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Louis S. Posner

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THE LAW OF EXTRADITION—A LATE PHASE

"But since for one state to admit within its territories another foreign power upon the score of exacting punishment is not practical, nor indeed convenient, it seems reasonable that a state where the convicted offender lives or has taken shelter should, upon application being made to it, either punish the demanded person according to his demerits, or else deliver him up to be treated at the discretion of the injured party."¹

IN these words Grotius declares the basic policy that underlies the law with regard to the extradition of criminals. The right to extradite a criminal is here said to spring from the inadmissibility of permitting a foreign power to exert jurisdiction within the confines of a nation, a difficulty that might prevent entirely the punishment of criminals unless the right of extradition be secured. While the law of extradition as recognized by Grotius at any early day is essentially modern in character, he follows his usual course of pointing to many illustrations even as far back as Biblical days, wherein the right was asserted by the various nations of ancient times.²

If we were to follow the views of Grotius, we should be led to conclude that the right to extradition is a fundamental right founded on natural law, and that it exists independent of treaties. The view, however, of the United States Government, as is also that of many other important nations excepting perhaps England and Italy, has been consistently to the effect that no right of extradition exists unless such a

¹ GROTIUS, *DE JURE BELLI ET PACI*, Book II, c. 21, par. 4, p. 457 (1738).

² See *JUDGES*, c. XX.

right is created by treaty. Thomas Jefferson, acting as Secretary of State, in November, 1791, declared: ³

“The delivery of fugitives from one country to another, as practised by several nations, is in consequence of conventions settled between them, defining precisely the cases wherein such delivery shall take place * * *. The laws of the United States, like those of England, receive every fugitive and no authority has been given to our executives to deliver them up.”

Several cases are on record in which extradition was demanded by foreign powers and refused by the United States in the absence of a treaty. Such a request was made by the French Government in February, 1794, and our State Department took the position that despite the friendly relations then existing between this country and France, the President's “legal power was too questionable to cause the arrest to be made.” ⁴ In the same way, in 1874, the United States refused to request the extradition from Spain of one Sharkey who was accused of murder in this country, because of the absence of a treaty of extradition between the United States and Spain. ⁵ In 1876, however, Tweed was extradited from Spain in spite of the absence of applicable treaty provisions. ⁶ This was accomplished through a suggestion made to the Spanish Government that the United States would be pleased if Tweed were returned for trial here, but this Government then expressly stipulated that it would assume no reciprocal obligation in the absence of a treaty. Secretary of State Fish said, with regard to this incident: ⁷

“The United States has from time to time carefully avoided making requests for the surrender of criminals, for the reason among others that it might

³ Thomas Jefferson, Sec. of State, to the President, Nov. 7, 1791. Mss. Dept. of State.

⁴ Mr. Randolph, Sec. of State, to M. Fanchet, Feb. 7, 1794.

⁵ Mr. Cadwalder, Acting Sec. of State, to Mr. Cushing, Minister to Spain, May 11, 1875.

⁶ Mr. Fish, Sec. of State, to Mr. Adee, chargé d'affaires, Nov. 3, 1876.

⁷ *Ibid.*

not be possible to reciprocate on such a matter. The Government of Spain, in its action in this case has appreciated the peculiarity of the case."

Similar requests to that in the Tweed case in which the Government of the United States asked the extradition of a criminal but expressly stipulated that it be not deemed to undertake to reciprocate are rare in the history of this country, and only one other such instance is readily to be found, namely, that of the extradition of Bill Tucker from Guatemala in 1884.⁸ As late as 1900 Mr. Hay refused to comply with the request of the Governor of Puerto Rico that this country demand the extradition from Spain of a person charged with murder; he based his refusal on the ground that there was no extradition treaty between Spain and the United States.⁹

Presiding Judge Martin T. Manton of the Circuit Court of Appeals in the Second Circuit, writing recently for that court, recognized that "The early writers of extradition held that it was a matter of 'right' and that the nation harboring a criminal had a 'duty' to deliver him to a requesting nation."¹⁰ He adds: "The more modern writers, however, are united in considering extradition not as a duty, but as a matter of favor or of comity,"¹¹ and expresses the opinion that it is "now clear that apart from a treaty a state has no duty to deliver up a person who has sought asylum within its boundaries."¹²

But even under existing extradition treaties problems have arisen with regard to the scope of the right to extra-

⁸ Mr. Frelinghuysen, Sec. of State, to Mr. Gosling, Dec. 18, 1884; see also report of Mr. Bayard, Sec. of State, to the President, in the case of Wm. J. McGraigle, Sept. 14, 1887: "During the past thirty years this Government has repeatedly refused to make a request for extradition in the absence of a treaty, and several notable surrenders of fugitive criminals to the United States, among which may be instanced that of Tweed, have been made without any request on the part of the Government."

⁹ Mr. Hay, Sec. of State, to the Governor of Puerto Rico, June 19, 1900. See also letter of Mr. Hill, Acting Sec. of State, to Mr. Warner, Oct. 6, 1899, "It has been deemed impolitic to ask of foreign governments a favor which this government could not grant."

¹⁰ U. S. *ex rel.* Donnelly v. Mulligan, 74 F. (2d) 220, 221 (C. C. A. 2d, 1934).

¹¹ *Ibid.*

¹² *Id.* at 222.

dition. For example, it is generally conceded that a criminal may not be tried for a crime committed before extradition, other than the one on account of which he has been surrendered, unless he first be given opportunity to return to the country of his asylum. This proposition, which is considered to be a rule of international law without regard to any specific provision in the treaty to that effect, is as a matter of fact incorporated in many of the extradition treaties to which the United States is a party.¹³ Apparently, jurists are concerned about preserving the right of asylum to its fullest possible extent, as an end to social security.

A superficial view might lead one to question the soundness of this rule. If a person be brought back from a foreign country to answer for a crime charged against him, it seems like an inordinate waste of administrative effort and a useless racing of governmental machinery to permit him to return to a foreign country only for the purpose of being again extradited to be tried for another crime. Indeed, the view that this procedure is unnecessary and not required by international law is taken by Westlake,¹⁴ who was of the opinion that a person might be tried for other offences than that for which he was extradited, with the possible exception of political offences. While the contrary view has been in recent years the official position of the United States Government, there was a time when the State Department insisted upon the right to try fugitives from justice for crimes other than those for which they had been extradited.¹⁵ In 1877 a Royal Commission in England reported in favor of permitting a criminal to be tried for one offence regardless of the fact that he had been extradited for another.¹⁶ Most international law writers, among them Billot,¹⁷

¹³ As for example art. VII of Extradition Treaty with France—37 STAT. 1531.

¹⁴ Quoted in MOORE, EXTRADITION (1876) 215.

¹⁵ Winslow Case (1870); opinion of Mr. Fish, Sec. of State, supported by his reference to Canadian Cases; *Regina v. Van Aerman*, 4 Upper Canada Rep. Com. Pleas 288; *Regina v. Paxton*, 10 Lower Canada Jurist 212; 11 Lower Canada Jurist 352; *In re Isaac Rosenbaum*, 20 L. C. Jur. 165; *Case of Burley*, 1 U. C. L. Jour. (N. S.) 34; *Case of Worms*, 22 L. P. Jur. 109.

¹⁶ See MOORE, EXTRADITION (1891) 79.

¹⁷ BILLOT, TRAITE DE L'EXTRADITION 308.

Hefter¹⁸ and Field,¹⁹ have supported the contrary view. Dr. Von Bar,²⁰ a German internationalist, proposed a compromise in which he suggested that a criminal who was extradited for one offence might be tried for any other committed before extradition, provided the consent of the government who had surrendered him could be obtained. Whatever may be the merits of these differences of viewpoint, it is obvious that much may be said in favor of that advanced by Dr. Von Bar. Since the decision, however, of the United States Supreme Court in the *Rauscher* case²¹ it has been the law, here at least, that no person who is extradited for one crime may be tried for another committed before extradition, unless and until he has been given opportunity to return to the country of his asylum. The decision has been followed in England and has been frequently cited by lower courts in the United States.²²

¹⁸ HEFTER, DAS EUROPÄISCHE VOLKERRICHT (1881) §63.

¹⁹ INTERNATIONAL CODE (2d ed. 1874) 122.

²⁰ See MOORE, EXTRADITION (1891) 216; 9 REV. DE DROIT INT. (1877) 5, 16.

²¹ United States v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234 (1886).

²² "The judicial history of the subject in the United States may be briefly summarized. In the case of Caldwell, in 1871, Judge Benedict, sitting in the Circuit Court of the United States for the Southern District of New York, sustained a demurrer by the government to a plea on the part of the prisoner that he was extradited from Canada to the United States under the treaty of 1842 and that the offence for which he was indicted was not one of those specified in the treaty. (U. S. v. Caldwell, 18 Blatchf. 131.)" 4 MOORE, INTERNATIONAL LAW DIGEST 310. In 1873, however, Mr. Justice Fancher, sitting in the Supreme Court of New York in Matter of La Grave, 14 Abb. Pr. (N. S.) 333, 45 How. Pr. 301 (N. Y. 1873), ruled the other way. The Supreme Court of Kentucky in Com. v. Hawes, 13 Busch 697 (Ky. 1878) likewise anticipated the decision of the Rauscher case in a case involving the extradition of a criminal from Canada and the same view was followed by the Texas Court in 1881 in Blandford v. The State, 10 Tex. App. 627 (1881). Judge Hoffman, sitting in the United States District Court for the Southern District of California, applied the same rule in 1882, in United States v. Watts, 14 Fed. 130 (D. C. D. Cal. 1882). The same view was also taken in Ohio in State v. Vanderpool, 39 Ohio St. 273 (1883), but in 1885 Judge Acheson took a different view in *In re* Miller, 23 Fed. 32 (C. C. W. D. Pa. 1885). In 1886, just before the decision in the Rauscher case, the view there enunciated was again anticipated by Judge Deady in *Ex parte* Hibbs, 26 Fed. 421 (D. C. D. Ore. 1886). The decision in the Rauscher case was followed on the Queens Bench Division of the High Court of Justice in May, 1888, in the case of Alice Woodhall, reported in MOORE ON EXTRADITION at 240. And also in *Ex parte* Coy, 32 Fed. 911 (W. D. Tex. 1887); In the Matter of Reinitz, 7 N. Y. Crim. Rep. 74, 39 Fed. 204 (C. C. S. D. N. Y. 1889); see also Hall v. Patterson, 45 Fed. 352 (C. C. D. N. J. 1891), where it was held that a fugitive who was charged originally with a different offence may yet be tried for the offence for which he was surrendered.

The development of extradition laws would seem from the foregoing to rest more and more upon a strict basis of treaty provision and upon an enhanced appreciation of the social desirability of protecting the right of asylum. Four phases of this development are readily discernible, and it is the fourth phase which constitutes the innovation—the subject of this paper.

The first step was taken when it was insisted that extradition both with regard to the “right” and the “duty” rests only upon the express provisions of treaty, and that without treaty there does not exist any mutual obligation to surrender criminals by one nation to another. We have seen that Grotius had other views and that he insisted upon the proposition that the mutual obligation to surrender criminals arose from natural law, but in the United States, at least, from the very outset it has been insisted that extradition can derive only from treaty provisions.

In the second phase, the right of extradition was limited not only to cases where treaties so provided in general, but where, in addition, the precise crimes were named in the treaty.²³ So that if the enumeration was incomplete and a person was accused of a crime not specified in the extradition treaty, the United States Government consistently refused either to request extradition or to grant surrender. John Bassett Moore states that:

“No case has been found in which the government of the United States requested of another government, with which it had a treaty, the surrender of a fugitive for an offence not therein specified.”²⁴

The third step in the process of limiting the right of extradition and fostering the right of asylum consisted of the judicial determination, finally settled in this country, in the *Rauscher* case, that the accused may be tried only for that offence for which he is surrendered, even though he may

²³ MOORE, EXTRADITION AND INTERSTATE RENDITION (1891) §43. See also Mr. Macy, Sec. of State, to Mr. Parker, Aug. 28, 1856; Mr. Seward, Acting Sec. of State, to Governor Young, April 6, 1877; Mr. Webster to Mr. Hebard, Feb. 26, 1851.

²⁴ *Id.* §43.

have committed before his extradition other offences specified in the treaty.

The result of these three steps in the development of the law of extradition is that a person who has escaped to the asylum of a foreign country may be extradited only if a treaty exists between the United States and that country, and then only if he is charged specifically with one of the crimes set out in that treaty, and that even after his surrender he may be tried only for the specific crime for which the extradition was requested.

The Circuit Court of Appeals in the Second Circuit in *United States ex rel. Donnelly v. Mulligan*,²⁵ decided on December 31st, 1934, and further reviewed on reargument upon amplified record on April 1, 1935, carried this process into a fourth phase related to the law of extradition. In achieving this result, Judge Manton wrote for the court an illuminating and scholarly opinion in which he stressed the history of the right of asylum and developed his decision by logical deduction from existing treaty and statutory provisions.

In that case, the relator was indicted in New York in December, 1930. His arrest occurred in France in July, 1933, and upon the application of the United States he was extradited under the treaty between the two governments. He was surrendered to the United States in April, 1934, and brought to New York City. Upon the later recommendation of the District Attorney of New York County he was discharged from the indictment, and enlarged upon his own recognizance, the reason assigned being the death of a material witness without whose testimony it was impossible to prove the crime. Within thirty days after his discharge he was again arrested by the United States Marshal at the request this time of the Canadian Government, and was held for extradition to Canada. Thereupon he sued out a writ of *habeas corpus*, alleging that his arrest for extradition to Canada was illegal in that he was not afforded an opportunity in accordance with the treaty provision to return to France. The case was complicated by the fact that the

²⁵ 74 F. (2d) 220 (C. C. A. 2d, 1934); S. C., reargument, decided April 1, 1935, not yet reported.

French Republic had signified to the Canadian Legation at Paris that if Canada intended at some future date to request the extradition of the prisoner from the United States, the Republic of France would support the request. The situation was parallel if not analogous to the proposal of Dr. Von Bar^{25a} nearly seventy years before, that a defendant might be tried for a crime other than the one for which he had been surrendered, if the surrendering nation consented—a proposal that was something of a compromise between the existing American rule on the one hand and the attitude, on the other, that there was no reason why a criminal once surrendered could not be tried for any offence of which he was accused, regardless of that for which he was surrendered.

The extradition treaty between the United States and France, however, contained an express provision to the effect that:²⁶

“No person surrendered by either of the High contracting parties to the other shall be triable or tried or be punished for any crime or offence committed prior to his extradition, other than the offence for which he was delivered up, nor shall such person be arrested or detained on civil process for a cause accrued before extradition, unless he has been at liberty for one month after having been tried, to leave the country, or, in case of conviction, for one month after having suffered his punishment or having been pardoned.”

The case thus presented a novel question. It was not whether the relator could be tried for an offence other than the one for which he had been delivered up. He could not be so tried. As to that the treaty was explicit. The question was whether he could be surrendered by this Government to another country, a situation not covered by the express language of the treaty, and for which no precedent existed. Was the thirty-day grant of immunity sufficiently broad to include apprehension for re-extradition to a third country?

^{25a} *Supra* note 20.

²⁶ *Id.* at 221.

True, the consent of France to the surrender of the criminal to Canada had been indicated to the Canadian Legation; but not to the United States. There stood the treaty between France and the United States, buttressed by the express provision for the "thirty day right to return," the settled rule of treaty basis for extradition, and the traditional policy of the United States for ready recognition of rights of asylum. The court was faced with the plain corollary to this situation, namely, that in cases not governed by the treaty the court has the duty of refusing the surrender of a criminal. Here, as elsewhere, the problem of interpretation of an existing text was almost equivalent to the problem of creating a new rule. The Circuit Court of Appeals followed the situation to its logical result and, sustaining the writ, wrote: ²⁷

"If a prisoner may not be subject to arrest on civil process after extradition from a foreign country, by the same reasoning he cannot be arrested and held for extradition (in a criminal offence) to a third country."

But the court was not slow to point the way out. Quoting with approval the declaration of the Supreme Court that "while the escape of criminals is, of course, to be greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith," the court makes clear that the criminal may be deprived of this right of asylum by the country in which that asylum is claimed: ²⁸

"The appellant had a place of asylum in France and could be deprived of this only by the action of the French government. France under international law, has the right to give him asylum or to take it from him. Asylum necessarily means absolute immunity from the jurisdiction of another state, subject only to the will of the state of asylum, and it must be borne in mind that the right of the state of asylum is

²⁷ *Id.* at 223.

²⁸ *Ibid.*

sovereign and unlimited, excepting insofar as the state freely imposes limits on itself."

The opinion concludes with the significant observation that while the formalities attending an extradition are purely *administrative* functions which the accused and the state of asylum can properly waive, the *diplomatic guarantees* in the instant case—the thirty-day period of immunity—which are accorded for the sole benefit of the accused, cannot be violated by the demanding state without the consent of the surrendering state.

The government of the United States was not slow to act. Since the right of asylum, as pointed out by the Circuit Court, means "absolute immunity from the jurisdiction of another state, subject only to the will of the state of asylum," the latter, France, in due course, registered its will by addressing to the United States its consent to the surrender of the prisoner to the new demanding government, Canada.

Within or *dehors* the treaty, France had the right to grant or refuse asylum to the prisoner. She was free to proceed independently of the treaty and to consent, as an act of international comity, that the prisoner be delivered to Canada. This was in full accord with the historic basis of the right of asylum and the prisoner could not complain.²⁹ Yielding to the policies declared in its previous opinion, the Circuit Court upon reargument directed the delivery of the prisoner into the hands of the Canadian Government.

The law of extradition is not infrequently in the foreground of international turmoil. The front pages of the daily newspapers are often the vehicles through which public opinion is formulated on such matters. When a stock promoter seeks sanctuary in Greece or two sovereign states like New York and New Jersey desire to inflict punishment on a person accused of heinous crime, the layman is often impatient with what he regards as technicalities whose sole use appears to be the creation of obstacles to the punishment

²⁹ *Glucksman v. Wm. Henkel*, 221 U. S. 508, 31 Sup. Ct. 704 (1910); *Greene v. United States*, 154 Fed. 401 (C. C. A. 5th, 1907); *Fernandez v. Phillips*, 268 U. S. 311 (1924); U. S. *ex rel. Donnelly v. Mulligan*, decided April 1, 1935, not yet reported.

of crime. It is unfortunate that the public may find it difficult to appreciate the niceties involved in the administration of justice and the social hazards that are avoided by holding close to the technical requirements and safeguards which surround our criminal jurisprudence and the liberties of the individual. While in some cases the guilty may go unpunished as a result of these refinements of the law, the security of person and the more important ends of justice can, it is believed, be obtained only by judicial statesmanship and careful analysis that lead to the application of existing and predictable rules and principles of law. The decisions of Judge Manton in *United States v. Mulligan* are a noteworthy illustration of this type of high judicial statecraft.

LOUIS S. POSNER.

New York City.