to the Attorney-General, who, in an opinion dated July 21, 1873, held that although, by the law of Germany, the accused, a German subject, might be justiciable in that country, yet under the treaty the *locus delicti* was material, and unless it was *within the jurisdiction* of the demanding Government, the provisions of the treaty did not apply.

To affirm, said the Attorney-General,

that the jurisdiction of Germany, by virtue of its own laws for the punishment of crimes, extends over the territory of Belgium, is equivalent to holding that the same jurisdiction extends to France, Great Britain, and United States, and indeed to every nation and country of the world. * * * Germany has an undoubted right to punish her subjects, if she chooses, for crimes committed in Belgium or the United States, but it would not be proper, therefore, to say that Belgium and the United States are within her jurisdiction; but it would be proper to say that she has made provision to punish her subjects for crimes committed without as well as within her jurisdiction. * * * All nations have jurisdiction beyond their physical boundaries. Vessels upon the high seas and ships of war everywhere are *within* the jurisdiction of the nations to which they belong. Limited jurisdiction by one nation upon the territory of another is sometimes ceded by treaty, as appears from the treaties between the United States, Turkey, China, Siam, and other powers. Constructive jurisdiction may possibly exist in special cases, arising in barbarous countries or uninhabited places; so that effect can be given to the word "jurisdiction," as meaning more than territory, without holding that Germany has jurisdiction over crimes committed in Paris, London, or Washington. * * * To recognize the claim of Germany in this case would establish a precedent that might lead to serious international complications. * * * To facilitate the punishment of crime is desirable, but the United States cannot, with dignity and safety, admit that any foreign power can acquire jurisdiction of any kind within their territory by virtue of its local enactments. * * * To recognize the claim to jurisdiction accompanying the requisition in this case may open the door to confusion and controversy as to claims of jurisdiction in other respects made under local laws by foreign governments. The plain and practical rule upon the subject seems to be that the jurisdiction of a nation is commensurate with,

and confined to, its actual or constructive territory, excepting changes made by agreement; and to this effect are the authorities.

The surrender of Vogt to the German Government was accordingly refused, and he was subsequently surrendered to Belgium under a treaty which was afterwards negotiated, but made retroactive in its terms. In the course of the negotiations, Mr. Fish, adverting, in a note to Mr. Delfosse, the Belgian Minister, to the decision of Judge Blatchford, said:

I deem it proper to say that the laws did not afford an opportunity to invite a revision of the action of the court in that case by a higher [judicial] tribunal. Had there been such an opportunity, the President entertains little doubt that the decision would have been reversed; and the course of reasoning upon which it was founded, and to which you refer, would have been shown to be erroneous.¹⁰⁰

It may be remarked as a coincidence that in the same year in which the case of Vogt occurred a precisely similar question was determined in the same way by the privy council in England in the case of *Attorney-General for the Colony of Hong Kong v. Kwok-a-Sing*, L. R., 5 P. C., 179; decided June 19, 1873, only a month before the date of the Attorney-General's opinion in the Vogt case, which contains no reference to the case of *Kwok-a-Sing*.

The defendant in this case was one of a cargo of Chinamen shipped at Macao on the 30th September, 1870, on a French vessel, called *La Nouvelle Penelope*, bound for Peru, in South America. On the 4th October, 1870, when at sea, *Kwok-a-Sing*, with certain other coolies, killed the captain and several of the crew of the vessel, and then, taking possession of her, compelled the remaining seamen to conduct her back to China, where the coolies landed and abandoned the ship. Some of them were tried in China. *Kwok-a-Sing* fled to Hong-Kong, from whence the Chinese authorities asked for his extradition. Pursuant to this request, an investigation was held, which resulted in his commitment for surrender for crimes and offenses against the laws of China by participating in the murder of a portion of the crew of the French ship *Nouvelle Penelope* at sea and feloniously seizing a boat of the ship and landing. The warrant of commitment was issued under Hong-Kong Ordinance No. 2, of 1850, which was passed to carry into effect a treaty between Great Britain and China for the extradition of Chinese criminals fleeing to Hong-Kong, and which provided for the commitment to prison on probable cause, with a view to their surrender, of fugitive Chinese

¹⁰⁰ Mr. Fish, Secretary of State, to Mr. Delfosse, August 11, 1873.

charged with “any crime or offense against the laws of China” *Kwok-a-Sing* was then brought before the Chief Justice of the Supreme Court of the Colony, who ordered his release on several grounds, among which was that the demand for extradition must come from the country in which the crime was committed (citing i Phill. *Inter. Law*, p. 413), which was not so in the case under consideration, the crime having been committed at sea on a French ship, and not in China. From this decision an appeal was taken to Her Majesty in Council, where the case was heard before Sir J. Colville, Sir R. Phillimore, the Lord Justice Mellish, Sir Barnes Peacock, and Sir Montague E. Smith. The judgment of their lordships was delivered by the Lord Justice Mellish, who said their lordships had to consider whether there was evidence that *Kwok-a-Sing* had been guilty of crimes against the laws of China within the meaning of the ordinance above referred to. He was accused of two crimes, murder and piracy.

The alleged murder,

...continued his Lordship, was the murder of a Frenchman on board a French ship, in which *Kwok-a-Sing*, was a passenger, on the high seas. They [their Lordships] have, therefore, to consider whether murder by a subject of *China* of a person who was not a subject of *China*, committed outside the Chinese territory, is a crime against the laws of *China* within the meaning of the ordinance, and they are of opinion that it is not. Their Lordships cannot assume, without evidence, that *China* has laws by which a Chinese subject can be punished for murdering beyond the boundary of the Chinese territory a person not a subject of *China*. Up to a comparatively late period England had no such laws. Moreover, although any nation may make laws to punish its own subjects for offenses committed outside its own territory, still, in their lordships’ opinion, the general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done. * * * On the whole, therefore, on these two grounds — first, that it cannot be assumed without evidence that there is any law in *China* to punish a Chinese subject for a murder committed upon a foreigner within foreign territory; and, secondly, because, even if it could be assumed that there was such a law, still this offense, having been committed within French territory, ought to be treated as an offense against French law, and not as an offense against Chinese law, their lordships are of opinion that there was no evidence before the magistrate that *Kwok-a-Sing*, in murdering the French captain, committed an offense against the laws of *China* according to the true construction of the ordinance.

On this ground their Lordships held that the magistrate’s warrant committing *Kwok-a-Sing* for surrender was illegal and beyond his jurisdiction,

and that the Chief-Justice's order for the release of *Kwok-a-Sing* from imprisonment under the warrant was right, and ought to be approved.

As an illustration of the international complications to, which the Attorney-General referred in the case of Vogt as likely to result from extraterritorial pretensions, and as an example of a denial of such pretensions by one government to another, we may advert to a remarkable and important incident in the history of the relations between France and Great Britain.

On the 1st June, 1852, M. Th. Vernier, a deputy of the *Corps Legislatif* of France, presented, on behalf of a commission¹⁰¹ appointed to examine a *projet* of a law modifying articles 5, 6 and 7 of the Code of Criminal Procedure of 1808, a report recommending a *projet* which had been adopted by the council of state and by the commission, and which was as follows:

Articles 5, 6 and 7 of the Code of Criminal Procedure are abrogated and replaced as follows:

ARTICLE. 5. Every Frenchman who, outside of the territory of France, is guilty of a *crime* or a *dilit* punished by the French law, may be prosecuted and judged in France, but only on the request of the public ministry.

If the *crime* or *delit* has been committed against an individual Frenchman or foreigner, the prosecution and judgment shall not take place before the return of the accused to France.

* * * * *¹⁰²

ARTICLE 6. The foreigner who, outside of the territory of France, is guilty of a crime, whether against the public welfare or against a Frenchman may, if he comes into France, be arrested and judged there conformably to the French laws.

As regards *delits*, the prosecution shall take place only in the cases and under the conditions determined between France and foreign powers by diplomatic conventions.

All prosecutions cease against a foreigner of whom extradition has been demanded and obtained.

ARTICLE 7. * * * * *¹⁰³

When a person has committed a *dilit*, or when the crime has been committed against an individual Frenchman or foreigner, no prosecution is carried on against the accused Frenchman or foreigner, if it appears that he has been definitively judged outside of France for the same acts, and against an ac-

¹⁰¹ The commission consisted of MM. Charles Lafitte, president; O'Quiv, secretary; Riche, de la Haiechois, Duboys, de Beauverger and Vernier.

¹⁰² The omitted portion refers solely to certain judgments by default.

¹⁰³ The omitted portion relates only to the competence of tribunals.

cused foreigner if he establishes the fact that the act does not constitute either a crime or a *délit* in the country where it took place.

In respect to those provisions of the *project* relating to offenses committed by foreigners outside of France, the report said:

The extension proposed by article 6 of the *project* is the consequence of that admitted by article 5. After having accorded to the foreigner as against the Frenchman the protection of our laws, it is just that, by an equitable reciprocity, we should assure the punishment of punishable acts committed by a foreigner against our citizens. Besides, we cannot permit the soil of France to become a place of refuge or of impunity for the foreigner who, even outside, shall have attacked French interests. Moreover, it is the arrival of the foreigner in France, after the crime or *délit* has been committed by him, that, in creating an interest in the repression, affords the first condition of the prosecution.¹⁰⁴

On the 10th June, 1852, the *corps législatif* adopted the *project* reported by M. Vernier, by a vote of 191 to 5.¹⁰⁵

The measure then went to the Senate, but was subsequently withdrawn by the government.

In the debates on the law of 1866, now in force, it was asserted more than once, and not denied, that the bill of 1852 was withdrawn on account of the opposition of foreign powers.¹⁰⁶ And in reply to a question by M. Jules Favre, M. Rouher, Minister of State, admitted that it stopped negotiations between France and Great Britain for a treaty of extradition.

Turning now to Hansard's Debates in the British Parliament, we find both these facts fully confirmed.

On the 8th June, 1852, Lord Malmesbury, Minister for Foreign Affairs, moved in the House of Lords, a second reading of the bill giving sanction to an extradition convention with France, then lately concluded. The question was generally discussed, and in the course of the debate Lord Brougham referred to the bill before the French legislature to give French tribunals jurisdiction over offenses committed abroad, whether by citizens or by foreigners.

Lord Malmesbury thought his noble and learned friend was mistaken. The bill, he thought, was confined to Frenchmen.

¹⁰⁴ *Le moniteur*, 4 June, 1852, p. 832.

¹⁰⁵ *Id.* 10 June, p. 369.

¹⁰⁶ *Le moniteur*, 31 May, 1866; M. Picard.

Lord Brougham said that was the way the bill stood when he last saw it, and he was glad to hear it stated that it was confined to Frenchmen, which till then he had never heard alleged.

On the 14th June (the French *projet de loi* was passed by the *corps legislatif* on the 10th) Lord Brougham arose and implored Lord Malmesbury, before the next stage of the bill, to reconsider the propriety of withdrawing the measure, a step warranted by the change in the French law.

Lord Malmesbury replied that he had already made up his mind upon the subject. He had come down to the House intending to announce at the proper time that Her Majesty's Government thought fit to withdraw the bill at present. He referred to the mistake into which he had fallen on a previous evening, which originated in an error of the person who wrote the despatch to him, and which the British ambassador at Paris had desired him to explain. "Before I leave this subject," said Lord Malmesbury, "I only wish to state that it would be extremely dangerous, I think, at the present moment, for Her Majesty's Government to continue this act of Parliament under the new law which has been passed in France".

On the 25th June the Marquess of Clanricarde inquired of Lord Malmesbury whether Her Majesty's Government intended to communicate any correspondence with Her Majesty's ambassador at Paris, or the French ambassador in London, concerning the law lately enacted in France, which had caused the withdrawal of the surrender of criminals bill, and which was not compatible with the relations at present existing between the two countries.

Lord Malmesbury replied that he had no correspondence *which he could lay before the House*; but that the French Government had acted in the most friendly and frank manner, and had no sooner perceived the hostility in the House to the *projet de loi*, than they gave him *an assurance that the projet de loi would not be persevered in*.

The Marquess of Normanby¹⁰⁷ expressed great satisfaction at this announcement, and said he could not sit down without stating "that during the whole period which he had labored in endeavoring to maintain amicable relations between the two countries he had seldom listened to any statement with greater pleasure than that of the noble Earl with regard to the manner in which the French Government have acted with respect to the withdrawal of the *projet de loi* referred to".¹⁰⁸

Another denial of the right of a nation to punish foreigners for acts done by them abroad was made both by Great Britain and the United States

¹⁰⁷ Formerly British Ambassador at Paris, &c., &c.

¹⁰⁸ See Hansard, 3 series, vol. XXXII, pp. 194-314, 563, 1278-1383.

upon the passage by the Brazilian Chambers in 1875 of the law now in force in Brazil on that subject, although it is not nearly so extensive and absolute in its provisions as article 186 of the Mexican Penal Code. The adoption of the law was first made known to the Government of the United States by its Minister at Rio, in a despatch¹⁰⁹ bearing date the 20th of August, 1875, and enclosing a copy of the law. In a later despatch, dated April 20, 1876, he called the attention of the Department more specifically to the provisions of the measure, and reported that the British *chargé d'affaires* at Rio had been instructed by the Earl of Derby in a despatch enclosing a copy of an opinion of the law officers of the crown to notify the Government of Brazil that Her Majesty's Government could not consent or submit to any action by Brazil under the law which would punish British subjects in Brazil for acts done by them either in Great Britain or in any other foreign country not subject to Brazilian jurisdiction.¹¹⁰

To this despatch Mr. Fish, Secretary of State, replied on May 26, 1876, as follows:

Your despatch, No. 322, of the 20th ultimo has been received. It represents that the British Government, pursuant to the opinion of the law officers of the crown, has instructed its minister to inform the Government of Brazil that it will not acquiesce in the application of the Brazilian law to which you refer to acts done by British subjects outside of the jurisdiction of Brazil. This decision may be regarded as obviously sound, and is entirely concurred in by this Government.

If, therefore, there should be occasion, you will inform the Minister of Foreign Affairs that we cannot consent to the prosecution or punishment of a citizen of the United States pursuant to the objectionable statute adverted to.¹¹¹

In the same year (1876) this doctrine was again announced by Mr. Fish in the case of Peter Martin, tried and sentenced in British Columbia. The circumstances of the case were that Martin, a naturalized citizen of the United States, was tried at Laketon, British Columbia, for an assault on an officer in the execution of his duty, prison breach, and escape from custody; and, having been found guilty, was sentenced to fifteen months imprisonment at Victoria, in the same province, there being no jail or secure place of confinement at Laketon. He was accordingly placed in the

¹⁰⁹ *For. Rel.*, 1875, p. 123.

¹¹⁰ *For. Rel.*, 1876, p. 25.

¹¹¹ *For. Rel.*, 1876.

custody of constables to be conveyed to Victoria. A part of the route taken lay through Alaska, and was traversed by canoe, via the Stickine River, near the mouth of which, and within the Territory of Alaska, the party made a landing for the purpose of cooking food. While they were thus engaged the prisoner obtained possession of a loaded gun and made a deadly assault on one of the constables, but was overpowered and conveyed to Wrangle Harbor, from whence he was taken by steamer to Victoria.

It having been reported that Martin would be tried at Victoria for this assault, Mr. Fish, on the 2d of November, 1876, wrote to the British Minister at Washington, Sir Edward Thornton, and after reciting the facts substantially as above stated, said:

It further appears, from what has been intimated by the consul [of the United States, at Victoria], that Martin will be fully committed for this assault, and that his case will be given to the grand jury, where a true bill will most likely be found against him, and that the case then will come up in the Supreme Court some time during the present month.

From the facts presented in the case, it is suggested that the person in question should not be tried for the offense with which he is charged, it having been committed, as is reported, within the jurisdiction of the United States, and that, such being the case, he should be set at liberty.

I will, therefore, thank you, at your earliest convenience, to call the attention of Her Majesty's proper authorities to the matter, in order that a thorough examination of the facts in the case may be made.

On the 10th of January, 1877, Mr. Fish addressed another note to Sir Edward Thornton, informing him that a despatch had been received from the consul at Victoria, stating that Martin had been tried there before the Hon. P. P. Crease, a justice of the Supreme Court of the province for the assault committed on the Stickine River, and had been found guilty and sentenced to one year and nine months imprisonment at hard labor, to take effect after the expiration of the term of fifteen months to which he was sentenced at Laketon. The consul's despatch further stated that as the evidence at the trial was conflicting as to the precise distance of the scene of the assault from the mouth of the Stickine, and as the boundary line between the British and American territory was not definitely marked the judge charged the jury that, under these circumstances, the court had either jurisdiction or concurrent jurisdiction, and that the proceedings were just and proper. To this line of argument Mr. Fish answered, first, that if the colonial officers, in transporting Martin from Laketon to Victoria conducted him at any time within and through the unquestioned territory of

the United States, they committed, in so doing, a violation of the sovereignty of the United States, which rendered his further detention unjustifiable. And in respect to the question of jurisdiction of the assault he said:

I must not allow this question to pass without entering an explicit dissent from the doctrine which seems to be advanced by the learned judge who presided at the trial of Martin, that jurisdiction or concurrent jurisdiction vests in Her Majesty's colonial authorities or courts over offenses committed within any part of the Territory of Alaska, even though so near to the treaty line that uncertainty or doubt may exist on which side of such line the offense is committed. It cannot, I think, be necessary to argue this point, or to do more than record this dissent and denial of a doctrine which, I have no doubt, Her Majesty's Government agrees with me in repudiating.¹¹²

On the 25th of September, 1877, the British *chargé d'affaires* at Washington addressed a note to Mr. F. W. Seward, Acting Secretary of State, saying:

I have the honor to inform you that I have just learned from the Deputy Governor of Canada that the Dominion Government has concluded the inquiry into the circumstances of the case, and has decided upon setting Peter Martin at liberty without further delay.

In his annual message of the 6th of December, 1886, the President defined the position of the United States on the jurisdictional question involved in the Cutting case, as follows:

The admission of such a pretension would be attended with serious results, invasive of the jurisdiction of this Government, and highly dangerous to our citizens in foreign lands. Therefore I have denied it, and protested against its attempted exercise, as unwarranted by the principles of law and international usages.

A sovereign has jurisdiction of offenses which take effect within his territory, although concocted or commenced outside of it; but the right is denied of any foreign sovereign to punish a citizen of the United States for an offense consummated on our soil in violation of our laws, even though the offense be against a subject or citizen of such sovereign. The Mexican statute in question makes the claim broadly, and the principle, if conceded, would create a dual responsibility in the citizen, and lead to inextricable confusion, destructive of that certainty in the law which is an essential of liberty.

When citizens of the United States voluntarily go into a foreign country they must abide by the laws there in force, and will not be protected by their

¹¹² *British and Foreign State Papers*, vol. 68, pp. 1227-1228.

own Government from the consequences of an offense against those laws committed in such foreign country; but the watchful care and interest of this Government over its citizens are not relinquished because they have gone abroad; and if charged with crime committed in the foreign land a fair and open trial, conducted with decent regard for justice and humanity, will be demanded for them. With less than that this Government will not be content when the life or liberty of its citizens is at stake.

Whatever the degree to which extraterritorial criminal jurisdiction may have been formerly allowed by consent and reciprocal agreement among certain of the European states, no such doctrine or practice was ever known to the laws of this country or of that from which our institutions have mainly been derived.

In the case of Mexico there are reasons especially strong for perfect harmony in the mutual exercise of jurisdiction. Nature has made us irrevocably neighbors, and wisdom and kind feeling should make us friends.

The overflow of capital and enterprise from the United States is a potent factor in assisting the development of the resources of Mexico, and in building up the prosperity of both countries.

To assist this good work all grounds of apprehension for the security of person and property should be removed; and I trust that in the interests of good neighborhood the statute referred to will be so modified as to eliminate the present possibilities of danger to the peace of the two countries.

Three causes have operated during the present century to diminish extraterritorial pretensions in criminal matters:

1. The growth of the idea of nationality and of national equality;
2. the development and extension of commercial intercourse;
3. the more general recognition and performance by independent states of their rights and duties under international law.

The first cause has operated to produce a clearer apprehension of the objects of national existence and of the bounds of national authority; the second has rendered more apparent the necessity of personal immunity from vexatious and unjust prosecutions under foreign and unknown laws; the third has made governments more ready to abandon assumptions of authority which infringe the rights of other sovereign powers.

The infliction of punishment involves an exercise of power; and power implies subjection. This principle holds good in public as well as in private affairs. The punishment by one state of the citizen of another for an act for which he was solely answerable to the laws of the latter, or even for an act for which he was not answerable to the laws of the former, is a public wrong.

For a nation to hold its penal laws to be binding on all persons within the territory of another state, is to assert a right of sovereignty over the latter, and impair its independence. A state may, if it see fit, tie its criminal law about the neck of its citizen and hold him answerable for its violation everywhere. But even this power of control has its limitations. For the citizen so bound is nevertheless not exempt from obedience to the law of the place where he may be, and it would be no defense to a charge of having violated it to say that the act complained of was required by the penal law of his own country. The local allegiance would be paramount; his double allegiance would be his misfortune, for relief from which he could appeal to the mercies of his own government alone.

When a man in his own country violates its laws, he is answerable for his misconduct to those laws alone; and it is his right to be tried under them and in accordance with the methods of procedure they prescribe. To say that he may be answerable to another law because the person he attacks is a foreigner would in principle subject him in his own country not merely to a dual, but to an indefinite responsibility. Such a pretension is an assertion not only of an *imperium in imperio*, but of *imperia in imperio*. It would expose citizens and all other persons in the United States to liability to as many penal systems as there happened to be nationalities represented in the foreign population. Every fresh accession to that population would extend the operation, and potentially increase the variety, of foreign penal systems in force in this country.

The mere statement of such a proposition is a sufficient refutation of it.

When a citizen of the United States commits in his own country a violation of its laws, he is entitled as a matter of right to be tried under and in accordance with its constitution and laws. As Heffter says, he should not be withdrawn for trial for such an act from his constitutional judge. While he is answerable in such case to the laws of his country, he is entitled to the rights of defense and the safeguards of liberty which they provide, and in accordance with which alone can his guilt be established. The methods of trial are not a matter of form, but an essential and inseparable part of every system of criminal jurisprudence.

In respect to the punishment, advocated by so many continental jurists and provided for in so many continental codes, of offenses against the safety of the state, it is beyond the purview of this report to enter into an elaborate discussion, and attempt to state a definitive conclusion. The grounds of necessity and self-defense, on which this claim of jurisdiction is based, are conditional and circumstantial rather than strictly legal, and the very mention

of them is suggestive of international controversies and complications. It is within the competence of every independent state to decide what measures it shall take to secure its safety. On the other hand, it may become necessary for foreign powers to consider whether those measures violate their sovereign prerogatives or the rights of their citizens.

All of which is respectfully submitted:

John B. MOORE
Third Assistant Secretary of State.

To the Honorable
T. F. Bayard,
Secretary of State.

EXHIBIT A
SENTENCE OF JUDGE ZUBIA

Vista la presente causa instruida contra A. K. Cutting, quien declaró ser soltero, de 40 años de edad, originario del Estado de Nueva-York, residente en esta villa y editor del periódico *El Centinela*, por delito de difamacion.

Vista la preparatoria del inculpado, el pedimento del representante del Ministerio público, lo expuesto por la parte civil C. Emigdio Medina, la exposicion del defensor C. Jesus E. Islas y todo lo demás que del proceso consta y ver convino.

Resultando, 1o.: Que en el número 14 del periódico intitulado *El Centinela* que se publica en este lugar, correspondiente al 6 de Junio próximo pasado, apareció un párrafo de gacetilla en inglés, en el que se critica de fraudulento un prospecto publicado en El Paso, Texas, anunciando la aparicion de un periódico intitulado *Revista Internacional*.

Resultando, 2o.: Que el C. Emigdio Medina considerándose aludido é injuriado en ese párrafo se presentó al alcalde segundo en turno de lo criminal en esta villa, promoviendo juicio de conciliacion en contra de A. K. Cutting, como editor responsable de *El Centinela*.

Resultando, 3o.: Que presentes las partes ante el Juez conciliador convinieron en publicar en el mismo periódico *El Centinela* una retractacion que fué redactada por Medina y corregida por Cutting, cuya publicacion debia hacerse por cuatro veces en inglés, y si lo permitia el Sr. A. N. Daguerre, editor tambien del periódico, seria publicada en español.

Resultando, 4o.: Que Cutting, lejos de cumplir lo estipulado en la conciliacion, publicó el veinte del mismo mes de Junio la retractacion solamente en inglés en *El Centinela*, en letra diminuta y con faltas sustanciales que la hacen casi ininteligible, publicando en la misma fecha un aviso ó remitido en el *The El Paso Sunday Herald*, en el que ratifica y amplía los conceptos difamatorios que publicó contra Medina y califica de indigno el acto de conciliacion que se verificó ante el alcalde segundo de esta villa.

Resultando, 5o.: Que el ofendido se presentó en forma acusando á Cutting por el delito de difamacion conforme á los artículos 643 y 646, fraccion segunda, del Código Penal, por cuyo motivo se libró la orden correspondiente de detencion.

Resultando, 6o.: Que en 22 del mismo mes la parte ofendida amplió la acusacion manifestando: que aunque el periódico *The El Paso Sunday Herald* se publica en Texas, Cutting lo hizo circular en gran número en esta poblacion y en el interior de la República, habiéndolo leído más de tres personas, por cuyo motivo se mandaron recoger los ejemplares que se encontraban en la oficina ó despacho del mismo Cutting.

Resultando, 7o.: Que dentro de los términos legales se tomó al inculpado su declaracion preparatoria en la que declinó la jurisdiccion del juzgado, por tratarse de un acto consumado en Texas, poniéndose bajo la proteccion del Cónsul de los Estados- Unidos, y se decretó el auto de formal prison, habiéndose comunicado á quienes corresponde.

Resultando, 8o.: Que seguida la averiguacion por todos sus trámites, el inculpado insistió en su anterior respuesta, y al prevenirle nombrara defensor por haber renunciado el C. Lic. José Maria Barajas, se negó á hacerlo, nombrándose de oficio al C. A. N. Daguerre, socio del mismo Cutting en la redaccion de *El Centinela*; pero habiendo renunciado á su vez, recayó el nombramiento en el C. Jesus E. Islas, quien ha desempeñado el cargo hasta presentar su alegato de defensa.

Resultando, 9o.: Que en virtud de la conclusion del Ministerio público relativa á haber lugar á la acusacion, se puso de manifiesto el proceso en la secretaria por el término que señala el artículo 409 reformado del Código de Procedimientos penales, y vencido el termino sin haberse opuesto excepcion alguna, se citó á las partes para el debate que se verificó el dia 5 del actual en la forma y términos prescritos por el mismo Código, terminando el acto con la citacion para sentencia.

Considerando, 1o.: Que conforme al artículo 121 del Código de Procedimientos Penales, la base del procedimiento criminal es la comprobacion del hecho que la ley reputa delito; y en el presente caso, está plenamente comprobada la existencia de este hecho, puesto que lo constituye la publi-

cacion que apareció en *El Centinela* correspondiente al 6 de Junio próximo pasado, en la que se calificó de fraudulento el prospecto que se dió á luz para anunciar la publicacion de la *Revista Internacional*.

Considerando, 2o.: Que si bien es cierto que respecto de este hecho hubo un acto conciliatorio, que habría dejado satisfecha á la parte ofendida si se hubiera cumplido, tambien lo es que ese acto no llegó á cumplirse y, por lo mismo, quedó en pié la responsabilidad del delito.

Considerando, 3o.: Que la prueba de la falta de cumplimiento del compromiso contraído en el juicio de conciliacion está precisamente en el remitido publicado por Cutting en el *The El Paso Sunday Herald* en el que ratifica la original asercion de que Emigdio Medina es un defraudador y estafador, y á la vez en la publicacion hecha en *El Centinela* de la misma fecha, suprimiendo todas las mayúsculas y poniendo el nombre de Medina con letra microscópica, á fin de dificultar su lectura.

Considerando, 4o.: Que la ratificacion conforme al Diccionario de Escriche, es la confirmacion y aprobacion de la que hemos dicho ó hecho: Tiene retroactivo y por consiguiente no constituye un acto diverso de aquel á que se refiere: *ratihabitio retrotrahitur ad initium*, ni nace de ella una nueva responsabilidad distinta de la que surgió al principio.

Considerando, 5o.: Que siendo esto asi, la responsabilidad criminal de Cutting surgió de la publicacion hecha en *El Centinela* que ve la luz pública en esta villa, la cual fué ratificada en el periódico de Texas sin que esta ratificacion constituyera un nuevo delito que deba ser castigado con una pena diversa de la que corresponde por la primera publicacion.

Considerando, 6o.: Que aun en el supuesto no concedido de que la difamacion procediera del remitido publicado con fecha 20 de junio en el *The El Paso Sunday Herald*, el artículo 186 del Código Penal mexicano previene “que los delitos cometidos en territorios extranjeros por un mexicano contra mexicanos ó contra extranjeros, ó por un extranjero contra mexicanos”, podrian ser castigados en la República y con arreglo á sus leyes si concurrieren los requisitos siguientes: 1o., que el acusado esté en la República ya sea porque haya venido espontáneamente ó ya porque se haya obtenido su extradicion: 2o., que si el ofendido fuere extranjero, haya queja de parte legitima: 3o., que el reo no haya sido juzgado definitivamente en el pais en que delinquirió, ó que si lo fué no haya sido absuelto, amnistiado ó indultado: 4o., que la infraccion de que se le acuse tenga el carácter de delito en el país en que se ejecutó y en la República: 5o., que con arreglo á las leyes de ésta, merezca una pena más grave que la de arresto mayor; requisitos que se han perfectamente llenado en el presente caso, supuesto que Cutting fué aprehendido en territorio de la República; hay queja de parte legitima ó sea

del C. Medina, quien presentó su querrela en la forma prescrita por la ley; el reo no ha sido juzgado definitivamente, ni absuelto, amnistiado, ni indultado en el país en que delinquiró; el delito de que se acusa á Cutting tiene ese carácter en el país en que lo ejecutó y en la República, segun es de verse en el Código Penal vigente en el Estado de Texas, artículos 616, 617, 618 y 619, y en el Código Penal del Estado de Chihuahua, artículos 642 y 646; y segun este último artículo, en su fraccion segunda, la infraccion de que se trata merece pena más grave que la de arresto mayor.

Considerando, 7o.: Que segun la regla de derecho *Judex non de legibus, sed secundum leges debet judicare*, no corresponde al juez que decreta examinar el principio asentado en el referido artículo 186, sino aplicarlo en toda su plenitud, por ser la ley vigente en el Estado.

Considerando, 8o.: Que esta regla general no tiene más limitacion que la expresada en el artículo 126 de la Constitucion general, que dice; “Esta Constitucion, las leyes del Congreso de la Union que emanen de ella, y todos los tratados hechos ó que se hicieren por el Presidente de la República con la aprobacion del Congreso, serán la ley suprema de toda la Union. Los jueces de cada Estado se arreglarán á dicha Constitucion, leyes y tratados, á pesar de las disposiciones en contrario que pueda haber en las Constituciones ó leyes de los Estados”.

Considerando, 9o.: Que el repetido artículo 186 del Código Penal, lejos de ser contrario á la ley suprema ó á los tratados hechos por el Presidente de la República, ha tenido por objeto, segun es de verse en la parte expositiva del mismo Código, página 38, “que obre de lleno el principio en que se funda el derecho de castigar, esto es, la justicia unida á la utilidad”.

Considerando, 10o.: Que aun suponiendo, sin conceder, que el delito de difamacion se hubiere ejecutado en territorio de Texas, la circunstancia en que tuvo en esta villa el periódico *El Paso Sunday Herald*, de la que se quejó el C. Medina, motivando el decreto en que se mandaron recoger los ejemplares existentes en la oficina de Cutting, situada en esta misma villa, constituye propiamente la consumacion del delito, conforme al art. 644 del Código Penal.

Considerando, 11o.: Que segun el artículo 70 reformado de la Constitucion general, los delitos que se cometen por medio de la imprenta deben ser juzgados por los tribunales competentes de la Federacion ó de los Estados, conforme á su legislacion penal.

Considerando, 12o.: Que la publicacion hecha por Cutting en *El Centinela*, ratificada despues en el *The El Paso Sunday Herald* y en el *The Evening Tribune*, que obran en el proceso, ataca la vida privada del C. Emigdio Medina al atribuirle el delito de fraude y estafa, y por lo mismo

está comprendida en la taxativa puesta á la libertad de imprenta por el articulo constitucional citado.

Considerando, 13o.: Que tratándose de hechos consumados en el territorio del Canton Bravos, perteneciente al Estado de Chihuahua, corresponde al Juez que suscribe juzgarlos conforme á la legislacion vigente en el mismo Estado, particularmente si se tiene en consideracion que el inculpado reside en esta villa, donde tiene su domicilio hace más de dos años, segun consta de las declaraciones visibles a fojas 20, 21 y 22 del proceso, afirmacion que no ha sido contradicha por Cutting, quien declara á fojas 19 que reside en ambos lados, esto es, en Paso del Norte, México, y en El Paso, Texas, sin residencia fija en ninguno de los dos lados.

Considerando, 14o.: Que á mayor abundamiento, Cutting reconoció expresamente la jurisdiccion de las autoridades de esa villa, compareciendo ante el Alcalde de 2o. turno de lo criminal y contestando la demanda conciliatoria que por difamacion interpuso en su contra el C. Medina.

Considerando, 15o.: Que la responsabilidad de Cutting está plenamente probada, puesto que aparece consignada en documentos fehacientes que de ninguna manera han sido contradichos por su autor; y si alguna duda hubiere respecto de la intencion dolosa con que se hizo la primera publicacion, desaparecería en vista de las ratificaciones posteriores hechas en el *The El Paso Sunday Herald* y en el *The Evening Tribune*, en las que Cutting expresa textualmente que Emigdio Medina es un *defraudador, estafador, cobarde y ladrón*; quedando así llenados los requisitos que señala el articulo 391 del Código de Procedimientos Penales.

Considerando, 16o.: Que para graduar la pena que deba aplicarse, hay que tener presente, que aunque el hecho que se imputa al ofendido le causa deshonra y perjuicio grave, y no existen circunstancias atenuantes, se trata de un delito de carácter privado entre dos editores, en el que solo han concurrido las circunstancias agravantes á que se refieren las fracciones sétima y undécima del articulo 44 y los articulos 656 y 657, fraccion cuarta, del Código Penal: no apareciendo plenamente justificadas las demás que menciona el Ministerio público, pues si bien es cierto que el presente caso ha producido grande alarma á la sociedad, esto no ha provenido del delito que se imputa á Cutting, sino de las medidas inadecuadas que se han tomado para su defensa: siendo en consecuencia de perfecta aplicacion la parte final del articulo 66 del Código citado; y

Considerando, finalmente, 17o.: Que el responsable de un delito lo es de sus consecuencias, quedando obligado á la indemnizacion civil en los términos que se disponen en los articulos 326 y 327 del Código Penal.

Con apoyo de las disposiciones citadas y de los artículos 646, fracción segunda, 661, 119 y 218 del mismo Código, se resuelve con las proposiciones siguientes:

Primera: por el delito de difamación cometido en la persona del C. Emigdio Medina, se condena á A. K. Cutting á sufrir un año de servicios públicos y á pagar una multa de 600 pesos, ó en su defecto á cien días más de arresto.

Segunda: se le condena igualmente á la indemnización civil, que se fijará como lo dispone el artículo 313 del Código Penal.

Tercera: amonéstese al reo, para que no reincida en el delito por el cual se le condena, advirtiéndole las penas á que se expone.

Cuarta: esta sentencia se publicará en los términos que previene el artículo 661 del propio Código.

Quinta: remítase esta causa al Supremo Tribunal de Justicia, para los efectos á que se contrae la parte final del pedimento del agente del Ministerio público, relativa á la intervención que ha tenido el Cónsul americano en este proceso.

Sexta: notifíquese á las partes y adviértase al reo el término que tiene para apelar de esta sentencia.

El C. Lic. Miguel Zubia, Juez letrado del Distrito Bravos, fallando en definitiva, así lo proveyó con testigos.

Miguel ZUBIA.
A., L. FLORES.
A., S. VARGAS.

Lo comunico á vd. para su conocimiento.

FELIX FRANCISCO MACEYRA.

EXHIBIT B

ARRÊT

LA COUR;—Attendu que si, en principe général, les Cours d'assises saisies par un arrêt de la chambre des mises en accusation non attaqué dans les délais fixés par l'art. 296, C. inst. cr., ne peuvent se déclarer incompetentes, soit parce que le fait incriminé ne constituerait qu'un délit, soit par le motif que l'accusé aurait dû être renvoyé devant une autre Cour d'Assises, ou même

devant un tribunal d'exception, cette régie est fondée sur ce que les Cours d'Assises, étant investies de la plénitude de juridiction en matière criminelle, peuvent, sans commettre aucun excès de pouvoir et sans sortir des limites de leurs attributions, connaître de tous les faits punis par la loi française; mais que cette juridiction, quelque générale qu'elle soit, ne peut s'étendre aux délits commis hors du territoire par des étrangers, qui, à raison de ces actes, ne sont pas justiciables des tribunaux français;—Attendu, en effet, que le droit de punir émane du droit de souveraineté, qui ne s'étend pas au delà des limites du territoire; qu'à l'exception des cas prévus par l'art. 7, C. inst. crim., dont la disposition est fondée sur le droit de légitime défense, les tribunaux français sont sans pouvoir pour juger les étrangers à raison des faits par eux commis en pays étranger;—Que leur incompétence à cet égard est absolue, permanente; qu'elle ne peut être couverte ni par le silence, ni par le consentement de l'inculpé; qu'elle existe toujours la même, à tous les degrés de juridiction, et que la chambre des mises en accusation, par son arrêt de renvoi, ne peut donner à la cour d'assises le droit, qu'elle n'a pas elle-même, de statuer sur un fait non soumis à la loi française;—Attendu, en fait, que Raymond Fornage a été traduit devant la Cour d'assises de la Haute Savoie, comme accusé d'un vol commis dans le Canton de Valais (Suisse); qu'avant l'ouverture des débats il a posé des conclusions tendant à ce que cette Cour se déclarât incompétente, par le motif qu'étant né en France de parents étrangers, et n'ayant pas réclamé la qualité de Français, il n'était pas justiciable des tribunaux français à raison d'un fait commis en pays étranger;— Attendu que cette exception, qui mettait en contestation la légalité même de la poursuite et le droit de juridiction de la Cour d'assises, constituait nécessairement une question préjudicielle qui devait être jugée par cette Cour avant tout débat sur le fond du procès; que le demandeur n'a pu être privé du droit d'exciper de ce moyen péremptoire, ni par son silence pendant le cours de l'instruction, ni par le défaut de pourvoi contre l'arrêt de la chambre des mises en accusation, qui, d'ailleurs, n'a pas été appelée à statuer sur la question de nationalité posée pour la première fois devant la Cour d'assises;—Attendu qu'en le déclarant non recevable à présenter cette exception par le motif qu'il ne s'est pas pourvu dans le délai fixé par la loi contre l'arrêt de renvoi, la Cour d'assises de la Haute Savoie a faussement appliqué les art. 296, 297 et 301 du C. d'inst. crim.; et qu'en ordonnant qu'il serait procédé à l'ouverture des débats sans statuer sur la question préjudicielle de nationalité soulevée par l'accusé, elle a violé l'art. 408 du même Code, et méconnu les droits de la défense;—Casse, etc.

Du 10 janv. 1873.—Ch. crim.—MM. Faustin Hélie, prés.; Réquier, rapp.; Bédarrides, av. gén.