

The Ohio State University
LAW JOURNAL

VOLUME 8

JUNE, 1942

Number 3

Practice In Ohio Under The Uniform
Criminal Extradition Act

CHARLES EMORY GLANDER†

Most lawyers, including those whose practice is confined to criminal matters, are relatively inexperienced in the field of criminal extradition. This fact, probably more than any other, accounts for the assertion frequently made by counsel at extradition hearings in the office of the governor: "I am familiar with the statutes, but somewhat rusty on procedure."

The lawyer is not responsible for his lack of knowledge or experience. The truth of the matter is that no clear-cut standard of procedure exists. The extradition statutes are clear enough as to most formal requirements, but they afford little assistance with respect to procedure or practice generally. For example, the extradition hearing which is conducted in the office of the governor is not mentioned in the Ohio statutes. There is likewise considerable confusion concerning the legal questions that may be raised at the hearing. It is the writer's purpose, therefore, to undertake an analysis of the Ohio law and practice from a practical administrative point of view. In this connection, reference will be made to actual case situations that recently have been presented in the governor's office.

† Member of the Columbus Bar; Executive Secretary to The Honorable John W. Eriker, Governor of Ohio.

The Uniform Criminal Extradition Act became effective in Ohio in 1937.¹ It also has been adopted in thirty other states.² Like all previous statutes of similar character, it is designed to implement the mandatory requirement of the United States Constitution³ and Statutes⁴ with reference to fugitives from justice.

¹ OHIO G. C. sec. 109-1 to 109-32 inc. For former analogous sections see OHIO G. C. secs. 109 to 115 inc. which were repealed upon adoption of the Uniform Act. Legislative history: Rev. Stat. 95, 81 Ohio L. 23 (1884), 78 Ohio L. 49 (1881), 72 Ohio L. 79 (1875), 67 Ohio L. 171 (J. R. 1870).

² Ala., Ariz., Ark., Calif., Del., Fla., Id., Ind., Kan., Maine, Md., Mass., Mich., Minn., Mont., Neb., N. H., N. J., N. M., N. Y., N. Car., Ore., Pa., S. D., Utah, Vt., Va., W. Va., Wis., and Wyo. The Act likewise has been adopted in Hawaii. There are minor differences between the acts adopted by the states. See 9 UNIFORM LAWS ANN., "Extradition" p. 174 et seq. For general background, see Prefatory Note, *id.* at 170.

³ U. S. CONST. Art. IV, Sec. 2: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Extradition has been defined as the right of one state to demand, and the duty of another to surrender, fugitives from justice from the former state into the latter. See *Thomas v. Evans*, 73 Ohio St. 140, 76 N. E. 862 (1905); SCOTT, INTERSTATE RENDITION (1917), P. 1, par. 1. Strictly speaking, use of the term "extradition" in interstate cases is inaccurate and "is plainly to misapply the real meaning of the word . . . as derived and understood from its long usage in connection with international law . . . ; accuracy and precision in the use of words demand the adoption of 'rendition'—the meaning of which is clear and unmistakable." SCOTT, *op. cit. supra* at 2.

⁴ Rev. Stat. 5278, 5279, 18 U. S. C. secs. 662, 663 (1793). Sec. 662 provides: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged . . ."

The provisions of the Uniform Act may be grouped under two general classifications: (1) those which pertain to the rendition of persons who are charged with crime in another state and are found in this state, and (2) those which pertain to the requisition of persons who are charged with crime in this state and are found in another state. For convenience and clarity we shall consider each classification separately even though the various sections of the Act do not follow this sequence.

It should be observed at the outset that the Uniform Act itself is limited to matters of interstate rendition. However, there are Ohio statutes which cover cases of international extradition, but which are beyond the scope of this discussion.⁵

RENDITION OF FUGITIVES FOUND IN THIS STATE

Procedure Pending Receipt of Requisition

Let us suppose that *B*, an alleged fugitive from the state of *X*, is found in Ohio and is placed under arrest. He may be charged with crime in the state of *X* or, having been convicted of a crime in that state, he may have escaped from confinement, or he may have broken the terms of his bail, probation, or parole. In any such case, the procedure preliminary to extradition is substantially the same. The arrest may have been made upon a warrant issued by a judge or magistrate of this state and supported by a "sworn charge or complaint and affidavit";⁶ or it may have

⁵ OHIO G. C. secs. 116, 117; *see* 18 O. JUR. "Extradition" par. 2, 4, 13, 28; 22 AM. JUR. "Extradition" par. 4, 5, 6, 7, 10, 37, 39, 49, 60, 62.

⁶ OHIO G. C. sec. 109-13. The sworn charge or affidavit must set forth that the accused is charged with crime in the demanding state and has fled from justice thereof, or that he was convicted of crime in that state and escaped from confinement, or that he has broken the terms of his bail, probation or parole. *Ibid.*

been made without a warrant "upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year."⁷ In either event, the accused must be brought before the judge or magistrate, and if it appears that he is the person charged with having committed the alleged crime and is a fugitive from justice, the judge or magistrate must commit him to jail for not more than thirty days pending receipt of extradition papers.⁸ The judge or magistrate may admit the accused to "bail by bond, with sufficient sureties, and in such sum as he deems proper," unless the offense charged is punishable by death or life imprisonment under the laws of the state in which it was committed.⁹

After his arrest, four courses of action are open to the accused. (1) He may decide to waive issuance and service of the governor's warrant and all other procedure incidental to extradition by executing in the presence of a judge of any court of record a written consent to return to the demanding state.¹⁰ (2) He may elect to resist the

⁷ Ohio G. C. sec. 109-14. But note that if the arrest is made without a warrant the accused must be taken before a judge or magistrate without delay and "complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section." *Ibid.*

⁸ Ohio G. C. sec. 109-15. Compare procedure for holding the accused pending receipt of requisition under Uniform Extradition Act with the provisions of Ohio G. C. sec. 13434-1 to 13434-3 inc. enacted in 1929; see also 18 O. JUR. "Extradition" p. 935, par. 6.

⁹ Ohio G. C. sec. 109-16. The accused may be released or discharged if he is not arrested under warrant of the governor at the expiration of the time fixed by the judge or magistrate, or he may be recommitted for a further period not to exceed sixty days or again admitted to bail. Ohio G. C. sec. 109-17. If the accused is admitted to bail and subsequently fails to appear, the judge or magistrate shall declare the bond forfeited and order his immediate arrest if he is within the state. Recovery also may be had on such bond. Ohio G. C. sec. 109-18.

¹⁰ Ohio G. C. sec. 109-26. Before the waiver is executed, it is the duty of the judge to inform the accused in open court of his rights to the issuance of

issuance of the governor's warrant and for such purpose may request a hearing in the executive offices. (3) He may decide not to avail himself of an executive hearing but choose instead to apply for a writ of habeas corpus after warrant of the governor has been issued.¹¹ (4) He may adopt a policy of passive resistance—that is, he may simply await completion of the extradition process but do nothing to assist or impede it. It is the duty of counsel, of course, to advise the accused as to the appropriate course of action in the light of all the facts.

The Executive Hearing

Let us assume now that the accused chooses to resist issuance of the governor's warrant. The first step is that of requesting a hearing. As hereinbefore indicated, there is no statutory provision for a hearing in the executive offices. However, it has long been the practice in Ohio to grant such hearings upon request by the accused or his counsel. The request may be made by letter, by telegram or by telephone. If promptly made, it will reach the executive offices in advance of the demand from the governor of the state which is seeking extradition. It should clearly specify the name or names by which the accused is charged and otherwise known, the charge upon which extradition probably will be sought, the state likely to make the demand and the name and address of counsel, if any. Upon re-

a warrant and to obtain a writ of habeas corpus. After the waiver has been executed, it must be forwarded to the office of the governor and filed therein. The waiver procedure itself may not be deemed to limit the rights of the accused to return voluntarily and without formality to the demanding state before demand has been made, nor shall it be deemed to be an exclusive procedure. *Ibid.*

¹¹ OHIO G. C. sec. 109-10. This procedure also may be followed where a hearing in the executive offices has been requested and held and a decision adverse to the accused has been rendered.

ceipt, the request is acknowledged and recorded in a special docket. If and when extradition papers are received, the matter is scheduled for hearing at a definite time and all interested parties are notified thereof immediately. If extradition papers are presented personally by the duly accredited agent of the demanding state, the matter is scheduled for hearing on the first or second days next succeeding receipt thereof, subject to engagements of counsel for accused. On the other hand, if the papers are filed by mail, the hearing is scheduled at the earliest convenient time, usually within a week.

While the issuance or refusal of an extradition warrant is within the final jurisdiction of the governor,¹² the details are handled by his administrative staff. All hearings are before the executive secretary¹³ who consider the evidence and makes a finding as to the facts and the law applicable thereto. It is the practice of the executive secretary at the present time to render an oral opinion at the conclusion of the hearing in which a recommendation for or against issuance of the governor's warrant is included. This opinion is taken down by a stenographer, transcribed and submitted to the governor. Copies thereof, if desired, are furnished to counsel for the accused and the demanding jurisdiction.

The hearings, while not complicated, are conducted with some degree of formality at the present time. In general, the rules of procedure may be summarized as follows:

¹² *In re Polly*, 3 Ohio N. P. (N. S.) 265, 16 Ohio D. (N. P.) 427 (1905); *In re Craig*, 7 Ohio N. P. (N. S.) 307, 19 Ohio D. (N. P.) 843 (1908); *In re Payne*, 7 Ohio D. Rep. 288, 2 W. L. Bull. 76 (1877).

¹³ "The governor, upon receipt of a demand from the chief executive authority of another state for extradition of a person found within the jurisdiction of this state, may properly delegate to a subordinate in his office the authority to hear matters relating to such extradition and report to him, and if satisfied from such report, may take action thereon." 1929 Ohio Atty. Gen. Opinions No. 81.

(1) After the hearing is called to order, counsel for the accused or for the demanding jurisdiction may request a separation of the witnesses.

(2) The requisition of the demanding state is presented by the duly appointed agent of that jurisdiction and the same may be examined by counsel for the accused.

(3) The requisition of the demanding jurisdiction will be recognized by the governor, and extradition will be granted, unless it is shown that the same is defective, or other valid objections are established.¹⁴

(4) The following matters may be inquired into during the course of the hearing:

(a) Whether the requisition of the demanding state is in conformity with all statutory requirements as to form and content.¹⁵

(b) Whether the accused is substantially charged with having committed a crime under the laws of the demanding state, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole.¹⁶

(c) Whether the accused was present in the demanding state at the time of the commission of the alleged crime, and thereafter fled from that state¹⁷; or, in the alternative, whether the accused is charged with committing an act in

¹⁴ "Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state." OHIO G. C. sec. 109-2.

¹⁵ OHIO G. C. sec. 109-3.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

this state, or in a third state, intentionally resulting in a crime in the demanding state.¹⁸

- (d) Whether the accused is properly identified as the person charged with crime.
- (e) Whether the proceedings were instituted in good faith for the prosecution of an alleged crime.

(5) The order of procedure is substantially the same as that prescribed for criminal trials in this state,¹⁹ modified as follows:

- (a) Counsel or the duly appointed agent of the demanding state will make the opening statement and offer the requisition and any supporting evidence. The accused or his counsel shall have the right to cross-examine all witnesses for the demanding jurisdiction.
- (b) The accused or his counsel may then state his objections to the demand and offer his evidence in support thereof. Counsel or agent for the demanding jurisdiction shall have the right to cross-examine all witnesses for the accused.
- (c) The demanding jurisdiction will then be confined to rebutting evidence, but for good reason, and in furtherance of justice, the executive secretary may permit evidence to be presented by either side out of its order.
- (d) When the evidence is concluded, unless the matter is submitted without argument, the counsel or agent for the demanding jurisdic-

¹⁸ OHIO G. C. sec. 109-6.

¹⁹ OHIO G. C. sec. 13442-8.

tion shall commence, the accused or his counsel shall follow, and the counsel or agent for the demanding jurisdiction shall conclude the argument.

- (e) The executive secretary has authority to deviate from the foregoing order of proceedings when in his discretion it is deemed proper.

The purpose of the executive hearing, of course, is to enable the governor to determine whether the person demanded ought to be surrendered. Other means of making this determination are also at the governor's command. The Uniform Act provides that he "may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered."²⁰ This provision has seldom, if ever, been used since enactment of the Uniform Act. Very frequently, however, a member of the attorney general's staff or that of the prosecuting attorney of Franklin County, Ohio, appears as counsel for the demanding jurisdiction as a matter of courtesy. In such capacity, however, the representative of the attorney general or the prosecuting attorney appears as an advocate rather than as a referee.

It is desirable at this point to consider in some detail the several matters concerning which inquiry may be made during the course of the hearing in the office of the governor. While a complete survey of the authorities cannot be made herein, consideration will be given to controlling or significant decisions, with emphasis upon the Ohio law pertaining to each question.

²⁰ Ohio G. C. sec. 109-4.

Requirements as to Form of Requisition

The Uniform Act provides that the demand or requisition must be in writing, that it must contain certain allegations as to the status of the accused as a fugitive, and that it must be accompanied by one of the following documents: "by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole."²¹ The statute also provides that the indictment, information or affidavit must substantially charge the person demanded with having committed a crime, and that the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.²²

The purpose of authentication by the governor of the demanding state is to satisfy the governor of this state that the copy of the instrument is not spurious. However, no particular form of authentication is required; and if the requisition signed by the demanding governor contains language asserting that the copy of the indictment, information, affidavit, judgment of conviction or sentence annexed thereto is authentic, it is sufficient.²³

²¹ OHIO G. C. sec. 109-3.

²² *Ibid.*

²³ *Ex parte Sheldon*, 34 Ohio St. 319 (1878); *In re Sanders*, 10 Ohio O. 1, 24 Ohio L. Abs. 605 (1937). An affidavit charging the offense upon which extradition is based need not be certified on its face as authentic, and it is not

The requisitions issued by the governors of the several states vary somewhat as to form. They are generally alike in substance, however, and contain approximately the same recitals that are contained in the demand or requisition used in Ohio.

Substantial Charge of Crime

The Uniform Act is explicit in providing that the accused must be substantially charged with having committed a crime under the laws of the demanding state.²⁴ The term "crime" is not confined to felonies or otherwise limited in scope. It has been held that the phrase "treason, felony or other crime" used in the Constitution includes every offense under the laws of the demanding state, and therefore includes misdemeanors.²⁵

If the crime charged is not an offense under the laws of the demanding state, the governor has no jurisdiction to issue a warrant.²⁶ On the other hand, the fact that the indictment, information or affidavit may be defective in form is not a reason for refusing extradition if the accused is substantially charged with crime.²⁷ The question whether

unusual to embody such certificate in the requisition itself. *In re Powell*, 10 Ohio O. 54, 25 Ohio L. Abs. 417 (1937). See 18 OHIO JUR. "Extradition" pp. 941-945, par. 15-18; 22 AM. JUR. "Extradition" pp. 274-279, par. 38, 40, 41. There is no requirement of the federal statutes that there be any particular form of attestation of the clerk with the certificate of the judge. *In re Sanders, supra*.

²⁴ OHIO G. C. sec. 109-3.

²⁵ *State v. Hudson*, 2 Ohio N. P. 1, 2 Ohio D. (N. P.) 41 (1893), *affirmed*, 20 Ohio C. C. 660, 10 Ohio C. D. 812, 33 W. L. B. 26 (1895); 52 Ohio St. 673, 44 N. E. 1138 (1895); see 22 AM. JUR. "Extradition" p. 270, par. 30 and cases cited.

²⁶ See, *Ex parte Sheldon*, 34 Ohio St. 319, 325 (1878).

²⁷ *Jackson v. Archibald*, 12 Ohio C. C. 155, 5 Ohio C. D. 533 (1896); *In re Williams*, 5 Ohio App. 55, 25 Ohio C. C. (N. S.) 249, 27 Ohio C. D. 385 (1915); *Ex parte Sheldon*, 34 Ohio St. 319 (1878); see Notes (1932) 81 A. L. R. 552, 565; 22 AM. JUR. "Extradition" p. 267, par. 27. An affidavit is not sufficient, however, if founded on belief or information. *In re Powell*, 10 Ohio O. 54, 25 Ohio L. Abs. 417 (1937),

there is a substantial charge of crime may be determined by comparing the charge with the statutes of the demanding state, of which the courts of this state will take judicial notice.²⁸ Occasionally the question presents considerable difficulty; but where there is a reasonable probability that the courts of the demanding state would hold the charge adequate, extradition should not be denied.²⁹

While the accused must be substantially charged with crime, the truth or falsity of such charge is not a proper matter of inquiry, except in one situation. The Uniform Act provides that the guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor, or in any proceeding after the demand shall have been presented to the governor, except as it may be involved in determining identity, hereinafter noted.³⁰ This limitation is often regarded by the lawyer as a hardship, and frequently presents difficulty in extradition hearings. There is no discretion in the matter, however, and it must be strictly observed.

Fugitive from Justice

The term "fugitive from justice" perhaps has caused more controversy in extradition matters than any other aspect of the subject. The Federal Constitution, provides

²⁸ *Ex parte Sheldon*, 34 Ohio St. 319 (1878).

²⁹ See note 27 *supra*. "The form of indictment may be good under the statutes of Missouri; but be this as it may, it charges the crime of embezzlement, and the sufficiency of the form in which the charge is made must be left for the determination of the courts of that state." *Ex parte Sheldon*, 34 Ohio St. 319, 326 (1878).

³⁰ OHIO G. C. sec. 109-20; *In re Powell*, 10 Ohio O. 54, 25 Ohio L. Abs. 417 (1937); see, *In re Sanders*, 10 Ohio O. 1, 24 Ohio L. Abs. 605 (1937). The question of the present sanity or insanity of an alleged fugitive from justice may not be considered, but must be determined by the law and courts of the demanding state. *State ex rel. Davey, Governor, et al. v. Owen, Judge, et al.*, 133 Ohio St. 96, 10 Ohio O. 102, 12 N. E. (2nd) 144, 114 A. L. R. 686, 693 (1937); see Note (1938) 4 OHIO ST., L. J., 356, 11 OHIO BAR 485.

for the rendition of persons "who shall flee from justice, and be found in another state."³¹ The books are replete with cases interpreting this phrase. While there is a lack of uniformity, the decided weight of authority, both in Ohio and elsewhere, is to the effect that one is a fugitive from justice if he was present in the demanding state at the time he is alleged to have committed the crime but is absent therefrom when he is sought to answer, regardless of his motive or purpose in leaving the demanding state.³² The Uniform Extradition Act contains a specific expression of this point of view. The demand must allege, and the governor of this state must find, "that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state."³³

There is one exception to these requirements of the statute. The governor of this state may also surrender on demand a person charged in another state with committing an act in Ohio, or in a third state, intentionally resulting in a crime in the demanding state. In such case,

³¹ U. S. CONST. Art. IV, Sec. 2, cited *supra* note 3.

³² "To constitute a fugitive from the justice of a State . . . it is not required that the person should have fled secretly or suddenly with the consciousness of having committed the offense, or hurriedly for the purpose of avoiding apprehended process of the law. It is sufficient that, being within the jurisdiction at the alleged time of the commission of the offense, he has subsequently departed before a reasonable time for prosecution shall have elapsed." Johnson and Johnson v. Ammons, 6 Ohio Dec. Rep. 747 (1879). See Wilcox v. Nolze, 34 Ohio St. 520 (1878); *In re Mutchler*, 8 Ohio N. P. (N. S.) 345, 19 Ohio D. (N. P.) 587 (1909); Jackson v. Archibald, 12 Ohio C. C. 155, 5 Ohio C. D. 533 (1896); 18 OHIO JUR. "Extradition" pp. 937-939, par. 9, 10, p. 948, par. 23; 22 AM. JUR. p. 259, par. 21; Notes (1921) 13 A. L. R. 415. As to extradition of persons who left the demanding state by official permission, see Notes (1930) 67 A. L. R. 1480; as to extradition of escaped or paroled convicts, see Notes (1932) 78 A. L. R. 419; and as to persons who were not in demanding state at time of crime, but subsequently entered and departed therefrom, see Notes (1934) 91 A. L. R. 1262. For discussion concerning sufficiency of statements in demanding papers as allegation or proof that accused is fugitive, see Notes (1941) 135 A. L. R. 973.

³³ OHIO G. C. sec. 109-3.

extradition may be granted even though the accused was not in that state at the time the crime was committed and has not fled therefrom.³⁴ Prior to adoption of the Uniform Act, it had been held that the language of the Constitution does not contemplate constructive presence of the accused in the demanding state and constructive flight therefrom.³⁵ The exception written into the Act meets this situation.

A requisition recently presented to the Governor of Ohio rested entirely upon this provision of the Uniform Act.³⁶ The accused had in New York been jointly indicted with a resident of that state for the crimes of abortion and manslaughter. The evidence showed that he was not present in the State of New York either at the time the alleged abortion was performed or thereafter. In fact, he was a resident of Ohio and was employed in this state. His only connection with the crimes lay in the fact that he allegedly had made financial arrangements with the abortionist in New York, and persuaded the victim to submit to the operation in that state. Under the statutes of New York, a person is criminally liable to punishment who, being without that state, causes, procures, aids or abets another to commit a crime within the state. New York statutes also provide that a person is criminally liable who, being with-

³⁴ OHIO G. C. sec. 109-6; see 9 UNIFORM LAWS ANN. "Extradition" p. 179, par. 6; (1940) 24 MINN. L. REV. 248; (1936) 5 FORDHAM L. REV. 484; Taylor v. Smith, 13 N. E. (2nd) 954 (Ind. 1938).

³⁵ Wilcox v. Nolze, 34 Ohio St. 520 (1878); *Ex parte Larney*, 8 Ohio Dec. Rep. 348, 4 Ohio N. P. 304, 5 Ohio D. (N. P.) 541 (1882); Thomas v. Evans, 14 Ohio D. (N. P.) 336 (1902); see 18 OHIO JUR. p. 937, par. 9. The consequences of this conclusion are at once apparent in a factual situation such as was presented in *State v. Hall*, 114 N. C. 909 (1894), in which it was held that "where one, standing in North Carolina, by the firing of a bullet, killed another standing in Tennessee, the assault or stroke was in the latter State and at common law the murder was committed in that State and its Courts alone have jurisdiction of the offense." Under the Constitution, however, the accused could not be extradited to Tennessee because, not having been physically present in that State, he was not a fugitive therefrom,

³⁶ *In re Culbertson* (1941).

out the state and with intent to cause within it a result contrary to the laws of New York, does an act which in its natural and usual course results in an act or effect contrary to its laws. In view of these facts, it was held that the case came within the aforesaid section of the Uniform Act, and a warrant was issued thereunder by the Governor.

In this case counsel for the accused contended that this section of the statute, which permits extradition of one who was not physically present in the demanding state, is unconstitutional. It was held, however, that the governor acts in an executive and not in a judicial capacity;³⁷ and therefore that it is his duty to follow or apply the statute until such time as it may have been declared invalid by a court of competent jurisdiction. That the question of constitutionality should be raised, however, is not unusual. The Constitution contemplates extradition only of persons who shall "flee from justice," and it does not apply, either expressly or impliedly, to persons who were not in the demanding state at the time the crime is alleged to have been committed. On the other hand, there is nothing in the Constitution which places any restriction on the power of the states to deal with situations outside the scope of the specific constitutional provisions. Consequently the writer has been of the opinion that this section of the statute is valid, and that its enactment may be justified as an exercise of the reserved sovereign power of the state.³⁸

This view was recently confirmed by the Court of Appeals for Cuyahoga County, Ohio in the Culbertson case. Following issuance of the Governor's warrant, habeas corpus proceedings were instituted in the Common Pleas

³⁷ See *Wilcox v. Nolze*, 34 Ohio St. 520, 523 (1878).

³⁸ See (1936) 5 *FORDHAM L. REV.* 484, 489, excerpts noted in *THE HANDBOOK ON INTERSTATE CRIME CONTROL* (1940), p. 35; Gordon Dean, *The Interstate Compact—A Device for Crime Repression* (1934) 1 *LAW AND CONTEMPORARY PROBLEMS*, 460, excerpts noted in *THE HANDBOOK ON INTERSTATE CRIME CONTROL*, *supra*, at 36; 22 *AM. JUR.* "Extradition" p. 249, par. 9.

Court of Cuyahoga County and the writ was denied. The matter thereupon was appealed upon the ground that Ohio G. C., 109-6 is in conflict with Article IV, Sec. 2 of the United States Constitution. The Court of Appeals, affirming the lower court in an opinion which as yet is unreported, expressed itself in the syllabus as follows: "Section 109-6, G. C. which provides for right to grant a request of a sister state for the extradition of a person from the state of Ohio where such person is charged in such sister state with having committed a crime therein, even though the person so charged was not in the requesting state at the time of the commission of such crime and has therefore not fled therefrom, is not in conflict with Sec. 2 Article IV of the Federal Constitution and comes clearly within the reserved sovereign powers of the state."

This case is important not only because it recognizes the reserved power of the states to deal with extradition matters outside the scope of the Federal Constitution and statutes, but because it is believed to be the first decision by an appellate court in the United States upholding the clause which authorizes extradition of one who was not present in the demanding state at the time of commission of the crime. The case is now pending in the Supreme Court of Ohio.

The manner in which this section of the law may be invoked may present difficulty. The statute refers to a person in this state "charged in such other state in the manner provided in section 3 (Ohio G. C. 109-3) with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand."³⁹ This might be interpreted to mean that the charge described in the statute must be contained in the indictment, information or affidavit which accom-

³⁹ OHIO G. C. sec. 109-6.

panies the requisition.⁴⁰ On the other hand, a more liberal interpretation would hold that the charge is adequately made if specified in the requisition.⁴¹ The writer is inclined to the latter view, providing the recitals contained in the indictment, information or affidavit are not materially inconsistent therewith. But it seems clear that the charge must be specified either in the requisition or in the indictment, information or affidavit; and that the section is not properly invoked if the accused is simply alleged to be a fugitive from justice as in the ordinary case.

It should be observed in passing that the governor has no duty to deliver up persons who are not fugitives from justice in the actual sense. The statute above described is permissive, not mandatory; and since it was not enacted pursuant to the Constitution, it derives no compulsion therefrom.

The most perplexing cases are those in which the accused is charged with desertion or non-support.⁴² It has been held that temporary presence within the demanding state of one who is charged with failure to provide for wife and children, even though such presence is for an innocent purpose, is sufficient to constitute such person a fugitive from justice upon his departure from that state.⁴³

⁴⁰ *In re Culbertson*, cited *supra* note 36.

⁴¹ The form of requisition recommended by The Interstate Commission on Crime contains an alternative statement: . . . "that the accused was present in this state at the time of the commission of said crime and thereafter fled from this state, or said accused committed an act resulting in said crime in this state . . ." A similar provision is contained in the form of governor's warrant also recommended by the Commission. *THE HANDBOOK ON INTERSTATE CRIME CONTROL* (1940), pp. 30, 31.

⁴² *See* 18 OHIO JUR. "Extradition" p. 939, par. 11.

⁴³ "A resident of one state who enters for a few hours for a lawful purpose the boundaries of another state where his children reside, whom he is failing to support, is subject to extradition after his return to his domicile, in a proceeding against him for such non-support." *People ex rel. Gottschalk v. Brown*, 237

A case of this type was recently presented in Ohio.⁴⁴ The accused, an employee of a railroad company, was transferred to Ohio from Pennsylvania. By mutual arrangement, the wife and family were to remain in Pennsylvania until the husband had become established in his new location. At the time he left them, and for some period after the transfer to Ohio, the accused apparently supported his wife and family within his means. He then discontinued such support, although his employment was continuous, and was thereupon indicted in Pennsylvania for wilful neglect and separation. The evidence showed that on two occasions during the period covered by the indictment he returned to Pennsylvania, remaining there for a very brief time on each occasion. By reason of these entries into the demanding jurisdiction and departure therefrom during the period the accused was charged with the crime, it was held that he became a fugitive from justice, and the warrant was issued by the Governor of Ohio.

On the other hand, where the accused furnished adequate support to his family while he remained in the state where they resided, but later moved to another state and then failed to support them, it has been held that he was not a fugitive from justice of the state where the wife or child remained.⁴⁵ A variation of this factual situation, in which the same principle of law was involved, was pre-

N. Y. 483, 143 N. E. 653, 32 A. L. R. 1164, 1167 (1924); *Chase v. State*, 93 Fla. 963, 113 So. 103, 54 A. L. R. 271, 281 (1927).

⁴⁴ *In re Goodrich* (April 2, 1942).

⁴⁵ *Taft v. Lord*, 92 Conn. 539, 103 A. 644, L. R. A. 1918 E 545 (1918); *Re Robertson*, 38 Nev. 326, 149 P. 182, L. R. A. 1915 E 691 (1915); see Notes 32 A. L. R. 1167 and 54 A. L. R. 281, cited note 43 *supra*. In *Taft v. Lord*, *supra*, the facts indicated that the accused and family resided in New York. He alone moved to Connecticut after making temporary financial provision for his wife and children, and later brought them to Connecticut. Shortly thereafter, the parties quarreled and the wife took the children back to New York where

sented in another case recently considered in Ohio.⁴⁰ The accused and his family, who had resided for some time in Ohio, moved to Boston where he obtained employment. Shortly thereafter a quarrel occurred and he returned to Ohio where he was reemployed. Sometime later he returned to Boston to see his family. Immediately upon his arrival, he was arrested on a non-support charge and was convicted and sentenced to serve a term of six months. On the day of his release from confinement he boarded a bus at East Boston arriving in Ohio on the next day. The evidence showed that, upon his return to Ohio, he sent a letter and two telegrams to his wife advising her that he was free and had returned to Ohio to work, but that no replies were received. Thereafter he failed to provide support, an indictment was returned in Massachusetts charging non-support for a period beginning on the date of his release from confinement in Massachusetts, and extradition was sought.

While there were valid arguments on both sides, it was held that the accused was not a fugitive from justice and extradition was denied. The decision rested on the following facts: (1) When the accused completed his term of service, such service disposed of all criminal neglect committed prior to the date of such incarceration. (2) The accused was at liberty in the State of Massachusetts for a few hours at the most on the day he left East Boston for

they continued to live. An indictment was returned against the accused in New York and extradition from Connecticut was sought. The court held that, under these facts, the accused was not a fugitive from justice. In the opinion, the court said: "It may well be that by his conduct towards his children, he has rendered himself answerable to the State of New York for a violation of its criminal laws, but clearly he is not a fit subject for a compulsory return to that State as a fugitive from justice therefrom, in order that he may be required to answer to such charge." *Id.* at 546.

⁴⁰ *In re Seward* (March 4, 1942).

Ohio, being the interval between the time he was released from confinement and the time he obtained bus transportation. (3) There was no continuing crime on the day the accused was released from confinement; in fact, it was alleged that his prison earnings had been turned over to the family and that his return to Ohio was motivated by the fact that he could obtain employment there. In view of all these circumstances, it was felt that the accused could not be regarded as a fugitive from justice within the meaning of the statute. The difficulty presented in cases of desertion and non-support can now be avoided, it would seem, by invoking the provisions of section 6 of the Uniform Act in those instances where the accused is not clearly a fugitive from justice according to traditional standards.⁴⁷

There is one further statutory provision concerning the requirement that the accused be a fugitive from justice. The Uniform Act provides that the governor may also surrender on demand persons charged with crime in another state even though such persons left the demanding state involuntarily.⁴⁸ The reason for this provision lies in the fact that the decisions are conflicting upon the question whether a person who is taken from a state by legal compulsion thereby becomes a fugitive from justice.⁴⁹

Identity of the Accused

The question always may be raised in extradition cases whether the person held has been identified as the person

⁴⁷ OHIO G. C. sec. 109-6.

⁴⁸ OHIO G. C. sec. 109-5 (par. 2).

⁴⁹ See Notes (1933) 85 A. L. R. 118; Note 9 UNIFORM LAWS ANN. "Extradition" p. 178.

charged with the crime, the issue being whether the proceedings are directed against him. The question is not whether the prisoner committed the crime, but whether he is the person charged and intended by the requisition or warrant.⁵⁰ Consequently, proof of an alibi or of absence from the scene of the crime at the time of its commission is not relevant or admissible unless such proof "is probative of the fact that the accused is not a fugitive from justice."⁵¹

As a matter of practice, the question of identity is frequently inseparable from the question whether the accused is a fugitive from the demanding state. In an extradition case recently considered in the Executive Offices, the accused was charged by affidavit and warrant with the crime of armed robbery alleged to have been committed in the State of Kentucky.⁵² The accused was identified by the victim and his wife as the person who entered his place of business and committed the robbery. At the same time, the accused was identified by reputable business persons of Cincinnati, Ohio, as a man who had transacted business with them in Cincinnati at the very time the crime was alleged to have been committed in Kentucky. It was necessary to choose between the testimony of the prosecuting witnesses and the witnesses for the accused and, after weighing all of the pertinent evidence, that offered by the

⁵⁰ See, *In re Williams*, 5 Ohio App. 55, 59, 25 Ohio C. C. (n. s.) 249, 37 Ohio C. C. 385 (1915); *Ex parte Van Vleck*, 6 Ohio Dec. Rep. 636, 7 Am. L. Rec. 275 (1878); *Ex parte Moore*, 7 Ohio Dec. Rep. 272, 275, 2 W. L. Bull. 42 (1877); 18 OHIO JUR. "Extradition" p. 950, par. 24; Notes (1933) 84 A. L. R. 337, 339.

⁵¹ *Ex parte Larney*, 4 Ohio N. P. 304, 5 Ohio D. 541, 7 W. L. B. 149 (1881); see *State ex rel. Davey v. Owen*, 133 Ohio St. 96, 102, 12 N. E. (2nd) 144, 114 A. L. R. 686 (1937); Notes (1927) 51 A. L. R. 797, 811; (1929) 61 A. L. R. 715, 717; 22 AM. JUR. "Extradition" p. 294, par. 54.

⁵² *In re Jackson* (April 2, 1942).

witnesses for the accused was deemed worthy of greater weight. One important factor was the fact that when the victim saw the accused the day after the robbery he was not certain that he was the person who committed the crime. It was not until he saw him a second time that he did so identify him. The extradition, therefore, was denied by the Governor on the ground that the accused was not a fugitive from justice.

A similar case arose in connection with the demand of the State of Indiana for the rendition of a resident of Ohio who was indicted on account of a swindle alleged to have been perpetrated in that state seven years earlier.⁵³ The victim of the swindle identified the accused as one of the persons who participated therein. The evidence showed, however, that shortly after the crime was alleged to have been committed the victim went to the State of Tennessee to identify the same person, and at that time was unable to identify him as one of those who committed the crime. There was no testimony whatever to the effect that the accused was in the state of Indiana or in any state other than Ohio at the time of the alleged crime. On the contrary, testimony was offered by the accused to show that he was in Ohio at the time the crime was committed. Consequently, extradition was denied on the ground that the accused was not a fugitive from justice. In this case, as in the previous one, absence from the scene of the crime, or an alibi, could be shown because such evidence was probative of the fact that the accused was not a fugitive from justice.

Occasionally, however, the question whether the person arrested is the person charged and intended by the requisition is squarely raised. A case of this type was pre-

⁵³ *In re Thompson* (October 23, 1941).

sented within recent months upon demand of the Governor of Pennsylvania for the return to that state of one charged with extortion.⁵⁴ In this case the accused was known by several aliases. It was the contention of his counsel that he was not the person named in the requisition. For the purpose of establishing identity, the State of Pennsylvania offered the testimony of the victim of the alleged swindle who described the person who perpetrated the crime upon him and identified him by photograph. In addition, he identified and there was offered in evidence a certain instrument alleged to have been signed by the accused and given to the victim as a part of the transaction. Counsel for the accused denied the photograph to be that of the accused and the instrument to be in his handwriting. He offered, however, subject to the consent of his client, to produce specimens of the accused's handwriting for the purpose of determining identity. Such specimens were produced and upon examination thereof it clearly appeared that the handwriting in each instance was the same as that appearing in the instrument alleged to have been signed by the person who perpetrated the crime. Accordingly, the question of identity was resolved in favor of the State of Pennsylvania and the warrant was issued by the Governor. In this case the question of identity was not related to the question whether the person held was a fugitive from justice. In fact, other evidence indicated that the person held was in the state of Pennsylvania at the time of the alleged crime.

In passing it should be remembered that the task of identifying the person held as the person charged with the crime is the only situation in which matters of guilt or in-

⁵⁴ *In re* Abels (January 17, 1942).

nocence may be involved either in a proceeding before the governor or in any proceeding thereafter.⁵⁵

Good Faith of the Proceedings

The statutes in effect in Ohio prior to adoption of the Uniform Act specifically provided that the demand upon the governor of this state by the executive authority of another state must be made in good faith.⁵⁵ The Uniform Act, however, contains neither the same nor any similar provision.⁵⁷ The question therefore may be raised whether, by reason of repeal of the former statute, the governor of this state is deprived of the right to inquire into the good faith of the foreign prosecution.

There is authority for the proposition that where an extradition is based on ulterior motive, such as collecting private claims or gratifying personal malice, it may be refused within the discretion of the governor. This view was clearly expressed in an early Ohio case decided under a statute which, like the present one, made no reference to

⁵⁵ OHIO G. C. sec. 109-20; see Note 30 *supra*.

⁵⁶ Former OHIO G. C. sec. 110, which provided that the requisition of the demanding state must be accompanied by sworn evidence "that the demand is in good faith for the punishment of crime and not for the purpose of the collection of debt or pecuniary mulct or of removing the alleged fugitive to a foreign jurisdiction to serve him with civil process." *In re Williams*, 5 Ohio App. 55, 25 Ohio C. C. (n. s.) 249, 37 Ohio C. C. 385 (1915); *Compton v. Wilder*, 40 Ohio St. 130, 133 (1883).

⁵⁷ The Uniform Act does require, in connection with the return of fugitives from this state, that the prosecuting attorney who applies for the requisition shall certify that the proceeding is not instituted to enforce a private claim. OHIO G. C. sec. 109-23. There is also a good faith requirement in connection with the requisition of fugitives in cases of international extradition. The governor must be "satisfied by sworn evidence that extradition is sought in good faith for the punishment of the crime named and not for the purpose of collecting a debt or pecuniary mulct or of bringing the alleged fugitive within the state of Ohio to serve him with civil process other than for the crime for which his extradition is sought." OHIO G. C. sec. 117.

good faith.⁵⁸ On the other hand, it has been held that the question of motive or purpose of the prosecution may not be inquired into on the hearing of an application for a writ of habeas corpus following the issuance of the governor's warrant.⁵⁹

In the most recent Ohio case on the subject,⁶⁰ the State of New York sought to extradite the accused, a woman, upon indictments for larceny and embezzlement. The facts showed that the accused had been employed as business agent for a number of years by another woman who maintained residence both in New York and Ohio. Subsequent to termination of this employment, the accused obtained

⁵⁸ *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345 (1877). "To employ this extraordinary process for public purposes tends to secure peace and good order; but to prostitute it to the advancement of private ends is to bring it into great disfavor . . . No satisfactory reason is perceived why a governor should issue or obey a requisition when he is satisfied that the sole object of the party complaining is to enforce the payment of a private claim for money. Such an abuse of process is equivalent to a fraudulent use of it." *Id.* at 74. See 72 Ohio L. 79. It should be observed, however, that the governor adopted and followed a suggestion contained in a joint resolution adopted by the general assembly on March 25, 1870. In this resolution, the general assembly expressed the opinion that the governor should not make or allow requisitions "until clearly satisfied that the requisition is sought in good faith for the punishment of crime . . ." 67 Ohio O. L. 171. In *ex parte Maloney*, 27 Ohio C. A. 529, 29 Ohio C. D. 357, 63 Bull. 33 (1917), *aff.* 98 Ohio St. 463 (1918), the court held that former OHIO G. C. sec. 110 did not authorize the court at the hearing provided in former G. C. secs. 113 and 114 to determine whether the proceeding is in good faith, and that if it did so authorize it would be unconstitutional. However, the court did say: "But as we read this section and construe it, we think it applies to the Governor of the state, and not to a judge of the court of common pleas. It was passed for the purpose of guiding the Governor in determining whether or not a warrant should be issued." *Id.* at 534. See Notes (1935) 94 A. L. R. 1493, 1495; 22 AM. JUR. "Extradition" p. 254, par. 15.

⁵⁹ *Ex parte Van Vleck*, 6 Ohio Dec. Rep. 636, 7 Am. L. Rec. 275 (1878); *Ex parte Maloney*, 27 Ohio C. A. 529, 29 Ohio C. D. 357, 63 W. L. Bull. 33 (1917) cited note 38 *supra*; see *In re Gregg*, 35 Abs. 378, *aff.* 139 Ohio St. 170 (1941). In the case of *People, ex rel. v. Murray*, 357 Ill. 326, 192 N. E. 198 (1934) a statute authorizing inquiry, in a habeas corpus proceeding, into the question whether the requisition is made in good faith was held unconstitutional by reason of being in conflict with Art. IV, Sec. 2 of the U. S. Constitution.

⁶⁰ *In re Gregg*, 35 Ohio L. Abs. 378, *aff.* 139 Ohio St. 170 (1941).

judgments in Ohio for more than sixty-five thousand dollars against her former employer. Thereafter the employer charged the accused with embezzlement and later indictments were returned.

At the extradition hearing in the Governor's Office, the accused sought to show that the prosecution was not in good faith. The argument was that the prosecuting witness had instituted the criminal proceedings against her former employee in order to impede collection of the judgments or to embarrass her in her efforts to collect them. In order to rebut any inference of "bad faith" which might arise from the foregoing circumstances, the assistant district attorney of New York County offered testimony to show (1) that the State of New York did not act when the prosecuting witness filed her original affidavit; (2) that an investigation was ordered; (3) that the accounting staff of the district attorney's office was assigned to assist in the investigation; and (4) that bank records, brokerage accounts and other documents belonging to the parties were subpoenaed. In addition, the method of investigation and the nature of the testimony and other evidence accumulated during the investigation were disclosed. From all this it order to rebut any presumption of "bad faith" which might be made clear that the prosecution in New York would not proceed upon the testimony of the prosecuting witness unsupported by substantial corroborating evidence. Accordingly, the prosecution was held to be in good faith and the warrant was issued by the Governor.⁶¹

⁶¹ In his opinion and recommendation to the Governor, the writer said: "Whether the indictment is true or whether the explanation offered by the accused is true, is wholly and absolutely immaterial in this proceeding. When you face that fact and discover that there was an independent investigation resulting in certain findings which are supported by documentary evidence, which may or may not be valid, the conclusion is inescapable that there is no bad faith on the part of the District Attorney. In other words, the malice or

Upon issuance of the Governor's warrant, a petition for a writ of habeas corpus was filed by the accused in the Common Pleas Court of Cuyahoga County, Ohio. Evidence offered by the accused to show that the prosecution in New York was not in good faith was rejected by the trial court and the prayer of the petition was denied. The judgment was affirmed by the Court of Appeals,⁶² and an appeal as of right to the Supreme Court was dismissed for the reason that no debatable constitutional question was involved.⁶³

Clearly the Supreme Court's judgment, following the earlier pronouncement, does not proscribe inquiry by the Governor into the question of good faith of the prosecution.⁶⁴ In the absence of a specific prohibition, it is the present policy in the Executive Offices to consider whether the proceedings are in good faith in any case where the question is raised. But a requisition is denied on this ground only where it is clear that the prosecuting authorities, as distinguished from interested parties, are not acting in good faith. In other words, even though a prosecuting witness may be acting from an ulterior motive, this fact will not be permitted to defeat the requisition if it is clear that the prosecuting attorney is acting in good faith and with the intention of prosecuting to the full extent of the law.⁶⁵ Bad faith on the part of a prosecuting witness will

ulterior motive of the prosecuting witness, if any, is of no importance in this hearing because adequate evidence has been submitted to rebut any inference of bad faith on the part of the prosecuting authorities."

⁶² *In re Gregg*, 35 Ohio L. Abs. 378 (1941), cited notes 59 and 60 *supra*. "It is our opinion that whatever the law may have been previous to the repeal of Sec. 110 G. C., evidence as to the motive or good faith of a prosecution is not now admissible in a habeas corpus proceeding in an extradition matter in Ohio." *Id.* at 379.

⁶³ *In re Gregg*, 139 Ohio St. 170 (1941), cited notes 59 and 60 *supra*.

⁶⁴ See note 58 *supra*.

⁶⁵ See note 61 *supra*.

defeat a requisition only where it may also be imputed to the prosecuting officer or where the prosecuting officer intentionally or through ignorance, carelessness or indifference lends the power of his office to the satisfaction of some personal malice or the settlement of some civil obligation.

Proceedings Subsequent to Executive Hearing

Having considered the questions that may be raised in an extradition hearing in the executive offices, let us now consider the proceedings subsequent thereto.

If the governor decides that the demand should not be complied with, that puts an end to the matter. From the decision there is no appeal.⁶⁶ In such event, the governor of the demanding state is notified by letter of the refusal and the reasons therefor.

If the governor decides that the demand should be complied with, he is required to sign a warrant of arrest directed to any peace officer or other person whom he may think fit to entrust with execution thereof. The warrant must be sealed with the state seal and must contain a substantial recital of the facts necessary to the validity of its issuance.⁶⁷ The statute also provides that such warrant shall authorize the peace officer to arrest the accused at any time and any place where he may be found within the state, to command the aid of all peace officers or other persons in

⁶⁶ The governor of Ohio cannot, through the judiciary or any other department of government, be compelled to deliver up an alleged fugitive from justice. *Kentucky v. Dennison*, Governor of Ohio, 24 Howard 66 (1860). See Notes (1894) 8 HAR. L. REV. 416. The demanding jurisdiction, however, may present a second requisition. See 22 AM. JUR. "Extradition" p. 296, in which it is pointed out that "where a first application for extradition is refused on the ground that the evidence presented is insufficient, it leaves the proceeding in the same condition as in other cases of preliminary examination, and there may be a second inquiry."

⁶⁷ OHIO G. C. sec. 109-7.

the execution thereof, and to deliver the accused to the duly authorized agent of the demanding state.⁶⁸

Before the accused may be delivered to the duly authorized agent of the demanding state, however, the statute requires that he shall first be taken before a judge of a court of record in this state, who shall inform him of the demand, of the crime with which he is charged and that he has the right to demand and procure legal counsel.⁶⁹ If the accused or his counsel desires to test the legality of arrest, and shall so state, the judge is required to fix a reasonable time within which the accused may apply for a writ of habeas corpus.⁷⁰ If such writ is applied for, notice of the time and place of hearing thereon must be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and also to the agent of the demanding state.⁷¹ It is a misdemeanor for an officer to deliver the accused contrary to the foregoing provisions.⁷²

Occasionally it will be discovered that while the accused is extraditable, criminal proceedings have been instituted against him under the laws of this state and are still pending. In such cases, the governor, in his discretion, may surrender the accused to the demanding state or he

⁶⁸ OHIO G. C. sec. 109-8. "Every such peace officer or other person . . . , shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance." OHIO G. C. sec. 109-9.

⁶⁹ OHIO G. C. sec. 109-10.

⁷⁰ *Ibid.* Where proceedings are in conformity with law and accused is held in custody by a sheriff pursuant to a warrant issued by the governor of Ohio, for delivery to agent of demanding state under OHIO G. C. 109-1 *et seq.*, the accused is lawfully restrained of his liberty. *Ex parte* Carpenter, 27 Ohio L. Abs. 363 (1938).

⁷¹ *Ibid.*

⁷² OHIO G. C. sec. 109-11.

may hold him until he has been tried and discharged or convicted and punished in this state.⁷³

A case of this nature recently arose in Ohio.⁷⁴ The State of Pennsylvania sought return of the accused on a charge of wilful neglect to maintain wife and minor children. The evidence showed that the accused was under indictment and in custody in Franklin County, Ohio on a perjury charge which was based upon an alleged false oath in an action for divorce filed by the accused in that county. Both the prosecuting attorney and the trial judge on the criminal bench recommended that the accused be released to Pennsylvania, stating that the charge here grew out of the domestic difficulties of the parties in Pennsylvania and that that state should be permitted to proceed first. For this reason, and inasmuch as the right of this state to regain custody of the accused upon his acquittal or completion of sentence in Pennsylvania are safeguarded under the Ohio statute,⁷⁵ the warrant was issued by the Governor.

It occasionally happens, after the governor's warrant is issued, that evidence will be presented clearly establishing a defect in the requisition or proceedings. The Uniform Act meets this situation by providing that the governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.⁷⁶ This was the law,

⁷³ OHIO G. C. sec. 109-19. See 18 OHIO JUR. "Extradition" p. 939, par. 12.

⁷⁴ *In re Goodrich* (April 2, 1942) cited note 44 *supra*.

⁷⁵ "Nothing in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever." OHIO G. C. sec. 109-27.

⁷⁶ OHIO G. C. sec. 109-21.

however, prior to adoption of the Uniform Act. In an early case, the Supreme Court held that if a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it, whether issued by himself or his predecessor.⁷⁷ It is the policy of the Governor, however, to recall a warrant only for the purpose of hearing the new evidence, after which final action will be taken in conformity with the findings thereon.

One other provision incident to execution of the governor's warrant should be mentioned. The statute provides that the officer or agent to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass.⁷⁸ In the same manner, when an officer or agent having a prisoner in custody is passing through this state from another state to the demanding state, he may when necessary confine the prisoner in the jail of any county or city through which he may pass. In such a case the prisoner is not entitled to demand a new requisition while in this state.⁷⁹

REQUISITION OF FUGITIVES FROM THIS STATE

The governor of this state may request the executive authority of another state to surrender fugitives from this state in the following instances: (1) when the person demanded is charged with crime in this state; or (2) when the person demanded has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole.⁸⁰

⁷⁷ *Work v. Corrington*, 34 Ohio St. 64 (1877).

⁷⁸ OHIO G. C. sec. 109-12.

⁷⁹ *Ibid.*

⁸⁰ OHIO G. C. sec. 109-23.

Before the governor may act in any of these cases, it is necessary that a written application for a requisition be presented to him. Printed forms are available at the governor's office and will be furnished upon request. In the case of a person charged with a crime in this state, the application for the requisition must be presented by the prosecuting attorney of the county in which the charge is made. Such application must state the name of the person charged, the crime charged against him, the approximate time, place and circumstances of its commission,⁸¹ the state in which he is believed to be, including the location of the accused therein; and the prosecuting attorney must certify that in his opinion the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.⁸²

In the case of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the application for the requisition must be presented by the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county from which escape was made. Such application must state the name of the per-

⁸¹ If the accused was personally present in this state at the time of the commission of the crime and thereafter fled from the state, the application should so allege. But if section 6 of the Uniform Act is invoked, the application should allege that the accused committed an act in the asylum state, or in a third state, intentionally resulting in a crime in this state. The latter procedure may be followed only in the event the demand is to be made on a state which also has adopted section 6 of the Uniform Act. See note 41 *supra*.

⁸² *Ibid.* Where an Ohio prosecutor in his application to the governor set forth the making of a complaint and the issuance of a warrant and annexed an affidavit of the complaining witness setting forth the time, place and circumstances of the alleged crime, there was sufficient compliance with the statute. *In re Molisak*, 291 Mich. 46, 288 N. W. 329 (1939).

son, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, and the state in which he is believed to be, including his location therein.⁸³

In every case, the statute provides that the application for requisition shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of (1) the indictment returned, or (2) information and affidavit filed, or (3) the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or (4) the judgment of conviction or the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper.⁸⁴

When the application for a requisition is presented at the governor's office, it is immediately referred to the governor's executive secretary who has charge of extradition matters. If it is found to be defective in any respect, it is returned at once to the officer filing it for correction or revision. If it is found to be correct in all respects, and fully in conformity with the Uniform Act, the executive secretary causes a requisition to be prepared.⁸⁵ One copy of the application and one copy of each of the supporting

⁸³ OHIO G. C. sec. 109-23.

⁸⁴ *Ibid.* The writer suggests that a copy of the Ohio statute applicable in the case also be attached.

⁸⁵ No statutory provision is made with respect to the form or content of the requisition. It is believed, however, that it should conform to the specifications contained in OHIO G. C. sec. 109-3 pertaining to the demand of the executive authority of other states, for otherwise it would defeat the purpose of the Act to achieve uniformity. Hence, in addition to the documents attached thereto, the requisition should allege all of the facts therein required, including a statement that the accused was present in this state at the time of the commission of the alleged crime and thereafter fled from the state, or that he committed an act in another state intentionally resulting in a crime in this state. See note 41, *supra*.

documents are attached thereto,⁸⁶ and the entire requisition is then referred to the governor with the recommendation of the executive secretary for approval. If the governor approves, he signs his name to the requisition and the same is promptly delivered to the prosecuting officer or agent.

The statute provides that one copy of the application for requisition, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence, shall be filed in the office of the secretary of state to remain of record in that office.⁸⁷ As a matter of practice, an additional copy of the application and supporting papers is requested in each case and is kept on file in the governor's office.

In addition to the requisition directed to the governor of the state in which the accused is found, the governor of this state is required to empower an agent to receive the prisoner if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed. This is accomplished by the issuance of a warrant under the seal of the state.⁸⁸ Although the statute provides that the warrant shall be issued "to some agent",⁸⁹ it is the practice of the governor, providing no adequate reason for doing otherwise is apparent, to appoint the person who is nominated or designated for such purpose in the application for the requisition. The warrant of appointment of agent is delivered to the prosecuting officer or agent with the governor's requisition.

⁸⁶ The requisition also contains the governor's certificate as to the authenticity of the annexed papers.

⁸⁷ OHIO G. C. sec. 109-23.

⁸⁸ OHIO G. C. sec. 109-22.

⁸⁹ *Ibid.*

The question is sometimes presented whether the accused is subject to service of process in civil actions in this state when he is brought back by means of extradition proceedings. This question is clearly answered by the Uniform Act. Whether the accused is brought back by, or after waiver of, extradition based on a criminal charge, he is not subject to such personal process "until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited."⁹⁰ Prior to adoption of the Uniform Act, Ohio followed this rule of immunity from service of civil process.⁹¹

Another question occasionally raised is whether the accused, after being returned to Ohio by extradition proceedings or after waiver thereof, may be tried for other crimes not designated in the requisition. The Uniform Act answers this question in the affirmative.⁹² Prior to adoption of the Act, the Ohio law was somewhat uncertain. The Supreme Court, contrary to the majority view elsewhere on this subject,⁹³ had held that the accused could not be tried for a crime other than that for which he was extradited unless he waived such privilege.⁹⁴ Thereafter, the Supreme Court of the United States, in a case which arose in Georgia, decided that the accused has no

⁹⁰ OHIO G. C. sec. 109-25.

⁹¹ *Compton, Ault & Co. v. Wilder*, 40 Ohio St. 130 (1883); *Lotz v. Lotz*, 23 Ohio N. P. (N. S.) 309 (1921). The privilege of immunity may be waived by the accused. *White v. Marshall*, 3 Ohio C. C. (N. S.) 495, 23 Ohio C. C. 376. When the accused, who was extradited from New York to Kentucky, was served with summons in a civil action while passing through Ohio on his way home by the party who caused his extradition, the court set aside the service. *Deuber Watch Co. v. Dalzell*, 10 Ohio Dec. Rep. 227 (1888). See 18 OHIO JUR. "Extradition" p. 936, par. 8.

⁹² OHIO G. C. sec. 109-28.

⁹³ Notes 21 A. L. R. 1405, 1418.

⁹⁴ *Ex parte McKnight*, 48 Ohio St. 588, 14 L. R. A. 128, 28 N. E. 1034 (1891).

right, privilege or immunity to be exempt from indictment or trial for other or different crimes in the demanding state.⁹⁵ After this decision but prior to adoption of the Uniform Act, two Ohio courts took the view that the decision of the United States Supreme Court should be followed notwithstanding the earlier pronouncement of the Ohio Supreme Court.⁹⁶

The Uniform Act makes special provision for a case where the accused is imprisoned or is held under criminal proceedings pending against him in another state at the time it is desired to have him returned to this state. In such case, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state.⁹⁷ But the agreement must be on condition that such person will be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.⁹⁸

Finally, a word concerning the payment of costs is in order. The Uniform Act provides for payment of certain expenses out of the state treasury, on the certificate of the governor and warrant of the auditor,⁹⁹ but the General Assembly has never appropriated funds for this purpose. However, the Ohio Code carries a provision in existence for many years, which authorizes payment by the county commissioners of "all necessary expenses of pursuing and

⁹⁵ *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. 687 (1893).

⁹⁶ *In re Brophy* 2 Ohio N. P. 230, 4 Ohio D (N. P.) 391 (1895); *Ex parte Moeller*, 14 Ohio App. 300 (1921). See 18 OHIO JUR. "Extradition" pp. 932-935, par. 5.

⁹⁷ OHIO G. C. sec. 109-5.

⁹⁸ *Ibid.*

⁹⁹ OHIO G. C. sec. 109-24. Such expenses include the fees paid to the officers of the state on whose governor the requisition is made, and not exceeding ten cents a mile for all necessary travel in returning the prisoner. *Ibid.*

returning such person so charged, or so much thereof as to them seems just" in cases where the governor has issued a requisition.¹⁰⁰ The Attorney General of Ohio twice has ruled that this statute was not repealed by implication upon adoption of the Uniform Act.¹⁰¹

The question whether expenses may be paid out of the state treasury has arisen in two cases where a person who had been charged and convicted of a felony and sentenced to a state penal or reformatory institution escaped from the county jail and fled to another state or county. In the first case no requisition was issued by the Governor, and for this reason the Attorney General ruled that the expenses could not lawfully be paid from the state treasury,¹⁰² although they could lawfully be paid by the county commissioners.¹⁰³ In the second case, extradition proceedings were had, but the Attorney General ruled that payment could only be made from county funds in the absence of a specific legislative appropriation.¹⁰⁴

CONCLUSION

In closing, there are two matters that ought to be emphasized. The first pertains to the importance of the Uniform Criminal Extradition Act as an instrumentality of law enforcement. The Federal Bureau of Investigation has estimated that the number of major crimes in the United States during the year 1941 was 1,531,272. This represented an increase of 14,246 crimes, or 0.9 percent,

¹⁰⁰ OHIO G. C. sec. 2491.

¹⁰¹ 1937 Ohio A. G. Opns. No. 1236; 1940 Ohio A. G. Opns. No. 3186.

¹⁰² 1940 Ohio A. G. Opns. No. 2021.

¹⁰³ "The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country." OHIO G. C. sec. 3015.

¹⁰⁴ 1940 Ohio A. G. Opns. No. 3186. In this case payment by county commissioners would be pursuant to OHIO G. C. sec. 2491 cited note 100 *supra*.

over the year 1940. The increases noted are as follows: murder, 0.3 percent; negligent manslaughter, 3.5 percent; rape, 2.2 percent; aggravated assault, 4.0 percent; larceny, 1.9 percent; and auto theft, 7.0 percent. Only robbery and burglary declined, having decreased 6.7 percent and 4.4 percent respectively.¹⁰⁵

While the relationship between crime generally and extradition statistics of a single state does not warrant any inferences or conclusions, it is interesting to note that the number of demands made upon the Governor of Ohio by the executive authorities of other states increased from 93 in 1940, to 109 in 1941. The demands in 1941 also exceeded the number made in 1939, although by a smaller margin.¹⁰⁶ On the other hand, the number of requisitions

¹⁰⁵ UNIFORM CRIME REPORTS, No. 4, January 1942, at 166. The report further states: "More than 59 per cent of the crimes committed in 1941 were larcenies; 21 percent were burglaries; 11.9 percent were auto thefts; and 3.1 percent were robberies. Thus it is seen that almost 96 percent of the offenses were for the purpose of obtaining property. Murders, negligent manslaughters, rapes, and other felonious assaults constituted the remaining 4.3 percent.

"More than 58 percent of the robbery cases were classed as highway robberies; 33.9 percent of the robberies involved oil stations, chain stores, and other commercial houses. Almost half of the burglaries in 1941 involved residences. Two-thirds of the residence burglaries occurred at night, whereas 90 percent of nonresidence burglaries were committed during the night.

"Thefts of auto parts, accessories, and other property from automobiles constituted 36 percent of the total larcenies in 1941, and in view of the probable difficulty of obtaining replacements, automobile owners might well make additional provisions to safeguard their property. In 67.2 percent of the larcenies, the stolen property was valued from \$5 to \$50; in 22.3 percent of the cases the property was valued at less than \$5; and property valued in excess of \$50 was stolen in 10.5 percent of the cases.

"The average value of property stolen per offense of robbery was \$112.37; for burglary, \$60.56; and for larceny, \$29.84. The average automobile stolen in 1941 was valued at \$458. In auto thefts, recoveries were effected in 95 percent of the cases, whereas slightly less than 22 percent of other types of property was recovered. The average value of property stolen per offense was higher in 1941 than in 1940." *Id.* at 166.

¹⁰⁶ There were 104 demands made upon the Governor of Ohio in 1939, 93 in 1940 and 109 in 1941.

issued by the Governor of Ohio in 1941 was slightly less than in 1939 or 1940.¹⁰⁷

Be that as it may, the Interstate Commission on Crime is undoubtedly right when it avers that "one of the most apparent needs in modernizing the administration of criminal justice is that of facilitating the transfer of criminals from one state to another, so that one state may not become, unintentionally, a sanctuary for criminals who are engaged in the commission of crimes in neighboring states."¹⁰⁸ The Uniform Criminal Extradition Act is an important factor in the solution of this problem. Of special significance is the section which permits an accused to be delivered up even though he is not a fugitive from justice in the constitutional sense.¹⁰⁹ As the Commission points out, "the importance of this provision is easily understood when thought is given to the vast conspiracies indulged in by organized criminals which may, and often do, involve operations across the borders of several states."¹¹⁰

The second point of emphasis follows from the first; the value of the Uniform Act as an instrumentality of law enforcement will be enhanced to the extent that it is universally adopted and uniformly interpreted. As to the former, substantial progress already has been made. The original Uniform Act was proposed in 1926 by the Na-

¹⁰⁷ There were 150 requisitions issued by the Governor of Ohio in 1939, 149 in 1940 and 142 in 1941.

¹⁰⁸ THE HANDBOOK ON INTERSTATE CRIME CONTROL (April 1, 1940), p. 20. Other uniform acts sponsored by the Interstate Commission on Crime are: Uniform Act on Fresh Pursuit of Criminals (OHIO G. C. sec. 13434-4 to 13434-11); Uniform Act to Compel Attendance of Witnesses (OHIO G. C. sec. 13436-24 to 13436-31); Uniform Act for Out-of-State Parolee Supervision (OHIO G. C. sec. 108-1 to 108-3); Uniform Pistol Act; Uniform Narcotic Drug Act (OHIO G. C. sec. 12672-1 to 12672-23).

¹⁰⁹ OHIO G. C. sec. 109-6, cited, *supra*, notes 18, 34, 39, and 47.

¹¹⁰ THE HANDBOOK ON INTERSTATE CRIME CONTROL, *supra*, at page 21.

tional Conference of Commissioners on Uniform State Laws, was amended in 1932, and was revised in 1936. Adoption of the Act by thirty-one states during the period of sixteen years attests the capacity of independent and sovereign states to meet an interstate problem through interstate cooperation and without resorting to federal legislation. It is to be hoped that the remaining seventeen states will adopt the Uniform Act in the near future.

As to uniformity of interpretation we must await the verdict of history. There undoubtedly will be variations but these variations will be of little consequence if governors and judges alike observe the mandate, written into the Act itself, that its provisions "shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it".¹¹¹ And this, too, is within the realm of possibility.

¹¹¹ OHIO G. C. sec. 109-29.