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# APPEAL AND ERROR-EISLER'S FLIGHT AND THE CASE AND CONTROVERSY QUESTION

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APPEAL AND ERROR—EISLER'S FLIGHT AND THE CASE AND CONTROVERSY QUESTION—The United States Supreme Court granted certiorari to review a federal court conviction on a charge of contempt of Congress.[1] Pending determination of the appeal, appellant was released on bail and, after argument on the merits but before a decision had been rendered, he wrongfully fled the country. Subsequently the Attorney General notified the Court that appellant had been apprehended in England at the request of the Secretary of State and that a court of competent jurisdiction there found that appellant was not guilty of an extraditable offense under English law. The Court of its own motion then considered the disposition of the appeal. *Held,* writ of certiorari would not be vacated but the appeal would be removed from the docket indefinitely pending return of the fugitive. *Eisler v. United States,* 338 U.S. 189, 69 S. Ct. 1453 (1949).

In deciding upon the effect of appellant's extrajudicial misconduct at least two of the justices advocated one of three alternatives. In opposition to the per curiam opinion of the five majority justices,[2] the Chief Justice concurred in a dissent by Justice Frankfurter which held that the appeal should be finally dismissed for lack of jurisdiction in absence of a case or controversy within the meaning of Article Three of the Constitution. Justice Jackson and Justice

[1] See Eisler v. United States, 83 App. D.C. 315, 177 F. (2d) 273 (1948), cert. granted, 335 U.S. 857, 69 S.Ct. 130 (1948). The alleged contempt occurred before the Un-American Activities Committee of the House of Representatives.

[2] Justice Burton joined in the opinion disposing of the appeal although he did not take part in the hearing on the merits.

Murphy entered separate dissenting opinions advocating a final decision on the merits. The majority relied upon a series of state and federal decisions which have held that the escape of an appellant from the custody of enforcement officers before determination of the appeal suspends the appeal.[3] Unfortunately none of these cases has included a discussion of the case and controversy aspect of the problem, although the majority here suggested the possibility that the issues had become moot by appellant's flight from the jurisdiction.[4] Justice Frankfurter was of the opinion that the failure of the United States to obtain extradition was conclusive of the permanency of appellant's absence from the jurisdiction, and that in the absence of appellant the issues became abstract depriving the Court of jurisdiction. In this he relied upon the advisory opinion cases beginning with the historic refusal of Chief Justice Jay to advise President Washington on an important question in the earliest days of this nation.[5] Even admitting that it is proper for a court to presume that an unsuccessful attempt at extradition is conclusive of a fugitive's permanent absence from the jurisdiction, there would seem to be a basic distinction between the advisory opinion cases and the problem at hand. It is clear that a request for an advisory opinion can never invoke the jurisdiction of a federal court, but here there is no doubt of the initial jurisdiction. The question is whether this sort of extraneous newly-developed fact will destroy jurisdiction once obtained. Furthermore, as pointed out by Justice Jackson, it is neither necessary nor usual for the appellant to be present when the opinion of the court is handed down; therefore the continuous presence of the appellant does not seem to be a jurisdictional essential within the normal meaning of the term.[6] Unless appellant's misconduct con-

[3] Smith v. United States, 94 U.S. 97, 24 L. Ed. 32 (1876); Bonahan v. Nebraska, 125 U.S. 692, 8 S.Ct. 1390 (1887); 5 U. of DETROIT L.J. 77 (1942). Although state procedure varies greatly even in the absence of statutes, it has quite generally been held that disposition of an appeal under these circumstances rests in the discretion of the appellate court. But see Moore v. State, 44 Tex. 595 (1876), for a suggestion that an appeal initiated by a criminal defendant would be determined at the request of the attorney general despite appellant's escape. Cf. United States v. Alaska S.S. Co., 253 U.S. 113, 40 S.Ct. 448 (1920), and see State v. Broom, 121 Ore. 202, 253 P. 1044 (1927), where the court in its discretion rendered an opinion after appellant's escape, apparently because it had previously decided to affirm the conviction.

[4] It has been the practice of the court to deal with moot cases in much the same way as with appeals not founded upon a case or controversy. Although the majority here apparently did not believe the issues were presently moot, the decision recognizes that future events may prove it to be so. Cf. United States v. Mitchell (C.C. Ore. 1908), 163 F. 1014 for the effect of the death of an appellant prior to determination of the appeal.

[5] See 3 JOHNSTON, CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486 (1891); 10 SPARKS, WRITINGS OF GEORGE WASHINGTON 542 (1840); Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911); Frankfurter, "A Note on Advisory Opinions," 37 HARV. L. REV. 1002 (1924).

[6] Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304, 4 L.Ed. 97 (1816); Muskrat v. United States, supra, note 5; McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927).

stitutes a forfeiture or implied dismissal of the appeal[7] he is still entitled to a determination of his rights as requested in his application for certiorari. It can hardly be said that appellant's flight negatives the adversary character of the proceeding[8] or the existence of an otherwise justiciable controversy,[9] which are the two situations in which the case and controversy jurisdictional limitation is most often invoked. The sole consequence of appellant's absence seems to be that a judgment if rendered would not be susceptible of enforcement presently or at any determinable future time.[10] Since the majority would have been bound to dismiss the writ if it had found that jurisdiction terminated with the English court's decision, the disposition of the appeal presupposes the continued existence of a case or controversy. In this the two separately dissenting justices agree, but they would go much further and hold that the Court cannot "run away from the case just because Eisler has."[11] In both of these opinions there is an unmistakable feeling that the importance of the question requires a decision if only in the interest of clarification of the law for the benefit of Congress and the public. The cases have quite uniformly held to the contrary, however, the Supreme Court being especially reticent to render an opinion solely on that basis.[12] An appeal is generally recognized as a statutorily-granted privilege of the

[7] See Justice Frankfurter's opinion in the principal case at 192: "When he withdraws himself from the power of the Court to enforce its judgment, he also withdraws the questions which he had submitted to the Court's adjudication." And Justice Jackson at 196: "Decision at this time is not urged as a favor to Eisler. If only his interests were involved, they might well be forfeited by his flight." Accord, People v. Genet, 59 N.Y. 80 (1874). It seems clear, however, that the majority did not construe Eisler's flight as tantamount to a voluntary dismissal, for abundant and recent precedent is clear that an appeal voluntarily dismissed cannot be revived by acts of the appellant. E.g., State ex rel. Allis-Chalmers Mfg. Co. v. Boone Circ. Court, (Ind. 1949) 86 N.E. (2d) 74.

[8] Muskrat v. United States, supra, note 5; South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300, 12 S.Ct. 921 (1892).

[9] Luther v. Borden, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849); Fed. Radio Comm. v. General Electric Co., 281 U.S. 464, 50 S.Ct. 389 (1930). It is notable in this regard that the Court has consistently refused to decide "moot" cases, although one widely accepted definition of that term includes a situation in which a judgment, "when rendered, for any reason, cannot have any practical legal effect on a then-existing controversy." Ex Parte Steele, (D.C. Ala. 1908) 162 F. 694 at 702.

[10] To the effect that the giving of relief is not an "indispensable adjunct to the exercise of the judicial function," see Nashville C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249 at 263, 53 S.Ct. 345 (1933); Michigan v. Wisconsin, 272 U.S. 398, 47 S.Ct. 114 (1926). In these cases, however, the absence of affirmative relief depends upon the nature of the controversy rather than the inefficacy of a decree once rendered.

[11] Opinion of Justice Jackson in the principal case.

[12] United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 36 S.Ct. 212 (1916); United States v. Chambers, 291 U.S. 217, 54 S.Ct. 434 (1934); 84 Univ. Pa. L. Rev. 104 (1935). Cf. Masses Pub. Co. v. Patten, (C.C.A. 2d, 1917) 245 F. 102, and see State ex rel. Dakota Trust Co. v. Stutsman, 24 N.D. 68, 139 N.W. 83 (1912), exemplifying that state's practice of allowing review solely to clarify the law where a question is presented involving substantial public interest. See also Iowa Code (1924) §14012, providing for state's appeal from criminal acquittals to decide questions of law only.

convicted party, and it is in his interest and for his benefit that the Court entertains it.[13] Nevertheless there are several decisions of the Court which have been made on the theory of a continuing wrong or the probability of its recurrence even though the issues upon which the appeal was taken have been rendered moot by the passage of time or the occurrence of events after the writ was granted.[14] If the majority had been so inclined it seems that the principle of those cases could be applied here, for since the opinion of the Court, in the *Christoffel* case,[15] and the granting of certiorari here, the status of the Un-American Activities Committee is left in some doubt. Probably the true foundation of the majority opinion is the traditional disinclination of the courts to render a judgment which is unenforceable.[16] If this is true, the decision leaves open a possible future opportunity for a different sort of declaratory judgment on the presentation of an appropriate case, for the majority describes the suspension of its determination as merely "a matter of our own practice," and does not seem to feel bound by any jurisdictional limitations.[17]

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[13] E.g., Commonwealth v. Andrews, 97 Mass. 543 (1867).

[14] See McGrain v. Daughterty, supra, note 6; So. Pac. Terminal Co. v. Young, 219 U.S. 498, 31 S.Ct. 279 (1911); United States v. American-Asiatic S.S. Co., 242 U.S. 537, 37 S.Ct. 233 (1917); United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 17 S.Ct. 540 (1897); ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§262, 263 (1936); 34 HARV. L. REV. 416 (1921). Cf. Gilpin v. Mutual Life Ins. Co. of New York, (N.Y.) 86 N.E. (2d) 737 (1949).

[15] Christoffel v. United States, (U.S. 1949) 69 S.Ct. 1447, where the Court also refrained from delivering an opinion on the merits because it was found that no quorum of the Un-American Activities Committee was present at the time of the alleged contempt.

[16] Supra, notes 4 and 9.

[17] In Smith v. United States, supra, note 3, at 97, cited approvingly by the majority in the principal case, it was said: "It is clearly within our *discretion* to refuse to hear a criminal case in error, unless the convicted party, . . . is where he can be made to respond to any judgment we may render." (Italics supplied).