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INTERNATIONAL LAW -EXTRADITION - CONSTRUCTION OF TREATY

INTERNATIONAL LAW — EXTRADITION — CONSTRUCTION OF TREATY— On complaint of the British Consul that the petitioner had "received certain moneys knowing the same to have been fraudulently obtained," the United States Commissioner for the Northern District of Illinois issued his warrant to hold petitioner in custody for extradition to England, under Article 10 of the Webster-Ashburton Treaty[1] of 1842, as supplemented by the Blaine-Pauncefote Convention[2] of 1889, and certified the evidence to the Secretary of State.[3] Upon application by petitioner for writ of habeas corpus and certiorari in its aid, the district court ordered him released from custody on the ground the act charged was not within the treaties because not an offense under the law of Illinois, where petitioner was found. The circuit court of appeals reversed this decision,[4] restoring the judgment of the Commissioner that it was a crime by the law of Illinois, as decided in *Kelly v. Griffin*.[5] Certiorari was granted[6] on a petition alleging that the act charged must be a crime by the law of the asylum, and that the act charged herein was not. *Held*, the offense charged is an extraditable one under the applicable treaties because it is recognized as criminal by most States, and so is "criminal by the law of both countries," whether a crime in Illinois or not. Butler, Brandeis, and Roberts, JJ., dissented. *Factor v. Laubenheimer*, (U. S. 1933) 54 Sup. Ct. 191.

The modern tendency is to regard crime as cosmopolitan, and to broaden extradition accordingly. The freedom of the individual is protected, however,

[1] 8 Stat. 572 at 576 (1842); 1 MALLOY, TREATIES 650, 655 (1910).

[2] 26 Stat. 1508 (1889); 1 MALLOY, TREATIES 740 (1910).

[3] By authority of 31 Stat. 656 (1900), U. S. C. tit. 18, sec. 652 (1926).

[4] Laubenheimer v. Factor, (C. C. A. 7th, 1932) 61 F. (2d) 626. Noted in 1 UNIV. CHICAGO L. REV. 157 (1933). The crucial point decided in the Supreme Court was not discussed, since the Court felt bound by Kelly v. Griffin, infra, note 5.

[5] 241 U. S. 6, 36 Sup. Ct. 487 (1916).

[6] Factor v. Laubenheimer, 289 U. S. 713, 53 Sup. Ct. 523 (1933).

by the common requirement that the act charged be "criminal by the law of both countries." [7] The scope of this provision is the real source of dispute in the instant case. In *Wright v. Henkel*,[8] the prisoner claimed that the act charged must be a crime by the general law or by the law of the United States, but it was held that the criminality of the act by the law of the State of asylum was a sufficient basis for extradition under the treaties with England. This case has led textwriters[9] to conclude that the law of the asylum controls although, curiously enough, the only case with facts analogous to the instant case decided that the foreign substantive law controlled, and extradited the prisoner in spite of the asylum law not making the act a crime.[10] The result of the instant case suggests a common law of the United States, though such a concept is usually denied.[11] The decision would also seem logically to lead to the denial of extradition whenever the general law does not make an act a crime, even though the asylum law does make it criminal. This logical extension would involve the overruling of the *Wright* case.[12] The policy of the present case appears to have the effect of the federal government legislating on crime for the States. It would often result in extradition where the act was not considered wrong in the asylum. England has always required that the act be criminal by the law of the asylum,[13] so the holding of the instant case means lack of reciprocity in administration of the treaties. The governmental set-up of the two Powers was well understood by the negotiators of these treaties, so that the instant case may well have been foreseen. The real difficulty, in the opinion of the writer, is the inadequacy of the law in Illinois on fraudulent crimes, since the majority impliedly overruled *Kelly v. Griffin*[14] on the point of this act being a crime by Illinois law. While the desire to extradite Factor is quite understandable, *quaere* as to whether the Court has laid down a wise rule for future cases? So far as the decision of the instant case is concerned, it is submitted that the majority could not be said to be wrong on the interpretation of the treaties. There is no obligation to extradite apart from treaty.[15] Treaties of extradition are not criminal statutes, but are to be liberally construed to effectuate the intent of the contracting parties.[16] Rules

[7] 1 MOORE, EXTRADITION 106, n. 1 (1891); TRAVERS, L'ENTR'AIDE RÉPRESSIVE INTERNATIONALE 54 (1928); Puente, "Principles of International Extradition in Latin America," 28 MICH. L. REV. 665 at 707 (1930); Bustamente Code, Art. 353, 86 LEAUGE OF NATIONS, TREATY SERIES 111 at 155 (1929).

[8] 190 U. S. 40, 23 Sup. Ct. 781 (1903).

[9] 1 MOORE, EXTRADITION 106, n. 1 (1891); 1 OPPENHEIM, INTERNATIONAL LAW, 4th ed., 568 (1928); BAR, INTERNATIONAL LAW 714 (1883); 1 HYDE, INTERNATIONAL LAW 570 (1922); CLARKE, EXTRADITION, 3d ed., 51 n. (1888).

[10] In re Metzger, 17 Fed. Cases 232 at 238 (1847). The extradition treaty with France containing similar language was involved.

[11] CLARK AND MARSHALL, CRIMES, 3d ed., 21 (1927); 1 WHARTON, CRIMINAL LAW, 12th ed., 382 (1932).

[12] Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781 (1903).

[13] Ex Parte Piot, 15 Cox C. C. 208 (1883); Re Bellencoutre, 17 Cox C. C. 253 (1891). Both dealt with a similar provision in the French-English treaty.

[14] 241 U. S. 6, 36 Sup. Ct. 487 (1916). See 1 UNIV. CHICAGO L. REV. 157 (1933) where the question as to the Illinois law is fully discussed.

[15] 1 OPPENHEIM, INTERNATIONAL LAW, 4th ed., p. 565 (1928); 1 HYDE, INTERNATIONAL LAW 568 (1922).

[16] Geofroy v. Riggs, 133 U. S. 258 at 271, 10 Sup. Ct. 295 at 298 (1890).

of construction are but guides to this intent,[17] which ought to be ascertained from the treaty itself, if possible. The court agreed that item 3 of Article 1 of the Convention of 1889 covered this case.[18] The majority argued that, since item 3 was not modified by a proviso requiring criminality by the law of both countries, whereas, for example, items 4 and 10 were so qualified, therefore there was no such requirement. The minority contended that the qualifying phrases, where used, had the obvious purpose of clarifying an ambiguous offense. The majority concluded that the treaty on its face would permit extradition when the law of the asylum did not make the act charged criminal, and distinguished the *Wright* case[19] on the ground that it involved item 4, and other former cases because they

[17] 2 HYDE, INTERNATIONAL LAW 69 (1922); CRANDALL, TREATIES, 2d ed., 400 (1916).

[18] The applicable treaty provisions are:

Treaty of 1842: " . . . and whereas it is found expedient, for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties, respectively, that persons committing the crimes hereinafter enumerated, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up."

"Article X. It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed. . . . " 8 Stat. 572 (1842).

Convention of 1889: Article I. "The provisions of the said Tenth Article are hereby made applicable to the following additional crimes:

1. Manslaughter, when voluntary.

2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

4. Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the law of both countries.

5. Perjury, or subornation of perjury.

6. Rape; abduction; child-stealing; kidnapping.

7. Burglary; house-breaking or shop-breaking.

8. Piracy by the law of nations.

9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this Convention or in the aforesaid Tenth Article, provided such participation be punishable by the laws of both countries." 26 Stat. 1508 (1889).

[19] 190 U. S. 40, 23 Sup. Ct. 781 (1903).

assumed without discussion the decided point in the instant case.[20] The minority agreed that the proviso of Article X of the Treaty of 1842[21] refers to procedure, but argued that by implication and convenience it supports their construction of the treaties. The minority contended that mutuality is the basic policy of these treaties, which is sound, but the United States has extradited its own nationals when continental countries have refused to do the same with their nationals.[22] Principles of interpretation are so slippery[23] that it really becomes a question of policy as to which result will aid in the extradition of criminals. If the holding of the instant case should require a choice between the general law and the law of the asylum in future cases,[24] it is submitted that the minority doctrine, which is more in accord with precedent, would work better in practice.[25] It is significant, however, that the prisoner has been extradited in most cases. If the Supreme Court is able to extradite when the act charged is an offense *either* by the general law *or* by the law of the asylum, then the majority holding will have done the cause of extradition good service. This would restrict nonextradition to cases involving items analogous to 4 and 10 in the instant treaty, and to cases where the act charged is not criminal either by the law of the asylum or the general law. The decision is commendable for its extraordinarily liberal application of the policy behind extradition treaties.

A. B. M.

[20] Collins v. Loisel, 259 U. S. 309, 42 Sup. Ct. 469 (1922); Bingham v. Bradley, 241 U. S. 511, 36 Sup. Ct. 634 (1916); Kelly v. Griffin, 241 U. S. 6, 36 Sup. Ct. 487 (1916).

[21] See note 18, supra.

[22] Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945 (1913).

[23] 1 OPPENHEIM, INTERNATIONAL LAW, 4th ed., 759-765 (1928); 2 HYDE, INTERNATIONAL LAW 69 (1922).

[24] *I.e.*, a choice between the instant case and Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781 (1903).

[25] The law of the asylum is the easier for the magistrate to handle.