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Article 7

Extradition - Extraditable Offense Under the Uniform Ciminial Extradition Act

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clarified its standards of constitutionality by manifesting their limitations, and held that these standards as propounded in the states of origin apply with equal force and effect in the states of market.

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Extradition—Extraditable Offense Under the Uniform Criminal Extradition Act—Petitioner Bledsoe, a resident of Oklahoma, was arrested in that state on a warrant honoring a demand for extradition made by the Governor of Kansas. The demand alleged that Petitioner was charged in Kansas with the statutory offense of failure to provide for the support and maintenance of his minor children, who were residing in Kansas. Petitioner brought this action in habeas corpus, alleging that (1) the Uniform Criminal Extradition Act[1] under which his extradition is sought is unconstitutional because in conflict with federal constitutional and statutory provisions relating to extradition; and (2) Petitioner has never been in the State of Kansas and has no agents in that State; he would not therefore be guilty of any crime committed in Kansas. *Held:* Writ denied. The Uniform Criminal Extradition Act is not repugnant to the Federal Constitution, and the actual presence of Petitioner within the demanding state at the time of the commission of the alleged offense is not a prerequisite for his conviction therefor. *Ex parte Bledsoe, 227 P. 2d 680 (Okla., 1951).*

The constitutionality of the Uniform Criminal Extradition Act, which has been adopted in nearly every state of the Union, is now uniformly established and no longer open to serious questioning.[2] The same conclusion seems to be true in Wisconsin, which adopted the Act in 1933.[3]

The provision of the Uniform Criminal Extradition Act applicable in the principal case reads as follows:

> "Surrender of persons not fleeing from demanding State. The Governor of this State may also surrender, on demand of the Executive Authority of any other state, any person in this State

[1] 22 OKLA. STAT. 1949 Supp. Sec. 1141.1.

[2] Ex parte Morgan, 194 P.2d 800 (Cal. App. 1948); Cassis v. Fair, 126 W.Va. 557, 29 S.E.2d 245 (1944); Ennist v. Baden, 158 Fla. 141, 28 So.2d 160 (1946); English v. Matowitz, 148 Ohio St. 39, 72 N.E.2d 898 (1947); Ex parte Campbell, 147 Neb. 820, 25 N.W.2d 819 (1946); Osborn v. Harris, 203 P.2d 912 (Utah, 1949); In re Harris, 309 Mass. 180, 34 N.E.2d 504 (1941). See also 22 AM. JUR., EXTRADITION, §9 and cases there cited. The Supreme Court of the United States has never passed on the constitutionally of Sec. 6 specifically.

[3] WIS. STATS. (1933) Chap. 364. The constitutionality of this Chapter has never been squarely passed upon in Wisconsin. In Milwaukee County v. Van Den Berg, 215 Wis. 519, 255 N.W. 65 (1934); State ex rel. Wells v. Hanley, 250 Wis. 374, 27 N.W.2d 373 (1947); and State ex rel. Kohl v. Kubiak, 255 Wis. 186, 38 N.W.2d 499 (1949), where individual sections of this chapter were construed, the court appears to assume that the act is constitutional. A similar assumption seems to be made by the Attorney General of Wisconsin in 21 O.A.G. 991, 22 O.A.G. 755, and 23 O.A.G. 757.

> charged in such other state * * * with committing any Act in this State * * * intentionally resulting in a crime in the state whose Executive Authority is making the demand, * * * even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."[4]

This provision clearly indicates that the Uniform Criminal Extradition Act intended to extend extradition to persons who are not, strictly speaking, "fugitives from Justice," not having fled from the jurisdiction of the demanding state. This extension is not envisaged by the Constitution of the United States.[5] Conceding that this would not in and of itself render that provision unconstitutional,[6] it still seems to present the abstract question of whether a person who has never been within the territorial boundaries of the demanding state, can be guilty of a criminal offense in that state.

Most courts find no difficulty in answering the question in the affirmative, provided it can be shown that the accused, although never physically present in the demanding state, accomplished a criminal result therein through an agent or accessory.[7] Through such agent or accessory the accused is held to have been constructively present in the demanding state, thereby subjecting himself to its criminal jurisdiction. This "constructive presence" theory has been used by the courts in a great number of instances, particularly in conspiracy cases where the conspiracy itself and the overt act occurred in two different jurisdictions, and defendant never entered the latter jurisdiction.[8]

A much more difficult problem is presented in cases where the accused was neither actually nor constructively present in the demanding state at the time of the alleged offense. A few older cases squarely hold that prosecution cannot be had in such cases.[9] In extradition cases prior to the enactment of the Uniform Criminal Extradition Act (and particularly Sec. 6 thereof) the courts have arrived at sub-

[4] UNIFORM CRIMINAL EXTRADITION ACT, Sec. 6; 220 S. 1949 Supp. Sec. 1141.6; WIS. STATS. (1949) 364.06.

[5] "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." U. S. CONSTITUTION, Art 4, sec. 2, cl. 2.

[6] Ex parte Morgan, *supra,* note 2; Cassis v. Fair, *supra,* note 2; English v. Matowitz, *supra,* note 2; Ex parte Tenner, 20 Cal.2d 670, 128 P.2d 338 (1942); Innes v. Tobin, 240 U.S. 127, 36 S.Ct. 290 (1915), holding that the States could validly extradite persons not "fugitives from Justice" as a matter of comity.

[7] 14 AM. JUR., CRIMINAL LAW, §§227, 228, 229, and cases there cited; principal case, cited in text, relying on Cassis v. Fair, *supra,* note 2.

[8] Rex v. Brisac, 3 East. 164 (1803); Reg. v. Jones, 1 Dem. C.C. 551, 4 Cox C.C. 198 (1791); Ex parte Hedley, 31 Cal. 108 (1886); Simpson v. State, 92 Ga. 41, 17 S.E. 984 (1893); Johns v. State, 19 Ind. 421, 81 Am. Dec. 408 (1862); Robbins v. State, 8 Ohio St. 131 (1853); State v. Morrow, 130 N.C. 811, 40 S.E. 853 (1883).

[9] Simpson v. State, *supra,* note 8; People v. Adams, 3 Denio (N.Y.) 190, 45 Am. Dec. 468 (1846).

stantially the same result by holding that persons not actually or constructively present in the demanding state at the time of the alleged commission of the offense charged were not "fugitives from justice" (as indeed they could not have been) and therefore not extraditable.[10] The courts have thus avoided having to decide the question by rigid adherance to the "fugitive from justice" test.

As during the course of the 'thirties most states adopted the Uniform Criminal Extradition Act, the problem received some clarification. While Sec. 6 does not purport to answer the theoretical question of the possibility of committing a crime while not actually or constructively present at the *locus* thereof, it practically decided it, at least so far as extradition was concerned, by unequivocally authorizing extradition in such cases, provided the act complained of was alleged to have occurred in the asylum state.

Judicial interpretation of Sec. 6 has been less unanimous than might have been expected.[11] In *Culbertson v. Sweeney*,[12] the Ohio court construed Sec. 6 to authorize extradition only where the accused had been at least constructively present in the demanding state. On the basis of the language of Sec. 6 this construction seems quite unjustifiable. As has already been stated above, Sec. 6 very clearly authorizes extradition regardless of the actual or constructive presence of the accused in the demanding state. The only logical reason behind the Ohio court's decision could be that in the opinion of that court no crime can be committed without actual or constructive presence in the demanding jurisdiction. While this court does not squarely decide the question, one cannot help being impressed by the apparent conclusion that, in Ohio at least, our theoretical question would be answered in the negative.

The New York courts, which first squarely faced the problem in *People ex rel. Buck v. Britt et al.*,[13] wavered at first in favor of the Ohio view as expressed in the *Culbertson* case, by holding that a New York resident, who returned to his home therein after his discharge from the Army and was never in Minnesota, to which his wife, whom he had married in California during his army service, moved after he was sent overseas, could not be extradited to Minnesota for abandonment. The precise question facing the court in this case was somewhat different from that in the Culbertson case, because the New York version of Sec. 6[14] adds the additional requirement that the act

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[10] In re Kuhns, 36 Nev. 487, 137 P.83 (1913); State v. Toney, 162 N.C. 635, 78 S.E. 156 (1913); 16 C.J. CRIMMINAL LAW §164 and cases there cited.
[11] People ex rel. Buck v. Britt, et al., 62 N.Y.S.2d 479 (1946).
[12] 70 Ohio App. 344, 44 N.E.2d 807 (1942). See also In re Roma, 82 Ohio App. 414, 81 N.E.2d 612 (1950).
[13] *Supra*, note 11.
[14] CODE CR. PROC., §834.

for which extradition is sought be punishable in New York also. The reasoning of the court, however, is somewhat analogous to the Ohio view, as it is largely based upon the theory that the accused had never subjected himself to the criminal jurisdiction of Minnesota, and therefore could not be extradited.[15]

The following year the New York court was again confronted with the question in the case of *People ex rel. Fazio v. Warden of City Penitentiary of New York County et al.*[16] The facts here were similar to those in the *Buck* case. The court refused extradition because the Minnesota demand claimed extradition on the theory that the accused was a "fugitive from justice," which he obviously was not. The court then goes on to say that had the demand been made on the basis of Sec. 6, petitioner could have been extradited. No reasons are given behind this dictum, but it clearly indicates that the New York court is breaking away from the result of the Ohio view as expressed in the *Culbertson* and *Buck* cases.

In 1950, when an identical fact situation faced the New York court in *People ex rel. Kaufman v. O'Brien,*[17] the final break with the Ohio view occurred as the court clearly held that under Sec. 6 neither the actual nor the constructive presence of the accused in the demanding state at the time of the commission of the alleged offense need be shown. The reasoning behind this decision logically is that it is possible to commit a crime without actual or constructive presence in the demanding jurisdiction. Thus the New York view, diametrically opposite to the Ohio view, would answer our theoretical question in the affirmative.

An examination of the decisions in other jurisdictions shows that the New York view is now the view of the decided weight of authority. Oklahoma, as indicated by the principal case, clearly follows the New York view. The same is true of the California court, which, in the recent case of *Ex parte Hayes,*[18] held that any act which in the demanding state results in crime is punishable there, regardless of the actual or constructive presence of the accused therein.

While no Wisconsin decisions are found in point, it would appear that a Wisconsin court faced with the question would follow the New York view and thus answer our problem in the affirmative. An opinion of the Attorney General of Wisconsin appears to support this conclusion.[19]

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[15] 62 N.Y.S.2d 479, 481 (1946).
[16] 69 N.Y.S.2d 383 (1947).
[17] 96 N.Y.S.2d 401 (1950).
[18] 225 P.2d 272 (Cal. App., 1950).
[19] 23 O.A.G. 757. A recent amendment of WIS. STATS. Sec. 49.135, the UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT. (Chapter 23, Laws of 1951) somewhat simplified extradition for nonsupport under certain conditions. See *supra,* p. 126, this issue.