STATE POLICE LEGISLATION AND THE SUPREME COURT

The Supreme Court of the United States has again, we venture respectfully to believe, misinterpreted its constitutional function in passing upon the validity of state legislation under the police power.3

The Nebraska standard-weight bread law provided for the manufacture and sale of a few standard-size loaves only, in multiples of pounds and half-pounds. The avowed purpose of the statute was to protect buyers from short weights and bakers from unfair competition. To effectuate the purpose, it prohibited under penalty variations from the standard beyond a tolerance of two ounces per pound above or below, but required the specified weight to be ascertained by an average taken from 25 loaves in a unit. The alleged unreasonableness, for which the Supreme Court held the Act unconstitutional, lay in the prohibition against baking and selling loaves which exceed the prescribed weight by more than the two ounce tolerance. The Court held that the provision was “not necessary for the protection of purchasers against imposition and fraud by short weights,” was “not calculated to effectuate that purpose,” and that it “subjected bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary.” The last ground, which apparently constituted the principal basis for the alleged violation of the due process clause of the fourteenth amendment, was derived mainly from the fact that in various seasons certain precautions, such as wrapping, would frequently become necessary to retard undue evaporation and that customers generally preferred unwrapped bread, which would thus often be difficult, owing to atmospheric conditions, to supply.

In the Schmidinger case the Court had settled that the sale of bread was a proper subject of police power regulation, and that to prevent short weights, the fixing of standard sizes and weights is an appropriate means. The loaf in the Chicago ordinance then under consideration had to bear a label stating its weight. The Nebraska statute here in question was in some respects milder in its requirements than the Chicago ordinance—it provided for a tolerance of two ounces in the pound, tested by averages of 25 loaves; the prescribed weight applied for only twenty-four hours after baking; the weighing was to be done on the baker's premises; and no label was required. The size was to constitute the evidence of weight. But the Nebraska statute was more stringent than the Chicago ordinance in prohibiting an excess-weight loaf, beyond the prescribed standard, including tolerance, and this, as already observed, was held to constitute the vulnerability of the Act.

The distinguishing characteristic between the majority opinion of the Court (by Butler, J.) and the minority (Brandeis and Holmes, JJ.) lies in the absence, in the majority opinion, of any extended discussion of the facts of scientific experience in the making and distribution of bread, and in the almost exclusive devotion of the minority opinion of Justice Brandeis to an exhaustive discussion of the scientific investigations of the federal and state governments and of experts.

These seem to show that expert opinion, beginning with the regulations of the federal Food Administration during the War, had come to the nearly unanimous conclusion, adopted in the legislation of some twelve states, but contrary to the views of the majority of the Court, that the prohibition of excess weights was deemed necessary and appropriate to effectuate the purpose of preventing short weights (in the next higher standard size) and unfair practices, and that it was a practicable method of preventing evasions without imposing unreasonable burdens.

Admitting that on these questions of fact there may be a difference of opinion, the important issue arises as to the function of the Supreme Court in the legislative and constitutional process. It is not necessary even to agree with the preponderant conclusion of the experts in order to believe that the Supreme Court made an error in substituting its own judgment as to policy or reasonableness or appropriateness of means to end for that of the legislature, sustained by the state court.

The true field of judicial inquiry under the fourteenth amendment would seem to be confined to determining whether the legislature had sufficient facts before them upon which, as reasonable men, they might justifiably have reached the conclusion adopted that the means devised were calculated reasonably to effect the object desired. To determine this, it is not always possible to examine the evidence before the legislature; but where country-wide experiments have been made over a period of years it is not unreasonable to suggest that the Supreme Court might have taken judicial notice of the fact that a preponderant expert opinion had concluded that the excess-weight prohibition, with tolerances, was necessary, reasonable, and appropriate to its purpose without undue burden on the baker, and that the legislature was familiar with these conclusions. Even if the expert opinion had not been preponderant, it could not be said that the legislature did not have adequate ground to believe that the means were necessary and effective. That suffices to sustain legislation under the police power and, it is believed, exhausts the revisory function of the federal judiciary under the fourteenth amendment. It is arbitrariness that is to be controlled, not opinion based on evidence, even if conflicting. For the Court to go further, and to determine for itself, legislative grounds for belief being admitted, what it considers appropriate or inappropriate, desirable or undesirable, reasonable or unreasonable, is, it is respectfully submitted, to misconceive its constitutional function. Incidentally, it may be said, that ex-Justice Clarke's suggestion that the concurrence of two justices in sustaining a statute should be regarded by the majority as evidencing that reasonable doubt which should bar a statute from being held unconstitutional, was applicable in this case.

E. M. B.

Mixed Claims Commissions are a familiar variety of international tribunal, some of whose decisions in the past have constituted valuable contributions to international law. But when created by a treaty of peace imposed by a victor on a vanquished foe, their value as precedent-makers is likely to be diminished. The Treaty of Berlin having reserved all American rights and claims as previously stipulated in a Joint Resolution of Congress and in certain sections of the Treaty of Versailles, an agreement for a Mixed Claims Commission to determine the validity of these claims was confirmed by the Act of August 10, 1922. The Commission is composed of one American and one German Commissioner and an umpire selected by agreement. The fact that Germany is given this amount of representation suggests an arbitration rather than the fixing of a war indemnity; but the Commission must follow the treaty, an arbitrary expression of the will of one of the parties, and is not free to follow the general rules of international law.

The claims of a victorious belligerent are not limited by international law, but a growing custom which recently crystallized in the IVth Hague Convention imposes a minimum liability whereby all bellig-

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5 The number and importance of such commissions will be seen by reference to Moore, Digest of International Arbitrations (1898); Borchard, Diplomatic Protection of Citizens Abroad (1915); Ralston, International Arbitral Law and Procedure (1910).
7 Commonly called the “Knox-Porter Resolution,” Act of July 2, 1921 (42 Stat. at L. 110).
8 The Treaty of Berlin gave the United States the privilege of availing itself of any of the terms of the Treaty of Versailles included in Part IV, Section 1, and Parts V, VI, VIII, IX, X, XI, XII, XIV, XV.
9 The Treaty is our charter,” said the Commission in its Opinions, at p. 31. (The opinions of the Commission are consecutively paged and are hereinafter cited as “Op. Com. p. ...”). In Op. Com. at p. 76, the Commission said: “The terms of the Treaty fix and limit Germany’s obligation to pay, and the Commission is not concerned with enquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law. It is probable that a large percentage of the financial obligations imposed . . . . would not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace.”
10 2 Fauchille, Traité de Droit International (1921) 309.
11 I Scott, The Proceedings of the Hague Peace Conferences (1920) 621; Bor- chard, op. cit. supra note 1, at p. 248.
COMMENTS

erents are liable for certain unlawful acts causing damage to an individual whether enemy or neutral. As a matter of fact, however, neutral claims rest on a surer basis than those of a belligerent, since the victor's liability may be discharged by a clause in the peace treaty. The claims of neutrals, on the other hand, are based also on customary international law which allows them a like recovery for damage caused by unlawful acts of war but not for injuries inflicted by lawful military acts such as bombardments of fortified cities, sieges, destruction based on military or strategic reasons, or in general all lawful acts occurring in the path of war. Before the Mixed Claims Commission the United States presents claims both as a neutral and as a successful belligerent. The liability imposed upon Germany by the Treaty of Berlin as interpreted by the Commission in Administrative Decision No. I is in part based on the rules of law noted above and in part on the fact that Germany was defeated in the war. Germany must pay for all damage to American property wherever situated, of which the proximate cause was the lawful or unlawful acts of Germany or her agents in the prosecution of the war during the period of American neutrality, whether the claimant suffered directly as an individual or indirectly as a stockholder. No such sweeping liability is imposed by international law. During the period of American belligerency Germany's liability is also in excess of the minimum provided by the Hague Convention. Since a maximum is not fixed by international law, no penalty can be described as "legal" or "illegal," but it is nevertheless interesting to note the number of categories of damage due to illegal acts. Under this head may be placed damages for maltreat-

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21 At the Conference Germany advocated a special duty to neutrals but was voted down. 3 Scott, op. cit. supra note 10, at pp. 80, 139; see 2 Oppenheim, International Law (3d ed. 1921) 353.

22 See, for example, Treaty of Versailles, Art. 244, Annex III, sec. 8, and Art. 298, Annex, sec. 2. The older view is expressed in Ware v. Hylton (1796, U. S.) 3 Dall. 199, 230, where it is said that if the treaty is silent, the claim is dead.

23 See 6 Moore, Digest of International Law (1906) sec. 1037; Borchard, op. cit. supra note 1, at p. 256; Fauchille, op. cit. supra note 9, at p. 797.

24 Borchard, op. cit. supra note 1, at p. 256; Fauchille, op. cit. supra note 9, at p. 302; Moore, op. cit. supra note 13, sec. 1032; Ralston, op. cit. supra note 1, at p. 277. The Dutch Government admitted this during the World War. Dutch Orange Book (1916) 146.


26 Op. Com. p. 2. The broad meaning which the American counsel wished to attach to the word "indirectly" was rejected. Ibid. 11.

27 The Commission adopts the categories laid down in Annex I, Art. 244, Part VIII of the Treaty of Versailles with the exception of Nos. 5, 6, 7, covering pensions, care of prisoners, and dependents' allowances. An historical survey of the peace treaties of the past century indicates that the Treaty of Versailles, incorporated by reference in the Treaty of Berlin, is almost unique in its exact specification of the bases of liability. A usual provision has been for the payment of a fixed sum to defray the expenses of the war or merely as a war indemnity. See Art. VII of Treaty of Frankfort (France and Germany) May
ment of prisoners of war;\textsuperscript{18} and for acts of cruelty to, or maltreatment of, civilians;\textsuperscript{19} as well as damages to civilians for all acts injurious to health, capacity to work, or honor,\textsuperscript{20} or for being forced to labor without just remuneration.\textsuperscript{21} On the other hand, defeat alone is the basis for Germany's liability for damages to all property (with the exception of naval and military works or materials) wherever situated, or however injured by Germany or her allies; and for damages to property caused by "any belligerent" in consequence of hostilities or of any operations of war (with the same exception); and also for damages to persons arising from acts of war, including bombardments or other attacks and all the direct consequences thereof, and of all operations of war. The damage to persons includes that suffered by surviving dependents.\textsuperscript{22}

The exception of "naval and military works or materials" has presented an interesting problem, a solution of which is offered by the Commission's Opinion of March 25.\textsuperscript{23} The term "has no technical signification."\textsuperscript{24} It is a new phrase whose meaning is not illumined by precedent. The Commission decided\textsuperscript{25} that the treaties were primarily concerned with compensation for damages suffered by the civilian popu-

\textsuperscript{18}1871, 62 British and Foreign State Papers 77 (hereafter cited as B. & F. State Papers); Art. XI of Treaty of Prague (Austria and Prussia) Aug. 23, 1866, 56 ibid. 1050; Art. VI of Treaty of Nanking (England and China) Aug. 29, 1842, 30 ibid. 389; Art. IV of Treaty of Paris (France and the Allies) Nov. 20, 1815, II Martens, \textit{Nouveau Recueil des Traitées} (1818) 688. In some treaties claims have been renounced on both sides but in these cases there has usually been a territorial readjustment. See Art. VII of Treaty of Paris (United States and Spain) Dec. 10, 1898, 2 Malloy, \textit{Treaties Between the United States and Other Powers} (1910) 1692; Art. XIV of Treaty of Guadalupe Hidalgo (United States and Mexico) Feb. 2, 1848, 1 ibid. 1114; cf. Arts. XVIII-XIX of Treaty of Paris (France and the Allies) May 30, 1814, 1 B. & F. State Papers 151. On some occasions it has been stipulated that property sequestered or taken as prize but not yet condemned, shall be returned. See Art. III of Treaty of Zurich (France and Austria) Nov. 10, 1859, 49 B. & F. State Papers, 364; Art. XI of Treaty of Kiel (England and Denmark) Jan. 14, 1814, 1 ibid. 234. Cf. Art. XIII of Treaty of Vienna (Austria, Prussia and Denmark) Oct. 30, 1864, 54 ibid. 522. The famous Jay treaty of 1794, Art. VII, 1 Malloy, 596, provided for a commission to determine sums due to merchants or others for illegal captures and condemnations. In the treaty of San Stefano of 1878 (Russia and Turkey) 69 B. & F. State Papers, 732, there is a more or less detailed account stated of the damage for which Turkey agrees to pay. The Treaty of Bucharest of May 7, 1918, 10 Martens, (1920) 3d series, 856, which Germany imposed upon Rumania, suggests the final peace treaties, though Rumania's liability is not quite so detailed.

\textsuperscript{19}"Forbidden by the IVth Hague Convention, Annex Art. 4, 1 Scott, \textit{op. cit. supra} note 10, at p. 623.

\textsuperscript{20}Art. 46. \textit{Ibid.} 630.

\textsuperscript{21}\textit{Ibid.}

\textsuperscript{22}Art. 52. \textit{Ibid.}

\textsuperscript{23}Op. Com. p. 3.

\textsuperscript{24}\textit{Ibid.} 75.

\textsuperscript{25}\textit{Ibid.} 76.

\textsuperscript{26}\textit{Ibid.} 77.
lation and that no liability was imposed on Germany for "property impressed with a military character either by reason of its inherent nature or by the use to which it was devoted at the time of the loss." With respect to ships (the only class of property covered by the above opinion) the test as laid down is whether they were operated privately for private gain or by the United States "directly in furtherance of a military operation." The Commission admitted that in a broad sense the whole merchant marine was mobilized for war, but seemed to reason that the line must be drawn somewhere and that the above test provided a reasonable place at which to draw it. Perhaps such a solution is reasonable; it seems preferable to the view of the Reparation Commission which makes ownership and offensive operations the test. But it is believed that had the Commission felt free to follow the rules of international law, they might well have included vessels which under international law were stripped of their peaceful character. Such, for example would be belligerently convoyed ships and armed merchantmen, which though privileged to arm, yet by exercising the privilege forfeited their immunity as peaceful merchantmen. Such vessels were treated by the Navy Department as part of the fighting force directed against the submarine. The Commission rejected the contention of the German Agent that the control of vessels by the Shipping Board created a presumption that they were used in furtherance of the military effort of the United States.

In Administrative Decision No. II, the Commission looks largely to legal precedents to find "basic principles" for "the preparation, presentation, and decision of all cases submitted." While pointing out that "the source of, and limitations upon, the Commission's powers and jurisdiction" are the agreement of August 10, 1922, the Commission will look to international law when the Treaty is silent. Thus from international law is derived the necessity for settling the preliminary point of jurisdiction; the rules to be applied in determining the measure of damages, the fact that the Government and not its

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n Ibid. 78.
7n Ibid. 79, 80.
10n See (1924) 33 Yale Law Journal, 439.
11n See Report of the Secretary of the Navy (1917) 3, 7; ibid. (1918) 30.
12n Op. Com. p. 84.
14n The footnotes of this decision are abundant evidence of the fact stated.
16n In relation to this point the Commission lists (at p. 7) the kinds of law to which it will look as follows: (a) international conventions, whether general or particular, establishing rules expressly recognized by the United States and Germany; (b) international custom, as evidence of a general practice accepted as law; (c) rules of law common to the United States and Germany established
citizens is the real party; the requirement that all claims shall be
American owned; the determination of the person in whom a cause of
action originally vests and questions of transfer of interest.37

In the opinions already handed down there is much that will be of
interest in the field of municipal as well as of international law.38 It is
by either statutes or judicial decisions; (d) the general principles of law
recognized by civilized nations; (e) judicial decisions and the teachings of the
most highly qualified publicists of all nations, as subsidiary means for the deter-
mination of rules of law; but (f) the Commission will not be bound by any
particular code or rules of law but shall be guided by justice, equity, and good
faith.

37 Only three of the seven decisions already handed down by the Commission
have been dealt with in the text. The other decisions are of more interest in the
Com. p. 17, the Commission rejects the principle of punitive or exemplary dam-
ages because it believes the proper theory of damages is the compensation of an
injured party and not the punishment of the wrongdoer, and also because no
international arbitral tribunal has awarded such damages and the Treaty of
Berlin does not provide for them. In the opinion of the same date, Op. Com.
p. 33, the war risk insurance premium claims were all ruled out on the ground
that they represented losses for which the acts of Germany were not the prox-
with the measure of damages for property losses which is stated to be "the
reasonable market value of the property as of the time and place of taking in the
condition in which it then was"; if there was no market value, then the intrinsic
value as of such time and place. The question of interest is also fully covered
a further war risk insurance premium claim which was urged upon them as an
exception to the class covered by the previous opinion.

By Art. I, par. 3 of the Claims Agreement, the Commission also has jurisdic-
tion of "debts owing to American citizens by the German Government or by
German nationals." This is an extraordinary clause in an arbitration agreement
and was doubtless inspired by Art. 296 of the Treaty of Versailles providing for
clearing house proceedings for debts. This provision was rejected by the United
States. But under that article reciprocity to German and English creditors is
assured whereas the Treaty of Berlin benefits only American creditors. The
important question raised by the "debts" clause is that of "valorization" of the
mark. Is the German Government liable to pay the debts of German debtors
at the March 1917 rate of the mark? Does the sequestration of debts in Germany
constitute an "exceptional war measure" under Art. 297 creating such liability?
Under the Treaty of Berlin it may be difficult to find a provision valorizing
private debts. Inasmuch as the German Government so contended, both as to
the Government and as to the private debtor, and since there is evidence that the
American negotiators of the Treaty of Versailles believed the private creditor
and the private debtor to remain unaffected, in the absence of the clearing house
provision, a supplementary agreement was concluded between the two Agencies
on May 15, 1923, empowering the Commission to determine to what extent and
at what rate the German Government and the private debtor are respectively
liable for private debts. No case has yet been argued or decided on these points.

38 See Yntema, The Treaties with Germany and Compensation for War Damage
(1923) 23 Col. L. Rev. 511; (1924) 24 ibid. 134; Notes (1924) 37 Harv. L. Rev.
492; Fehr, American Claims against Germany (1924) 219 North American
Review, 8.
to be hoped that the Commission in the future will feel more free to follow legal international precedents so that its opinions may in turn serve as precedents for the future. It may be said that the United States, which in the past has contributed so much to the international law of arbitration, has set a further good example in settling these war claims at least in part upon the basis of law.

ADHERENCE TO STATE DECISIONS IN FEDERAL COURTS

Diversity of citizenship was made a ground of federal jurisdiction in Sec. II of the Judiciary Act of 1789,\(^1\) to afford non-residents a tribunal free from local prejudice.\(^2\) It seems a natural inference that the federal tribunals would apply the common law of the state rather than a distinct system, and section 34 provides that “the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”\(^3\) Recent research by Charles Warren in the history of the passage of the act reveals quite conclusively that “laws” was used in the broad sense inclusive of the unwritten law.\(^4\) In the first cases in which Sec. 34 made its debut in the courts, it was thought that “laws” embraced the common law.\(^5\) Nevertheless in 1842, in *Swift v. Tyson,*\(^6\) Justice Story construed “laws” as limited “to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial . . . . and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals but in the general principles of commercial jurisprudence.”\(^7\)

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\(^1\) Act of Sept. 24, 1789, ch. 20, sec. 11 (1 Stat. at L. 78).
\(^3\) Act of Sept. 24, 1789, ch. 20, sec. 34 (1 Stat. at L. 92).
\(^4\) The original draft of sec. 34 found by him in the Archives of Congress provided that “(the statute law) of the several states (in force for the time being and their unwritten or common law now in use whether by adoption from the common law of England, the ancient Statutes of the same or otherwise) . . . .” The words in parentheses were stricken out and “laws” inserted with a caret before the words “of the several states.” Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, at p. 86.
\(^6\) (1842, U. S.) 16 Pet. 1 (indorsee taking negotiable paper for a pre-existing debt held to be a holder in due course).
The cases in elaboration of the doctrine are legion. The construction of a state constitution or statute by the state court of last resort is in general conclusive upon the federal courts. This is true also of what are said to be "local laws" and "rules of property," though the cases are not in harmony as to the content of these generalities. Illustrative of the former are the rules of evidence, the question of municipal liability for injuries caused by defects in sidewalks, whether the contractual or the statutory rate of interest is to be applied after maturity, the rule denying recovery against a carrier for injuries received while traveling on Sunday, and interpretations of the Statute of Frauds even on questions common to all statutes; illustrative of the latter are laws concerning the construction of deeds and wills, adverse possession, fraudulent conveyances, the validity of mortgages, and the rights of riparian owners. On the other hand the federal courts

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8 See Luther v. Borden (1849, U. S.) 7 How. 1, 40.
16 Buford v. Kerr (1898, C. C. A. 8th) 90 Fed. 513; but see Foxcroft v. Mallett (1846, U. S.) 4 How. 353; compare Kuhn v. Fairmont Coal Co. (1910) 215 U. S. 349, 30 Sup. Ct. 140, which apparently requires in addition that the cases be so numerous as to establish a rule of conduct.
are free to decide questions of "commercial and general jurisprudence," without adherence to state decisions. Within this concept are questions concerning contracts not relating to specific property or dependent upon statutes, \(^4\) commercial paper, \(^5\) agency, \(^6\) negligence, \(^7\) insurance, \(^8\) carriers, \(^9\) and conflict of laws. \(^10\) The Supreme Court has recently held in \(Salem Trust Co. v. The Manufacturer's Finance Co.\) (1924) 44 Sup. Ct. 266, that the question whether an earlier assignee of a chose in action prevails over a later assignee who first notified the debtor is one of general jurisprudence, to be decided without reference to state decisions. \(^11\) Justices Holmes and Brandeis concurred in the result, on the ground, however, that the law of the state should govern.

The doctrine of \(Swift v. Tyson\) is an expression of the jurisprudential conception of a one common law "as a brooding omnipresence in


\(^{39}\) Ex Parte Heidelbach (1876) Fed. Cas. No. 6, 322; Dygert v. Vermont Loan Co. (1899, C. C. A. 9th) 94 Fed. 913; see also Guernsey v. Imperial Bank (1911, C. C. A. 8th) 188 Fed. 300. If the substantive rule involved is one of general jurisprudence, it is obvious that no necessity for determining what law is to govern arises, since the substantive question is decided by the federal courts without reference to state decisions. Taylor & Bourique Co. v. National Bank, supra note 25.

\(^{40}\) For a learned discussion of the substantive law involved see Comments (1924) 33 Yale Law Journal, 767. The Supreme Court refused to follow the English rule that a later assignee of the same chose who first notifies the debtor is entitled to priority.
It is conceived to be a body of principles adopted by common law jurisdictions from which its courts can deduce a one and only proper rule. True, a court in making the deduction sometimes misstates the rule but the common law remains unchanged in spite of the error. As Justice Story said, "... it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are." And Justice Gray states that, "a circuit court ... has to inquire what the law of the state may be ... it may differ from a state court in determining what the common law of the state ... applicable to the given case may be." Though this conception is still evinced at times by the courts, it is repudiated by modern analytical jurists. Thus Justice Holmes says that "the law of a state does not become something outside of the state court and independent of it by being called the common law. Whatever it is called, it is the law as declared by the state judges and nothing else." This point of view is taken in the innumerable cases in private international law in which the forum accepts as law the decisions of the courts of a foreign state.

The dogma that federal tribunals are not bound by state decisions on questions of general law has long provoked disapprobation. One supreme court judge has assailed it as an unconstitutional invasion of state rights. Courts sometimes modify it by adhering to a line of

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25 *Supra* note 6, at p. 18.
26 *Snare & Triest Co. v. Friedman*, supra note 27, at p. 11, 12.
27 *Kuhn v. Fairmont Coal Co.*, supra note 19.
29 *Dissenting in Kuhn v. Fairmont Coal Co.*, supra note 19.
32 Mr. Justice Field dissenting in *Baltimore & O. R. R. v. Baugh*, supra note 13, at p. 401, 13 Sup. Ct. at p. 927: "I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views ... I have myself in many instances ... but I think now erroneously, repeated the same doctrine. But notwithstanding ... the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States ..."
state decisions so numerous that they can be said “to establish a rule of conduct.” And the decisions of the state are frequently given “considerable weight for the sake of harmony and to avoid confusion when the question is balanced with doubt.” The confusion of the cases on whether a question relates to “local law” or “general jurisprudence” contributes much to the uncertainties of law. Perhaps the most serious objection, however, is that substantive rights are made to depend upon the chance circumstance of diversity of citizenship. Thus two choses in action are held against a debtor domiciled in a state whose courts apply the English doctrine of Dearle v. Hall. One chose is held by a resident creditor who assigns it successively to two non-resident assignees, A and B. B gives prior notice to the debtor and is accorded priority by the state courts. The other chose is held by a non-resident creditor who also successively assigns to A and B. B gives prior notice to the debtor as before. Here A can sue in the federal courts which prefer the prior assignee and B is not protected. This is the very inequality of law between residents and non-residents which Sec. 34 was passed to prevent. The doctrine of Swift v. Tyson has become so firmly entrenched that a cure will hardly be effected by judicial legislation. Is it too optimistic to hope for another and more explicit act of Congress?

CONFIDENTIAL RELATIONSHIP BETWEEN BANKER AND CUSTOMER

The inadequacy of describing the relationship of banker and depositor as merely that of debtor and creditor is illustrated by a recent English case. In Tournier v. National Provincial & Union Bank of England [1923, C. A.] 40 T. L. R. 214, the defendant bank had informed the plaintiff's employer that checks payable to the plaintiff had been indorsed by him to a bookmaker, and intimated that the plaintiff's overdraft of his account was due to his having engaged heavily in betting. In a suit for breach of an implied duty not to disclose information concerning the plaintiff or his account, the lower court instructed the jury that if the disclosure was made on a reasonable and proper

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4 Bucher v. Cheshire R. R., supra note 11; Snare & Triest Co. v. Friedman, supra note 27. It has been held that state decisions on a subject of general law will be followed when the situation is such that a party would otherwise be subject to double payment of the same debt. Sonstiby v. Keeley (1882, C. C. D. Minn.) 11 Fed. 578.


4 Supra note 31, at p. 769, note 17.

4 The assignee of a chose cannot sue in the federal courts unless his assignor could have done so. See Citizens' Savings Bank & Trust Co. v. Sexton (1924) 44 Sup. Ct. 338.

4 Supra note 44.
occasion, the bank was not liable. In reversing a judgment for the defendant, the Court of Appeal held that the jury should have been more definitely instructed as to the nature of the duty owed by the bank, that there was such a duty implied from the contract, although a disclosure for the bank's own needs, or with the consent of the customer, or in discharge of a legal or public duty, would be legally privileged. It is remarkable that such an important problem seems never to have been definitely decided by either the American or English courts.  

That the relationship of banker and customer is one which the courts are astute to protect is illustrated by those cases which hold that libellous communications by a bank to its customer are conditionally privileged. The credit structure is strengthened if bankers keep their customers fully informed about such matters as may affect their interests. Not only is the bank privileged thus to serve its customer but it is placed under a duty to pay substantial damages for a wrongful dishonor of a merchant's check. Some courts award substantial

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1 The pass book provided that "the officers of the bank are bound to secrecy as regards the affairs of the customers." It seems that the decision would have been the same even in the absence of this provision. Thus Scrutton, L. J., said, "... I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances." 40 T. L. R. at p. 219.  
2 In Tassell v. Cooper (1890) 9 C. B. 590 this point was raised by counsel, but was abandoned since he was winning on another count. In Foster v. Bank of London (1862, C. P.) 3 F. & F. 214, the court instructed the jury to find whether a bank was under such a duty. In Hardy v. Veasey (1868) L. R. 3 Exch. 107, the court instructed the jury that even if there was such a duty, disclosure on a reasonable and proper occasion would be privileged. See Grant, Law of Banking (6th ed. 1910) 6; Morse, Banks and Banking (5th ed. 1917) sec. 294. "It has never been definitely decided whether the duty of secrecy is a legal one giving right to at least nominal damages or a moral one only, or an incident of a larger duty on the part of the banker not to do any act to the prejudice of the customer." Paget, Law of Banking (3d ed. 1922) 77.  
3 On the relation of banker and customer being established, if, by virtue of the existing relation the bank be entrusted with a cheque for certain purposes, the occasion of privilege arises, and it is then the bank's duty to notify everything to the customer which seems to affect his interest." Levy v. Union Bank of Australia (1896) 21 Vict. L. R. 738; see Lewis v. Chapman (1857) 16 N. Y. 369. Communications to non-customers are also privileged if made in answer to a specific request. Robshaw v. Smith (1878, C. P.) 38 L. T. R. 423; Richardson v. Gunby (1912) 88 Kan. 47, 127 Pac. 533. Similarly where the communication is made by a mercantile agency. Pacific Packing Co. v. Bradstreet (1914) 25 Idaho, 696, 139 Pac. 1007; 12 Ann. Cas. 149, note; ibid. 1916 D, 364, note; contra: Macintosh v. Dun [1908, P. C.] A. C. 350. But the language of the courts where the communication is made by a bank to a customer is clearly indicative of an appreciation of the existence of a close relationship,  
4 Rolin v. Stewart (1854) 14 C. B. 595; Hilton v. Jessup (1907) 128 Ga. 30, 57 S. E. 78; Browning v. Bank of Vernal (1922) 60 Utah, 197, 207 Pac. 462. Where the depositor is not a merchant, substantial damages are not allowed unless specially
damages because they regard banks as "quasi-public" institutions. Others reach the same result by analogy to slander of a merchant in his trade. In either case the result reflects an appreciation of the closeness of the relationship and the social advantage of creating certain special rights and privileges in the parties.

The classic examples of confidential relationships are those of attorney and client, and physician and patient. There, as with the banker the relationships are furthered by privileging communications of the attorney to his client or physician to his patient. Furthermore the attorney or physician is under a duty not to disclose confidential communications of his client or patient. The law goes even further in such cases and requires such communications to be kept secret even as against the interest of the community in the ascertainment of truth in court, a greater social advantage being seen in secrecy than in disclosure.

Business cannot to-day be carried on without banks. A customer makes many confidential statements to his bank for purposes of borrowing, and any open-eyed banker learns much by merely handling a checking account. The disclosure of these matters might be highly injurious to the customer or his credit and invaluable to his competitors. This relationship is equally as important to society as is that of attorney and client or physician and patient, and confidence is just as essential to the one as to the others. The court's conversion into a legal duty of what was certainly a moral duty is commendable. While Atkins and Bankes, L.JJ., were of the opinion that the bank was under a duty not to disclose any information concerning its customers or their accounts that it may have received in its character proven, there being no presumption of injury to credit. Friedman v. Edgewater State Bank (1919) 215 Ill. App. 36; First National Bank of Huntsville v. Stewart (1920) 204 Ala. 199, 85 So. 529. But in New York even if the depositor is a merchant, substantial damages will be allowed only if the dishonor is wilful. Meyer v. Hudson Trust Co. (1917, 1st Dept.) 181 App. Div. 69, 168 N. Y. Supp. 387; Wildenberger v. Ridgewood National Bank (1921) 230 N. Y. 425, 130 N. E. 660. If substantial damages are granted because of the presumption of injury to credit, it is difficult to see why the New York courts should require a wilful dishonor.

Patterson v. Marine National Bank (1889) 130 Pa. St. 419, 13 Atl. 632. 8


1 Comyns, Digest (5th ed. 1832) 348; Taylor v. Blacklow (1836, C. P.) 3 Bing. N. Cas. 235.

Hart v. Therien (1879) 5 Que. L. R. 267; Simonsen v. Swenson (1920) 104 Neb. 224, 277 N. W. 831; Notes (1921) 34 Harv. L. Rev. 312.

5 Wigmore, Evidence (2d ed. 1923) secs. 2291, 2380.
as bank, Scrutton, L.J., thought the duty should extend only to information received from the account itself. While one hesitates to dispute Lord Justice Scrutton's view on any subject pertaining to commercial paper, his limitation of the bank's duty of non-disclosure to information received from the account itself seems illogical. It is difficult to perceive why the disclosure of information received from a source other than the account should be less damaging than that received from the account itself.\footnote{As pointed out above, the court said that a disclosure would be privileged if made in discharge of a legal or public duty. If the term "public" is used in the sense of "legal," it is mere repetition; if in any other sense, the scope of the exception is so broad as to make the rule extremely flexible.}

\section*{Counterclaims Under Modern Codes}

The usual provision in the Codes respecting counterclaims is that which first appeared in the New York Code of Civil Procedure of 1848. Section 501 of that statute reads:

"The counterclaim. . . must tend in some way to diminish the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents and in favor of the defendant. . . .

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.\footnote{See Pomeroy, \textit{Code Remedies} (4th ed. 1904) sec. 472, note 1, for a collection of statutes. See also \textit{ibid.} sec. 502.}

It is under paragraph one that most of the difficulty arises in construing this section, since no attempt was made to define the terms used, "cause of action," "transaction," and "subject of the action." These terms also appear in other parts of the Codes,\footnote{N. Y. Laws, 1848, ch. 379. This section has been taken over almost literally into the Civil Practice Act; \textit{N. Y. Laws}, 1920, ch. 925, sec. 266. There is no corresponding section in the Connecticut Code; see Conn. Gen. Sts. 1918, ch. 294. But substantially the same rule has been adopted by decision. \textit{Downing v. Wilcox} (1911) 84 Conn. 437, 80 Atl. 288.} and it seems reasonable to suppose that the legislatures intended to give them the same meaning in all connections.\footnote{See for example \textit{N. Y. C. C. P.} sec. 446 as to joinder of parties plaintiff; sec. 481 as to the contents of the complaint; sec. 484 as to the joinder of causes.}

The term "cause of action" has been less troublesome than the other requirements, though it has been the source of considerable confusion of thought in other connections,\footnote{For an interesting opinion regarding the definition of these terms, see \textit{McArthur v. Moffet} (1910) 143 Wis. 554, 574, 128 N. W. 445, 448.} especially with respect to

\footnote{\textit{ibid.} sec. 602.}
joinder of causes, and the splitting and consolidation of demands. This is largely due to the faith which has been placed in the definition advanced by Mr. Pomeroy, that "the primary right and duty and the delict or wrong combined constitute the cause of action." This definition has been subject to criticism, which appears to be well-founded. Thus, it has been pointed out that in this form it would not be applicable to actions for the partition of land, or for the probate of a will, where a delict or wrong is not an essential element. Pomeroy's statement is rather a definition of a right of action, and since it is recognized that one cause of action may give rise to several rights of action, it seems more correct to regard as the cause of action the operative facts out of which a right to relief through the courts arises.

The tendency of the courts to permit an amendment during the trial changing the legal theory of recovery, and therefore changing the nature, and sometimes the extent, of the remedial right, substantiates this proposition. In interpreting the other terms in question, it is necessary to keep in mind that the purpose of the codifiers in expanding the common law rules as to counterclaims, and permitting the trial of more issues in one suit than was formerly possible, was to avoid circuity of action.


*Hinton, Cases on Code Pleading (2d ed. 1922) 22, note 4.*

*Phillips, loc. cit. supra note 9.*

*These terms are clearly not synonymous. Thus, injuries to both person and property inflicted at the same time, by the majority view, are regarded as constituting but one cause of action, although more than a single primary right is involved. *Jenkins v. Skelton* (1920) 21 Ariz. 663, 192 Pac. 249; *Anderson v. Jacobson* (1919) 42 N. D. 87, 172 N. W. 64; (1923) 32 Yale Law Journal, 506.


*Phillips, op. cit. supra note 9, sec. 247; (1921) 21 Col. L. Rev. 196.*

*(1873) 36 & 37 Vict. c. 66. Sec. 20 of the Rules of Procedure reads: "A defendant may set off, or set up, by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment
It permits a defendant to counterclaim wherever, in the discretion of the court, it might be conveniently tried together with the plaintiff's case. The American Codes do not go to this length, yet it seems possible, without undue distortion of the words of the statutes, to reach approximately the same result.

A transaction, as used in the Codes, is not necessarily a series of negotiations leading to the formation of a contract, nor is it the actual formation of the contract, though this view formerly had some support. It is clear from the decisions that there need not be more than one active party to a transaction. A transaction has been held to include in an action for services, the performance of the services; in an action of replevin, the wrongful taking of the property; a trespass to realty; a sale of goods; the conversion of

in the same action, both on the original and on the cross claim. But the Court or Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.


Pomeroy, op. cit. supra note 1, sec. 367 defines a transaction as a “negotiation, or a proceeding, or a conduct of business, between the parties, of such a nature that it produces, as necessary results, two or more different primary rights in favor of the plaintiff, and wrongs done by the defendant which are violations of such rights.” Emerson v. Nash (1905) 124 Wis. 359, 389, 102 N. W. 921, 928: “Any event in which two or more persons are actors, involving a right which may presently or by what may proximately occur in respect thereto be violated, creating a redressible wrong, is a transaction within the meaning of the statute.” McArthur v. Moffet, supra note 4, at p. 572: “At first glance both Pomeroy’s definition and the definition given in the Emerson case might seem to imply that both parties to the action must be active participants in the event or affair in order that it constitute a transaction. If this were so, neither a trespass on land in the absence of the owner, nor an unfounded claim of title to land in like absence, would amount to a transaction. . . . The definitions referred to do not, when properly understood, mean that both parties must actually be present in order that an event or affair may rise to the dignity of a transaction. If the act of one person wrongfully invades or infringes upon the right of another there is undoubtedly a transaction, though the injured party be not physically present.” See also Scarborogh v. Smith (1877) 18 Kan. 399, 406; Craft Refrigerating Machine Co. v. Quinsipae Brewing Co. (1893) 63 Conn. 351, 350, 29 Atl. 76, 77; Drincbier v. Wood [1899] 1 Ch. 393. A number of the authorities are collected in L. R. A. 1916 C, 445, 504.

Steiblcy v. Dixon County (1901) 61 Neb. 499, 85 N. W. 399.

Osmers v. Furey (1905) 32 Mont. 581, 81 Pac. 345.

Sharp v. Kinsman (1882) 18 S. C. 108; Stolze v. Torrison (1903) 118 Wis. 315, 95 N. W. 114.

chattels;\textsuperscript{28} an arrest.\textsuperscript{24} The term may be defined as any act or connected series of acts, affecting the legal relations of two or more persons.\textsuperscript{25}

An equally liberal construction of the term "subject of the action" may be reached. It has been applied to include the land encroached on in an action for a trespass to realty;\textsuperscript{26} the title to land;\textsuperscript{27} a debt;\textsuperscript{28} a mortgage and the property covered by it;\textsuperscript{29} chattels;\textsuperscript{30} and the like.\textsuperscript{31} There is some difference of opinion among the text writers as to the meaning of the term. Pomeroy at one place interprets it as applying to the physical object involved,\textsuperscript{32} and at another as being the plaintiff's primary right which has been broken.\textsuperscript{33} The latter, of course, is open to the same objection as his definition of a cause of action, as all actions do not include the breach of a right; nor would there in all cases be a physical object which could properly be called the subject of the action.\textsuperscript{34} By defining the "subject of the action" as the subject-matter of the action or an interest of the plaintiff in that subject-matter,\textsuperscript{35} most of the existing authorities would be harmonized, and the purpose of the Codes could be fulfilled. It is obvious that the subject-matter need not be tangible property, but may be a chose in action or a relationship such as marriage.

Admittedly the liberal construction advocated above leaves much

\textsuperscript{23} First National Bank v. Thompson (1913) 41 Okla. 88, 137 Pac. 668.
\textsuperscript{24} Rothschild v. Whitman, supra note 17.
\textsuperscript{25} "As the word is employed in American codes of pleading and in our own Practice Act, a transaction is something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered." Baldwin, J. in Craft Refrigerating Co. v. Quinnipiac Brewing Co., supra note 18.
\textsuperscript{26} Venable v. Dutch (1887) 37 Kan. 515, 15 Pac. 520.
\textsuperscript{27} Grignon v. Black (1890) 76 Wis. 674, 45 N. W. 122.
\textsuperscript{28} McCormick Harvesting Machine Co. v. Hill (1904) 104 Mo. App. 544, 79 S. W. 745.
\textsuperscript{29} Metropolitan Trust Co. v. Tonawanda Valley R. R. (1887) 106 N. Y. 673, 13 N. E. 937.
\textsuperscript{30} Carpenter v. Manhattan Life Ins. Co. (1883) 93 N. Y. 552.
\textsuperscript{31} A number of cases are collected in L. R. A. 1916 C, 445, 471, note.
\textsuperscript{32} Pomeroy, op. cit. supra note 1, sec. 369.
\textsuperscript{33} Ibid. sec. 651.
\textsuperscript{34} For example, in an action for divorce, in which the subject of the action would be the marital relationship, and the interest of the plaintiff in it.
\textsuperscript{35} Compare Bliss, Code Pleading (3d ed. 1894) sec. 126: "In an action for a tort, the injury complained of is the wrong, and the subject of the action would be that right, interest [relation], or property which has been affected—as, in replevin or trover, the property taken; for libel or slander, the plaintiff's character or occupation; for an injury to a servant, the service; for the seduction of, or for harboring a wife, the marital relation; for negligence, the duty, property, or person in respect to which the negligence occurred; for false imprisonment, the plaintiff's liberty; and for trespass upon property, the property."
to the discretion of the court in each case. However, as the Codes contain no definitions of the terms used, it seems likely that this result was intended. Furthermore, the allowing or disallowing of a counterclaim rarely prejudices either party to a suit. If the defendant has a valid claim, it would be equally valid in an independent action. So, assuming that the requirement as to parties, and the requirement that the counterclaim must tend in some way to defeat the plaintiff’s recovery, are satisfied, it is submitted that the controlling factor in determining the disposition of the counterclaim should be the probable effect of the counterclaim on the trial of the suit. If it appears that the issues in the plaintiff’s case and in the counterclaim are similar, and that the same witnesses, for the most part, are required for both actions, it would expedite the administration of justice to allow the counterclaim. On the other hand, if it is felt that the counterclaim will confuse the issues for the jury, or otherwise hamper the action of the court, it should be denied. In most instances where this would be true it does not seem that the liberal construction of terms set out above would prevent this. Sufficient latitude remains by construction of the phrases “arising out of” and “connected with,” to permit rejection. How directly the cause of action must arise out of the transaction, or how closely it must be connected with the subject of the action, to be the basis of a counterclaim, might properly be left to the circumstances of each case.

A recent case illustrates how these principles might be applied. In Bank of Charleston, National Banking Assoc. v. Bank of Neeses (1923, S. C.) 119 S. E. 841, the plaintiff bank had by mistake credited the defendant’s account with $1,000, which amount was later demanded of the defendant, and payment refused. In the plaintiff’s action on an implied contract to repay the money, the defendant set up three counterclaims for libel and slander, which, the defendant alleged, took place two years after the indebtedness arose, and which were committed because the plaintiff was angry with the defendant for not paying the indebtedness. The plaintiff demurred to the counterclaim. Under the interpretations advocated above, the transaction on which the plaintiff’s claim is founded is the act of crediting the defendant’s account. The subject of the action is the asserted quasi-contractual right and the entire situation concerning it—the aggregate of the operative facts. There appears to be no logical necessity for deciding that

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38 “Transaction connected with the same subject of action may include any transactions which grow out of the subject matter in regard to which the controversy has arisen; as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also any injury to them by his fault or neglect; the breach of a covenant for quiet enjoyment by the entry of the lessor, and also a trespass to goods committed in the course of the entry.” Rules of the Superior Court, sec. 187, CONN. PRACTICE BOOK (1922) 285. This is a rule formulated by the judges under the rule-making power authorized by Conn. Gen. Sts. 1918, ch. 288, sec. 5475.
the defendant's counterclaims did not arise out of the crediting of the defendant's account. As the defendant contended, had this not occurred the plaintiff would not have become angry with the defendant, and would not have defamed him. This might be a broader application of the rules of causation than is ordinarily recognized, but there is no necessity for applying in this connection the same rules of legal cause that are applied in a tort action for negligence. The lapse of two years does not of itself break the chain of causation; but the lapse of a considerable length of time leaves it open for the court to decide that the connection is too remote and that the defendant's cause of action did not arise out of the transaction on which the plaintiff's claim was founded. In the instant case the court so decided, and sustained the plaintiff's demurrer to the counterclaims.

Applying the test of convenience of trial, the decision seems sound. An action for defamation presents different issues from those involved in a contract action based on an unjust enrichment. A different set of witnesses, for the most part, might be required for each claim. These factors in themselves are not conclusive. But actions of defamation frequently result in the award of nominal damages, and frequently are based largely on wounded sensibilities rather than actual injury. Being one of the vindictive actions, it is possible that it would create undue heat and passion which might tend to hamper a clear presentation of the facts of the plaintiff's case to the jury. These practical considerations might well have formed the basis of the court's decision in denying the counterclaims.

COLLISIONS IN TERRITORIAL WATERS AND THE CONFLICT OF LAWS

Does the nature of Admiralty Jurisdiction or do the rules of international law require a court in determining liability for collisions in foreign territorial waters to vary the usual rule of the conflict of laws as to tort obligations? A recent Scottish case, Owners of S. S. "Reresby" v. Owners of S. S. "Cobetas" (Outer House) 1923, Scots L. T. 719, answered this question in the affirmative. A Spanish ship collided with an English ship in French territorial waters. The owners of the latter sued the owners of the former in a Scottish court. The defendants pleaded that the law of the locus delicti should govern and that by this law they were discharged from liability because their ship was sunk in the collision. The court held that the law of the forum applied and dismissed the plea.

The court found it necessary to hold that "the locus commissi here is

1 The usual rule that in tort cases the law of the locus delicti governs, has a peculiar variation in England. The English courts will not give relief for an alleged foreign tort unless the act was wrongful by the law of the locus, and would, if committed in England, be a tort by English law. See Dicey, Conflict of Laws (1896) 659.
part of the high seas, although within the territorial waters of France." The court said that the accident occurred *intra fauces terrae*, or within "the land territory of France" where the French state would have exclusive jurisdiction, the French law would be applied. But this jurisdictional difficulty does not in fact exist. The court seems to be confused, as courts frequently are, by the different uses of the word "jurisdiction." In the first place, there is what we may call "local court jurisdiction," which is a question determined by the local law as to what court—admiralty, probate, appellate, equity—the government has authorized to handle a certain part of the judicial business. In the second place there is what may properly be called "territorial jurisdiction" which, it is submitted, is determined by international law. By virtue of this "jurisdiction" a state has the exclusive legal privilege of acting through its agents upon persons and property while they are within its territorial limits, and a right that no other state shall so act. For example, the officers of State X alone may rightfully serve A with process in the territory of that state, though it is true that the officers of State Y by wrongfully serving A in X's territory, have the power to affect his legal relations before Y's courts. Under this head we may also class the phenomenon which has grown up possibly more as a matter of convenience than of law, that a state may lay down rules according to which persons while within its territory will normally govern their conduct. This does not mean that a foreign court may not also attach similar or different legal consequences to such conduct. And thirdly, there is jurisdiction which involves elements of the other two and which upon analysis seems to be that to which courts (albeit usually unconsciously) have reference in cases involving the conflict of laws. It is this "conflicts jurisdiction" which is here under discussion. In this sense jurisdiction is merely a question whether a particular court has power to attach legal consequences to certain operative facts. Given the power, the determination of what consequences will be attached is a matter of convenience and policy. Whether the Scottish court had "jurisdiction" is merely a question whether it had the power to affect the legal relations of the parties litigant. Any legal limitations upon such a power "must be found in positive law of some kind—be the same international law or constitutional law, and do not inhere in the constitution of the legal universe." The term "exclusive jurisdiction" implies some such inherent necessity for any forum which may

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2 At p. 721.
3 Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 *Yale Law Journal*, 457, 484. Professor Cook analyzes the orthodox view of jurisdiction which considers that there is only one appropriate or proper law which can attach legal consequences to a given situation. There might be another bar of "self-limitation" as when a court having originally had a choice decides not to take jurisdiction thereby binding courts in the future on the basis of *stare decisis*. Here we may place certain well-settled rules of the conflict of laws which have come to be a part of our legal system.
be seised of the case to attach consequences according to the law of the locus. The territorialist school pictures some such natural necessity. There was in the case under consideration no constitutional bar (if we may use the term in a broad sense to denote internal as distinguished from international control). An English statute of 1861 provides that "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Dr. Lushington, the noted English Admiralty judge, in interpreting this statute fixed a realm of admiralty jurisdiction which has no territorial limits. In the leading case, The Diana, he asserted the court's jurisdiction over a collision in the Great North Holland Canal, a body of water geographically well within the territory of Holland. That the owners of both vessels were foreigners made no difference. This position is in accord with the general maritime practice of the world. It is natural that a branch of the law which centers around ships which are here to-day and there to-morrow, should find little difficulty in vesting power in the courts of any state within whose territory the ship may be found, especially since the procedure is in rem. Nor does international law forbid the exercise of such power. The high seas are common ground and the fiction of the territoriality of vessels has never been extended to grant exclusively to the state of the flag the power to pass upon collisions at sea which are said to be communis juris. In territorial waters, international law recognizes two spheres: first, what we may call the marginal sea proper, through which the ships of all nations have a right of innocent passage, subject to the control of the littoral state only in so far as the interests of that state may be affected by the actions of the ship or of those on board. The littoral state may impose rules of navigation and the like; that is, it has "territorial jurisdiction" but no claim to "exclusive jurisdiction" in the conflicts sense may be asserted. Second, inland waters, or waters intra fauces terrae, including ports and harbors where the littoral state exercises a larger but not exclusive control. There is then no necessity for the assumption that the locus

The Admiralty law of Scotland is the same as that of England. See the decision in the instant case in 1923, Scots L. T. 492, 493; Roscoe, Measure of Damages in Maritime Collisions (2d ed. 1920) 133.

\(^4\) The Admiralty law of Scotland is the same as that of England. See the decision in the instant case in 1923, Scots L. T. 492, 493; Roscoe, Measure of Damages in Maritime Collisions (2d ed. 1920) 133.

\(^4\) 24 Vict. c. 10, sec. 7.

\(^4\) See Marsden, Collisions at Sea (7th ed. 1919) 220.

\(^1\) (1862, Adm.) 1 Lush. 539.

\(^1\) \(\text{The Courier} (1862, \text{Adm.}) 1 \text{Lush. 541.} \text{The Ida} (1862, \text{Adm.}) 1 \text{Lush. 6.} \) contains a few statements which might be construed as contra to The Diana, but jurisdiction was refused in that case not because of the locus, but because the nature of the act did not give rise to a maritime cause of action.

\(^9\) To discuss the varied views which have been expressed on the nature of the marginal sea, is beyond the scope of this comment. Most general works on international law touch on this problem. See 1 Moore, Digest of International Law (1906) sec. 144; 2 ibid. sec. 203; Hall, International Law (7th ed. 1917) 155; 1
delicti in the instant case was on the high seas, and furthermore, it is unjustified as a principle of international law.\footnote{1}

Assuming then that the court may determine the legal consequences of a collision in foreign territorial waters, what rule of law is it to apply?\footnote{12} For convenience we may discuss the problem under three heads: Navigation, Compulsory Pilotage, and the Liability of the Shipowner. The first two cover the determination of the fact of negligence or fault, and the third refers to the question of how the penalty shall be borne when the blame has been placed.\footnote{13}

The power of the state under international law to lay down rules for navigation of foreign ships within territorial waters has been noted. Just as an automobilist in France must keep to the right, so it seems natural that a ship in French waters must obey the rules of the searoad.\footnote{14} This is the general view of the English courts which have applied local rules of harbors, rivers, and other foreign waters.\footnote{15} In

Westlake, International Law (1904) 189. Among special works, see Latour, La Mer Territoriale (1889); Raestad, La Mer Territoriale (1913); Crocker, The Extent of the Marginal Sea (1919); cf. Comments (1923) 33 YALE LAW JOURNAL, 72.

\footnote{3} The court (at p. 721) shows some realization of this point. See Lorenzen, Cases on the Conflict of Laws (2d ed. 1924) 282, note 30, for a statement of American, continental, and South American law.

\footnote{10} Professor Cook in his article op. cit. supra note 3, at p. 468, discusses the real meaning of "applying foreign law." In the instant discussion "foreign law" is used to mean the foreign domestic rule only.

\footnote{13} Whether A is liable for the act of B, or whether A when liable can limit his liability, appears clearly to be a matter of substance and not of procedure; the extent of rights and duties and their very nature are involved.

\footnote{4} It is perhaps well to note in this connection the language of the court in The Halley (1868) 5 Moore P. C. (n. s.) 262, 276: "As in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is . . . alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal Law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed." Yet the court will withhold damages in respect of an act according to English law does impose liability on the person from whom the damages are claimed, if the foreign law give no such remedy. The M. Moxham [1875] L. R. 1 P. Div. 43.

\footnote{17} The Calein Austin (1904, New Brunswick Adm. Dist.) 9 Exch. Ct. 160 (Boston Harbor rules); The Diana (1894, P. C.) L. R. 19 A. C. 625; The Yourri (1889, P. C) L. R. 10 A. C. 276 (Danube River rules); The Talabot (1890) 15 P. 194 (customary rule in the Scheldt); contra: The City of Berlin [1908, C. A.] P. 110 (Elbe river rules not inquired into by court) see The Kaiser Wilhelm der Grosse [1907, C. A.] P. 259 (Cherbourg Harbor rules). In two
American courts, the exact question has not often been raised, but it seems that the local rule would be applied. On principle, English rules of navigation should equally apply to foreign ships in British waters and the Merchant Shipping Amendment Act of 1862 so provided. It seems that local English rules for river traffic should be enforced against foreign ships, but the English courts were reluctant to admit this. It has been said that foreign municipal regulations for the navigation of harbors and rivers have not the force of law in the English court but are important in determining liability for collision in foreign waters. It is true that the English court will administer only English law (which includes the English interpretation of the general maritime law) but the court seems to admit that it is negligence not to obey a foreign local regulation for navigation. Thus indirectly the foreign rule is given effect in England. We can therefore say that if in the X River a local regulation requires an ascending vessel to give way to a descending vessel, this regulation is accepted as part of the law of England, by which we mean that we can prophesy that if an ascending ship does not give way and a collision results, that ship must answer to the descending ship in damages, the payment of which will be enforced by the officers of the English court who will detain the ship as security if she visits an English port. In these cases it seems the English courts do not insist on finding a general rule of the forum which would make the particular act a tort.

In British courts the difficulty in pilotage cases arose from the fact that until 1918, by the English law, compulsory pilotage was a good case. Dr. Lushington held that the general maritime law applied to collisions in Turkish waters. The Griefswald (1859, Adm.) Swabey, 430; The Ticonderoga (1857, Adm.) Swabey, 215.


19 25 & 26 Vict. c. 63, sec. 57; see Marsden, op. cit. supra note 6, at p. 219; cf. The Vera Cruz (1884, C. A.) L. R. 9 P. Div. 96. Before the passage of that act, the cases were divided although the higher courts took the view which was later sanctioned by Parliament. See The Borussia (1856, Adm.) Swabey, 94, 95; The Milford (1858, Adm.) Swabey, 372, 367; General Iron Screw Collier Co. v. Schumanns (1860, Ch.) 1 John. & Hem. 180, 191; The Saxon (1861, P. C.) 15 Moore, P. C. 262, 267; see Lowndes, Collisions at Sea (1867) 183.

20 See Marsden, op. cit. supra note 6, at p. 227.

21 The Pyrenoord (1858, P. C.) Swabey, 374; cf. The Saxonia, supra note 17, at p. 267; see Lowndes, op. cit. supra note 17, at p. 184.

22 See Marsden, op. cit. supra note 6, at p. 227; Lowndes, op. cit. supra note 17, at p. 187, and case there cited.

23 The Diana, supra note 15.

24 See Cook, op. cit. supra note 3, at p. 476.

25 The Pilotage Act of 1913, 2 & 3 Geo. 5, c. 31, sec. 15, changed the English law by abolishing the defense of compulsory pilotage. By par. 2 of this section it was provided that the section should not take effect until 1918. See Digby and Cole, Pilotage Law (1913) 23.
defense in a collision suit, because the pilot who was in full control of the ship was not an agent chosen by the party, and therefore the doctrine of *respondeat superior* could not apply. But by the continental practice, the compulsory pilot had merely an advisory capacity and his presence on board did not relieve the ship from liability for a collision.

Should the English court then say that facts of collision + compulsory pilotage = non-liability, or should it examine the nature of the second term under the local law? In *The Halley*, the Privy Council held that when the pilot was compulsory, there would not be any liability in an English court, although the law of the *locus*, Belgium, made the ship responsible. The true nature of the pilot’s function in Belgian law was apparently not properly presented by counsel, and the court considered that the pilot was in full control. The Court of Appeal in a later case took a sounder view, probably based on more complete information as to the foreign law, saying: “With the law of France we are not concerned. We are concerned with the law of England, and in an English case we are bound by the law of France because the law of France establishes what are the circumstances of the appointment and employment of the pilot. When you find that the pilotage is such that it comes under one head of the English law rather than another, you adopt the terms of the employment according to the English law.” They found that the law of France did not put the pilot in full control and that therefore there was no compulsory pilotage in the English sense, and the ship was liable. In almost every other English case the court has looked at the local pilotage laws to ascertain whether or not the pilot did actually control the ship. It is obvious that if there was no such control there was no reason for applying the English rule. In *The Andoni*, the court said that compulsory pilotage *prima facie* meant that the pilot was in control and that the plaintiff had the burden of showing he was merely an advisor. This is probably nothing more

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24 See *The Halley*, *supra* note 14, at p. 274.
26 *Supra* note 14.
27 In *The Augusta* (1887, C.A.) 6 Asp. M. C. 161, 162, *The Halley* was explained on the assumption that the Belgian or Dutch law did not make the pilot merely advisory. That this view was erroneous, see (1904) 76 *Pandectes Belges*, 771; art. 31 of the Reglement of May 20, 1843. At p. 795, par. No. 14, the author of the *Pandectes* says, “Le pilote n’est que le conseiller du capitaine et la législation belge n’enlève jamais au capitaine, ni la direction, ni la responsabilité de son navire.” See Roscoe, *Admiralty Practice* (3d ed. 1903) 180, note (a).
28 *The Augusta*, *supra* note 27.
30 *The Guy Mannering* (1883, C.A.) L. R. 7 P. Div. 132; *The Dallington* [1903] P. 77 (Belgian law); *The Prince Hendrik* [1899] P. 177 (Dutch law); *The Agnes Otto* (1887) L. R. 12 P. Div. 56 (International Danube regulations); *The Peerless* (1860, Adm.) 1 Lush. 30 (British colonial law).
than a way of stating the rule that the foreign law must be proved. But if before 1918\textsuperscript{22} the foreign law had provided that though the pilot was merely advisory the ship was relieved from liability, or if at the present time a foreign state granted freedom from liability when the pilot was in absolute control, there would in both cases be sufficient facts to create liability under the English law, but there would be no wrongful act in the \textit{locus delicti}. Under the peculiar English doctrine of the conflict of laws requiring the act to be a wrong both by the English law and by the law of the \textit{locus}, a recovery would be denied in both cases.\textsuperscript{33} The same result would be reached under the general rule applying the \textit{locus delicti}. Practically, such a solution is sound. A ship captain can regulate his conduct according to the law of the country through whose waters he chances to be passing, but it is obviously impossible for him to adjust himself to the rules of any and all forums before which his ship might be haled.\textsuperscript{34} The Supreme Court of the United States did not hesitate to apply the English statute making compulsory pilotage a defense, to a collision occurring in the port of Liverpool.\textsuperscript{35}

With regard to shipowners' liability, this may be of two kinds. Where the proceeding is \textit{in rem}, the owner is liable to the extent of the value of the ship, a result which is conveniently, but from the analytical viewpoint inaccurately, described by the personality theory which says the ship itself is liable. Where the proceeding is \textit{in personam}, the owner may be liable, as in the instant case, though his ship is at the bottom of the sea. It is this latter sort of liability with which we are here concerned. An interesting case is that of \textit{The M. Moxham}.\textsuperscript{36} An English company sued the owners of an English ship for damage done by that ship to the company's dock in Spain. The defendants pleaded that the Spanish law, which does not recognize the doctrine of \textit{respondeat superior}, should govern. The court said that the plaintiff properly conceded that the question must be treated exactly in the same way as if it were being tried in Spain, and, if he would win his suit, he must show that it would be the duty of the Spanish Court, if the action

\textsuperscript{22}It was in that year the Pilotage Act took effect; see supra note 23.

\textsuperscript{23}But see statement of Sir Robert Phillimore in \textit{The Halley} (1867, Adm.) L. R. 2 Adm. & Ec. 3, 13, that pilotage is considered a matter of policy.

\textsuperscript{24}The tendency is to unify the rules of the sea by international convention. The question of collisions at sea was discussed at the International Maritime Committee's Conference of Brussels (1887), Antwerp (1898), London (1899), Paris (1900), Hamburg (1902), and at the diplomatic conferences held in Brussels in 1905, 1909, and 1910. In 1910 an international convention on Collision and Salvage was signed, which has been ratified by most of the important nations of the world. The United States ratified as to salvage only. See International Maritime Committee Bulletin No. 47 (1921) 2. The Antwerp Conference of 1921 passed a resolution urging other states to adhere at once. \textit{Ibid.} XI. The text of the convention is given in Marsden, \textit{op. cit. supra} note 6, at p. 550.

\textsuperscript{25}\textit{Smith v. Condry} (1843, U. S.) 1 How. 28.

\textsuperscript{26}Supra note 14.
had proceeded there, to apply the principles of English law. The court argued that by entering a Spanish harbor, the ship made herself subject to Spanish law, which therefore governs this case and makes it impossible for the plaintiff to place on the defendant a liability not recognized by that law. The court thus commits the error of assuming that because Spain had “territorial jurisdiction” she also necessarily had exclusive “conflicts jurisdiction.” In a later case the House of Lords held that an act in foreign territorial waters which was legalized by a local ordinance was not actionable though a tort under English law. Marsden states that if a collision occurs in foreign territorial waters where the local law does not make the owners liable for the acts of the officers and crew, the owners will not be held liable in England. But he also states that if two foreign ships collide in foreign waters, the English Admiralty rule for the division of loss will be applied though it is not part of the general maritime law. The two statements cannot be based on the same principle. The confusion is intensified by the instant case wherein the defendant is refused the benefit of a defense afforded by the rules of the locus.

It seems that the English courts are trying to follow a policy which “limits the creation of rights in case of foreign torts to those which are if not identical with, at least highly similar to, the rights created by the foreign law where the torts were committed.” The tendency today is to unify the rules of the sea by International Convention. The English legislature has taken some steps to iron out the difficulties, and the courts are apparently willing to take a hand in the movement. But where divergencies still exist, the court should apply the law of the locus. As pointed out above, it is only by this law that the captain can reasonably be expected to govern his conduct. The soundness of this reason as applied to general rules of navigation is believed to be obvious. In the pilotage cases the same practical considerations are present. A pilot will naturally govern his conduct by the law under which he lives and by force of which he is taken aboard the ship. Presumably the captain is familiar with that law. If under such law the pilot is advisory only and the captain is still responsible for the negligent handling of the vessel, the latter will be zealous in assisting the pilot and in commanding the ship. If, on the other hand, he knows that the local

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37 This is the renvoi doctrine which cannot be discussed here but which seems to be an undesirable rule for the conflict of laws. See Lorenzen, The Renvoi Doctrine in the Conflict of Laws (1918) 27 Yale Law Journal 591; The Renvoi Theory and the Application of Foreign Law (1910) 10 Coll. L. Rev. 190, 337.


39 At p. 225.

40 At pp. 142 and 229, esp. note (i) p. 142.

41 See Supra, op. cit. supra note 3, at p. 480.

42 See supra note 34.
law puts the pilot in full control and relieves him from liability, his relations with the pilot will be governed accordingly. This reasoning does not apply to our third group of cases (Shipowner's Liability). The limitation of a shipowner's liability is a matter of policy based upon a desire to encourage investments in shipping. It protects the owner of a negligent vessel which is sunk; the owner of the injured vessel can find protection in insurance. Therefore in any given case the court may well as to this personal liability as distinguished from the "liability of the vessel" apply either the rule of the forum or the rule of the \textit{locus} as its local policy dictates. In the absence of a conflicting policy, the interests of uniformity will best be served by applying the rule of the \textit{locus}.

\footnote{For a discussion of the relative merits of applying the law of the \textit{locus}, the forum, or of the flag of either ship, see Cholet, \textit{L'Abordage} (1898) i16. This author prefers to apply the law of the flag of the colliding ship. See also (1888-9) \textit{IO ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL}, i52; Regnau, \textit{Droit Français des Abordages Maritimes} (1891) 284.}