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of liberty and justice as to be implicit in the concept of ordered liberty, collateral estoppel can hardly be said to be such a fundamental principle. "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it]."[24]

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FEDERAL ASSIMILATIVE CRIMES ACT: HOW MUCH STATE LAW?

The Assimilative Crimes Act, first enacted in 1825 and periodically re-enacted thereafter,[1] supplements the specific criminal laws passed by Congress for places within the borders of a state but under the exclusive or concurrent jurisdiction of the United States; the 1948 Act[2] adopts as federal law the criminal law of the state or territory in

[24]Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[1]4 Stat. 115 (1825), 14 Stat. 13 (1866), 30 Stat. 717 (1898), 35 Stat. 1145 (1909), 48 Stat. 152 (1933), 49 Stat. 394 (1935), 54 Stat. 234 (1940), 62 Stat. 686 (1948). Congress has employed three methods of adopting the criminal law of the states as federal criminal law for the federal enclaves. The simplest is the adoption of state laws existing on the date of the enactment, allowing no subsequent changes or repeals of state law to be effective in the federal enclaves. This method, used from 1866 through 1933, was upheld when challenged as an unconstitutional delegation of Congressional power to the states in Franklin v. United States, 216 U.S. 559 (1910). The acts in force from 1933 through 1948, and apparently the one in force from 1825 through 1866, adopted the state criminal laws existing at the date of enactment of the federal statute for such period of time as the state laws remained in force. This method raises the question of the constitutionality of delegating to the states the power to repeal federal laws, a question which does not appear to have been litigated. The present statute adopts the state law in force at the time of the alleged offense, thus giving effect to all repeals, additions, and amendments enacted by the state legislature, and was upheld in United States v. Sharpnack, 355 U.S. 286 (1957).

[2]62 Stat. 686 (1948), 18 U.S.C. § 13 (1952) provides: "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." Note that the Act provides that it is applicable in the "places now existing or hereafter reserved or acquired as provided in section 7 of this title." Although § 7 defines the total special maritime and territorial jurisdiction of the United States, the Act appears to be applicable principally in the areas defined by § 7(3): "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." However, United States v. Gill, 204 F.2d 740 (7th Cir. 1953), cert. denied, 346

which a federal enclave is located. In a recent case, *Kay v. United States*,[3] the Court of Appeals for the Fourth Circuit upheld a conviction under the Assimilative Crimes Act of 1948 by a federal district court of a driver charged with driving on a federal parkway in Virginia while under the influence of intoxicants. The court held that the 1948 Act made applicable, first, the Virginia statute which prohibits one from driving a vehicle while under the influence of alcohol,[4] and, secondly, the Virginia statute which prescribes penalties for the offense.[5] The first statute includes provisions for (a) a chemical analysis of a blood sample taken at the request of the accused in order to ascertain the extent of intoxication,[6] (b) receipt in evidence of a certificate

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U.S. 825 (1953), extended the Act at least to § 7(2): "Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line." The defendant was convicted of the specific federal crime of assault with intent to commit a felony—sodomy. The assault occurred on Lake Michigan aboard a vessel licensed under the laws of the United States. Since the felony intended must be a federal felony, Jerome v. United States, 318 U.S. 101 (1943), and since there was no specific federal crime of sodomy, the court found that the state felony of sodomy was an assimilated federal crime, although the offense did not occur within a "place" described in § 7(3).

The areas within § 7(3) are extensive: Williams v. United States, 327 U.S. 711 (1946) (Indian reservations); James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940) (post offices); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (national parks); James v. Dravo Contracting Co., 302 U.S. 134 (1937) (locks and dams); United States v. Unzeuta, 281 U.S. 138 (1930) (land used for forts and military reservations); McKelvey v. United States, 260 U.S. 353 (1922) (public lands); Capetola v. Barclay White Co., 139 F.2d 556 (3d Cir. 1943) (navy yards); Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938) (housing projects); Air Terminal Servs., Inc., v. Rentzel, 81 F. Supp. 611 (E.D. Va. 1949) (airports).

[3]Kay v. United States, 255 F.2d 476 (4th Cir. 1958), cert. denied, 358 U.S. 825 (1958).

[4]Va. Code Ann. § 18-75 (1950) provides: "No person shall drive or operate any automobile or other motor vehicle ... while under the influence of alcohol ... or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature."

[5]Va. Code Ann. § 18-76 (1950).

[6]Va. Code Ann. § 18-75.1 (Supp. 1958) provides: "In any criminal prosecution under § 18-75 ... no person shall be required to submit to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood, breath, or other bodily substance; however, any person arrested for a violation of § 18-75 ... shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, provided the request for such determination is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination and if he makes such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness.

"Only a physician, nurse, or laboratory technician, shall withdraw blood for

showing the results of such analysis,[7] and (c) the establishment of certain presumptions arising out of the finding.[8]

Appellant argued on appeal that the vial containing the blood sample and the certificate showing the results of the analysis were not properly received in evidence,[9] that admission of the certificate into evidence deprived him of his constitutional right of confrontation by

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the purpose of determining the alcohol content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labeled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample.

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"Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court. The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case."

Forty-seven states use chemical tests, including blood tests, to aid in the detemination of intoxication in cases involving charges of driving while under the influence of alcohol. Twenty-three of these states sanction the use of the tests by statute. For an enumeration of the state statutes, see Briethaupt v. Abram, 352 U.S. 432, 1 L. Ed. 2d 448, 451 at n. 3 (1957).

[7]Va. Code Ann. § 18-75.2 (Supp. 1958) provides for a report of the blood test and, upon proper identification of the container, for a certificate being admitted as evidence of the results of the analysis.

[8]Va. Code Ann. § 18-75.3 (Supp. 1958) sets up the following presumptions based on the result of the blood analysis: "(1) If there was ... 0.05 per cent or less by weight of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants; (2) If there was ... in excess of 0.05 per cent but less than 0.15 per cent by weight ... such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused; (3) If there was ... 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants." These presumptions are similar to those in § 11-902 of the Uniform Vehicle Code prepared by the National Committee on Uniform Traffic Laws and Ordinances.

[9]The facts used to substantiate this contention were (1) that there was no identification of the person who took the blood, thus no evidence that § 18-75.1 was complied with; (2) that appellant's arm was wiped off with alcohol through which the needle was inserted, which could have increased the alcoholic content; and (3) that a white substance was seen in the vial, which was assumed to be an anticoagulate, but which was not identified. 255 F.2d at 480.

witnesses,[10] and that the presumptions created deprived him of due process.[11] The court held, however, that since no question was raised below as to the proper identification of the vial and the certificate, receipt in evidence was properly made and that in a federal court the certificate would have been admissible in any event under the provisions of another federal statute.[12] Receipt in evidence of the certificate did not foreclose inquiry into the regularity of the procedure, but it was held that any inquiry would go to the weight of the evidence rather than to its admissibility.[13] Nor did the court find that admission of the certificate deprived appellant of his constitutional right of confrontation by witnesses.[14] On the question of due process, the

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[10]Id. at 480-81. Appellant argued that § 18-75.2 was unconstitutional as unduly precluding inquiry into the accurateness of the Medical Examiner's report, since "proper identification" of the vial was the only requirement for admitting the certificate into evidence. See note 7 supra. It was contended that since admission into evidence was not based on requirements other than identification of the vial, the details outlined in § 18-75.1 were rendered immaterial. Brief for Appellant, pp. 17-18 (on appeal), Kay v. United States, 255 F.2d 476 (4th Cir. 1958); Brief for Appellant, pp. 10-14 (petition for certiorari), Kay v. United States, supra.

[11]255 F.2d at 481. The contention in this regard was that by allowing the presumption to be weighed against the evidence of appellant, the statute gives the presumption the effect of evidence and in so doing contravenes the due process clauses of the United States and Virginia Constitutions. Brief for Appellant, pp. 18-23 (on appeal), Kay v. United States, supra. In petition for certiorari, appellant also claimed that since petitioner did not request the blood analysis, as specified in § 18-75.1, supra note 6, its introduction as evidence constituted illegal search of his person and self-incrimination in contravention of the fourth and fifth amendments of the United States Constitution. Brief for Appellant, pp. 5-10 (petition for certiorari), Kay v. United States, supra.

[12]255 F.2d at 480. 28 U.S.C. § 1732 (1952) provides for admission in evidence, pursuant to statutory requirement, of writings made in the regular performance of the official duties of a public official.

[13]255 F.2d at 480. The courts of Virginia, in interpreting the regularity of this procedure, have used the following test: Was the evidence identifying the blood sufficient to establish beyond a reasonable doubt that the blood analyzed was that extracted from the accused? If not, a motion to exclude the findings will be sustained. Newton v. City of Richmond, 198 Va. 869, 96 S.E.2d 775 (1957); Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257 (1955). See also, Novak v. District of Columbia, 160 F.2d 588 (D.C. Cir. 1947); Greenwood v. United States, 97 F. Supp. 996 (D. Ky. 1951). These Virginia and federal decisions have strongly insisted that there be no missing link in the chain of identification. Since the substance to be analyzed must pass through several hands, the evidence, to be admissible, cannot leave to conjecture who had the sample and what was done with it between the taking and the analysis. See McGowan v. Los Angeles, 100 Cal. App. 2d 386, 223 P.2d 862 (1950); Am. Mut. Liab. Ins. Co. v. Industrial Acc. Comm'n, 78 Cal. App. 2d 493, 178 P.2d 40 (1947); Brown v. State, 156 Tex. Crim. 144, 240 S.W.2d 310 (1951). See also, State v. Romo, 66 Ariz. 174, 185 P.2d. 757 (1947). For a thorough discussion of the evidence aspects of the problem see, Annot., 21 A.L.R.2d 1216 (1952).

[14]255 F.2d at 480-81. The authorities show that when there is statutory authority for making a certificate by a public officer of acts which are within the scope of his

court reasoned that since a rebuttable presumption "neither restricts the defendant in the presentation of his defense nor deprives him of the presumption of innocence,"[15] there was no constitutional objection to the jury's consideration of the statutory presumption together with all of the other evidence.[16]

The briefs of both parties before the appellate court and on petition for certiorari in the United States Supreme Court centered exclusively around the questions of the admissibility of the evidence, the reasonableness of the statutory presumptions, and the constitutional issues of confrontation and due process.[17] The more fundamental problem of whether the *entire* Virginia statutory provision prohibiting drunken driving, prescribing a standard by which drunkenness can be measured, and establishing certain presumptions based on such finding is incorporated into federal law by the Assimilative Crimes Act of 1948 was not discussed. Potentially, every case under the Act presents the question of *how much state law is assimilated into federal law*. For example, it is possible that all of the substantive state law is incorporated, but that the procedural aspects of the state law are not assimilated. If a distinction between substance and procedure be

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duty as an officer, such certificate is normally receivable under the documentary evidence rule as an exception to the hearsay rule. For a general discussion see, Annot., 29 A.L.R. 289 (1924). The constitutional right of an accused to confrontation may not be invoked to exclude evidence otherwise admissible under well-established exceptions to the hearsay rule. Matthews v. United States, 217 F.2d 409 (5th Cir. 1954); United States v. Leathers, 135 F.2d 507 (2d Cir. 1943). See also, Tot v. United States, 319 U.S. 463 (1943). Cf., Snyder v. Massachusetts, 291 U.S. 97 (1933), arising under the fourteenth amendment and suggesting that the exceptions are not static, but may be enlarged from time to time if there is no material departure from the reason of the general rule. The constitutional guaranty of confrontation carries with it the exceptions to the common law principle which it embodies. Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718 (1931). See also, Salinger v. United States, 272 U.S. 542 (1926); People v. Reese, 258 N.Y. 89, 179 N.E. 305 (1932). Certificates quite comparable to the one in the principal case have been held admissible over objections upon similar constitutional grounds. State v. Torello, 103 Conn. 511, 131 Atl. 429 (1925); Commonwealth v. Slavski, 245 Mass. 405, 140 N.E. 465 (1923); Bracey v. Commonwealth, 119 Va. 867, 89 S.E. 144 (1916). But cf. Estes v. State, 283 S.W.2d 52 (Tex. Crim. App. 1955).

[15]255 F.2d at 481. On the broad general question of the constitutionality of a statute or ordinance making one fact presumptive evidence of another fact, see, Annot., 51 A.L.R. 1139 (1927); Annot., 86 A.L.R. 179 (1933); Annot., 162 A.L.R. 495 (1946). See also, Heiner v. Donnan, 285 U.S. 312 (1932); Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929); Yee Hem v. United States, 268 U.S. 178 (1925); Hawes v. Georgia, 258 U.S. 1 (1922); Mobile, J. & K.C. R.R. v. Turnipseed, 210 U.S. 35 (1910); State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954), 46 A.L.R.2d 1176 (1956); Toms v. State, 239 P.2d 812 (Okla. Crim. 1952); Burnette v. Commonwealth, 194 Va. 785, 75 S.E.2d 482 (1953).

[16]255 F.2d at 481.

[17]See notes 9-11 supra.

meaningful in construing the Assimilative Crimes Act—and it would be in civil cases in federal courts based on diversity of citizenship—it is significant to inquire into the basis for such a distinction and how it would be drawn.

The Assimilative Crimes Act of 1948 specifically provides for the punishment of *any* act or omission punishable within the jurisdiction of the State.[18] In interpreting this language under prior Assimilative Crimes Acts, the courts have held that Congress may validly incorporate state laws into federal penal statutes,[19] and that an act may be criminal under both state and federal law.[20] Moreover, the Act applies to state statutes enacted after the effective date of the 1948 Act, as well as to those in force prior to that date.[21] The only patent exception to assimilation of a state criminal statute is the provision that if Congress had itself made certain conduct criminal the Act does not apply.[22]

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[18]See note 2 supra.

[19]Hemans v. United States, 163 F.2d 228 (6th Cir. 1947), cert. denied, 332 U.S. 801 (1947), rehearing denied, 332 U.S. 821 (1947).

[20]See Westfall v. United States, 274 U.S. 256 at 258 (1927).

[21]United States v. Sharpnack, 355 U.S. 286 (1957) upheld the constitutionality of the 1948 Act insofar as it makes applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated. The Act was held not to be an unconstitutional delegation to the states of Congressional legislative authority, but rather a deliberate and continuing adoption by Congress of such unpre-empted offenses and punishments as already put into effect by the respective states. Id. at 294. Black and Douglas, JJ., dissented on the ground that the Act is in conflict with the principle that Congress alone has the power to make rules governing federal enclaves. Id. at 297.

[22]See note 1 supra. Williams v. United States, 327 U.S. 711 (1946). It may be difficult to determine whether the Congressional definition of a criminal offense necessarily precludes assimilation of the state law—e.g., in order to secure a conviction, a federally defined crime may require a showing of intent, although the comparable state crime does not; in this situation it would appear that Congress has deemed intent an essential element and that the state law should not be adopted. A different result, however, seems proper when a state statute allows prosecution for an attempted crime, but where the attempt is not covered by a federal statute—e.g., the federal crimes of robbery, 18 U.S.C. § 2111 (1952), and larceny, 18 U.S.C. § 661 (1952), do not appear to include attempts, but only completed crimes. Moreover, there is no general attempt section in the Federal Criminal Code. But see Fed. R. Crim. P. 31(c). The same problems may arise where the crime to be assimilated is closely related to the specific federal crime—e.g., larceny is a federally defined crime within the enclaves, but burglary is not. 18 U.S.C. § 661 (1952). In view of the fact that there may be a burglary without a completed larceny, the creation of the federal crime of larceny should not be viewed as precluding the assimilation of the state offense of burglary. However, a completed larceny which included a burglary raises difficult questions. Although it may be argued that only the larceny can be prosecuted, it has been held that burglary and larceny are different crimes, and punishment for each is permitted. Morgan v. Devine, 237 U.S. 632 (1915); Dunaway v. United States, 170 F.2d 11 (10th Cir. 1948). See also, Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L.J. 513, 519 (1949).

Nevertheless, limitations to incorporation have been made by judicial decision. Two cases involving a Virginia segregation law[23] have held that the Assimilative Crimes Act should not be construed to adopt a state law inconsistent with a policy of Congress as expressed in a civil statute,[24] or in a regulation issued pursuant to statutory authority.[25] *Johnson v. Yellow Cab Transit Co.*,[26] in granting equitable relief from state seizure of a shipment of liquor destined for an army post in Oklahoma, indicated that federal courts are not bound by rulings of a state court regarding the statute in question, even though some part of the question involved a consideration of state law adopted by the federal government. The *Johnson* holding[27] tacitly contradicts *United States v. Andem*,[28] the only prior decision on the issue of whether a state court's interpretation of an assimilated statute is controlling.

In the *Andem* case a federal district court followed the state court's interpretation of a state statute, expressly holding it to be binding on federal courts. In that case an employee in a United States Post Office located in New Jersey was indicted under a New Jersey forgery statute for forging and counterfeiting the seal of a private corporation. The court held that by virtue of the earlier Assimilative Crimes Act of 1898 the federal government had jurisdiction to prosecute for an act which violates state law and which was committed in a building over which legislative jurisdiction has been ceded to the federal government.[29]

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[23]Va. Code Ann. §§ 18-327, 328 (1950).

[24]Air Terminal Servs., Inc. v. Rentzel, 81 F. Supp. 611 (E.D. Va. 1949).

[25]Nash v. Air Terminal Servs., Inc., 85 F. Supp. 545 (E.D. Va. 1949). The Administrator of Civil Aeronautics had not exercised his statutory power to issue regulations forbidding segregation at the Washington National Airport, a federal enclave located in Virginia. The court regarded its result of adopting the Virginia segregation statute, note 23 supra, as consistent with its earlier decision in the Rentzel case, note 24 supra, holding that when regulations to forbid segregation on the federal enclave were issued by the Administrator, assimilation of the state segregation laws was precluded. The Rentzel opinion, however, had relied upon the regulation as only a part of a general federal policy, and it would seem that this general policy could have been found sufficient to bar assimilation in Nash v. Air Terminal Servs., Inc., supra.

[26]321 U.S. 383 (1944).

[27]Id. at 391.

[28]158 Fed. 996 (D.N.J. 1908).

[29]It was argued that the word "character" was inadvertently substituted for the word "charter" in the New Jersey criminal forgery statute, which was adopted by the Assimilative Crimes Act. The courts of New Jersey had established the rule that an engrossed act of the legislature, duly approved, signed, and filed, was conclusive evidence of its contents and could not be contradicted by any evidence whatsoever. The federal district court, in view of such state interpretation, refused to consider the word "character" as meaning "charter," and held that the seal

Although *Johnson* can be distinguished from *Kay* and *Andem* on the ground that applicability of the Assimilative Crimes Act was not decided, dictum in *Johnson* pointed up the fundamental question of which, if any, of the state penal statutes "are so designed that they could be adopted by the assimilative crimes statute."[30] Language used in three prior decisions gives an insight into the Supreme Court's interpretation of how much state law is assimilated by the Act. In *Puerto Rico v. Shell Co.*,[31] the court, in comparing the Assimilative Crimes Act to another federal statute which the case involved,[32] emphasized that details of the federal law as assimilated, "instead of being recited, are adopted by reference."[33] Moreover, in *United States v. Press Publishing Co.*,[34] the court held that the punishment in the federal courts for an offense committed on a government reservation can be "only in the way and to the extent that it would have been punishable if the territory embraced by such reservation had remained subject to the jurisdiction of the state."[35] Based on this reasoning, circulation on federal enclaves of a newspaper containing a criminal libel printed and primarily published in New York City was not held punishable in the federal courts under the Act, since conviction would be "disregarding the laws of that State and frustrating the plain purpose of such law, which was that there should be but a single prosecution and conviction."[36] Thus the court was guided by state interpretation of the New York statute in holding that the Assimilative Crimes Act did not apply at all, and a quashing of the conviction was affirmed. *United States v. Coppersmith*,[37] involving the number of peremptory challenges allowed in a federal prosecution for counterfeiting, said in dictum that when state laws are adopted by the Assimilative Crimes Act, "they stand as if the act of Congress had defined the offenses in the very words of the state law."[38]

In the *Andem* case the federal court, after holding state interpretation of the adopted statute binding on federal courts, incorporated the substantive state offense and excluded the procedural aspects;

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of a corporation must be regarded as a "character" within the meaning of the adopted act. Id. at 998-99.

[30] 321 U.S. at 389.

[31] 302 U.S. 253 (1937).

[32] 26 Stat. 209 (1890) (Sherman Anti-Trust Act).

[33] 302 U.S. at 266.

[34] 219 U.S. 1 (1911).

[35] Id. at 10.

[36] Id. at 15.

[37] 4 Fed. 198 (W.D. Tenn. 1880).

[38] Id. at 205.

there, the court upheld application of the federal statute of limitations over the state statute of limitations, principally on the ground that the state statute of limitations was embodied in a different statute from that which defined the assimilated offense.[39] This brings into focus the signficance of the substantive-procedural distinction in such cases, for had the statute of limitations been included in the same statute or section that defined the crime, it would probably have been construed as applicable to the right itself, rather than to the remedy; accordingly, in such a case, the statute of limitations would be regarded as substantive.[40]

Although *Andem* is the only case prior to *Kay* involving the Assimilative Crimes Act that draws such a distinction as a basis for not adopting a state statute which relates to the remedy but not to the elements of the offense in question, the *Kay* decision concluded that the presumptions embodied in the Virginia statute proscribing drunken driving are not merely procedural, for they amount to a redefinition of the offense and that as a new defintion of the substantive offense are adopted by the Assimilative Crimes Act of 1948.[41] Although presumptions, except for conclusive presumptions, are almost unanimously regarded as matters of procedure,[42] the court's language in *Kay* is generally in accord with the conflict of laws principle that the court of the forum determines, in accordance with its own conflict of laws principles, whether the question involved is one of substance or procedure.[43] Thus, in view of the language in the *Johnson, Puerto Rico* and *Press Publishing Co.* cases and because the Assimilative Crimes Act of 1948 specifically provides that an act will be federally punishable "if it would be punishable if committed . . . within the jurisdiction of the State,"[44] a conflict of laws analogy seems appropriate in cases involving the Act.

It therefore appears that in a case involving the Assimilative Crimes Act the federal court must first determine how much of the state law is adopted by the Act. It further appears that the distinction between substantive law and procedure is a determinant in reaching

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[39]158 Fed. at 1000.

[40]Goodrich, Conflict of Laws 243 (3d ed. 1949).

[41]255 F.2d at 479-80.

[42]Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 192 (1944); Goodrich, op. cit. supra at 237.

[43]Goodrich, op. cit. supra at 228. Cf., Morgan, op. cit. supra at 194: "That presumptions are properly classified as procedural is beside the point. The desirability of securing identity of result in whatever forum the controversy is tried ought to be controlling . . . ."

[44]See note 1 supra.

such a decision and that the federal court itself will decide the substantive-procedural issue rather than look to state interpretation.[45] The court's language in *Kay* was emphatic on this latter point, although the court did rely on Virginia judicial construction of the statute in question: "Indeed state interpretation of the adopted statutes is not binding upon a federal court, and federal, rather than state, rules of evidence are applicable to all prosecutions under the Act."[46] On this point, the court in *Kay* refers to similar language in *Johnson*.[47] No reference was made in *Kay* to a contrary holding in *Andem;* the fact that *Anden* was decided by a district court in another federal circuit and that *Johnson* was decided by the U.S. Supreme Court may be significant in this respect.[48]

The language in *Kay* that a federal court is not bound by state interpretation may be construed as a reservation of the right not to be so bound, but not as a denial of the federal court's privilege to look to state construction when such is deemed by the court as appropriate. It might seem that since the Assimilative Crimes Act provides that an act will be federally punishable if it would be punishable if committed within the jurisdiction of the state, Congress intended to adopt not only the state criminal statutes, but also the state courts' interpretations of those statutes. The *Press Publishing Co.* case turned on the point that the state court's interpretation was controlling;[49] that case was not cited by the *Kay* court, although it was a Supreme Court decision. Thus *Johnson* and *Kay* appear to pull the teeth of *Andem* and *Press Publishing Co.* on the question of state interpretation of a statute adopted by the Act.

Several conclusions can be reached in view of the *Kay* decision regarding the problems of the extent of state law adopted by the Assimilative Crimes Act and of the criteria for determining such. In the first place, the federal court has reserved the right to interpret a state statute rather than to look solely to state construction. In this regard, it can be reasonably assumed that Congressional intent in enacting a statute specifically adopting state crimes as federal offenses will be considered by a federal court and that implementation of such intent will be a factor in whether the court relies partially or totally on state interpretation or whether it disregards state interpre-

[45]See Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), cert. denied, 310 U.S. 650 (1940).

[46]255 F.2d at 479.

[47]See text accompanying note 26 supra.

[48]See notes 26-27 supra.

[49]See notes 33-34 supra.