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Criminal Law - Extradition - Persons Illegally Brought within Jurisdiction - Right to Habeas Corpus of a Person Unlawfully Returned to a State for Prosecution

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bility for negligence by special contract.[15] North Dakota has imposed upon the bailee for hire the duty of ordinary care,[16] and has held that where one enters into an agreement to return the property or pay its value, he is an insurer of the property.[17] The value of the bailed goods is usually a decisive factor in determining the degree of care required of the bailee.[18]

It is well settled that by actual incorporation into the contract of the limitation of liability,[19] the bailee for hire may limit his contract liability unless the limitation contravenes public policy or violates a statute.[20] Hence, the limitation in the instant case was perfectly valid in regard to the contract for storage. However, it seems from the facts in the case that the storage contract had not become effective when the coat disappeared because the coat never reached storage. Limitation of liability in bailment contracts usually is strictly construed,[21] and it should be confined to the terms and performance of the contract.

In the struggle against public policy, limitation of liability has completely won out in England,[22] but has not fared so well in this country.[23] Freedom of contract should not be hampered unless it actually does operate to the detriment of the public, but neither should this freedom be extended beyond the contract. Where the practice of limiting liability would invite fraud, it should not be allowed to prevail. The wisdom of allowing two parties to contract to the detriment of a third party, in this case the insurance company, is open to question.

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CRIMINAL LAW — EXTRADITION — PERSONS ILLEGALLY BROUGHT WITHIN JURISDICTION — RIGHT TO HABEAS CORPUS OF A PERSON UNLAWFULLY RETURNED TO A STATE FOR PROSECUTION. — It has long been considered settled law in both federal [1] and state [2] courts that an illegality [3] occurring in the methods used to bring a defendant back to a state from which he has fled

15. Scott Auto & Supply Co. v. McQueen, 11 Okl. 107, 226 Pac. 372 (1924) (based upon statute). *But cf.* Interstate Compress Co. v. Agnew, 255 Fed. 508 (8th Cir. 1919) (decided before Erie R. Co. v. Tompkins, refusing to apply law established by Oklahoma decisions).

16. N.D. Rev. Code §47-1504 (1943).

17. Grady v. Schweinler, 16 N.D. 452, 113 N.W. 1031 (1907) (plaintiff's stallion died while in defendant's possession,); *accord,* Steele v. Buck, 61 Ill. 343 (Freem. 1881).

18. *See* Cussen v. Southern California Sav. Bank, 133 Cal. 534, 65 Pac. 1099 (1901).

19. Jones v. Great Northern Ry. Co., 68 Mont. 231, 217 Pac. 673 (1923).

20. See Story, Bailments 31-2 (8th ed. 1870).

21. Minnesota B. & C. Co. v. St. Paul C-S. W. Co., 75 Minn. 445, 77 N.W. 977 (1899); Jones v. Great Northern Ry. Co., 68 Mont. 231, 217 Pac. 673 (1923). *Contra:* Stephens v. Southern Pac. Ry. Co., 109 Cal. 86, 41 Pac. 783 (1895).

22. See 86 U. of Pa. L. Rev. 772, 774 (1938).

23. *Ibid.*

1. Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886); United States v. Toombs, 67 F.2d 744 (5th Cir. 1933); *Ex parte* Campbell, 1 F.Supp. 899 (S.D.Tex. 1932). *Cf.* Robinson v. United States, 144 F.2d 392 (6th Cir. 1944) (by the same court which decided the principal cases).

2. People v. Groves, 63 Cal.App. 709, 219 Pac. 1033 (2d Dist. 1923); Joiner v State, 66 Ca.App. 105, 17 S.E.2d 101 (1st Div. 1941); Commonwealth v. Gorman, 288 Mass. 294, 192 N.E. 618 (1934); People v. Eberspacker, 29 N.Y.Supp. 796 (2d Dept. 1894).

3. "Illegality" as used herein refers to acts of abduction or kidnapping, as distinguished from mere procedural or substantive errors occurring during the course of an extradition proceeding. For an able discussion of extradition procedures, see Moorhead, *Texas and Interstate Rendition,* 23 Tex. L. Rev. 228 (1945).

in order to avoid arrest and trial in no way impairs the jurisdiction of the state over him. In view of this state of the law two recent decisions by the United States Circuit Court of Appeals for the Sixth Circuit should be noticed. The first decision, in 1949, concerned a defendant who fled from Michigan to Georgia to escape prosecution. Michigan officers, with the connivance of local Georgia authorities, returned him to Michigan without going through extradition procedures. The second case arose in 1951. The defendant was arrested in Illinois by Michigan officers who returned him for trial, once more without benefit of extradition proceedings. Both men were convicted. Both brought petitions for habeas corpus in the federal district court, which denied them in reliance on the old rule. The Circuit Court of Appeals reversed both times. In the first case it *held* that the defendant had been denied due process of law if the facts as set forth above were established. In the second decision it *held* that a kidnapping in violation of federal statutes was set forth in the petition, and laid it down that a person cannot be kidnapped from one state and brought to trial in another regardless of the nature of the crime charged against him. *Brown v. Frisbie,* 178 F.2d 271 (6th Cir. 1949)[4]; *Collins v. Frisbie,* 189 F.2d 464 (6th Cir. 1951).

The holdings in these two cases are obviously in conflict with the old rule that the illegality of the acts which bring a defendant within a state's jurisdiction are immaterial to the state's rights to try him. This new rule would exempt a criminal suspect from trial by a state whose officers had kidnapped him from another state, at least until he had been brought within the state by regular methods of extradition from the state of refuge. The idea is not without historical analogy.[5] It has long been the accepted rule that a court which obtains jurisdiction of a defendant's person under an international extradition treaty can try that defendant for no offense other than that specified in the extradition papers.[6] Such treaties, and laws[7] passed in pursuance of them, are interpreted as clothing a defendant with immunity from trial for any other offense committed prior to his extradition until he has had reasonable opportunity to return to the country from which he was extradited.[8] The basis of this result is to be found in the fact that a sovereign nation has the right to grant asylum within its borders to fugitives,[9] *e.g.* political refugees, if it wishes. To allow a person extradited from a foreign country to be tried for an offense other than that specified in the extradition papers would mean an invasion of this sovereign right, since it would be a simple matter to charge a person wanted for a non-extraditable offense (for instance, political activity in opposition to a dictatorial government) with an extraditable offense simply to get jurisdiction over him. Of course where the

4. The subsequent hearing in *Brown v. Frisbie, supra,* resulted in a further denial of the writ by the district court, which stated that there had been "no violation of federal statutory and/or constitutional provisions." *Ex parte* Brown, 90 F.Supp. 50, 53 (E.D. Mich. 1950).

5. For an interesting discussion of a similar exception and its advocacy by Clarence Darrow, see Stone, Clarence Darrow for the Defense, Ch. 7 (1941). See also Pettibone v. Nichols, 203 U.S. 192 (1906).

6. Cosgrove v. Winney, 174 U.S. 64 (1899); People v. Stout, 81 Hun. 336, 30 N.Y.Supp. 898 (1894).

7. 62 Stat. 825 (1948), 18 U.S.C. §3192 (1948 Supp.).

8. United States v. Rauscher, 119 U.S. 407 (1886). For an interesting application of these principles, see *In re* Whittington, 34 Cal.App. 344, 167 Pac. 404 (2d Dist. 1917), commented upon in Moorhead, *op cit. supra* note 3, at 230, n. 14.

9. United States v. Mulligan, 74 F.2d 220 (2d Cir. 1934).

extradited person commits a crime after extradition but before opportunity to return to foreign asylum, the foregoing reasoning applies with materially reduced force, and it has been held that a trial on the new charge may be had.[10]

It is clear, therefore, that extradition is a non-judicial political process designed to promote international and interstate comity.[11] It is based on the right of a state or nation to territorial integrity and immunity from violation of that right by officers of other states.[12] The courts have therefore said repeatedly that the right of extradition is not a personal right possessed by a fugitive from justice but a sovereign right possessed by the state in which he takes refuge.[13] When the question of whether a state was entitled, on habeas corpus proceedings, to the return of a person abducted from its territory, arose before the Supreme Court of the United States, however, it was held that no such right existed and that the state's remedy lay in prosecuting those who had committed the abduction within its borders.[14]

In arriving at the decisions in the instant cases, the Circuit Court neither provided a mode by which a kidnapped defendant can be returned to his state of asylum nor intimated that he should be immune from arrest until given time to leave the prosecuting state. Thus, it seems entirely possible that the same officers who originally kidnapped him might re-arrest him as he emerges from his habeas corpus hearing and strip him of his newly won freedom. While at first glance such a remedy would seem to be one in form only, the defendant would nevertheless get the practical benefit of a second trial upon the question of his guilt or innocence of the crime charged. On the other hand, it is conceivable that a kidnapped criminal suspect, after release on habeas corpus, could claim immunity from arrest until he had been afforded a reasonable opportunity to return to the state of refuge.[15] One considered not within the state's jurisdiction for the purpose of trial could not consistently be held to be within it for the purpose of arrest. However, real difficulties could result from allowing a criminal suspect to claim that he is temporarily not subject to the laws of the state in which he finds himself.

A significant theoretical question is raised by the Circuit Court's failure to

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10. Collins v. Johnston, 237 U.S. 502 (1915); Collins v. O'Neil, 214 U.S. 113 (1909).

11. *See* United States v. Rauscher, 119 U.S. 407, 412 (1886); United States v. Unverzagt, 299 Fed. 1015, 1016 (W.D.Wash. 1924).

12. The extent of sanctity afforded this territorial integrity is well illustrated by the case of an Indian Hindoo prisoner who escaped from a British ship in the harbor of Marseilles, France. Although this escapee was on French soil only momentarily before being returned to the British vessel, the case led to an international dispute requiring arbitration in the International Court of Justice, The Savarkar Case, The Hague Court Reports, p. 275 (1911).

13. Pettibone v. Nichols, 203 U.S. 192 (1906); Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436, 443 (1886); *In re* Ferrelle, 28 Fed. 878 (S.D. N.Y. 1886).

14. Mahon v. Justice, 127 U.S. 700, 705 (1888). This decision may be criticized on the ground that it leaves the state of refuge whose rights have been violated with four separate alternatives: (1) It can forget all about the case; (2) It can demand the return of the officers guilty of the abduction to its territory for prosecution, a request which the state harboring the officers is free to refuse; (3) It can attempt to rescue the kidnapped fugitive by sending its own officers over into the state where he has been taken; or (4) presumably it could in turn kidnap the arresting officers, threatening to prosecute them in case the kidnapped fugitive is not returned. It goes without saying that a holding which leaves a state of the union to such warlike alternatives is open to serious question.

15. See the argument made for the appellant in Collins v. O'Neil, 214 U.S. 113, 116 (1909).

give any satisfactory explanation of the connection it presumed between the crime committed by the arresting officers and the right of the state court to decide the primary question of the defendant's guilt or innocence. It seems difficult to sustain the result of the present cases on the ground that the state of Michigan, as distinguished from its officers, was guilty of any culpable act. A state is not liable for the torts of its agents.[16] Nor can an officer who commits a crime of the type found in the present case be considered within the scope of his authority.[17] The very act denudes him of official capacity in its commission.[18] Strictly speaking, there can be no agency, even between individuals, in the perpetration of a crime.[19] An act criminal in its inception, moreover, cannot be ratified by a purported principal.[20] Thus the state of Michigan, on settled agency principles, was not responsible for the acts of its officers. Yet the Circuit Court in effect held the state responsible for the kidnapping in the *Collins* case by divesting the state courts of jurisdiction.

The dissenting opinion in the *Collins* case focused attention on the fact that the Circuit Court, in both the cases under discussion, directed trial of the habeaus corpus petitions by the federal district court before either defendant had resorted to the remedies provided by the state courts. It is elementary that the obligation to enforce and guard rights secured by the federal Constitution and laws rests as squarely upon state courts as it does upon federal, and it has been held by the federal courts that persons seeking release from state custody under habeas corpus proceedings should resort to state courts before taking recourse to the federal tribunals.[21] The federal courts will therefore hear a petition for habeas corpus by one convicted in a state court only after all remedies by appeal in that state's courts have been exhausted.[22] Exceptions are made only where circumstances of peculiar urgency justify prompt federal interference.[23] The mere presence of a federal constitutional question dose not justify such interference.[24] The cases which have allowed exceptions fall into three categories: (1) Those involving intergovernmental relations; [25] (2) those involving failure or inadequacy of the state appellate remedies; [26] and (3) those involving extreme hardship or emergency

16. See Prosser, Torts 1064 (1941).
17. See Mechem, Agency §741 (2d ed. 1914).
18. *Ex parte* Young, 209 U.S. 123 (1908).
19. Pearce v. Foote, 113 Ill. 228 (1885).
20. United States v. Grossmayer, 9 Wall. 72 (U.S. 1869).
21. United States v. Tyler, 269 U.S. 13 (1925); *In re* Ryan, 47 F.Supp. 10 (E.D.Pa. 1942).
22. 62 Stat. 967, 28 U.S.C. §2254; Mooney v. Holohan, 294 U.S. 103 (1935); *Ex parte* Hawk, 321 U.S. 114 (1944).
23. United States v. Tyler, 269 U.S. 13 (1925).
24. United States v. Murphy, 108 F.2d 861 (2d Cir. 1940).
25. Boske v. Comingore, 177 U.S. 459 (1900) (state interference with federal officer's performance of duties); *In re* Neagle, 135 U.S. 1 (1890) (state prosecution for killing done by federal officer in performance of his duty to guard the life of a Supreme Court justice); *In re* Loney, 134 U.S. 372 (1890) (state prosecution of defendant charged with perjury in a contested congressional election); Wildenhus's Case, 120 U.S. 1 (1887) (state arrest of foreign seaman in violation of federal treaty).
26. *Ex parte* Stricker, 109 Fed. 145 (C.C.D.Ky. 1901) (state provided no appeal from contempt ruling); United States v. Ragen, 59 F.Supp. 374 (N.D.Ill. 1945) (state appeal frustrated by procedural rule). *See* Darr v. Burford, 172 F.2d 668, 670 (10th Cir. 1949) (stating that such interference is permissible where state remedy is doubtful).

for the individual defendant involved.[27] In the *Collins* case, the Circuit Court justified its untimely intervention on the ground that the same district court had three times upheld the action of the Michigan officers who were regularly kidnapping criminal suspects for trial.[28] This is not the usual type of reason cited by the federal courts to justify untimely intervention in habeas corpus cases.

Cases involving similar abductions [29] support the Circuit Court's implication that the arresting officers in the *Collins* case were guilty of kidnapping under the Lindbergh Act.[30] The Act, since a 1934 amendment,[31] has been construed not to require any element of ransom or reward,[32] but to make the motive of the kidnapper immaterial so long as he does the prohibited acts.[33] In *Gooch v. United States* [34] the converse of the present cases was presented. A criminal, motivated solely by the desire to escape arrest, kidnapped the officers sent to arrest him and forced them across a state line beyond the limits of their authority. A conviction for kidnapping was upheld. It would seem that the same principles could be consistently applied to convict the police officers involved in the present cases. The Federal Kidnapping Act makes no exceptions in favor of over-zealous policemen.[35] It is highly probable that a few convictions for this type of kidnapping would provide a sufficient deterrent to curb the extra-territorial activities of officious law enforcement agents.[36] Indeed, it is submitted that punishment of the kidnappers, and not release of a man whose trial, as distinguished from his arrest, has undoubtedly been perfectly fair, would be the more expedient policy to protect the right of personal security against unlawful seizure. That policy, plus the usual civil remedies for false arrest and imprisonment, should engender in law officers a reasonable respect for law. It seems unreasonable that one brought before a state tribunal to answer for a wrong against the state should be liberated upon a mere showing of a wrong committed by another. The two are separate transactions and should be dealt with separately.

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27. Potter v. Dowd, 146 F.2d 244 (7th Cir. 1944) (petitioner too poor to pursue lengthy appeal through the state courts); Coates v. Lawrence, 46 F.Supp. 414 (S.D.Ga. 1942) (life at stake and federal constitutional rights denied); *Ex parte* Sharp, 33 F.Supp. 464 (D.Kan. 1940) (Mere pretence of trial and denial of chance to appeal to state Supreme Court). As to the principle of *Potter v. Dowd, supra,* see United States v. Tyler, 269 U.S. 13 (1925) (taking an opposite view). These rules are definitely discretionary in their total character, since "unusual hardship" can be pleaded in almost every case where a person is in prison and contends that he is there unlawfully.

28. See Collins v. Frisbie, 189 F.2d 464, 468, n.1 (6th Cir. 1951).

29. *E.g.* United States v. Cleveland, 56 F.Supp. 890 (D.Utah 1944); Gooch v. United States, 297 U.S. 124 (1936).

30. 47 Stat. 326 (1932), 18 U.S.C. §1201 (1946). That act made it a federal crime to transport in interstate or foreign commerce anyone "unlawfully seized . . . abducted, or carried away and held for ransom or reward or otherwise. . . ." The words "or otherwise" were added by amendment in 1934. 48 Stat. 781 (1934). These words broaden the definition of the crime of kidnapping to include cases where the motive of the kidnapper is any kind or degree of anticipated benefit to himself. Before the addition of these words, "or otherwise," some element of pecuniary reward or ransom had been considered the *sine qua non* of the crime.

31. *Ibid.*

32. Sanford v. United States, 169 F.2d 71 (8th Cir. 1948); United States v. Parker, 19 F.Supp. 450 (D.N.J. 1937).

33. United States v. Baker, 71 F.Supp. 377 (W.D.Mo. 1947).

34. 297 U.S. 124 (1936).

35. See note 30, *supra.*