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A Half Century of Jurisdictional Development: From Bananas to Watches

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philosophy. It is this writer's view that to restrict the seller to just one of his remedies when he has a just debt against the buyer is inconsistent with the economic policy of greater distribution of goods. Statutory remedies like those employed in the Uniform Conditional Sales Act tend to be too cumbersome with their periods of redemption and forced sales. But this Act has proved itself to be, in the overall sense, a fairer remedy between the parties than that afforded by the election doctrine. Perhaps a revision of the U.C.S.A. to incorporate some of the advantages of the individual remedies that do exist from the seller's point of view might be beneficial to both the seller and buyer when simple financing is needed. At present, Florida is one of the few states that have enacted no legislation covering this problem.

ALBERT L. WEINTRAUB.

A HALF CENTURY OF JURISDICTIONAL DEVELOPMENT: FROM BANANAS TO WATCHES

It is conventional in an international sense to characterize States as members of a family of nations. The members of this community are considered to be equal from a legal point of view. Accordingly, a State's co-existence within this framework is conditioned upon its acceptance of limitations that should be observed in the exercise of its inherent sovereignty, *i.e.*, unlimited powers. The extent of such limitations is subject to several dynamic pressures. Among these constraining forces are the changing political beliefs and agitations within the community of nations and the external problems facing individual States.

The adjustment of such potential powers of States to the exigencies of a harmonized international community presents a fascinating aspect of international law as reflected by the internal law of the different countries. Not only are the constitutional and conflicts of law approaches of these States affected by this international interplay, but also influenced is their exercise of legislative and judicial powers.

Viewed in its broadest outlines there appears a surprisingly clear trend in our country away from what we may call our early legal introversion. This original unwillingness to deal, in a legal sense, with situations involving foreign elements changed gradually to the disposition to face such problems without evidencing too much concern over the possibility of a lack of legislative or judicial jurisdiction in the traditional sense.

It is elementary to say that all jurisdiction as exercised by a country through its various organs is *prima facie* territorial. Territorial boundaries are, under this proposition, identical with the limitations imposed upon all types of jurisdiction exercised by the States. Such a rigid territorialistic attitude was expressed by Huber to the effect that the laws of every State

have force within its limits and bind all subjects within such confines. To this he allowed certain exceptions, provided there is no prejudice to the sovereignty of other States or their citizens.¹

For a long time our nation followed this territorialistic doctrine. It was adopted by Story in his fundamental commentaries:

. . . Another maxim . . . is, that no State or nation can, by its own laws directly bind property out of its own territory, or bind persons not resident therein whether they are natural born subjects or other . . . for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any nation should be at liberty to regulate either persons or things not within its own territory.²

This attitude of legal isolationism coincides with a parallel period in our national history when we were almost completely occupied with internal problems and were unwilling and unable to spend our scarce energies on foreign affairs. The corollary of such a propensity was the development of a legalistic doctrine leveled at solving our domestic problems, but of limited applicability to local issues which involved international considerations.

It is against such a background of the past century that we must examine the developments of the present. The purpose of this writing, therefore, will be to show, in its broad features, the progressive weakening of our territorial concepts of jurisdiction and the espousal of a more universalistic technique. While jurisdiction is the derivative of our legislative power, it is in the examination of judicial decisions interpreting these legislative commands that this change manifests itself.

The first statute to be examined in relation to this problem will be the Sherman Act.³ The purpose of this Act was to preserve open competition among our business enterprises in both interstate commerce and foreign trade. As such, this early Act presented the problem of whether or not our judiciary would be willing to accept the challenge arising out of extra-territorial acts which might be construed to be within the meaning of the statute.

It is significant that the Sherman Act should have been interpreted at the turn of the century with an approach which restated and applied the principles expressed by Story. The Supreme Court was called on in *American Banana Co. v. United Fruit Co.*⁴ to decide whether or not the statute would apply to acts committed in Costa Rica which were intended to restrain trade within the United States. Justice Holmes, reaffirming the orthodox territorial doctrine, held that the Act could not be defined to include acts occurring outside of our own country. He stated that the ". . . general and almost universal rule is that the character of an act as lawful

1. 1 WHEATON, ELEMENTS OF INTERNATIONAL LAW 126 (3d ed. 1846).

2. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 30 (3d ed. 1846).

3. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946).

4. 213 U.S. 347 (1909).

or unlawful must be determined wholly by the law of the country where the act is done."⁵ He felt that to do otherwise ". . . not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations which the other state concerned justly might resent."⁶ Had the Court wished to interpret the statute to denote these acts as violations, they had adequate support in the wording of the Act which stated that "every contract, combination . . . in restraint of trade of commerce among the several States, or with foreign nations is declared to be illegal."⁷

This case supported the proposition that the evasion of this statute could be accomplished by our own nationals by merely conspiring or acting outside of our territory in spite of the fact that the intended effect of their conspiracy would monopolize the internal market which is within our sovereign jurisdiction. This escape was soon vitiated by decisions⁸ which held that combinations or acts which affected the commerce of this country were within the meaning of the Act.

These last decisions were in line with the international law thought which recognized that one who, outside of a country, willfully puts into motion a force to take effect in it, is answerable at the place where the harm is done.⁹

The Sherman Act was also expressly intended to prohibit the restraint of foreign trade. This statute had the effect of making combinations organized in the export trade illegal. To stimulate and promote our export trade Congress modified this policy in the Webb-Pomerene Act¹⁰ which relaxed the statutory direction that all combinations in the export trade were illegal *per se*.¹¹ The Court, in the interpretation¹² of this Act, fol-

5. *Id.* at 356.

6. *Ibid.*

7. 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946).

8. *United States v. Pacific & A.R. & Nav. Co.*, 228 U.S. 87 (1913) (a combination to control transportation within the United States is within the jurisdiction of the United States notwithstanding the fact that part of the transportation route is outside the United States); *Thomsen v. Caysner*, 243 U.S. 66 (1917) (a combination of ocean carriers which affected the foreign commerce of this country and was put into operation here, is within the meaning of the Sherman Act although the combination was formed abroad); *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927) (monopolization of the supply of an article abroad has the "effect" of restraining the import trade in the United States and so was within our jurisdiction).

9. *Hunting, Extra-Territorial Effect Of The Sherman Act: American Banana Company v. United Fruit Company*. 6 ILL. L. REV. 34 (1911); 1 HYDE, INTERNATIONAL LAW § 238 (2d ed. 1947).

10. 40 STAT. 516 (1918), 15 U.S.C. § 6 (1946).

11. "Nothing contained in sections 1-7 . . . shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade . . . or an agreement . . . provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." 15 U.S.C. § 62 (1946).

12. *Branch v. FTC*, 141 F.2d 31, 34, 35 (9th Cir. 1944) (a correspondence school which was engaged in unfair trade practices, sent all of its material outside the United States. On the defense that there existed no jurisdiction, Judge Minton said: ". . . however, it was conceived, initiated, concocted, and launched on its way in the United

lowed the pattern set by the later Sherman cases as to the irrelevancy of the position that acts done outside of our territory were not within the purview of our legislative jurisdiction.

The extent to which this Act was interpreted was illustrated in *United States v. Minnesota Mining & Mfg. Co.*¹³ In this case a combination of domestic manufacturers, representing almost all of the export trade in coated abrasives, established factories abroad and agreed to refrain from exporting to those countries in which the products of the foreign plants could be sold more profitably. The defendant's position, that the Webb-Pomerene Act sanctioned this activity, was dismissed by the court in the statement that the statute was limited to the sort of export trade which consists in commerce in goods. "Export of capital is not export trade."¹⁴ Had the Court talked in terms of "contacts" instead of the "effect" on the business in the United States it would have taken considerable conceptual juggling to find the prohibitions of the Act applicable in this case.

It appears established that the necessary element in deciding the applicability of these anti-trust statutes is whether there is a deleterious effect on our commerce. "If such effect is present it is immaterial whether the common understanding was entered into in the United States or abroad."¹⁵ These anti-trust statutes were, in their nature, quasi-criminal; we will now examine the territorial extent of the applicability of the criminal law.

As to the criminal legislative jurisdiction of a State there is a general rule of international law which recognizes the taking of such jurisdiction to be warranted whenever there are justifiable contacts between the acts to be declared punishable and the country enacting the law. Therefore, crimes against nationals of a country, or against the public interest of that State, regardless of the place where the acts were committed, may be within the State's jurisdiction.¹⁶ This position found articulation in this country in *United States v. Bowman*,¹⁷ decided in 1922, wherein the Court applied the criminal code¹⁸ to acts which occurred outside of our territory. Unlike the *American Banana* case where interests of private competitors were involved, the conspiracy here was a scheme to defraud the federal government itself. The defendant's argument of no jurisdiction over the act was overruled by

States. That the persons deceived were all in Latin America is of no consequence. It is the location of the petitioner's competitors which counts.")

13. 92 F. Supp. 947 (D. Mass. 1950).

14. *Id.* at 963, Wyzanski, D.J.

15. Comment, *Application of Anti-Trust Laws To Extra-Territorial Conspiracies*, 48 YALE L.J. 1313, 1316, 1317 (1940); *United States v. Nord Deutscher Lloyd*, 223 U.S. 512 (1912) The Immigration Act of Feb. 20, 1907, 34 STAT. 898, 904, c. 1134 was applied in giving relief to an immigrant who entered into a contract in Germany which would be illegal under the Act. The court claiming no extra-territorial effect for the Act held that the making of a contract may, by the condition which is operative in this country, make the omission of this act punishable in this country).

16. S.S. Lotus, Permanent Court of International Justice (1927) Series A No. 10; 1 HYDE, INTERNATIONAL LAW § 238 (2d ed. 1947).

17. 260 U.S. 94 (1922).

18. 40 STAT. 1015 (1918).

the court when it said: ". . . Others (acts) are such that to limit their *locus* to the strictly territorial jurisdiction would greatly curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."¹⁹ They felt that there existed ". . . the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens . . ." ²⁰

A noticeable change of emphasis took place ten years later in *Blackmer v. United States*²¹ in which the Court, no longer on the defensive as to the legislative power of Congress, expressed the thought: "While the legislation of the Congress, unless the contrary appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power."²² The defendant in this case, residing in France, was found guilty of contempt by refusing to appear before a legislative committee. The government attached his property in this country to satisfy the contempt judgment.

An analogous use of the nationality contact upon which to attach jurisdiction was employed in *Skiriotes v. State of Florida*.²³ The defendant, a Florida fisherman, was indicted under a Florida statute²⁴ prohibiting the use of certain fishing devices in the territorial waters of the state. He defended on the ground that his act was accomplished in international waters. The Court summarily dismissed the question of whether the waters were territorial or not and restated the *Blackmer* dicta: ". . . with respect to such exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government."²⁵ "Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place."²⁷

Lest it be understood that only nationality would be used as a contact in applying our criminal statutes extra-territorially, the decision in *United States v. Archer*²⁸ should dispel that assumption. The defendant

19. *United States v. Bowman*, 260 U.S. 94, 98 (1922).

20. *Ibid.*

21. 284 U.S. 421 (1932).

22. *Id.* at 437.

23. 313 U.S. 69 (1941).

24. FLA. STAT. § 374.27 (1951).

25. *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

26. *Skiriotes v. State of Florida*, 313 U.S. 69, 73 (1941).

27. *Id.* at 76. This case presents an interesting question. The purpose of the statute is the preservation of certain fishing from unreasonable exploitation. Would the Court find that jurisdiction existed over a non-citizen violating the statute in international waters? Not to extend such jurisdiction would be, in effect, to put the State's own citizens at a disadvantage. See 1 HYDE, INTERNATIONAL LAW § 227 C (2d ed. 1947).

28. 51 F. Supp. 708 (S.D. Cal. 1943).

was charged with the violation of a United States statute²⁹ when he appeared before an American vice-consul in a foreign country and executed under oath an application for a non-immigrant's visa. His defense was that he was a non-resident alien of the United States and since criminal statutes have no extra-territorial applicability as to him, the Court had no jurisdiction. The Court used the "effect" principle holding that the fraud was not in the act (which occurred in a foreign country) but in the result to be achieved.³⁰ It is significant to point out that greater concentration by the courts on public or government interest seems to justify lesser consideration of the conceptual territorial contacts which had so dominated our early law.

The cases presented have developed support for the proposition that our early legal introversion and our reluctance to extend our criminal and quasi-criminal statutes beyond our borders have been abandoned in less than fifty short years. The following cases will attempt to show this change toward extroversion which has appeared in a more controversial area, that of our civil statutes.

One of the first statutes of a civil nature to be questioned as to its applicability outside of our own territory was the Federal Fair Labor Standards Act.³¹ An employee sued his employer under this statute for unpaid overtime for work performed on a United States leasehold on the Crown Colony of Bermuda. This highly controversial³² decision in *Vermilya-Brown Co. v. Connell*³³ found the Court interpreting the statute to include work performed in this area. The Court held the leased area to be a "territory" within the meaning of the Act.³⁴

Commenting on our established criminal jurisdiction Justice Reed concluded: "A *fortiori* civil controls may apply, we think, to liabilities created

29. 34 STAT. 100 (1906), 22 U.S.C. § 131 (1946).

30. *State of Netherlands v. Federal Reserve Bank*, 99 F. Supp. 655, 665 (S.D. N.Y. 1951) (an interesting application of the Trading With The Enemy Act where the purchaser of war confiscated bonds, bought in Switzerland, could not gain good title. Goddard, J. said, "Since . . . the defendant is now, and was at all times here involved, a citizen of the United States, power existed to regulate his actions outside the territorial limits of the United States whether or not the condemned act [buying the bonds] occurred within the territory of a foreign nation.").

31. 52 STAT. 1060 (1938), 29 U.S.C. § 201 *et seq.* (1946).

32. *Vermilya-Brown v. Connell*, 335 U.S. 377, 409 (1948) (Justice Jackson in the dissent, voices the concern that "Such a decision by this Court initiates a philosophy of annexation and establishes a psychological accretion to our possession at the expense of our lessors. . . .") Fuchs, *Administrative Determinations And Personal Rights In The Present Supreme Court*, 24 IND. L.J. 164 (1949), "The Government argued vigorously that affirmance . . . which was favorable to the Employees' contention, would be unfortunate in its effects upon our foreign relations. The dissenting opinion regards these effects as attaching to the result in the Supreme Court." Comment, *Overseas Effect Of Federal Statutes*, 1 STAN. L. REV. 768, 771 (1949). "The Executive Department opposed the result reached. The State, Army and Navy Departments thought the results hampered our foreign policy and good relations with the islands. The Administrator of the Act prophesied fundamental administrative difficulties if coverage of the Act was extended to Bermuda and other bases."

33. 335 U.S. 377 (1948).

34. Work done within the territorial limits of Canada did not come within this statute in *Bryne v. Metcalfe Const.*, 99 F. Supp. 635 (D. Neb. 1951).

by statutory regulation of labor contracts, even if aliens may be involved, where the incidents regulated occur on areas under the control, though not within the territorial jurisdiction or sovereignty, of the nation enacting the legislation."³⁵ It would not be venturous to interject the opinion that the position of the court in the *Blackmer* case as to the problem being one of statutory construction and not legislative power would not have been restated in the *Vermilya* decision had the judicial thought been still under the influence of the *American Banana* rationale.

With the holding barely rendered there was handed down in the same year a decision interpreting the federal Eight Hour Law.³⁶ In *Foley Bros. v. Filardo*³⁷ an employee was suing for rights allegedly accruing under this statute. The work was not performed on a leased area but on a government project in Iraq and Iran. Justice Reed could not find any expression of Congressional intent to extend this statute when he said: "The absence of any distinction between citizen and alien labor indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress."³⁸

The language of these two cases is extremely interesting when compared with the remarks of Holmes in *American Banana* forty years previously. He said: "In the first place, the acts causing the damage were done, so far as it appears, outside the jurisdiction of the United States, and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress."³⁹

The Federal Tort Claims Act⁴⁰ which was pleaded in numerous cases involving injuries arising outside of our territory has withstood extra-territorial application.⁴¹ The clear language of the Act, which stated among its exclusions: "Any claim arising in a foreign country,"⁴² remained an obstacle to the courts in applying it outside the country.

In *United States v. Spelar*⁴³ the Court found an American leased air base (of the same type as in the *Vermilya* case) in Newfoundland to be a "foreign country" within the meaning of this Act. The Supreme Court's position in *Cobb v. United States*⁴⁴ denying applicability of the statute to Okinawa was weaker since our control over the island since the end of

35. *Vermilya-Brown v. Connell*, 335 U.S. 377, 381 (1948).

36. 27 STAT. 340 (1892), 37 STAT. 726 (1913), 40 U.S.C. §§ 321-326 (1946).

37. 336 U.S. 281 (1949).

38. *Id.* at 286. But in *Finnan v. Elmhurst Contracting Co.*, 199 Misc. 1016, 107 N.Y.S.2d 407 (Sup. Ct. 1950) a New York court held the Eight Hour Law applicable to employees working on a leased base in British Guiana.

39. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 353 (1909).

40. 62 STAT. 982 (1948), as amended 63 STAT. 106 (1949), 28 U.S.C. § 2671 *et seq.* (Supp. 1952).

41. *Brunell v. United States*, 77 F. Supp. 68 (S.D. N.Y. 1948) (Saipan); *Straneri v. United States*, 77 F. Supp. 240 (E.D. Pa. 1948) (Belgium).

42. 62 STAT. 982 (1948), as amended 63 STAT. 106 (1949), 28 U.S.C. § 2680(k) (Supp. 1952).

43. 338 U.S. 217 (1949).

44. 191 F.2d 604 (9th Cir. 1951).

World War II was dangerously near to sovereignty. Apparently a *de facto* sovereignty was not sufficient.

The serious and detailed consideration given these statutes by the courts when they deny extra-territorial effect manifests little hesitation to apply this legislation if they can find any Congressional intent in the acts to do so.

With such a background it was not unusual for the appearance, late in 1952, of the *Steele v. Bulova Watch Co.* case.⁴⁵ This was a suit under the Lanham Trade Mark Act⁴⁶ brought by an American corporation to enjoin an American national from using the plaintiff company's trade-mark registered in the United States. The defendant was assembling watches in Mexico and labeling them with the company trade name. The relationship of the parties and the relief demanded should be pointed out. Here was a private interest asking civil relief for the infringement, accomplished by acts in a foreign country, of a private right acquired in the United States. The Court, in granting relief by enjoining the defendant from doing an act in Mexico, expressed the view that the legislative intent in this case was the decisive question. The statute's purpose, "to regulate commerce within the control of Congress,"⁴⁷ was held to include jurisdiction over the acts complained of.⁴⁸ It would appear from this decision that the nationality of a party is sufficient interest for the State to legislate all over the world in regards to its citizens even to the extent of determining civil relationships.

Lest these cases suffer the rationalization that it is judicial rather than legislative jurisdictional accretion, the 1952 Bankruptcy Amendment⁴⁹ should be consulted. The amendment of Section 70 directed that "all property wherever located . . . shall vest in the trustee."⁵⁰ This is the first time that Section 70 was amended.⁵¹ Before such a universalistic approach was manifested, the statute can be said to have expressed the attitude of Story when he said: "There is a marked distinction between a voluntary conveyance of property by the owner, and a conveyance by mere operation of law

45. 73 Sup. Ct. 252 (1952).

46. 60 STAT. 427, 15 U.S.C. 1051 (1946); SEN. REP. NO. 1333, 79th Cong. 2d Sess. (1946) (The purpose of this Act was to carry out our international commitments to the end that American traders in foreign countries may secure the protection of their trade-marks to which Congress felt they were entitled).

47. 60 STAT. 443, 15 U.S.C. § 1127 (1946).

48. It is hard to see where the defendant's activities in Mexico are within Constitutional definitions of commerce with foreign nations. What is significant is the *willingness* of the Court to abandon the early limitations.

49. 64 STAT. 26 (1952), 11 U.S.C. § 110 (1952).

50. 52 STAT. 879 (1938), 64 STAT. 26 (1952), 11 U.S.C.A. § 110(a) (1952).

51. This amendment represents legislative response to the plea of Mr. Nadelmann in 1946 after an amendment of the bankruptcy law which neglected to change section 70. "Discussions of the possibilities of improvement have long centered around . . . the theory of universality (ubiquity) and the theory of territoriality of bankruptcy. . . . The serious consequences of lack of international cooperation in bankruptcy cases where assets are located in more than one country have become even more apparent with the growing intercourse between nations. Creditor nations, of course, the greatest sufferers." Nadelmann, *The National Bankruptcy Act and the Conflicts of Laws*, 59 HARV. L. REV. 1025 (1946).

But a Statutable conveyance, made under the authority of any legislature cannot operate upon any property, except that, which is within its own territory."⁵²

The case decisions interpreting statutes as to their extra-territorial effect show a growing momentum during the last half century toward expanding our national policy to include outside areas if our legislative thought considers such application necessary.

This progressive extension was illustrated by the following developments:

- (1) Extra-territorial acts of our nationals which adversely affect our internal commerce or foreign trade can be the subject of prosecutions under the anti-trust acts.
- (2) Extra-territorial acts of our nationals which *directly* harm our government will come within the purview of our criminal statutes.
- (3) Extra-territorial acts by employees can gain for them special legislative grants of certain private rights enforceable against their employers.
- (4) Acts by a national in another country which infringe upon private rights acquired in this country are subject to injunctive relief.
- (5) Congress grants title to a trustee in bankruptcy of property of the bankrupt wherever located.

These new formulas as to statutory applicability are comparable to the developments in the tests of the treaty-making power. In this field the shift of definitive emphasis was from one of what is a "proper subject" to the more inclusive "national policy" concept. Such a rapid liberalization has already resulted in a reaction as expressed by the proposed constitutional amendment restricting the treaty-making power.⁵³ The *Bulova Watch* case is illustrative of the fact that such a reaction is not manifest in the extra-territoriality-of-jurisdiction field, but it would not be unreasonable to predict such a counter-tendency in the near future.

DONALD A. WIESNER

52. 1 STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 684 (3d ed. 1846).

53. The American Bar Association adopted to recommend the following constitutional amendment: "A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by congress which it could enact under its delegated powers in the absence of such treaty." See Edwards, *The Constitution, the Treaty Power and Juridical Isolationism*, 14 U OF PITT. L. REV. 199 (1953).