International Extradition

H. H. Grooms

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the International Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol15/iss1/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
INTERNATIONAL EXTRADITION.

Bouvier defines extradition as "the surrender by one sovereign state to another, on its demand, of persons charged with the commission of a crime within its jurisdiction, that they may be dealt with according to its laws." From the international viewpoint it may be defined as the surrender of persons by one federal state to another on its demand, pursuant to their federal constitution and laws.

In the absence of treaty stipulations public jurists are not agreed whether extradition is a matter of duty or discretion merely. Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent are of the opinion that it is a matter of imperative duty. While Puffendorf, Martens, Kluber, Leyser, Voet, Kluit, Schmaltz, Saalfield, Hefter, Mittemeyer, Wheaton, and a number of others equally eminent are of the opinion that it is a matter of discretion.

Chancellor Kent, in the Matter of Daniel Washburn, says; "It is the law and usages of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction;" and further, "whether such offender be a subject or a citizen of this country, would make no difference in the application of the principle; though if the prisoner . . . . be a subject of the foreign country, the interference might meet with less repugnance."

Vattel says that to deliver up one's own subjects to the offended state, there to receive justice is pretty generally observed, with respect to great crimes, equally contrary to the laws and safety of all nations; and that the sovereign who refuses to deliver up the guilty, renders himself, in some measure, an accomplice to the injury, and becomes responsible for it.

Grotius, who is still of higher authority, declares that the state is accountable for the crimes of its subjects, committed abroad, if it affords such subjects protection. Heineccius in

1 Compilation by Bouvier. Extradition.
2 24 Johns. Cr. (N. Y.) 106.
3 Opinions of Vattel, b. 2 Ch. 6, s. 76.
4 b 2, Ch. 21, s. 3, 4, 5.
commenting on this statement of Grotius admits that the surrender of a citizen, who commits a crime in a foreign country, is according to the laws of nations; and he further says that it is to be deduced from the principles of natural law. Burlamaqui\(^5\) follows the opinion of Grotius, and maintains that the duty of delivering up fugitives from justice is a common and indispensable obligation.

There are several decisions of the English courts that follow the principles enunciated by Grotius. In Lord Loughbourough's time, the crew of a Dutch ship mastered the vessel and ran away with her, and brought her into an English port, and it was held that the English authorities might seize them and send them to Holland. In the *East India Company v. Campbell,\(^6\) the Court of Exchequer observed that "government may send persons to answer for a crime wherever committed, that he may not involve his country and to prevent reprisals." But the authority most relied on, is the *dictum* of Heth, J., in *Mure v. Kays*. In the course of his opinion he says, "It has generally been understood that wheresoever a crime has been committed the criminal is punishable according to the *lex loci* of the country against the laws of which the crime was committed; and by the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime as committed, in bringing the criminal to punishment." However, the statement of Lord Coke of much earlier times has not gone unobserved in the English courts. This great common-law judge said, "It is holden, and so it hath been resolved, that divided kingdoms under several kings, in league, one with another, are sanctuaries for servants or subjects, flying for safety from one kingdom to another, and upon demand made by them, are not by the laws and liberties of kingdoms, to be delivered."\(^8\) Wynne in his Treaties on the Law and Constitution of England\(^9\) makes very free with Lord Coke's opinion, and asserts that it seems directly against the laws of nations, and that, "if, from the very nature of society, subjects are answerable to their own nation for their criminal conduct

---

\(^5\) Part 4, c. 3, s. 23 to 29.  
\(^6\) 1 Vest 246.  
\(^7\) 4 Taunt. 34.  
\(^8\) 3 Inst. 180.  
\(^9\) Eunomus, Dialog. 3, s. 67.
by the laws of nations, they may be justly demanded of foreign
states to which they fly; and the refusal to deliver them up is a
just cause of war." Chancellor Kent, in the Matter of Daniel
Washburn, supra, says that this remark of Lord Coke is contra-
dicted by history, and by the great work of Grotius (which was
published in the lifetime of Lord Coke).

Shortly after the decision of Chancellor Kent, Chief Justice
Tilghman, in the case of Short v. Deacon in the Supreme Court
of Pennsylvania, under a similar state of facts reached an oppo-
site conclusion as to the principle of law involved. He cites with
approval the statement of Lord Coke, and observes that Mr.
Wynne "does not seem to have been in all respects master of the
law of nations," "No states," continues Chief Justice Tilghman,
"has an absolute and perfect right to demand of another, the
delivery of a fugitive criminal, though it has what is called an
imperfect right, that is a right to ask it, as a matter of courtesy,
good will and mutual convenience. But a refusal to grant such
request is no just cause of war; no nation has the right to ask
the delivery of a fugitive for the purpose of wrecking its veng-
ence on him."

Lord Coke mentions three memorable instances where fugi-
tives were demanded from foreign governments and their de-
Iivery was refused. Queen Elizabeth, during the 34th year of
her reign, demanded of the French King, Morgan and others of
her subjects, who had committed treason against her; the answer
of the French King was, "that if these persons had machinated
anything against the Queen, in France, he could lawfully pro-
ceed against them; but if the offense was committed in England,
he had no right to take cognizance of it; that all kingdoms were
free to fugitives, and it was the duty of the Kings to defend,
everyone the liberties of his own kingdom. . . . . " The
second instance was the demand made by Henry VIII of Eng-
land, of the King of France, to deliver up to him the Cardinal
Pole, "being his subject, and attainted of treason." This de-
mand was well considered but not complied with. The third
was the case of the Earl of Suffolk, attainted of high treason by
parliament, and demanded by Henry VII of England, of Ferdi-
nand, King of Spain; Ferdinand refused to deliver him up, but

10 S. & R. 125.
was afterwards induced to do so, in consequence of the promise of Henry, not to put the Earl to death. This promise was basely violated. Another instance is that of Perkin Warbeck, an impositor, who contended with Henry VII, for the throne of England, and having fled to Scotland was protected by the King of that country, against Henry, who demanded him.

Martens\(^{11}\) is of the opinion that a sovereign is not obliged to send a fugitive from justice to his own country, or to the place where the crime was committed, even supposing that the fugitive had been condemned before his escape. Puffendorf founds the right of demanding delivery of the fugitive on treaty only. The Marquis of Beccaria,\(^{12}\) though giving no direct opinion as to the right of a sovereign to demand the delivery of the fugitive, from the scope and spirit of his thoughts, was plainly against it. Ward, like Puffendorff, seems to rest the matter on treaties or conventions.\(^{13}\)

A number of decisions from the federal courts of the United States are in accord with Short v. Deacon, supra. Among these may be cited United States v. Ruscher,\(^{14}\) in which Mr. Justice Miller states that prior to, and apart from treaties, there is no well defined obligation on one country to deliver up a fugitive to another, and though such delivery is often made, it is upon the principle of comity, and within the discretion of the government whose action is invoked.

The United States has always declined to surrender criminals unless bound by treaty to do so.\(^{15}\) Two instances in particular may be pointed out where, in the absence of treaties, the United States declined to surrender fugitives. One Chevalier de Longchamps, a subject of the King of France, was demanded of the Executive Council of the State of Pennsylvania by the French Minister, to be sent to France, and there tried and punished, for an insult offered in the city of Philadelphia, to a member of the legation of the French embassy. The Council consulted the Judges of the Supreme Court, and by their advice refused to deliver de Longchamps, who was punished, however,

---

\(^{11}\) Martens' Book 11, Ch. 3, c. 22, p. 107.

\(^{12}\) Beccaria, Ch. 35, p. 134.

\(^{13}\) Ward on The Law of Nations.

\(^{14}\) 119 U. S. 407.

\(^{15}\) Holmes v. Jennison, 14 Peters (U. S.) 540.
in Philadelphia, for breach of the laws of nations. This was in 1794. In 1793, M. Genet, minister of the French Republic, requested Mr. Jefferson, Secretary of State, to issue a warrant for the arrest of several persons, citizens of France, who had escaped from a French ship of war, after committing crimes against that Republic. Mr. Jefferson answered as follows: "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him."

In the instructions from Mr. Monroe, Secretary of State, to our plenipotentiaries, charged with negotiating peace with Great Britain (which terminated in the treaty of Ghent), the following passage may be noted: "Offenders, even conspirators, cannot be pursued by one power, into the territory of the other, nor are they to be delivered up by the latter, except in the compliance with treaties, or by favor."

Despite the opinions of several great jurists, the weight of authority is that there is no obligation upon a government, under the laws of nations, to surrender fugitive criminals to a foreign power. England and Canada follow the United States in adherence to this doctrine. The obligation is created by treaty. However, it is well to note, that it has been held that the existence of an extradition treaty does not prohibit the surrender by either party or country of a person charged with a crime not enumerated in the treaty.

In the extradition treaties of the various countries, the list of offenses are always set out. The list of offenses embraced in the many extradition treaties made between the United States and other nations number more than thirty. By the enumeration in the several extradition treaties of certain crimes for which the surrender of a fugitive may be demanded, it seems that all other offenses not included in such enumeration are by implication, excluded from the operation of the treaties. "A demand for extradition will not be made unless the authorities of the country requesting it are satisfied from the papers and evidence

---

26 L. Dall. 111.
27 Vol. 1, American State Papers, 175.
28 Clarke's Extradition, Pp. 93, 126, 128 (4th Ed.).
29 Ex Parte Foss, 102 Cal. 347; 36 Pac. 669; 25 L. R. A. 593.
30 Malloys Treaties, 1776-1909; Cahrles Treaties, 1910-1913.
submitted, that the offense for which extradition is sought is one that, as the law then is in the demanding country, will be fairly embraced within the terms of the treaty.”  

The decision of the courts of the asylum country as to whether an offense is within the terms of the extradition treaty is final, and the question can not be raised in the courts of the demanding country after extradition.

The general principle of international law is that in all cases of extradition the act or crime committed must be considered a crime by both countries. The Supreme court has held that absolute identity of statutes defining the offense is not necessary; it is sufficient if the essential character of the transaction is the same and made criminal by both statutes. It is not necessary that both statutes use the same name in describing a particular crime.

For the definition of the offense, the laws of the states and not the enactments of Congress must be looked to. This is necessary because there is no common-law crimes against the United States government.

Irrespective of treaty stipulations, governments do not deliver fugitives for political crimes. Both the United States and England have tenaciously adhered to this principle. In the matter of political offenses, most of the extradition treaties throw special precautionary measures around the fugitive, specifically providing that the decision whether or not an offense is political rests with the asylum country. Even in the absence of treaty the right to determine the question is undoubtedly inherent in the government upon which the demand is made. An extradition magistrate has jurisdiction, and it is his duty, to determine whether an offense charged is political within the meaning of the treaty provisions.

In the absence of treaty stipulations, it appears from the decisions of the courts, that it is immaterial that the person whose extradition is demanded is a citizen of the country upon

---

21 Cohn v. Johnn, 100 Fed. 639.
23 Wright v. Henkel, 190 U. S. 49.
25 In re Ezeta, 62 Fed. 972.
26 In re Arton, 1 Q. B. 108; In re Levi, 6 Que. Q. B. 151.
27 In re Ezeta, supra.
which the demand was made. But in *Ex parte McCabe* it was held that where it was provided in an extradition treaty that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty," the United States will not surrender one of its citizens charged with murder committed in one of the states of Mexico.

Desertion from a foreign army or navy is held to be an extraditable offence in *Tucker v. Alexander*. This was a five-four decision, and turned upon the construction of our extradition treaty with Russia.

A question that sometimes arises is as to the effect of an illegal extradition. In *Ker v. Illinois*, one Ker was kidnapped in Peru by one Julian and brought back to the United States. Mr. Justice Miller held that the fact that the prisoner had been kidnapped did not establish any right under the Constitution, or laws or treaties of the United States, sufficient to allow the courts to give any relief to the fugitive. However, in the last paragraph of his opinion he said that this did not leave the government of Peru without remedy, and that under our extradition treaty with that country (which included kidnapping), and on their demand Julian could be surrendered, tried in its courts for violation of its laws. The court says in *State v. Brewster*; "The illegality, if any, consists in the violation of the sovereignty of an independent nation . . . . if such country waives the invasion of its sovereignty it is not for the fugitive to object." "or," says the court *In re Newman*, can a fugitive claim immunity on the ground that he was enticed by stratagem from a foreign country into the jurisdiction where the crime was committed." The court will not in passing upon a fugitive's plea to the jurisdiction, enter into an inquiry as to whether he came into the jurisdiction voluntarily or against his will.

In many of the cases that have come before the courts for adjudication, the question as to the *right of asylum*, has been directly or indirectly involved. We can only conjecture whether

---

30 46 Fed. 363.
31 183 U. S. 424.
32 113 U. S. 436.
33 7 Vt. 118.
34 79 Fed. 822.
35 *In re Newman*, supra.
in the time of Herrod, extradition was known to and used by that despot as an instrument to reclaim his subjects; but from the Biblical story of the flight of Joseph and Mary with the infant Jesus, we know that they were aware of and did avail themselves of the right of asylum and the security offered by the assertion of that right. In the opinion of many jurists, the right of asylum is one of the most jealously guarded rights in free counties. Lord Coke declared this right in his much criticised statement.

Can it be said that a sovereign can convert his nation into a felon’s asylum? As a general statement this seems repugnant to our sense of morals and good order. One writer says, "But the fact is that there is no such ‘right’ as the ‘right of asylum.’" In law a right cannot exist without what lawyers call a sanction to enforce it, and a corresponding duty in some one else to recognize it. Now, no fugitive can enforce the right of asylum anywhere. From the opinion of the same writer political offenses would seem to be the only ones out of which the right of asylum could grow. In *Ker v. Illinois*, supra, Ker insisted that the right of asylum existed by virtue of the treaty with Peru, but Mr. Justice Miller in the course of his opinion answers this by saying that a treaty so far as it regulates the right of asylum at all, is intended to limit that right. From this we may infer that the right of asylum is inherent in the fugitive. This is not an absolute right, but one that the fugitive enjoys at the pleasure and discretion of the asylum country.

Summing up the authorities consulted it is apparent, as has been stated by a writer in the *Nation*, that apart from convention there is no right or duty of extradition." The whole question appears to depend upon treaties. Since this is the case we are brought to observe the effectiveness of such treaties. The United States courts contend that these treaties should be interpreted in a spirit of *uberrima fide*, and in manner to carry out their manifest purpose. The asylum country may be unable to enforce the stipulations of the treaty due to their own internal weaknesses. This case presented itself when the bandit Villa invaded American territory and murdered our citizens. Even

---

36 The Nation, Vol. 27, p. 251.
37 183 U. S. 424.
though the Carranza government had been sympathetic it is very
doubtful if it could have enforced its obligations under our
treaty with that country. Then there is the case of Grover
Cleveland Bergdoll. Due to the conditions arising from the war,
the only defensible method of securing Bergdoll from Germany
was to make his extradition part of the terms of peace. This
was not carried out, and there appears to be nothing to do but
wish Germany joy in her adopted son.

Where the rights of third parties are involved there may
arise cases where the extradition treaty can not be carried out.
Two instances of this kind have been pointed out in an article
in the Outlook. In the case of Peter Martin who was con-
victed and sentenced in British Columbia (1876) for a crime
committed in that province, and sent by Canadian authorities in
custody to Victoria, during which transit the prisoner was
brought by the Canadian officers, across part of the territory of
Alaska, the Government of the United States claimed the release
of the prisoner on the ground that the act of bringing him in
duress within the territory of the United States, was a violation
of its sovereignty, and the British Government acceded to the
demand. On another occasion a man charged with crime in the
United States and arrested in Norway was duly extradited.
There was no passenger steamer running directly from Norway
to the United States. The prisoner was brought through the ter-
ritory of another in violation of the other's sovereignty, but
there was no protest. Had the prisoner been aware of his right,
he could without the least difficulty, have gained his freedom on
reaching the country in question. Since those instances the
various extradition treaties have become more comprehensive in
their scope, and the spirit of uberrima fide more pronounced,
even as to nations not signatory to the extradition treaty in-
volved.

H. H. Grooms,
Attorney-at-Law.

Birmingham, Ala.

Outlook, Vol. 99, 94-95.