The immediate result of the decision in Monaco *v.* Mississippi would seem to be that, if a foreign State should have a claim against a State of the Union, which would amount to a controversy justiciable by the Supreme Court of the United States if the claim ran in favor of one of the States of the Union, it must proceed by way of diplomatic reclamation. But here an important question arises as to the liability in international law of a federal state for the acts or failures to act of one of its constituent parts. By closing the door to the determination of this matter by the Supreme Court of the United States, another door is opened, namely, the question of the international responsibility of a federal State for the acts or failures to act of the various States of the Union. The route of diplomatic reclamation has its terminus in an international court. That the United States would consent to have an international court pass upon the delinquencies of States of the Union, for which the United States might be responsible, is hardly likely.

J. S. REEVES

THE FACTOR EXTRADITION CASE

In the recent case of Factor *v.* Laubenheimer, United States Marshall,[1] Factor was held in Chicago, Illinois, on complaint of the British Consul for extradition to England on the charge of having received in London large sums of money in pursuance of a fraudulent scheme[2] "knowing the same to have been fraudulently obtained," under Article I of the British-American Extradition Treaty of 1889, requiring the surrender of fugitives for ". . . receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained." The United States District Court on *habeas corpus* had ordered Factor released on the ground that the act charged was not a crime under the laws of Illinois, and hence there was no treaty obligation to surrender; the Circuit Court of Appeals reversed[3] on the ground that the offense charged *was* a crime in Illinois as declared in Kelly *v.* Griffin.[4]

The Supreme Court of the United States, on *certiorari*, by a vote of six to three, affirmed the decision of the Circuit Court of Appeals on what might be considered several alternative grounds, either (a) that it is not necessary that a crime charged coming within the terms of the treaty, be also an offense against the laws of Illinois; (b) that as the offense was recognized as criminal

[1] 290 U. S. 276, 54 Sup. Ct. 191 (1933); this JOURNAL, Vol. 28 (1934), p. 149.

[2] The scheme, to sell worthless stock through a tipster sheet, is set out in U. S. *ex rel.* Klein *v.* Mulligan, 1 Fed. Supp. 635 (1931), Knox, D. J., and U. S. *ex rel.* Geen *v.* Fetters, *ibid.*, 637 (1931), Dickinson, D. J., in which other members of the group to which Factor belonged were held for extradition.

[3] 61 F. (2) 626 (7th Circuit).

[4] 241 U. S. 6, 36 Sup. Ct. 487 (1915). Two of the three judges of the Circuit Court thought that there were statutes in Illinois, independently of Kelly *v.* Griffin, sufficient to convict Factor. Judge Dickinson came to the same conclusion in the Federal Court in Pennsylvania, *supra*, note 2.

in twenty-two of our States[5] it is "generally recognized as criminal at the place of asylum"; and (c) that a liberal construction of the treaty obligation of surrender for extradition requires Factor's surrender, even though it might be that Great Britain would not have delivered up the accused person had it been the country of asylum under similar circumstances.

The majority, by Mr. Justice Stone, supports the argument under (a) by calling attention to the fact that with respect to three of the eleven categories of offenses listed in Article I of the Treaty of 1889, namely, fraud, slavery or slave-trading, and participation in crime, it is expressly provided that extradition is conditional upon their criminality by "the laws of both countries," whereas such a provision is omitted from the eight other categories of offenses, of which the offense of receiving money "knowing the same to have been . . . fraudulently obtained" is one; that hence for that offense no such double criminality is to be deemed essential, and that this was the interpretation given to the Treaty of 1842 by Secretary Calhoun; that the proviso to Article X of that treaty, carried over to the Treaty of 1889, reading:

> Provided, that this (surrender) shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed,

relates only to procedure, to the *quantum* of evidence required for commitment for extradition, which must be governed by the procedural standards of the place of asylum.

Justice Butler, for himself, Brandeis and Roberts, JJ., filed an able and vigorous dissenting opinion, based on the grounds that double criminality in extradition was a requirement of international law, that many decisions and writers had so affirmed, that England had in its practice so insisted and had done so in the present case, arguing that the offense charged against Factor was a crime in Illinois, which the majority agree that it is not;[6] that the mutuality and reciprocity provisions of the extradition treaties between the United States and Great Britain required that the United States Supreme Court give the treaty the same construction that Great Britain does or did, that the qualification of double criminality attached to some of the offenses of the Treaty of 1889 was due to their indefiniteness, whereas the unqualified categories were so grave and well-known as to make such specification unnecessary; that the lack of uniformity in the criminal laws of the American States and of the subdivisions of the British Empire was known to the treaty

[5] Mr. Hudson, in a competent article on the case, "The Factor Case and Double Criminality in Extradition," this JOURNAL, Vol. 28 (1934), p. 274 at 303, n. 120, remarks that the number is inaccurate, a Harvard investigator having established that only sixteen States make the act a crime. There is doubt as to five of these, he reports.

[6] In the Circuit Court of Appeals, the British Consul appears to have argued that criminality in Illinois is not essential. See also U. S. *ex rel.* Geen *v.* Fetters, *supra*, note **2.**

makers and was anticipated; and that the proviso to Article X of the Treaty of 1842, though relating to the evidence of the commission of crime to be produced by the demanding country, implies "that neither party agreed to extradite for acts not criminal under its laws." Mr. Hudson, in the article referred to,[7] appears to sustain in general the arguments elaborated by the minority.

As in the case of many legal problems, there were here two competing principles of law either of which the court might have chosen to apply. The balance in favor of surrender for extradition turned upon the majority's views of treaty construction and policy, which dictated liberality in order to promote the administration of justice, the avowed object of all extradition treaties. The attempt of the minority to give a literal or strict construction to the obligations of the treaty would have defeated the administration of justice and been contrary to the spirit of the treaty, and for those reasons, among others, the conclusion of the majority seems sounder and preferable. *Qui haeret in litera haeret in cortice.*[8] To hold that the acts charged, clearly within the terms of the treaty, must, in order to be extraditable, constitute a crime in the particular State of Illinois, when in fact such acts seem to be criminal in a considerable part of the United States, would have been contrary to the spirit of the treaty, however debatable might be the letter. While it is not believed to be true that the requirement of double criminality is a rule of international law,[9] as evidenced by the fact that surrender is in many countries frequently voluntary without insistence on reciprocity and without treaty, in execution of a mere moral obligation to aid justice, it is nevertheless a fact that in Anglo-American treaty practice double criminality had frequently been demanded. Whether apart from express treaty provision this was essential is a debatable question. Many of the cases which call attention to the fact that the acts in issue constituted a crime under the laws of both countries do not necessarily imply that such double criminality is a condition precedent of extradition.

It might have been better had the majority of the court not departed by technical logic from the usual requirement of double criminality, but had simply maintained, in the light of the spirit of the treaty, that the consider-

[7] *Supra*, note 5.

[8] Meaning, "He who considers merely the letter of an instrument goes but skin-deep into its meaning." Broom's Legal Maxims, 8th ed. (London, 1900), p. 533, citing Coke's Littleton, 283b. *Cf.* St. Paul's proverb, "the letter killeth but the spirit giveth life," Corinthians II, ch. 3, verse 6, both cited by John Bassett Moore in International Law and Some Current Illusions, New York, 1924, pp. 20, 21, doubtless with Stoehr *v.* Wallace, 255 U. S. 239, 41 Sup. Ct. 293 (1921), in mind, where a literal construction of the treaty word "residing" produced an unsound conclusion of law, in effect privileging the confiscation of the property of non-resident alien owners.

[9] This statement is ventured notwithstanding the remark of Fuller, C. J., in Wright *v.* Henkel, 190 U. S. 40, 58, 23 Sup. Ct. 781 (1903), that it is a "general principle of international law." Chief Justice Fuller was not always happy in his generalizations on international law.

able recognition in American State statutes of the crime of receiving money knowing the same to have been unlawfully obtained, was evidence of American recognition of its criminality, and was therefore a sufficient compliance with the general rule that the crime be punishable by the laws of both countries; and that it was not necessary to show that it was specifically punishable in each State in which the fugitive might seek shelter. Such a strict interpretation of the word "country" as to make it read "State" of the United States, is calculated to defeat the purpose of the treaty, and if, as was argued, Great Britain takes such a narrow view of its obligations, that view should be modified. It is in the interest of justice and good administration that the United States take the broader view. Any other position would make it extremely difficult to know when a treaty with the United States was effective, for there are many States in the country and it is not expedient or politic that the treaty should be differently interpreted in accordance with the particular State in which refuge is sought. It could hardly have been the intention of the framers of extradition treaties to commit themselves to so uncertain an obligation, which would vary or be nullified according to local technicalities. Indeed, a specific amendment making local State law the criterion of criminality and of the duty to surrender was once proposed by the United States to Great Britain in 1872 and 1873, but appears not to have been adopted, a fact which justifies the inference that such a loose view of the obligation had been in the minds of the parties but was not espoused.[10]

Extradition is primarily an evidence of the desire and purpose to coöperate in the enforcement of the criminal law, and states have a mutual interest in seeing that no major criminal escapes trial by his natural judges. But as it is asking much to request a nation to abandon its asylum and jurisdiction over the person, the surrendering country properly demands a reasonable amount of evidence that the crime has been committed and that the accused is reasonably chargeable with its commission. Treaties and statutes generally so provide. The proceeding for commitment is not a trial nor does commitment establish guilt. The attempt to interpret extradition treaties as narrowly and strictly as penal statutes, as Travers Twiss seemed to believe desirable, is calculated to defeat, not promote justice. The majority in the Factor case is therefore eminently sound in concluding that extradition treaties, even more than other treaties, should be liberally construed to effect their purpose, the suppression of crime. As the court says, the surrender of Factor to Great Britain for a crime expressly recognized in many parts of the United States (and hardly condoned even in Illinois, it is presumed), "involves no impairment of any legitimate public or private interest." Even when the general requirement of double criminality is demanded in the practice of states, it "does not mean that there must be an

[10] See the references to the Appendix to Petitioner's Brief on Reargument in Hudson, *supra*, note 5, p. 299.

exact identity of the offense named in the two systems of law";[11] nor is it essential, it is believed, that all the elements of the crime under the law of the requesting state shall be exacted by the state of asylum, or that all the technicalities of the offense according to the law of the state of asylum be required by the law of the requesting state as a condition of extradition. To the question, therefore, whether on a demand by Canada for extradition from Alabama, where the age of consent is twelve years, for the treaty crime of rape, committed in Canada, where the age of consent is fourteen years, "may not the Alabama age of consent be applied to prevent the surrender,"[12] the writer ventures an answer in the negative. Rape is punishable in both countries generally, and if such crime were committed, local variations in the elements of the offense should not be a basis for refusing extradition.[13] It is a foreign crime which has been committed and for which extradition is sought.

The conclusion of the Supreme Court seems to the writer a just and sound interpretation of the treaty obligation to surrender Factor. It is understood that Factor has now been released without bond because he was not surrendered to Great Britain within the sixty days contemplated in the statute, a delay caused by the need for Factor as a witness in the Tuohy kidnapping prosecution. The British consul will therefore have to commence all over again to demand the arrest and extradition of Factor; but the law of the case has now been laid down by the Supreme Court, and there seems no reason why the Secretary of State should overrule that conclusion.

EDWIN M. BORCHARD

[11] Hudson, *loc. cit.*, 285; *cf.* Collins *v.* Loisel, 259 U. S. 309, 42 Sup. Ct. 469, 470 (1922), and other cases cited in 61 Fed. (2) 626, 632.

[12] Hudson, *loc. cit.*, 296.

[13] *Cf.* Benson *v.* McMahon, 127 U. S. 457, 466, 8 Sup. Ct. 1240, 1244 (1888): ". . . we do not see that in this application to set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held to answer in Mexico for the offense charged, this court is bound to examine with very critical accuracy into the question as to whether or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed, and the final success by which the fraud was perpetrated, are undoubted."

See also Kelly *v.* Griffin, 241 U. S. 6, 14: ". . . . The treaty is not to be made a dead letter because some possible false statements might fall within the Canadian law that perhaps would not be perjury by the law of Illinois." *Cf.* other quotations in 61 Fed. (2) 626, 631, 632.