The court further pointed out, consistently with earlier Ohio decisions, that the ordinance was invalid as a stop-gap ordinance to preserve the *status quo* pending the adoption of a comprehensive zoning ordinance. *State ex rel.* v. *Guion*, 117 Ohio St. 327, 158 N.E. 748 (1927); *State ex rel.* v. *Kruezweiser*, 120 Ohio St. 352, 166 N.E. 228 (1929). A number of jurisdictions look more favorably upon such emergency measures. *Downham* v. *City Council of Alexandria*, 58 Fed. (2d) 784 (1932); *Lima* v. *Woodruff*, 107 Cal. App. 285, 290 Pac. 480 (1930).

The crux of the whole problem is the extent to which regulation under the police power can be carried before it ceases to be regulation and reaches the point of confiscation without compensation. It is essentially a question of degree and a balancing of public and private interests. While it may at first seem startling that such a hazard to life cannot be removed in the manner attempted, the case is sound from the viewpoint of precedent.

JOHN G. SARBER

CRIMINAL LAW

EXTRADITION — INSANITY AS A BAR TO

The Ohio Legislature, during its last session, adopted the Uniform Criminal Extradition Act (Ohio G.C. sec. 109-1 to 109-31) which became effective August 20, 1937. The first case decided under the new Act involved a request by the State of Georgia for the return of an alleged fugitive who had committed arson in that state and fled from justice, seeking asylum in Ohio. At the hearing before the Governor, the request for extradition was honored, and a warrant issued for the rendition of the alleged fugitive. A writ of *habeas corpus* on behalf of the accused issued out of the court of common pleas, and at the hearing of the cause it was shown that a lunacy inquest concerning his mental capacity was then pending. The court found that it was improper to proceed with the extradition so long as the lunacy proceedings existed. A writ of procedendo on the relation of the Governor then issued in the Supreme Court compelling the court of common pleas to proceed to judgment in the *habeas corpus* proceedings notwithstanding the pendency of the lunacy inquest. *The State, ex rel., Davey, Governor, et al.* v. *Owen, Judge, et al.*, 133 Ohio St. 96, 10 Ohio O. 102, 12 N.E. (2d) 144 (1937). This raises the interesting question, "Suppose the alleged fugitive were so insane as to be unable to understand the

nature of the extradition proceedings, and to take advantage of his right, under the present Act, to *habeas corpus*?"

Ohio has held that in the trial of a criminal indictment it must appear that the accused has sufficient reason and presence of mind to properly inform his counsel of matters pertaining to his defense, to be advised by them, to aid in the selection of the jury, and to comprehend the details of the evidence; and if any of these details be missing, a defense of insanity has been made out. *State* v. *Rieber*, 51 Ohio Law Bull. 208 (1906). And the jury in such a case is expected to inquire into the present sanity or insanity of the accused concerning these matters, without regard for the mental condition of the accused at the time of the commission of the alleged act. *State* v. *Terwiliger*, 54 Ohio Law Bull. 205, 6 Ohio Law Rep. 588 (1908).

By section 13441-1 of the General Code, it is provided that where a suggestion of the insanity of the accused is made by counsel, or notice of this fact is otherwise conveyed to the court, he shall proceed to a determination of that issue before proceeding with the trial of the indictment. This section was held to be mandatory in *Evans* v. *State*, 123 Ohio St. 132, 174 N.E. 348 (1930) at page 140, where the Court, speaking through Judge Allen, says, " * * * hence the accused is assured of an inquiry into his mental condition, not at the discretion of the court, but as a matter of right."

In the extradition proceedings involved in *The State, ex rel., Davey, Governor, et al.* v. *Owen, et al., supra*, however, the court was basing its decision on sound authority when it ordered the *habeas corpus* hearing to proceed to final judgment regardless of the lunacy proceeding which was pending. In that case, the court relied in part on the case of *Charlton* v. *Kelly, Sheriff*, 229 U.S. 447, 57 L. Ed. 1274, 33 Sup. Ct. 945 (1912), which is a leading authority in the field, and in which the Supreme Court of the United States said, through Mr. Justice Lurton: "We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime." In view of the usual procedure adopted in cases where the sanity of the accused is questioned, it would appear that this rule applied in extradition proceedings would constitute an anomaly in the law of criminal procedure.

At this point it would be well to inquire into the nature and technique

of extradition in order to determine whether there are any fundamental differences between that proceeding and the ordinary trial of a criminal indictment which would justify so seemingly radical a departure from our well established procedural policy in cases involving sanity of the accused.

In the extradition hearing held in the asylum state, no attempt is made to pass on the ultimate guilt of the accused. The only considerations inquired into at such a hearing are whether or not a crime is charged under the laws of the demanding state; whether or not the identity of the accused is established; whether or not the accused is a fugitive from justice, and that the demand for extradition is made in good faith. *Wilcox* v. *Nolze*, 34 Ohio St. 520, 7 Ohio D.R. 446 (1878); *In re Williams*, 5 Ohio App. 55, 25 Ohio C.C. (N.S.) 249, 27 Ohio C.D. 385 (1915). Thus it will be seen that alleged insanity at the time of the commission of the act will not constitute a defense, and that question is one to be determined at the trial of the offense. The problem raised here is the one of present insanity, or insanity at the time of the proceeding for extradition, with the resultant inability on the part of the accused to appreciate the rights guaranteed him under the Act.

The common method of testing the sufficiency of the extradition proceedings is through application for a writ of *habeas corpus*. It is expressly provided in the new Act (Ohio G.C. 109-10) that the prisoner shall be taken before a judge and informed of the charge made against him, and a reasonable time allowed within which he may apply for a writ of *habeas corpus*. Under the former act (Ohio G.C. 114) there was no express provision for *habeas corpus*, it being provided that a person arrested in such a proceeding should, before being surrendered to the agent of the demanding state, be brought before a judge who proceeded to hear and examine the charge. It was held, however, that the power of the court at such a proceeding was substantially the same as in *habeas corpus*. *Wilcox* v. *Nolze*, *supra*, *In re Hampton*, 1 Ohio N.P. 181, 2 Ohio Dec. (N.P. 579 (1895). But while the extradition of the prisoner is a criminal process, the writ of *habeas corpus* is not a proceeding in that process. *Habeas corpus* is a civil proceeding, instituted by a party to enforce the civil right of personal liberty, whether the restraint being exercised is civil or criminal. *Henderson* v. *James*, 52 Ohio St. 242, 39 N.E. 805, 27 L.R.A. 290 (1895); *Ex Parte Tom Tong*, 108 U.S. 556, 27 L. Ed. 826, 2 Sup. Ct. Rep. 871 (1883). The action is brought at the instance of the accused, and he is the party plaintiff. Recognizing this distinction then, can it be said that the insanity of the accused would materially affect the case? Ohio has adopted a legislative

provision (Ohio Gen. Code Sec. 11247), which is common in most states, providing that the action of an insane person must be brought by his guardian. That this section is mandatory has been expressly held in *Reno* v. *Love*, 25 Ohio C.C. (N.S.) 129, 26 Ohio C.D. 296, 60 Bull. 497, affirmed without opinion in 88 Ohio St. 623 (1916). The provision is only applicable, however, where the party has been adjudged insane by proceedings instituted for that purpose, and where there has been a guardian appointed at the time the suit is brought. 22 Ohio Jur., "Insane Persons," sec. 40. By section 11249 of the General Code, it is provided that, where the plaintiff becomes insane or his insanity is discovered after the action is brought, it shall be prosecuted by his guardian or trustee appointed by the court. Section 11251 provides that where the insanity is not manifest to the court, the question may be tried by the court or a jury impaneled for that purpose.

As a result of the foregoing statutory provisions, the fact that the accused is the party plaintiff, and the fact that the action is a civil proceeding, would not appear to be sufficient reasons for saying that the insanity of the accused in an extradition proceeding is immaterial. If these provisions are to be construed liberally, it would seem that, upon the suggestion of insanity, it would be incumbent upon the court to investigate the charge, and, if found to be true, appoint a trustee whose duty it would be to aid the accused in the preparation and conduct of his case.

CHARLES A. REYNARD

DOMESTIC RELATIONS

CONTRACTS AND QUASI-CONTRACTS OF PARENT AND CHILD

The plaintiff filed an action against the defendant, executor of his mother's will, to recover for personal services rendered by him during the six years immediately preceding her death. The decedent had lived at the Hotel Alms and the plaintiff lived with his family about one mile therefrom. The services consisted in personal attention to the mother and in assisting her in the management of her property consisting of about eighty thousand dollars worth of securities. The court of appeals held (1) that the plaintiff could not recover on a quasi-contractual theory for work and labor performed because of the close family relationship of the parties; (2) that the evidence was not of a sufficiently high degree to warrant recovery on a contractual basis. *Woods* v. *Fifth-Third Union Trust Co.*, 54 Ohio App. 303, 6 N.E. (2d) 987 (1936).