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## Criminal Law -- Jurisdiction -- Illegal Arrest -- Due Process -- Violation of International Law

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CRIMINAL LAW—JURISDICTION—ILLEGAL ARREST—DUE PROCESS—VIOLATION OF INTERNATIONAL LAW.—In the absence of universal criminal jurisdiction, it is well established that only the state whose criminal law has been violated<sup>1</sup> may try the person accused of the violation. If the accused has sought refuge abroad, he must be brought within the state in which he is to stand trial in order to give the appropriate court of this state jurisdiction over his person. His presence may be secured lawfully by way of extradition or, unlawfully, by kidnapping him in the state of refuge, or by enticing him to come into the state of prosecution by fraud, deception or trickery, rather than force.

Will the accused be able successfully to resist any attempt to prosecute him on the ground that his presence within the territorial jurisdiction of the court has been illegally obtained?

Kidnapping may involve a violation of customary or conventional international law when officials of the prosecuting state or private persons at the instigation of such officials perpetrated it. In this case, the kidnapping of the accused constitutes a violation of the territorial sovereignty of the state of refuge. A violation of international law may also occur where the accused has been seized in breach of a treaty of extradition.

In Canada, the courts seem to be of the opinion that an accused cannot succeed in escaping justice because he was brought to trial against his will. This practice has its source in the Roman law maxim *mala captus bene detentus*. On the other hand, in the United States of America, some courts have begun to adopt a different opinion on this question.

In *Re Hartnett and The Queen; Re Hudson and The Queen*,<sup>2</sup> the applicants who resided in the United States of America sought, by way of *certiorari*, to quash their committal for trial on charges of fraud. The informations had been laid by an investigator with the Ontario Securities Commission in January, 1973, after an investigation which had begun in 1972. The applicant Hudson who had voluntarily appeared before the Commission on two previous occasions and the applicant Hartnett had been asked to appear again before the Commission to give evidence under oath in January, 1973. They journeyed from Dallas, Texas, to Toronto, but were arrested before they could attend the hearing. The applicants took the position that they were enticed into

<sup>1</sup> In Canada jurisdiction over offences is mostly based on the territorial principle. See ss. 5(2) and 6 of the Criminal Code, R.S.C., 1970, c. C-34, as am. Jurisdiction generally means the capacity of a state under international law to make or to enforce a rule of law.

<sup>2</sup> [1974] 1 O.R. (2d) 206.

Canada on the pretence that the further assistance of Hudson and the additional assistance of Hartnett were required by the Ontario Securities Commission when the real purpose of the Commission staff was to have them arrested. They argued that in a civil proceeding service of a writ effected in this way would be set aside, and that for the purposes of the criminal law, what had happened amounted to denying them that "due process of law" which Canadian subjects and the subjects or citizens of any other state to whom the laws of Canada applied, were guaranteed by section 1(a) of the Canadian Bill of Rights which states:<sup>3</sup>

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

The process of law owed to them included the right to have extradition proceedings taken against them in the United States of America. Failure to take such proceedings denied them this right as well as natural justice and in consequence the Provincial Court judge had no jurisdiction to conduct the preliminary hearing on the charges which were laid against them in Canada.

The Ontario High Court dismissed the applications on the ground that the method used in bringing an accused to Canada does not affect the jurisdiction of the judge to conduct the preliminary hearing.

There was no denial of "due process of law". The court relied on the Supreme Court decision in *Curr v. The Queen*<sup>4</sup> where Mr. Justice Ritchie stated that the "meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase 'due process of law' as used in s. 1(a) is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts in Canada'".<sup>5</sup>

In that case Mr. Justice Laskin made an extensive review of the meaning of "due process of law" in which he referred to the origins of the phrase and its application in decisions of the United States Supreme Court. However, he declined to take the phrase

<sup>3</sup> S.C., 1960, c. 44, now R.S.C., 1970, App. III.

<sup>4</sup> [1972] S.C.R. 889, 7 C.C.C. (2d) 181.

<sup>5</sup> *Ibid.*, at pp. 916 (S.C.R.), 185 (C.C.C.) For earlier cases see S. M. Beck, *Electronic Surveillance and the Administration of Criminal Justice* (1968), 46 Can. Bar Rev. 643, at p. 659 *et seq.* The purpose of the Bill of Rights is to make existing rights more enforceable. It does not create new rights. Still a right exists even though it is often violated.

"except by due process of law" beyond its antecedents in English legal history in order to view it in terms that have had sanction in the United States of America, ". . . in the consideration there of those parts of the Fifth and Fourteenth Amendments to the American Constitution that forbid the federal and state authorities respectively to deprive any person of life, liberty or property without due process of law".<sup>6</sup> Section 1(a) essentially points to procedural considerations. As his Lordship said: "I am unable to appreciate what more can be read into s. 1(a) from a procedural standpoint than is already comprehended by s. 2(e) ('a fair hearing in accordance with the principles of fundamental justice') and by s. 2(f) ('a fair and public hearing by an independent and impartial tribunal')".<sup>7</sup> In other words, section 1(a) would seem to refer to procedural regularity or procedural fairness in the criminal courts and not to the manner in which the accused is brought before these courts.

Although Mr. Justice Laskin stated that the Crown conceded that section 1(a) could have application to pre-trial matters affecting the person who is about to be charged with an offence, this issue was not pursued.<sup>8</sup> Nor did the High Court of Ontario in the *Hartnett* case accept Mr. Justice Martland's invitation in *Curr* to expand the law when he said: "I do not adopt as final, any specific definition of the phrase 'due process of law' as used in s. 1(a) of the Canadian Bill of Rights."<sup>9</sup>

The Ontario High Court merely applied *R. v. Isbell*<sup>10</sup> where it was held that an illegal arrest does not deprive the judge of jurisdiction to entertain the prosecution of the accused. The court pointed out that although this case was decided before the enact-

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<sup>6</sup> *Ibid.*, at pp. 896 (S.C.R.), 190 (C.C.C.).

<sup>7</sup> *Ibid.*

<sup>8</sup> Pre-trial police misconduct that would be prohibited is that which would tend to convict an innocent man, such as an illegally obtained confession.

<sup>9</sup> *Ibid.*, at pp. 914 (S.C.R.), 184 (C.C.C.). Note that *Hartnett* is not a case where the infringement of the Bill of Rights would render a federal enactment inoperative. All that is needed is for the courts and the police to exercise their powers in accordance with s. 1(a) of the Bill of Rights. For support by analogy see Laskin J. in *Brownridge v. R.*, [1972] S.C.R. 926, at pp. 954-955.

<sup>10</sup> (1928), 63 O.L.R. 384, 51 C.C.C. 362, [1929] 2 D.L.R. 732. This view implies a literal interpretation of s. 428(a) of the Criminal Code, *supra*, footnote 1, which provides that ". . . every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence (a) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court;".

ment of the Bill of Rights, it was still good authority since the arrest of the applicants was not unlawful in its domestic aspects and all they were complaining of was that, by virtue of such arrest, they had been denied the right to be heard in extradition proceedings, a circumstance which, in the view of the court, did not invalidate the process, although it may have constituted a violation of the United States-Canada Extradition Treaty.

The Ontario High Court also refused to apply by analogy the well-settled rule applicable to civil proceedings that where a non-resident defendant is enticed into the state by the fraud of the plaintiff, the court will not exercise jurisdiction over him<sup>11</sup> on the ground that: "Analogy may be useful and persuasive but it cannot be used to make law. . . ."<sup>12</sup>

By contrast, in the United States of America, the Federal Court of Appeals for the Second Circuit, in a remarkable opinion, came to the conclusion that the requirement of due process, as understood in that country, requires the criminal court to divest itself of jurisdiction over the accused where it has been acquired as a result of the illegal conduct of law enforcement authorities. Such conduct debases the processes of justice and cannot be ignored by the court.

In *United States v. Toscanino*,<sup>13</sup> the accused, an Italian citizen, was appealing from a conviction in the Eastern District Court of New York for conspiracy to import and distribute narcotics. He contended that the court had acquired jurisdiction over him unlawfully through the conduct of American agents who kidnaped him in Uruguay with the connivance of the United States Government, used illegal electronic surveillance, tortured him and abducted him via Brazil to the United States to prosecute him there.

The accused did not question the sufficiency of the evidence against him, nor did he claim any error as regards the trial itself. His argument both prior to the trial and after the verdict of the jury was returned, was that the proceedings in the District Court were void because his presence within the territorial jurisdiction of the court had been illegally obtained. At no time had the United States formally or informally requested the Government of Uruguay to extradite him. No effort was made to proceed through legal channels, but rather the whole operation was conducted willfully and unlawfully, violating the domestic laws of three separate

<sup>11</sup> *Lewis v. Wiley* (1923), 53 O.L.R. 608, at p. 609, per Riddell J.

<sup>12</sup> *Supra*, footnote 2, at p. 210.

<sup>13</sup> (1974), 500 F. 2d 267 (2nd Cir.). Re-hearing denied (Oct. 8th, 1974), 43 U.S.L.W. 2175.

countries, as well as treaties to which the United States was a party. The government prosecutor neither affirmed nor denied these allegations but claimed that they were immaterial to the District Court's power to proceed.

The Court of Appeals considered whether a federal court must assume jurisdiction over an accused who is illegally apprehended abroad and forcibly abducted by government agents to the United States for the purpose of facing criminal charges. Under the so-called *Ker-Frisbie* rule,<sup>14</sup> which resulted from two decisions of the United States Supreme Court that have laid the foundations of cases of this nature, "due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards",<sup>15</sup> regardless of the manner in which jurisdiction was obtained over the accused. However, later on, the United States Supreme Court widened its interpretation of the doctrine of due process to bar the government from realizing the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial<sup>16</sup> while other courts and writers<sup>17</sup> criticized the *Ker-Frisbie* rule: The requirement of due process must extend to the pre-trial conduct of law enforcement authorities. Today, these two cases can no longer be reconciled with the principle expressed in *Wong Sun v. United States*<sup>18</sup> that the government should be denied the right to exploit its own illegal actions. Having unlawfully seized a person in violation of the Fourth Amendment, which guarantees "the right of the people to be secure in their persons . . . against unreasonable . . . seizures", the government should as a matter of fundamental fairness be obliged to return him to his previous status.<sup>19</sup>

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<sup>14</sup> See *Ker v. Illinois* (1886), 119 U.S. 436, 72 S. Ct 225, 30 L. Ed. 421, and *Frisbie v. Collins* (1952), 342 U.S. 509, 72 S. Ct 519, 96 L. Ed. 541. For an earlier case see *United States v. Insull* (1934), 8 F. Supp. 310 (N.D. Ill.).

<sup>15</sup> *Frisbie v. Collins*, *ibid.*, at p. 522 (U.S.).

<sup>16</sup> See *Wong Sun v. United States* (1963), 371 U.S. 471, 81 S. Ct 407, 9 L. Ed. 2d 441. Also *Rochin v. California* (1952), 342 U.S. 165, 72 S. Ct 205; *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S. Ct 1684.

<sup>17</sup> E.g., *United States v. Edmons* (1970), 432 F. 2d 577, at p. 583 (2nd Cir.); R. M. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized (1968), 56 Cal. L. Rev. 579, at p. 600; A. W. Scott, Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud (1953), 37 Minn. L. Rev. 91, at pp. 102, 107.

<sup>18</sup> *Supra*, footnote 16.

<sup>19</sup> Compare the power of the federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured

In *Toscanino*, the court pointed out that the accused was abducted by federal agents in contravention of the provisions of the Charters of the United Nations<sup>20</sup> and of the Organization of American States<sup>21</sup> which were binding upon the United States and Uruguay. Since in these international treaties the United States had agreed not to violate the territorial integrity of Uruguay but had broken this obligation by abducting Toscanino, the allegations made against the government were not governed by *Ker* where no treaty obligation had been found to be broken. The relevant authority was *Cook v. United States*,<sup>22</sup> where it was held that the court had no jurisdiction since, under a treaty between the United States and Britain, forcible seizure was incapable of giving that court power to adjudicate title to a vessel regardless of its physical presence within the jurisdiction.

The *Toscanino* case constitutes a new logical expansion of the notion of due process in the United States of America.<sup>23</sup> It also

by fraud. See *In re Johnson* (1896), 167 U.S. 120, at p. 126, 17 S. Ct 735, 42 L. Ed. 103; *Fitzgerald Construction Co. v. Fitzgerald* (1890), 137 U.S. 98, 11 S. Ct 36, 34 L. Ed. 608.

<sup>20</sup> See the Charter of the United Nations, art. 2, par. 4, which obligates "All Members" to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . .".

<sup>21</sup> See O.A.S. Charter, art. 20, which provides that the "territory of a state is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever . . .".

<sup>22</sup> (1933), 288 U.S. 102, esp. at p. 121, 53 S. Ct 305. On this point see also *Ford v. United States* (1927), 273 U.S. 593, at pp. 605-606, 47 S. Ct 531, 71 L. Ed. 793.

<sup>23</sup> The court's conclusion in *Toscanino* was that the case should be remanded for further proceedings, not inconsistent with the opinion given. Should Toscanino provide evidentiary credible supporting evidence that the action was taken by or at the discretion of United States officials, an evidentiary hearing would have to be held. *Toscanino* was partly distinguished in *United States v. Herrera* (1974), 504 F. 2d 859 (5th Cir.) and the *Ker-Frisbie* rule reaffirmed. In *United States ex. rel. Lujan v. Gengler* (1975), 510 F. 2d 62 (2nd Cir.), the court distinguished and explained *Toscanino*, its own previous decision, on the ground that the abduction of a suspect from another country violates international law only when the offended state objects to that conduct. Toscanino had offered to prove that the Uruguayan government had condemned his apprehension as alien to its laws whereas Lujan had failed to allege that Argentina or Bolivia protested his abduction. A careful reading of *Toscanino* does not seem to bear this out. From an international law point of view, the decisive factor seemed to have been the violation of two treaties by the United States rather than any protest by the countries involved. Also in *Lujan* the court held that the absence of any contention that the accused was subjected to torture, terror or custodial interrogation of any kind did not constitute a violation of due process which would require the federal courts to divest themselves of jurisdiction over him. Thus, *Toscanino* was not applicable. In footnote 9, at p. 68,

emphasizes the fact that in that country an accused may successfully raise the question of violation of international law in the domestic courts.

When an accused is kidnapped in the state of refuge and forcibly brought within the jurisdiction by agents of the prosecuting government, he may obtain his freedom as the violation of the sovereignty of the foreign state engages the responsibility of the state of arrest, provided the state of refuge complains that his abduction was in violation of international law and requests his return. This would also be the case where the provisions of a valid extradition treaty in force between the state of refuge and the state of arrest have been ignored or violated, as for instance where the demanding state after receiving the fugitive tried him for a crime other than that for which he was extradited.<sup>24</sup> When the extradition treaty has deliberately been ignored by both states, it would be more difficult for the accused himself to invoke a violation of international law. The merit of *Toscanino* is clearly to point out that a violation of international law is not merely a political matter to be settled through diplomatic channels by the states involved<sup>25</sup> but can also be relied upon by the accused in the domestic courts. Not only has the territorial state a claim against

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the court pointed out that unlike the exclusionary rule which prohibits use of illegally obtained evidence or confessions, the adoption of an exclusionary rule here would confer a total immunity to criminal prosecution. This did not seem to be favoured by the court which pointed out that since there was probable cause for Lujan's arrest and since the failure of Argentina or Bolivia to object suggested they would have been receptive to his extradition, the extreme remedy of requiring dismissal of the indictment was not necessary. The court did not reject *Toscanino* in its entirety. Government agents do not have a *carte blanche* to bring defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct. However, any irregularity in the circumstances of a defendant's arrival in the jurisdiction does not always vitiate the proceedings of the criminal court. A simple abduction is not necessarily a violation of due process.

<sup>24</sup> *United States v. Rauscher* (1888), 119 U.S. 407, 7 S. Ct 234. In Canada see J.-G. Castel, S. Williams, *International Criminal Law* (1st ed., 1974), p. 557 *et seq.* Note that an illegal arrest could constitute a serious violation of an internationally protected human right under the Charter of the United Nations (art. 55(i)), the Universal Declaration of Human Rights (arts 3, 9, 10), and the International Covenant on Civil and Political Rights (arts 9, 12, 13) to the extent that these are part of the law of Canada and therefore enforceable in our country. See also W. J. Brennan Jr., *International Due Process and the Law* (1962), 48 Va. L. Rev. 1258.

<sup>25</sup> See *State v. Brewster* (1835), 7 Vt. 118; *United States v. Unverzagt* (1924), 299 F. 1015 (D.C.), (1919-42), 11 Annual Digest (Supplementary Vol.), Case No. 53, p. 101. In the case of violation of a treaty, appeal must be made to the executive branches of the treaty governments for redress.



the arresting state under international law but the accused has a defense based upon the arrest in violation of customary or conventional international law. This is the law in the United States especially in the case of violation of a treaty which is part of the law of the land. In Canada the same rule should prevail under the common law doctrine of incorporation and, in the case of a treaty, if it has been implemented by legislation when this is necessary.<sup>26</sup>

When Eichmann<sup>27</sup> was kidnapped in Argentina by a group of Israelis who took him back to Israel to stand trial for the murder of more than six million Jews, it was recognized that it is a principle of international law that kidnapping of a person on the territory of a state by foreign agents is an infringement of that state's sovereignty and *prima facie* a breach of international law. There is an obligation on the part of the state of arrest to restore the accused to the state of refuge and to punish or extradite the offending agents, provided the injured state makes a diplomatic reclamation to that effect.<sup>28</sup> The same appears to be true when the accused has been induced by fraud to leave the state of refuge by individuals acting with the complicity of agents of the arresting state.<sup>29</sup> No such international obligation exists when the kidnapping or the enticement was the act of a private person without official complicity on the side of the prosecuting state. Obviously,

<sup>26</sup> See J.-G. Castel, *International Law Chiefly as Interpreted and Applied in Canada* (1965), Ch. II. Professor M. C. Bassiouni, in *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition* (1973), 7 *Vanderbilt J. of Transnational L.* 25, at p. 27 points out that: "Aside from the flagrant violation of the individual's human rights, these practices affect the stability of international relations and subvert the international legal process." See also M. H. Cardozo, *When Extradition Fails, Is Abduction the Solution?* (1961), 55 *Am. J. Int. L.* 127; A. E. Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice* (1964), 40 *Br. YrBk Int. L.* 77.

<sup>27</sup> *The A.-G. of the Government of Israel v. Eichmann*. Criminal Case No. 40/61 (1961), 36 *I.L.R.* 5, *aff'd* (1961), 36 *I.L.R.* 277. It was assumed that the kidnappers were acting on behalf or with the tacit approval of the State of Israel.

<sup>28</sup> See L. Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory* (1935), 29 *Am. J. Int. L.* 502 who gives some examples; also E. D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law* (1934), 28 *Am. J. Int. L.* 231; T. H. Spensler, *International Kidnapping* (1971), 5 *Int. L.* 27. In 1974, the U.S. government returned to Canada an American draft evader, resident in British Columbia, who had been illegally arrested within a few feet of the Canadian border as he was attempting to enter the State of Washington. For other recent incidents involving Canadians, see C. V. Cole, *Extradition Treaties Abound But Unlawful Seizures Continue, International Perspectives*. March-April 1975, p. 40.

<sup>29</sup> However, see *Ex parte Brown* (1886), 28 F. 653 (N.D.N.Y.) and *Ex parte Ponzi* (1926), 106 *Tex. Crim.* 58.

too, there is no obligation to release the accused when officials of the state of refuge participated in the irregular arrest.<sup>30</sup>

In the past, British and American courts have been reluctant to hold that a violation of international law is a defence which may be invoked by the accused.<sup>31</sup> Thus, in *Eichmann*,<sup>32</sup> the accused could not question the jurisdiction obtained by the Israeli courts. It was a matter between the states involved.

The problem of whether an individual can be a subject of international law depends on the given situation and the relevant applicable international instrument. This instrument may make him a subject but without procedural capacity or it may do both.<sup>33</sup> Argentina could have officially contested the apprehension of Eichmann on her soil but not on behalf of the individual.<sup>34</sup> Argentina accepted Israel's apology and did not assert her sovereign rights by demanding the restitution to her territory of the accused. Thus Eichmann could not benefit from the violation of Argentina's sovereignty. Germany (or Austria) as the state where the accused served as an official or of which he was a national, could also have protested. Eichmann's only claim could have been a civil one against his Israeli abductors. The fact that the United Nations requested Argentina to accept Israel's apology in order for Eichmann to be tried seems to indicate that, with respect to international crimes, kidnapping does not affect the jurisdiction of the court over the person of the accused.<sup>35</sup>

In *United States v. Sobell*<sup>36</sup> it was held that the fact that the defendant had been forcibly returned to United States authorities by the Mexican security police did not impair the power of the federal District Court to try him for espionage conspiracy. Sobell did not make a pre-trial motion challenging the jurisdiction and the court held that this precluded the assertion of such a matter by

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<sup>30</sup> *Savarkar Case* (1911), Scott Hague Court Reports (1916), 275.

<sup>31</sup> For a survey see P. O'Higgins, *Unlawful Seizure and Irregular Extradition* (1960), 36 Brit. YrBk Int. L. 279, at p. 302; M. R. Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from Foreign Country by Force or Fraud: A Comparative Study* (1957), 32 Ind. L. J. 427. See also Restatement of the Law Second, Foreign Relations Law of the United States (1965), s. 8, comment f.

<sup>32</sup> *Supra*, footnote 27.

<sup>33</sup> H. Lauterpacht, *The Subjects of the Law of Nations* (1948), 64 L. Q. Rev. 97.

<sup>34</sup> P. Cutler, *The Eichmann Trial* (1961), 4 Can. Bar J. 352.

<sup>35</sup> E. Heazlett, *The Kidnapping of Eichmann* (1962), 24 U. Pitt. L. Rev. 116.

<sup>36</sup> (1957), 244 F. 2d 520 (2nd Cir.), cert. den. (1957), 355 U.S. 873, 78 S. Ct 120, re-hearing denied (1958), 335, U.S. 926.

motion in arrest of judgment.<sup>37</sup> He did, however, raise the matter in later appeals<sup>38</sup> and, relying on *Cook*,<sup>39</sup> argued that his kidnaping violated the Extradition Treaty with Mexico and since that treaty was the law of the land its violation deprived the United States courts of jurisdiction over the offence with which he was charged. He contended that his "objection to national and consequently, judicial power [did] not rest on the kidnaping or abduction . . . but rather upon the violation of the treaty".<sup>40</sup> The court did not find any violation of the Extradition Treaty with Mexico and applied the rule in *Ker v. Illinois*<sup>41</sup> that the power of a court to try a person for a crime is not impaired by the fact that he has been brought into the jurisdiction of the court by a forcible abduction, provided he was physically present at the time of the trial.

In *United States v. Toscanino*,<sup>42</sup> the Court of Appeals, in fact, rejected the authority of *Ker*<sup>43</sup> and *Frisbie*<sup>44</sup> on the ground that they had been eroded by subsequent decisions of the Supreme Court of the United States.

Since for years the *Ker-Frisbie* rule has resisted attacks based on the extradition clause in the United States Constitution,<sup>45</sup> the federal Kidnapping Act<sup>46</sup> and the due process clause of the Fourteenth Amendment, it is doubtful whether the Supreme Court of the United States will approve the reasoning of the federal Court of Appeals in *Toscanino*.<sup>46a</sup>

In *Ker v. Illinois*<sup>47</sup> the court stated that seizure by United States officials of fugitive criminals on the territory of a state with whom the United States has an extradition treaty is not *ipso facto* a breach of that treaty. In that case the defendant was indicted for embezzlement and larceny by an Illinois grand jury while he was residing in Peru. The President on the request of the Governor of Illinois invoked the Extradition Treaty between the United

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<sup>37</sup> *United States v. Rosenberg* (1952), 195 F. 2d 583 (2nd Cir.).

<sup>38</sup> *Supra*, footnote 36.

<sup>39</sup> *Supra*, footnote 22.

<sup>40</sup> *Supra*, footnote 36, at p. 524.

<sup>41</sup> *Supra*, footnote 14.

<sup>42</sup> *Supra*, footnote 13.

<sup>43</sup> *Supra*, footnote 14.

<sup>44</sup> *Ibid.*

<sup>45</sup> Art. IV § 2, cl. 2 and 18 U.S.C. § 3182 (1948).

<sup>46</sup> 18 U.S.C. § 1201 (1948).

<sup>46a</sup> In *Gerstein v. Pugh* (1975), 95 S. Ct 854, at p. 865, the U.S. Supreme Court stated: "Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction", and cited *Ker* and *Frisbie*.

<sup>47</sup> *Supra*, footnote 14 and see *Effect of Illegal Abduction into the Jurisdiction on a Subsequent Conviction* (1952), 27 Ind. L. J. 292, at p. 294.

States and Peru and issued a warrant to a Pinkerton agent to receive the fugitive from the Peruvian authorities. The agent never served the warrant, nor did he make any requests to the Peruvians for Ker's surrender to him, but rather he forcibly arrested Ker, placed him aboard an American ship and kept him in detention until the ship reached California. From there he was delivered to the State of Illinois. The Supreme Court stated that the "due process of law" guaranteed by the Fourteenth Amendment is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings, he is not deprived of any rights to which he is lawfully entitled. The court held that Ker's irregular arrest did not deny him any right under the constitution, laws or treaties of the United States and that as an individual he possessed no right of asylum in Peru.<sup>48</sup>

The Supreme Court faced this same question sixty-six years later in *Frisbie v. Collins*<sup>49</sup> where a prisoner from the State of Michigan, on *habeas corpus*, alleged that he had been abducted from Illinois to Michigan by Michigan police officers. He claimed that his conviction in Michigan violated the due process clause of the Fourteenth Amendment as well as the federal Kidnapping Act, and was therefore null and void. The Supreme Court rejected his claim basing its decision on *Ker*.

This court has never departed from the rule announced in *Ker v. Illinois*. 119 U.S. 436, 444, that the power of a court to try a person is not impaired by the fact that he had been brought within the court's jurisdiction by means of a "forcible abduction". No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.<sup>50</sup>

In other cases the same pattern was adhered to. In *United States ex rel. Voigt v. Toombs*<sup>51</sup> it was held, following *Ker*, that jurisdiction once acquired in a criminal case is not impaired by

<sup>48</sup> *Preuss, op. cit.*, footnote 28, at p. 502. See also Fairman, *Ker v. Illinois* Revisited (1953), 47 Am. J. Int. L. 678. In *United States v. Caramian* (1972), 468 F. 2d 1370 (5th Cir.), the court applied *Ker* and stated that even if no extradition hearing had been conducted in the state of refuge, this fact would not affect the jurisdiction of the court to try the accused on the charges pending against him. See also *United States v. Herrera, supra*, footnote 23, and *United States v. Winter* (1975), 509 F. 2d 975 (5th Cir.).

<sup>49</sup> *Supra*, footnote 14.

<sup>50</sup> *Ibid.*, at p. 522.

<sup>51</sup> (1933), 67 F. 2d 744 (5th Cir.).

the manner in which the accused is brought before the court. In *Stamphill v. Johnson*<sup>52</sup> it was concluded that the personal presence of a defendant before a District Court gives that court complete jurisdiction over him, "regardless of how his presence was secured, whether by premature arrest . . . wrongful seizure beyond the territorial jurisdiction of the court . . . false arrest . . . or extradition arising out of an offence other than the one for which he is being tried",<sup>53</sup> and the court cannot decline to exercise jurisdiction. In *United States v. Vicars*<sup>54</sup> it was held that even if, as the defendant claimed, he was illegally arrested in the Panama Canal Zone and brought to the United States, this was not a ground for requiring that the trial court should release and discharge him without trial. The most recent case decided prior to *Toscanino* was *United States v. Cotten and Roberts*.<sup>55</sup> There it was conceded that the appellants, who were convicted of conspiracy and theft of government property, had been kidnapped or forcibly removed from the Republic of Vietnam to the territorial limits of the United States by the order of government personnel. The court held that this fact did not preclude assertion of jurisdiction over their persons. To the court the *Ker* principles remained firm. Although the court recognized that the doctrine had been criticized and that its validity may be questioned, it felt that recent legislation and constitutional protections enunciated in the last decade provided viable alternative protection against undisciplined law enforcement activities.<sup>56</sup>

The confusion which has arisen from the *Ker* decision can be traced back to two English cases, *R. v. Sattler*<sup>57</sup> and *Ex parte Susannah Scott*<sup>58</sup> on which *Ker* was founded. *Ex parte Susannah Scott* is the earliest case in which the irregular apprehension of an accused abroad and its effect on the jurisdiction of the court was considered. The accused was arrested in Brussels by a British police officer, who had a warrant for her arrest on a charge of perjury. She was forcibly brought back to England to stand trial and raised the alleged illegality. Lord Tenterden C. J. held that the court could not inquire into the circumstances under which

<sup>52</sup> (1943), 136 F. 2d 291 (9th Cir.).

<sup>53</sup> *Ibid.*, at p. 292.

<sup>54</sup> (1972), 467 F. 2d 452 (5th Cir.), cert. den. (1973), 410 U.S. 967.

<sup>55</sup> (1973), 471 F. 2d 744 (9th Cir.).

<sup>56</sup> *Ibid.*, at p. 748. See also *United States v. Caramian*, *supra*, footnote 48. In the *Cotten* case, the forcible abduction of the accused did not violate international law as he had been voluntarily turned over to United States representatives by the South Vietnamese authorities.

<sup>57</sup> (1858), 1 D. and B. 539, 169 E.R. 1111.

<sup>58</sup> (1829), 9 B. and C. 446, 109 E.R. 166.

she was brought into the jurisdiction.<sup>59</sup> In *R. v. Sattler* the accused committed a felony in England and subsequently fled to Hamburg, where he was arrested by an English detective with the help of the local police. The detective had no warrant and there was no extradition treaty between Hamburg and Britain. On the voyage Sattler shot the detective who later died. It was held that offences committed by foreigners on British vessels on the high seas may be tried by any court within whose jurisdiction the offender is found and that the court did not thus have to decide on the illegality of the original arrest.

As the legal reasoning upon which these two decisions are based is rather unconvincing, it is surprising that the United States courts were so ready to follow them as "authorities of the highest respectability".<sup>60</sup> English courts have, however, continued to follow the pattern that possession of the offender gives jurisdiction and forcible arrest or abduction does not impair that jurisdiction. In *R. v. Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliot*<sup>61</sup> a deserter was arrested at Antwerp by British officers accompanied by two Belgian police officers. He contended that his arrest and subsequent detention by the military authorities was illegal because the British officers had no authority to arrest him in Belgium and he was arrested contrary to Belgian law. The court held that if a person is arrested abroad and brought before a British court charged with an offence which that court has jurisdiction to hear, the court has no power to go into the circumstances of the arrest once the person is in lawful custody in Britain, but has jurisdiction to try him for the offence in question.

In the case of *R. v. Hughes*<sup>62</sup> the accused, a police constable, procured a warrant to be illegally issued, without written information or oath for the arrest of one Stanley, on a charge of "assaulting and obstructing" the police officer "in the discharge of his duty". Upon this warrant Stanley was arrested, tried and convicted. Hughes was later tried for perjury committed at Stanley's trial and was convicted. The court held that Hughes was rightly

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<sup>59</sup> See also F. Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law* (1952), 29 *Brit. YrBk Int. L.* 265, at p. 273. It is surprising that Lord Tenterden paid no heed to violations of international law.

<sup>60</sup> O'Higgins, *op. cit.*, footnote 31, at pp. 283-284.

<sup>61</sup> [1949] 1 All E.R. 373 (K.B.).

<sup>62</sup> (1879), 4 Q.B.D. 614.

convicted, notwithstanding that there was neither written information, nor oath to justify the issue of the warrant.

*Leachinsky v. Christie*<sup>63</sup> definitively established that an illegal arrest does not affect the competence of the judge or the jurisdiction of the court to deal with the case. The presence of the offender is basically the original starting point of any criminal proceeding.

Canadian practice has adopted the same rule, as has been noted in the *Hartnett*<sup>64</sup> case. It is of no relevance in the courts of Canada that the accused has been brought illegally into the jurisdiction. In *R. v. Walton*<sup>65</sup> the court held that although the accused had been wrongfully arrested at Buffalo and forcibly brought into Canada against his will and not under the provisions of the Extradition Treaty in force between Canada and the United States of America, this did not impair the jurisdiction of the court to try him. Rather it was the duty of the court, once the accused was within the jurisdiction, to make him amenable to justice. Basing its findings in part on *Ex parte Scott* and *Ker v. Illinois*, the court held that the remedy for illegal arrest and kidnapping is by proceedings at the instance of the government whose territorial sovereignty was violated, or at the suit of the injured party against the individual or individuals who committed the trespass to his person.

Case law involving purely domestic situations supports the same position. In *R. v. Bourgeois*<sup>66</sup> it was held that if the accused is present before the magistrate and the magistrate has jurisdiction over the offence charged, he has jurisdiction to proceed with the hearing no matter how illegal may have been the procedure which caused the accused to be before him. An improper arrest does not fault the jurisdiction of the magistrate. This proposition is supported by many other decisions including *Ex parte Giberson*,<sup>67</sup> *R. v. McDougall*, *Ex parte Goguen*,<sup>68</sup> *R. v. Benoit*<sup>69</sup> and more recently *Re Regina and Groves*.<sup>70</sup>

If one turns from criminal cases to civil cases, one finds that a party who is enticed into the state by fraud or force will not

<sup>63</sup> [1945] 2 All E.R. 395, 61 T.L.R. 584 (C.A.). See also *Christie v. Leachinsky*, [1947] A.C. 573 (H.L.).

<sup>64</sup> *Supra*, footnote 2.

<sup>65</sup> (1905), 10 C.C.C. 269 (Ont. C.A.).

<sup>66</sup> (1948), 92 C.C.C. 229 (N.B.C.A.).

<sup>67</sup> (1898), 34 N.B.R. 538 (C.A.).

<sup>68</sup> (1916), 35 D.L.R. 269 (N.B.).

<sup>69</sup> (1952), 105 C.C.C. 185 (Que.).

<sup>70</sup> (1972), 5 C.C.C. (2d) 90 (B.C.S.C.), and cases cited therein.

be subject to the jurisdiction of that state as the courts will not be a party to any abuse of its own process.<sup>71</sup>

In the light of these precedents, the decision reached by the Ontario High Court in *Hartnett*<sup>72</sup> is hardly surprising. The applicants in that case argued that *R. v. Isbell*<sup>73</sup> to which one can add all the other cases of that era, were decided before the enactment of the Canadian Bill of Rights, and thus today should no longer be followed. This was not accepted by the Ontario High Court. Had the applicants merely relied on the fact of their arrest being unlawful, the court might have taken a more enlightened approach<sup>74</sup> and not relied on the heavy measure of case law discussed above. They lost their case by merely asserting that they were denied the right to be heard in extradition proceedings, a circumstance which in the view of the court did not invalidate the process.<sup>75</sup>

In *In re Johnson* the court decided in part:<sup>76</sup>

The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.

<sup>71</sup> *Lewis v. Wiley* (1923), 53 O.L.R. 608, at p. 609. In *Lawrence v. Ward*, [1944] O.W.N. 199, [1944] 2 D.L.R. 724, the defendant was not in Ontario as the result of enticement or physical violence. He was a member of the Canadian Navy, and although in Ontario under orders and not voluntarily, he did not come within the qualifications expressed in *Lewis v. Wiley* and was not thus exempt from jurisdiction. See also *Doyle v. Doyle* (1974), 6 Nfld. & P.E.I.R. 110 (Nfld. S.C.). In *Watkins v. North American Land and Timber Company* (1904), 20 T.L.R. 534, the House of Lords dealt with the service of a writ on the defendant who claimed he was enticed to enter the jurisdiction of the court by fraud. The court decided that, had there been any element of fraud, the service of the writ would have been set aside as an abuse of process. However, it was found that the intention of the directors of the plaintiff company was to discuss with the defendant certain matters in difference between them. There being no element of fraud, the defendant was properly within the jurisdiction. Also *Colt Industries v. Sarlie*, [1966] 1 All E.R. 673 (Q.B.D.). Here the defendant, domiciled in the United States, visited London for a few days on business and was served there with a writ. The court held that there was no fraud or enticement to induce the defendant to come to England, and thus the writ was well founded. In the United States of America see cases cited, *supra*, footnote 19.

<sup>72</sup> *Supra*, footnote 2.

<sup>73</sup> *Supra*, footnote 9.

<sup>74</sup> However, note that in another context, the majority of the Supreme Court of Canada was not prepared to declare inadmissible, evidence obtained before the accused had an opportunity to consult his lawyer: *Hogan v. The Queen* (1974), 48 D.L.R. (3d) 427 to be compared to *Brownridge v. The Queen* (1972), 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1, [1972] S.C.R. 926.

<sup>75</sup> No violation of the U.S.-Canada treaty was involved.

<sup>76</sup> (1897), 167 U.S. 120, at p. 126.



Beale also states that:<sup>77</sup>

The effect of physical force, whether human force or *vis major*, should be, on general principles, to nullify jurisdiction. . . . Where the defendant was brought into the state by the unlawful use of force the court should not exercise jurisdiction over him in a civil case. . . .

The underlying principle seems to be that the courts will not allow a plaintiff to profit from underhand conduct. In *United States v. Cotten and Roberts*,<sup>78</sup> the appellants, relying on the analogy of criminal to civil procedure, stated that as a court will not exercise civil jurisdiction over a defendant brought into a state by the unlawful force or fraud of the plaintiff, similarly a state should not be permitted to benefit from the illegal activities of its agents. In such case the court should exercise its discretionary powers and refuse to sanction unreasonable conduct by withholding jurisdiction.

The theory behind the courts' refusal to adopt the logic of the above approach is that in a civil case the plaintiff who uses fraud or violence is himself guilty of a misdemeanor. Yet why should police conduct be whitewashed? In *State v. Ross*<sup>79</sup> it was stated that:

There is no fair analogy between civil and criminal cases in this respect. In the one (civil) the party invoking the aid of the court is guilty of fraud or violence in bringing the defendant . . . within the jurisdiction of the court. In the other (criminal) the people, the state, is guilty of no wrong.

Even if one accepts the view that the state is a compact entity, and that what the people or agents of the state do is done by the state itself, this has not prevented American courts from excluding evidence secured by illegal searches, seizures and even voluntary confessions when made while in unlawful police detention.<sup>80</sup> Thus, analogy between civil and criminal cases is not totally irrelevant. One American author<sup>81</sup> suggests that states should refuse to sanction the trial of offenders whose presence in the jurisdiction has been secured in breach of federal and state kidnapping and extradition laws. However, he recognizes that it may be difficult to achieve this result by a simple process of statutory interpretation. He suggests that it would be better to resort to common law rules which can be influenced by policy

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<sup>77</sup> Conflict of Laws (1935), Vol. 1, p. 341.

<sup>78</sup> *Supra*, footnote 55, at p. 747.

<sup>79</sup> (1866), 21 Iowa 467.

<sup>80</sup> *McNabb v. United States* (1943), 318 U.S. 332, 63 S. Ct 608, 87 L. Ed. 819.

<sup>81</sup> See Scott, *op. cit.*, footnote 17, at p. 105.

considerations.<sup>82</sup> To prevent physical abductions and lawlessness *in toto* which seems to be a valid objective in a democratic society, the courts must refuse to try persons whose presence was secured illegally. As indicated in the *Toscanino* case, this could be done by interpreting due process more broadly and discarding the *Ker-Frisbie* rule which has become outmoded. The criminal procedure of a court is degraded when it is used against a defendant who is the subject of a flagrant illegality.

One of the major problems raised by the present uncertain tendencies of the law concerning unlawful arrest is the question of policy. The interests of the individual offender are in juxtaposition with those of the state. Canadian as well as American courts have tended to promote the idea that illegality of some pre-trial events, although infringing the accused's rights, should not nullify his detention and excuse him from a crime he has committed. They have weighed the illegal arrest against the merits of the criminal charge. However, there is a conflicting theory as to the thought that criminals should be punished, and that is that a government should obey the law — even where criminals are concerned. Jurisdiction gained through illegal acts tends to reward brutality and lawlessness. Thus, one must consider whether it is in the social interest to excuse a criminal because the police or government agents used illegal means to bring him before the court.<sup>83</sup>

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<sup>82</sup> As to the common law duty to act fairly, that is judicially, in the context of a decision of an administration board, see the dissenting opinion of Dickson J. in *Howarth v. National Parole Board*, Supreme Court of Canada, October 11th, 1974, not yet reported.

<sup>83</sup> In *Hogan v. The Queen*, *supra*, footnote 74, Laskin J. (as he then was) in a dissenting opinion, gives a good analysis of the social interest involved in connection with the admissibility of illegally or improperly obtained evidence. After noting that, in Canada, the choice of policy has been to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement, he comes to the conclusion that "We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation." At pp. 442-443. His reasoning is equally applicable to illegal arrest: "It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-Court statements by an accused." *Ibid.*

This trend of thought appears in a dissenting opinion of Mr. Justice Brandeis in *Olmstead v. United States*:<sup>84</sup>

The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .

Government officials should not have a separate set of rules as regards their conduct. Respect for the authority of a government will seriously be affected if it fails itself to observe the law faithfully, and individual citizens feel that their liberty is at stake. A government should set an example to its people and if it is known to be breaking the law in order to secure criminal convictions what hope is there for society in general. The right to be protected from abduction into the jurisdiction of a state is a basic human right in a free society.<sup>85</sup> The misplaced sense of justice on the part of governments or individual agents not to comply with legal machinery to bring offenders into the jurisdiction of the court must be condemned.<sup>86</sup> The official who acts in an unlawful way may be criminally liable for kidnapping. He may also be liable civilly to the victim for trespass to the person. The criminal penalties are seldom used as there is no tendency on the part of states to prosecute their officers, and as regards the civil measures, there is little doubt that policemen are not affluent enough to warrant action against them personally unless their employers are made jointly liable.<sup>87</sup> Thus, the most definite way by far of deterring the police from wilful lawlessness is to make it clear that criminals will not be tried who have been illegally secured.<sup>88</sup>

The United States Supreme Court in *Mapp v. Ohio*<sup>89</sup> interpreted the due process clause in the Fourteenth Amendment to require that the exclusionary rule be applied in state as well

<sup>84</sup> (1928), 277 U.S. 438, at pp. 484-485. Note that in *Ex parte Brown*, *supra*, footnote 29, the court stated: "The criminal law, administered, as it is for the protection of the whole people does not take cognizance of the means by which illegal offenders are apprehended, *so long as no act is done which in itself is an infraction of the law.*", at p. 656, italics mine.

<sup>85</sup> See, for instance, International Covenant on Civil and Political Rights, 1966, article 9, Brownlie, ed., *Basic Documents in International Law* (1967), pp. 153-154.

<sup>86</sup> Would Canada allow the kidnapping on her territory of fugitives from justice by agents of foreign states?

<sup>87</sup> See for instance Ontario Police Act, R.S.O., 1970, c. 351, as am., s. 24.

<sup>88</sup> Scott, *op. cit.*, footnote 17, at p. 101.

<sup>89</sup> *Supra*, footnote 16, at p. 646.

as federal prosecutions. Thereafter evidence obtained by illegal search or seizure could no longer be admitted in a state criminal trial of a person from whom it was seized.<sup>90</sup> If illegal seizures and searches cannot be used in evidence as contrary to public policy, this can surely be extended to prevent police kidnapping, and to close the courts to the trial of an individual wrongly brought into the jurisdiction.

As one author has put the problem succinctly:<sup>91</sup>

It seems that the courts have simply fallen into the habit of repeating, parrot-like, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle. In these days of low moral standards among public officials, both law enforcement officers and others, it is especially important to re-establish public respect for the law. This simply cannot be done if the very people who enforce the law are themselves guilty of serious violations of law. A rule of procedure which would forbid courts to try accused persons who have been subjected to the type of lawless treatment covered in this article would help to resurrect something we seem to have lost and which we badly need to find — a spirit of respect for law and order.

In conclusion, it is obvious that the trend must be towards a more even handed approach. Canadian courts should reconsider their present position, as it is apparent that safeguards must be provided for individuals against the over zealous agents of governments.

At the pre-trial stage, due process should cover more than situations which could result in convicting an innocent person. It should also be used as a means of deterring the police from using methods that are offensive to the community's sense of fair play and decency. The lessons and excellent reasoning of *Toscanino*, even if the case involves some aspects of American constitutional law peculiar to that country, should not be ignored by Canadian courts if they are to follow Mr. Justice Martland's opinion in *Curr*<sup>92</sup> that the final word<sup>93</sup> has not yet been said

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<sup>90</sup> See also *Silverthorne Lumber Co. v. United States* (1920), 251 U.S. 385, per Holmes J., at p. 392. This case involved the Fourth Amendment to the U.S. Constitution which denounces unreasonable searches and seizures. In *Hobson v. Crouse* (1964), 332 F. 2d 561 (10th Cir.), the Court of Appeals was of the opinion that the *Ker-Frisbie* rule had not been overruled by *Mapp v. Ohio*.

<sup>91</sup> Scott, *op. cit.*, footnote 17, at p. 107.

<sup>92</sup> *Supra*, footnote 4.

<sup>93</sup> In the light of the majority opinion in *Hodge v. The Queen*, *supra*, footnote 74, this might prove to be difficult. In *Rex v. Bottley* (1929), 51 C.C.C. 384 (Alta C.A.), Harvey C.J.A. said at p. 387: "... the objection

as to the meaning of our due process of law.<sup>94</sup>

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is in reality not one to jurisdiction in the ordinary sense but rests rather on the 'disregard of the forms of legal process or by some violation of the principles of natural justice' in the words of Viscount Cave L.C., in *Rex v. Nadan*, [1926] 2 D.L.R. 177, at p. 184, 45 C.C.C. 221, at p. 229".

<sup>94</sup> Should s. 1(a) of the Bill of Rights be applicable to the type of conduct referred to in this comment, there would still remain the question whether the Bill can be given extraterritorial application to the conduct abroad of Canadian officials directed against Canadian citizens and residents. In the U.S.A. this has been answered in the affirmative. See *Balzac v. Puerto Rico* (1922), 258 U.S. 298, at pp. 312-313: "The Constitution of the United States is in force... whenever and wherever the sovereign power of that government is exerted." The constitution applies only to the conduct abroad of agents acting on behalf of the United States and not that of foreign officials in their own country. *Birdsell v. United States* (1965), 346 F. 2d 775, at p. 782 (5th Cir.), cert. den. 382 U.S. 963.

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