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International Extradition

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INTERNATIONAL EXTRADITION

By FOREST A. HARNESS*

The United States has set up orderly machinery for the extradition of fugitives from most of the countries of the world. All of our extradition treaties provide for the same general procedure. The principal variance being in the specified crimes and offenses for which extradition may be granted. This variance is due in the main to the difference in the criminal laws of foreign countries, some of which do not recognize as crimes or offenses, acts that are denounced as criminal by other countries. Under our extradition treaties, fugitives can only be surrendered for acts which are made crimes or offenses by the laws of both countries, and then only upon competent legal evidence, according to the laws of the country where the fugitive is found, which would justify his apprehension and commitment for trial if the acts had been committed there.

This does not mean, however, that the crime or offense must have the same name in both countries, but it is sufficient if the acts are criminal in both countries and are within the terms of the treaty under which the proceedings are brought.

Some of our extradition treaties have been in existence for many years and need to be revised and modified to include offenses that were not denounced by the criminal law at the time the convention was negotiated. The United States has sought in recent years to modernize these older treaties. Our government is also negotiating new extradition treaties with countries with which we have not heretofore had agreements for the surrender of fugitives from justice.

The provision in our extradition treaties, as well as a similar provision in the extradition treaties of other Anglo Saxon

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countries, requiring as a prerequisite to extradition legal proof of probable cause, or sufficient competent evidence to justify the apprehension and commitment for trial of the accused, has caused no little confusion in the minds of courts in the Latin and Balkan countries, who have found it difficult under the laws of their countries, to distinguish between proof of probable cause and proof of guilt.

This question was the determining factor with the Justices of the Supreme Court of Athens, in the extradition case of Samuel Insull. It was urged by the representative of the United States in that case, that the scope of the inquiry by the Greek court under Article I of the treaty, was limited to a finding, solely from the evidence submitted by the United States, as to whether or not the accused should be committed for trial, and that the court would invade the province of the trial court and jury if it examined the substance or merits of the case to determine guilt.

Article I of the Extradition Treaty between the United States and Greece provides

> "It is agreed that the Government of the United States and the Government of Greece shall, upon requisition duly made as herein provided, deliver up to justice any person, who may be charged with, or may have been convicted of, any of the crimes or offenses specified in Article II of the Present Treaty committed within the jurisdiction of one of the High Contracting Parties, and who shall seek any asylum or shall be found within the territories of the other, provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugutive or persons so charged shall be found would justify his apprehension and commitment for trial if the crime or offense had been there committed."

It is perfectly clear to an American or English lawyer that under this provision the court in an extradition hearing sits as a committing Magistrate, and it is not the function of the court to determine whether the accused is guilty, but merely whether there is competent evidence which, according to the law of the country, would justify the holding or commitment of the accused for trial upon the indictment or accusation, if the acts had been committed in that country The United States Supreme Court in *Collins v. Loisel, 259 U S. 309,* in

construing a similar provision in our extradition treaty with Great Britian, held that the accused was entitled to testify and give other evidence only to explain the evidence produced against him, or otherwise to establish want of probable cause, and was not permitted to give evidence to sustain a defense, since otherwise the country demanding the extradition would be required to conduct the trial at the place of arrest, instead of at the place where the offense was committed, as contemplated by the treaty

At the time Samuel Insull sought an asylum in Greece, the United States Government did not have an extradition treaty with the Hellenic Republic, but was negotiating with that country for one. As soon as it was definitely learned that the fugitive Insull had gone to Greece, these negotiations for an extradition convention were speedily concluded and the treaty between the two countries was signed and ratified. Almost immediately after the treaty became effective the United States Government, acting upon the application of the State of Illinois, requested the Greek Government to arrest Mr. Insull and hold him for extradition to the United States, to answer an indictment of the Grand Jury of Cook County, Illinois, charging the crime of embezzlement, one of the extraditable offenses enumerated in the treaty The fugitive was arrested but after a hearing before the Supreme Court of Athens, was discharged on the ground that the evidence was not sufficient to justify his commitment for trial for the crime of embezzlement. This same evidence, however, was held sufficient by the Canadian Courts for the extradition of Martin J Insull, jointly indicted with his brother, Samuel Insull, in the Illinois State Court and who was surrendered to the United States, and finally tried in Cook County About a year later the United States Government again requested the Greek Government to arrest Mr. Insull and hold him for extradition to answer an indictment of the Federal Grand Jury for the Northern District of Illinois charging a violation of the National Bankruptcy Act, which offense was also specified in the extradition treaty, and after an exhaustive hearing the Greek Court again refused extradition—four Justices of the court holding against extradition and the Chief Justice dissenting

in a minority opinion. These opinions are interesting, and plainly show that the finding of the court was the result of a trial upon the merits of the case, rather than a hearing to determine probable cause for the accusation.

The majority opinion presents an illogical and contradictory discussion of the facts and the law and is indeed an amazing document. In substance the majority opinion states

Extradition does not aim at rectifying the affront done by the accused to the law of the country demanding his extradition, and can not be granted unless the act for which the accused has been indicted or sentenced, is punishable under the laws of both countries. The offenses need not bear the same name, nor be included in the same category, nor be punished by the same penalty, in the two sets of laws. The extraditing country has the right to examine the substance and basis of the charges in order that additional safeguards may be created for personal liberty. Under Article I of the treaty, extradition can not be granted unless according to the laws of the extraditing country, there is sufficient indication of guilt justifying the arrest and commitment for trial of the accused, if the offense had been committed in the extraditing country itself.

It is undeniable, as set forth in the first count of the indictment that the accused, together with others, knowing the insolvent condition of the corporation, handed over out of the corporation's assets and capital the sum of $558,120 for the payment of a dividend on the corporation's preferred stock, which dividend was paid, not out of the real earnings or surpluses of the company, but really out of its capital the earnings and surpluses being fictitious and imaginary. These acts constitute offenses under the Greek bankruptcy law as well as the bankruptcy law of the United States, and the Greek bankruptcy law punishes for fraudulent bankruptcy, the administrators of the company who pay to shareholders dividends manifestly non-existent and thereby reduce the share capital. The danger from the payment to the shareholders of non-existent dividends, by reducing the share capital, is obvious and such acts are manifestly intended as a snare for the attraction of outside capital to a precarious enterprise. The payment of dividends, manifestly non-existent, at the expense of the share capital, is in itself fraudulent, and it is not necessary to prove any other more specific definition of fraud. It is also undeniable that the accused, together with his associates, did not hesitate to commit an act which is forbidden both by the moral law and the criminal law of all countries. The evidence clearly shows that he caused fraudulent and illegal sales and purchases of the corporation's shares on the Chicago Stock Exchange, in maintaining the company's share at fictitious and inflated values, and

through "this Satanic artifice" deceived the public. Such acts are manifestly immoral and acts which no self-respecting person can commit, and these acts on the part of the accused are a violation of written and unwritten law, but were performed at a time when the post-war financial whirlwind in America was sweeping away everything, and must not be judged with the same measure of severity as would apply to normal conditions. These tactics are a very common practice of corporations for maintaining the company's credit at all cost.

The accused, of advanced age, and suffering from a serious complaint, was primarily an engineer of great enterprise, an assistant of the great inventor, Edison, he contributed to the world's industrial progress by achieving the production of cheaper electricity. His great electric empire was useful to mankind. And lastly, it must not be overlookod that the petition in bankruptcy against the corporation was not filed for a long time after the company became insolvent, and the prosecution of the accused did not begin until he had left the United States with the good wishes of a goodly number of his fellow citizens, which fact shows that even in the United States the acts committed by the accused were not at first considered fraudulent.

By all the foregoing considerations, the court is led to the conclusion that at present there is not sufficient evidence to justify the commitment for trial of the accused.

The minority opinion of the Chief Justice is a concise presentation of the law and the facts and states in part: "The Council is unanimously of the opinion that the accused did commit the offenses under the American law, for which he has been indicted. * * * The Council is likewise agreed that the accused and his co-adjutors did, in the management of the company's affairs, commit acts which are forbidden both by the moral law and by the laws in force everywhere, * * * And these acts do not lose their immoral and unlawful character by the fact that such acts are not unusual, so that the conduct of the accused should not be judged with the severity required under normal conditions (a question, it is emphasized, that belongs to the competency of the court that will try the substance of the case) "

It will be seen from these opinions, that the court was satisfied the accused committed the acts charged and that the acts were a violation of the bankruptcy laws of both countries, but the finding that the acts should not be judged with the severity

required under normal conditions was an invasion of the trial court's prerogative.

The refusal of the Greek Government to extradite the fugitive in the face of these findings, was clearly a violation of the terms and provisions of the treaty between the two nations, and the United States Government thereupon, acting under Article VIII, denounced the treaty, stating in substance, that the decree of the court was untenable and contrary to the convention, that it was obvious the court attempted actually to try the case upon its merits instead of confining itself to ascertaining whether the evidence submitted by the United States was sufficient to justify the fugitive's apprehension and commitment for trial.

This was probably the first time in its history that the United States denounced an extradition treaty with a foreign nation, which action, in effect, terminated the treaty after the expiration of the period therein provided—a determined and aggressive stand fully justified under the circumstances.

Following the action of the United States in denouncing the treaty, and undoubtedly due in a measure to the widespread criticism of the decision, the Greek Government notified the fugitive to leave Greece on or before a specified day, on the ground that his presence in the Hellenic Republic was embarrassing to the Government, and he was, therefore, an undesirable alien.

Appeals from this order were taken to the Greek Cabinet and the Council of State but failed, and the Government remained firm in its determination that Insull must go. However, before the final day fixed for his departure, Mr. Insull secretly chartered the S S Maiotis, a Greek freighter, and in March, 1934, set sail. He had obtained several extensions of the order to depart on the plea that he was too ill to travel, and his secret departure without complying with the usual formalities and without the knowledge of the Greek officials, so enraged the latter that they instituted a search for the Maiotis, which was located somewhere at sea, and forced to return to Piarius, the port of Athens, where the vessel was officially cleared and Mr. Insull formally checked out. After a few weeks of sailing around in the Mediterranean, the S S

Maiotis, carrying the fugitive, put into the Bosphorus for food, fuel and other supplies. While the steamship was at anchor, in the harbor at Istanbul, the Turkish Police boarded the vessel, seized and removed the fugitive therefrom, took him to shore where he was incarcerated in the prison at Istanbul. After a brief hearing before the Turkish Court to determine his identity, the Turkish Police removed the fugitive from Istanbul to Smyrna and there took him aboard the S S Exlonia and delivered him to an agent of the United States who took him into custody and delivered him to the United States Marshal in the Northern District of Illinois, the jurisdiction where the indictments were pending.

In addition to the bankruptcy charge upon which the Government sought to extradite Mr. Insull from Greece, he and others were under indictment in the Federal Court at Chicago for the use of the United States mail in furtherance of a scheme and artifice to defraud in the sale of the shares of one of the Insull corporations. Had the Government been successful in extraditing Mr. Insull from Greece, he could have been tried only on the bankruptcy charge, but since the extradition proceeding in Greece failed, and since his surrender was not pursuant to an extradition treaty with the Republic of Turkey, Mr. Insull was arraigned on both the indictments in the Federal Court, as well as the indictment in the State Court charging embezzlement.

Prior to his arraignment, Mr. Insull attacked the jurisdiction of the court, alleging that his removal from the Greek vessel by the Turkish Police, his delivery into the hands of the United States representative and his subsequent return to the United States, was illegal and in violation of his rights under the laws of the United States and under international law It was urged that since the Greek Court had refused his extradition under the treaty, his seizure while on Greek "territory" was a violation of the extradition treaty between Greece and the United States.

The Government successfully contended that there was no treaty involved in the case, that the United States had no extradition treaty with the Republic of Turkey and that the extradition treaty between the United States and Greece was

not called into operation, that Mr. Insull was not, in fact, extradited under any treaty, but was delivered over to the United States authorities by Turkey as a gesture of good will and in a spirit of friendly cooperation for the enforcement of law; and that when a person is accused of crime and has departed the jurisdiction of the court in which the indictment was returned, and is subsequently found within the territorial jurisdiction wherein he is so charged, the right to compel him to answer to the indictment and to stand trial, is not impaired by the fact that he was brought from another jurisdiction by illegal and otherwise questionable means, such as kidnapping or unlawful force or fraud.

One of the leading cases in the United States in this connection is *Kerr v. Illinois, 119 U S. 436.* In that case the defendant was indicted in Illinois for embezzlement and larceny He fled from the United States and went to Peru. Proceedings for his extradition were instituted under the treaty between the United States and Peru and application was made by our Government for his surrender, a warrant issued by the President directed one Julian, as a messenger, to receive him from the authorities of Peru upon his surrender, and to bring him to the United States for trial. The presidential agent, without presenting the necessary papers to the Peruvian officials or without making any demand upon them for the surrender of Kerr, forcibly arrested him and eventually caused him to be taken a prisoner to the State of California. Before his arrival in that state, the Governor of Illinois made a requisition upon the Governor of California for his delivery as a fugitive from justice. Upon his return to Illinois, where the process of the Criminal Court was served upon him, he was held to answer the indictment. He filed a petition for a writ of habeas corpus, contending his arrest and deportation was a violation of the treaty and that his subsequent detention was unlawful. The Circuit Court of Cook County remanded him to jail and held that whatever illegality might have attended his arrest, it could not affect the jurisdiction of the court or release him from liability to the state whose laws he violated. He subsequently applied to the Circuit Court of the United States for a writ of habeas

corpus, which was likewise denied, the court holding that it was not competent to look into the circumstances under which the capture and transfer of the prisoner from Peru to the United States was made, nor to free him from the consequences of the lawful process served upon him. On appeal to the Supreme Court of the United States that court affirmed the judgment of the Circuit Court stating:

"It is contended * * * that the proceedings in the arrest in Peru, and the extradition and delivery to the authorities of Cook County, were not 'due process of law,' * * * He may be arrested for a very heinous offence by persons without a warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it would hardly be claimed that, after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' So here, when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision."

The court further states in its opinion that the treaty with Peru was not called into operation, "was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the Government of the United States."

The court further stated.

"The question of how far this forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which held that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."

Another interesting case squarely in point with the facts is *U S. v. Unverzagt, 299 Fed. 1015* (Certiorari denied 269 U S. 566), where the court said

"By his petition the petitioner alleges in substance that he is unlawfully restrained of his liberty, in that the basis of his commitment is an indictment returned in the Western District of New York, proceedings having been instituted to remove him from this District to the District of New York; that he did not commit the crime charged in the indictment, that of using the mails to defraud, and that he 'by artifice and physical violence was abducted and kidnapped from the City of Vancouver, province of British Columbia, Dominion of Canada, by certain purported officials of the United States of America,' he being in Vancouver on business with relation to a mine of which he is manager in British Columbia, that he is a citizen of the United States, and that his detention is unlawful, and prays that he be produced in court, and, after hearing, discharged.

"It is contended by the defendant that, being in British Columbia, a British Province, he could not be removed without the permission of the British Columbia authorities; that, having been abducted, he is unlawfully before the court, and this court has no jurisdiction. The offense of which the defendant is charged does not appear to be within the extradition convention between the United States and Great Britain (26 Stat. P 1508). Article I enumerates the causes applicable, and a mail fraud case is not one of them. No asylum is guaranteed to defendant in Canada, and if a Treaty did cover the offense charged it would be political, and not judicial, and before the matter could be presented to the court the Congress must make it a rule for the court. The treaty between the United States and Great Britain is a compact depending upon honor between the Governments. Any infractions are subject to international negotiations, so far as the party chooses to seek redress. It must be obvious that with this the courts have nothing to do. U. S. v. Rauscher, 119 U. S. 407, at page 418."[1]

The Federal District Court at Chicago overruled Mr. Insull's plea to the jurisdiction and held that he must stand trial on the indictments pending against him. The court held that the right of the Hellenic Republic or Turkey to give asylum to the defendant is different from the right of the defendant

[1] Other cases supporting this theory are, *Ford v. U. S.,* 273 U. S. 593, *Kelley v. Griffin,* 241 U. S. 6, *Voight v. Tombs,* 67 Fed. (2d) 744, *Whitney v. Zerbst,* 62 Fed. (2d) 970. This same reasoning has been advanced by English and Canadian Courts as appears in *Ex parte Scott,* 9 B. & C. 446, 109 Eng. Reprint 166, and *Rex v. Walton,* 6 Ont. Week. Rep. 905.

to demand security in such asylum. The Hellenic Republic or Turkey, through their sovereignties, if unlawfully invaded, may demand reparation and a surrender of the abducted party, and also the parties committing the offense, and in case of refusal to comply with the demand might resort to reprisals, or take any other measures it deemed necessary as redress for the past, and security for the future. But that question was purely political and could be settled only by negotiation through diplomatic channels between the two sovereign powers.

On the other hand where extradition treaties have been brought into operation in the surrender of fugitives, the courts of the United States have consistently upheld the treaty provisions, as "the law of the land," by limiting prosecution or imprisonment of the surrendered person to the offense or crime for which he was surrendered. The case of *Johnson v. Browne, 205 U S. 309,* is a leading authority on this question. In that case the petitioner was indicted in the Federal Courts of New York for two separate and distinct offenses. He was tried and convicted on one offense and pending an appeal he fled to Canada and there sought an asylum. Request for his extradition was made by this country on the Canadation authorities. After a hearing, the Canadian Court denied the request and refused extradition on the ground that the offense was not within the extradition treaty between this country and Great Britain. A second request for the extradition of the fugitive was made by this country on the other offense pending in the Federal Court in New York. After a hearing on this second request, the Canadian Court ordered the extradition of the fugitive. He was thereupon returned to the jurisdiction of the court where he was under indictment, but instead of prosecuting him on the offense for which he was extradited, *under and pursuant to the treaty,* he was committed to Sing Sing Prison to serve the sentence imposed upon him in the other case for which the Canadian Government had refused his extradition. The court held that his imprisonment was unlawful and in violation of the treaty between the two governments, that the United States Government was limited to the prosecution for the charge upon which

he was extradited, that a treaty of this nature should be construed in accordance with the highest good faith.

An extradition treaty is not a legislative act but a contract between two nations and if its terms and provisions are invoked in the surrender of a fugitive from justice, the courts are bound to comply with the treaty provisions in the trial of the accused. However, if the treaty has not been brought into operation, it affords no protection to a person accused of crime and removed from a foreign country by unlawful or questionable means. The country from whose jurisdiction the accused person was unlawfully removed may, under such a situation, seek redress for the affront but only through diplomatic channels.

Requistions for the surrender of fugitives from justice, under our extradition treaties, are made by the respective diplomatic agents of the contracting parties. The arrest of the fugitive is brought about in accordance with the laws of the country where the fugitive is found, and if after an examination of the evidence, it is decided that extradition is due, the fugitive is surrendered in conformity to the law of the extraditing country

If the fugitive has been convicted of the crime or offense for which his surrender is asked, the duly authenticated judgment of the court showing the conviction is sufficient, provided of course, that the conviction was for one of the crimes or offenses specified in the treaty If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant was issued, must be produced, with such other proof or evidence as may be deemed competent.

Where the surrender of a fugitive is sought from a country with which our government has no extradition treaty, the removal of the fugitive is granted or refused according to the laws of the country where the fugitive is found, and the cooperative attitude of its Government officials. In countries where the United States has set up its extra-territorial courts, fugitives found there and wanted in the United States for offenses or crimes committed here, are tried and removed by

our own courts sitting there. Our courts in China, under treaty regulations with that country, hear and are authorized to remove fugitives from justice who have fled from the United States and are found in China. Congress has had under consideration, a bill to authorize the Consular officers in Egypt to judge and remove fugitives found there and wanted in this country for crimes or offenses committed here. The power of Congress to delegate such authority to our foreign diplomatic representatives is derived from treaties with the respective countries.

Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any Federal Court Justice, Judge or Commissioner or any Judge of a court of record of general jurisdiction of any state may hear the complaint charging any person, found within its jurisdiction, with having committed within the jurisdiction of any foreign government any of the crimes provided for by the treaty or convention. If the court or magistrate finds that the evidence is sufficient to justify the apprehension and commitment for trial of the accused, if the acts had been committed in that jurisdiction, the accused is held and the finding of the court transmitted to the Secretary of State who orders the fugitive delivered over to the representative of the foreign government demanding his surrender.

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