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Conclusions

Study of the background, development and criteria for enforcement of Section 7 illustrates the hazards facing both the lawyer and the administrator who deal with economic facts of business life. Shall the per se rule or the rule of reason apply in its enforcement? Economic criteria to judge the "reasonable probability" of a "substantial restraint on trade" or "tendency to monopolize" do not require that all tests be met to establish prima facie violation of the statute. However, in order to have something resembling effective enforcement, sufficient funds should be provided to enable the Antitrust Division and the Federal Trade Commission to submit major mergers to detailed economic analysis. Unless this is done the antimerger section will be sparingly applied, as in the Bethlehem Steel merger, so as to be more properly termed an "anti-oligopoly" law. The law was designed to prevent incipient violations of the antitrust law and should be widely applied to preserve (or restore?) a healthy competitive system. In the absence of adequate funds for enforcement, industry may find itself faced, through further amendment of Section 7, with the prior administrative approval requirement for all mergers or acquisitions previously recommended by the TNEC in 1941.[96]

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[96] Investigation of Concentration of Economic Power, Final Report 38, 39 (approved without objection) 77th Cong., 1st Sess. (1941).

It is suggested for the consideration of the Congress that no such merger should be permitted unless its proponents demonstrate—

(a) That the acquisition is in the public interest and will be promotive of greater efficiency and economy of production, distribution, and management;

(b) That it will not substantially lessen competition, restrain trade, or tend to create a monopoly (either in a single section of the country or in the country as a whole) in the trade, industry, or line of commerce in which such corporations are engaged;

(c) That the corporations involved in such acquisition do not control more than such proportion of the trade, industry, or line of commerce in which they are engaged as Congress may determine;

(d) That the size of the acquiring company after the acquisition will not be incompatible with the existence and maintenance of vigorous and effective competition in the trade, industry, or line of commerce in which it is engaged;

(e) That the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce as materially to lessen the effectiveness and vigor of competition in such trade, industry or line of commerce;

(f) That the acquiring company has not, to induce the acquisition, indulged in any unlawful methods of competition or has not otherwise violated the provisions of the Federal Trade Commission Act, as amended.

Several such proposals have been submited to the Congress in 1955, Cellar, Hearings Before House Antitrust Subcommittee: A Progress Report, 1 The Antitrust Bulletin 171, 173 (1955).

INTERSTATE RENDITION AND ILLEGAL RETURN OF FUGITIVES

HERBERT O. REID*

THE story is told that Robert Benchley, the noted humorist, while a student at Harvard College, presented himself for a history examination. There was considerable question as to his preparedness for this examination. Among the examination questions was one asking for a discussion of the effect of a United States-Canadian treaty relating to fishing rights. He was asked to discuss the treaty from the point of view of the United States and from the point of view of Canada. Benchley responded that he preferred to discuss the treaty from the point of view of the fish.

In a similar vein, most discussions of interstate rendition approach the problem from the point of view of the asylum state and/or of the demanding state. As Benchley preferred to discuss the United States-Canadian treaty from the point of view of the fish, this discussion of interstate rendition is from the point of view of the extraditee or returnee.

It is intended first, by way of introduction, to treat briefly the history and background of interstate rendition; second, to discuss the rights and remedies of the extraditee in the asylum state and; third, to discuss the rights of the extraditee or returnee in the demanding state.

I. History and Background

Extradition is ". . . [t]he act by which one nation delivers up an individual, accused or convicted of an offense outside of its own territory, to another nation which demands him, and which is competent to try and punish him. . ."[1] And it is imperative that the government making the demand must show, as a basis of its action, that its laws have been violated by the individual whose surrender it asks. In the United States, however, offenses are treated as local in character and the government refuses to surrender fugitives without a showing that the crime was committed in the territory, actual or constructive, of the demanding government. Technically, then, "extradition is a surrender by one sovereign state or nation of persons found within its jurisdiction to another on whose territory they are alleged to have committed, or to have been convicted of, crime, so that they might be dealt with

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[1] 1 Moore, Extradition and Interstate Rendition 1 (1891). In some countries citizens are held amenable to the penal laws for acts committed outside the national territory, and to some extent even foreigners are answerable for such acts. The definition given is broad enough to cover demands in either of these cases.

according to the penal laws of the latter state."[2] "State" as used in this definition is used in an international sense, i.e., states subject to the law of nations, and does not include member states of the Federal Union. "Interstate Rendition," is the surrender by one state of persons found within its jurisdiction to another state in whose territory they are alleged to have committed, or to have been convicted of, crime, so that they might be dealt with according to the penal laws of the latter state.[3] The word "state" as used in rendition refers to one of the member states of the Federal Union. "Extradition" refers to situations among nations, whereas "interstate rendition" is used to denote proceedings among the several states of the United States. Since various materials dealing with this problem quite frequently fail to make a proper distinction, both terms will be used interchangeably.[4] In this discussion, "extradition" and "rendition" when used or quoted, refer only to states among the member states of the Federal Union.[5]

Though the American Colonies were generally havens from tyranny and oppression and afforded asylum for political and other criminals[6] no refuge was afforded fugitives from the various Colonies.[7] This rationale is explainable on grounds that prior to the American Revolution the Colonies formed a part of the English Realm all under a common sovereign. Thus a fugitive from one colony to another

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2 Kopelman, Frank, Extradition and Rendition — History — Law — Recommendations, 14 B.U.L. Rev. 591, 592 (1934).

3 Id. at 624.

4 Although convenient and firmly established, the use of the term extradition to describe the surrender of fugitives from justice from one State of the Union to another is inaccurate and misleading. As Moore points out, "On the theory that they were dealing with a matter of extradition in the international sense, public officers and law writers have been led to consult the principles of international law and to apply them to a subject which they do not govern. The transfer of an accused person from one part of a country to another having a common supreme government does not bring into operation the principles of international law." 2 Moore, Extradition and Interstate Rendition 819 (1891).

5 For a discussion of the problem of removal of a prisoner from one United States territory to another see U.S. v. Wright, 15 F.R.D. 184 (D. Hawaii 1954); 9 Miami L.Q. 74 (1955).

6 "And if any strangers, or People of other nations, professing the true Christian Religion, shall fly to us from the tyranny or opression of their persecutors, or from Famine, Wars or the like necessary and compulsory cause, they shall be entertained and succored amongst us according to that power and prudence God shall give us [1641]." Colonial Laws of Massachusetts, (Reprinted from Edition of 1672) Boston (1887).

7 "The principle of these laws is plain, and undeniable; the territories where the crime was committed, and to which the criminal fled, were parts of the same empire, and under one common sovereign. The King of England could have no privilege against the King of Ireland, being one and the same person. Calcutta is part of the British empire. The common good of the whole forbids an asylum, in one part, for the crimes committed in another. So, prior to the American revolution, a criminal who fled from one colony, found no protection in another; he was arrested whenever found, and sent for trial to the place where the offense was committed." Short v. Deacon, 10 Sergeant & Rawle (Penn.) 125, 129 (1823).

would be returned from that part of the Realm where found to that part where he committed a crime.

Prior to the adoption of the Articles of Confederation, and for a time after, rendition of a fugitive from justice was usually accomplished through the courts without the intervention of the executive.[8] But when the Colonies confederated on March 1, 1781 a new method of recovering fugitives from justice was established. Article IV of the Articles of Confederation provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; . . .
> If any person guilty of, or charged with treason, felony or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the state from which he fled, be delivered up and removed to the State having jurisdiction of his offence.[9]

This new method, not being as comprehensive as previous practice, came to be regarded as not exclusive.[10] The clause of the article, restricted by the word "high misdemeanor," a term capable of a construction too technical and limited, was finally changed, and, appears in the Federal Constitution, as a broad and unconditional clause containing the words "other crimes." [11]

Article IV, § 2, cl. 2 of the Federal Constitution provides:

> 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.[12]

As a result of an indictment in Pennsylvania for the illegal and forcible seizure and carrying away of a free Negro with an intention to sell him as a slave in another state, the Governor of Pennsylvania in 1791 made a demand upon the Governor of Virginia, under this provision of the Constitution for the return of the three persons named in the indictment alleging them to be fugitives from justice and seeking their return to Pennsylvania for trial. The Governor of Virginia refused to honor the demand on the ground that this provision of the Constitution was not self-executing and Congress had not passed executing legislation. The Governor of Pennsylvania presented the

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[8] 2 Moore, Extradition and Interstate Rendition 821 (1891).

[9] Articles of Confederation and Perpetual Union, 1778, Art. IV.

[10] As to the scope of the words "other crimes," see 2 Moore on Extradition and Interstate Rendition 826 (1891); see also, Gatewood v. Culbreath, 47 So. 2d 725 (1950).

[11] See note 8 supra.

[12] U.S. Const., Art. IV, § 2, cl. 2.

correspondence in this matter to President Washington[13] who communicated the matter to Congress and on February 12, 1793 Congress passed the first law upon this subject putting into operation this provision.[14]

The present implementing statute governing interstate rendition provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other high crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.[15]

The constitutional provision and the enabling federal statutes have removed the problem of interstate rendition from the area of comity and have created a duty upon the states in this regard.[16] Whether the federal statute has preempted the field of interstate rendition so as to foreclose the various states from providing additional machinery for applying the law of extradition to matters not covered by the federal statute, has seemingly been answered in the negative.[17]

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13 American State Papers, Misc., Vol. I, p. 38.

14 1 Stat. 302 (1793).

15 62 Stat. 822 (1948), 18 U.S.C. § 3182 (Supp. 1952).

16 Lascelles v. Georgia, 148 U.S. 537 (1893).

17 The court in Innes v. Tobin, 240 U.S. 127, 134 (1916) said:
". . . [W]hile it is undoubtedly true that in the decided cases relied upon (Kentucky v. Dennison, supra; Roberts v. Reilly [supra]; Hyatt v. People of State of New York ex rel. Corkran [supra], 188 U.S. 691) the exclusive character of the legislation embodied in the statute was recognized, those cases, when rightly considered, go no further than to establish the exclusion by the statute of all action from the matters for which the statute expressly or by necessary implication provided.
"No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—state authority until it was deemed essential by further legislation to govern them exclusively by national authority. In fact, such conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt."

States had legislated upon the method of applying for the writ of habeas corpus, upon the mode of preliminary trial, upon the method of arrest and detention before extradition was demanded, upon the prisoner's exemption from civil process, and upon the extent of asylum allowed a prisoner when brought back to the state from which he fled.[18] Since the legislation by the various states[19] on these matters and judicial decisions were diverse, the Conference of Commissioners on Uniform State Laws sought to embrace the best features of the legislation and decisions and offer a practicable law for the adoption by all the states, thus promoting uniformity.[20] Thirty-nine States and the Territory of Hawaii have adopted the Uniform Criminal Extradition Act.[21]

II. Rights and Remedies of a Prospective Extraditee and the Asylum State

The Federal Extradition Statute and the Uniform Criminal Extradition Act provide machinery for one state to demand rendition from another. However, as a result of the nature of Federal-State relations there is no machinery for legal compulsion to force the executive of the asylum state to render a fugitive.[22] Thus, where the executive of the asylum state refuses to honor the demand, the matter is effectively terminated (i.e., except for the extra-legal processes of illegal self help which are discussed later).[23]

From the point of view of the prospective extraditee, the position taken that the constitutional provision and the Federal Statute are not exclusive and have not preempted the field has limited his right to resist return in the asylum state. Since the rights and remedies of the defendant may be determined under the Uniform Criminal Extradition Act, he has less protection in the asylum state than he had under the Federal Statute; for the purpose of the Uniform Criminal Extradition Act was not only to facilitate the machinery of extradition, but also to provide interstate rendition in some situations not covered by the Federal Statute.[24]

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[18] Commissioner's Prefatory Note, Uniform Criminal Extradition Act, 9 Uniform Laws Annotated 169.

[19] Under the authority of Art. I, § 10, cl. 3 of the U.S. Constitution and pursuant to Congressional Act of June 6, 1934 (48 Stat. 909), states may act further in this matter by compact. See U.S. ex rel. MacBlain v. Burke, 200 F.2d 616 (3rd Cir. 1952) upholding Pennsylvania in the State Compact Act which did not allow for judicial review in the asylum state.

[20] Ibid.

[21] Uniform Laws Annotated 58 (1954 Supp.).

[22] Kentucky v. Dennison, 24 How. 66, 109, 16 L. Ed. 717, 730 (1861).

[23] Once the governor issues the extradition warrant he may withdraw it. On August 11, 1955 Governor Leader of Pennsylvania granted a petition recalling an extradition warrant. Thereafter, the prisoner was formally discharged. Philadelphia Inquirer, August 11, 1955, p. 2, col. 7, 8.

[24] Commissioner's Prefatory Note, Uniform Criminal Extradition Act, 9 Uniform Laws Annotated 169.

In general, the procedure for interstate rendition is as follows: (1) a demand for the person sought by the demanding state; (2) a determination by the executive authority of the asylum state of the question whether the demand ought to be honored, followed by issuance by the Governor of a warrant for the arrest of the person demanded, if the request for extradition is to be honored; (3) determination by the State and Federal Courts in the asylum states, normally upon petition for a writ of habeas corpus, of the question whether, under applicable law, the demand may properly be honored by the executive authority of the asylum state, and (4) upon determination unfavorable to the person sought, by both the executive and judicial authority of the asylum state, his release to the demanding state's officers and return to that state for the further operation of its legal processes.[25]

Pursuant to the Federal Statute[26] the questions to be determined, first by the executive and later by the judiciary, are frequently listed as: (1) whether the fugitive has been charged with a crime under the criminal law of the demanding state; (2) whether he is a fugitive from justice; (3) whether he is the person charged with the crime indicated by the warrant, and; (4) whether he was arrested under a warrant regular on its face.[27] In order for the fugitive to be "charged" there must have been, in the demanding state, some proceeding by indictment or by affidavit formally charging him, sufficient in the demanding state, even though insufficient in the asylum state.[28] However, an affidavit based on information or belief was held to be insufficient to support a requisition.[29] "Crime" under the criminal law of the demanding state embraces every act forbidden and made punishable by law of the demanding state.[30] Under the Uniform Criminal Extradition Act it has now been held that "crime" means any offense indictable by the laws of the state demanding surrender of a fugitive and is not limited to Common Law Crimes.[31]

Under the Federal Statute it was possible to extradite only those charged with crime who could be said to be "fugitives." A "fugitive from justice" was held to be a person who had been charged with a crime in one state and had left that state's jurisdiction and is now found within the territory of another.[32] A person continues to be charged until he has been acquitted or has completely satisfied his punish-

25 Horowitz & Steinberg, "The Fourteenth Amendment—Its Newly Recognized Impact on the Scope of Habeas Corpus in Extradition," 23 So. Calif. L. Rev. 441 (1950).

26 Supra, note 15.

27 See Comment, 10 Ohio St. L.J. 362, 363 (1949).

28 Pearce v. Texas, 155 U.S. 387 (1894).

29 Ex parte Duddy, 219 Mass. 548, 107 N.E. 364 (1914).

30 See note 25 supra.

31 Tingley v. State, 36 Ala. App. 655, 63 So. 2d 712 (1952) cert. den. 238 Ala. 436, 63 So. 2d 722 (1953); cert. den., 346 U.S. 837 (1953).

32 Appleyard v. Massachusetts, 203 U.S. 222 (1906).

ment.[33] It was also held under the Federal Statute and some state statutes that in order for one to be a fugitive he must have been actually present in the state at the time of the commission of the crime rather than constructively present.[34] Some state statutes were not construed as strictly, allowing extradition where the alleged criminal, before leaving the demanding state, performed acts which were intended as material steps toward the accomplishment of a crime which was consummated after he left the state.[35] In addition, there was considerable conflict as to whether one whose criminal acts were done within the state could be said to be a "fugitive" when his departure from the state was under legal compulsion.[36] The weight of authority is to the effect that the mission, motive or purpose inducing a person accused of being a fugitive to leave the demanding state is immaterial.[37]

Sections 5 and 6 of the Uniform Extradition Act remove the requirement that the prospective extraditee be a fugitive.[38] He may be returned to the demanding state though imprisoned or awaiting trial in another state. Those who have left the demanding state under compulsion may be returned to the demanding state. In addition, a person may be extradited who was not present in the demanding state at the time of the commission of the crime.[39] The express provisions of Section 6 to the effect that the accused need not have been in the demanding state at the time of the commission of the crimes and hence, need not have "fled" has created a device for the extradition of individuals accused of crimes of omission from outside the state and has been frequently used in cases of abandonment and nonsupport by those not present in the demanding state at the time of the alleged crime.[40]

Even though the Federal Statute and the Uniform Criminal Extradition Act provide that these initial determinations be made by the Governor, the fugitive has no constitutional right to a hearing before the executive officer.[41] The Massachusetts Supreme Judicial Court has

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[33] Hughes v. Planfz, 138 Fed. 980 (CC WD., Ky. 1905); Ex parte Williams, 10 Okla. Cr. 344, 136 Pac. 597 (1913).

[34] State v. Hall, 115 N.C. 811, 20 S.E. 728 (1894); Hyatt v. Corkran, 188 U.S. 691 (1903); People v. Babb, 4 Ill. 2d 483, 123 N.E.2d 639 (1955).

[35] Strassheim v. Daily, 221 U.S. 280 (1911).

[36] See Commissioner's Note, 9 Uniform Laws Annotated § 5, 191.

[37] Hogan v. O'Neill, 255 U.S. 52 (1921).

[38] Levie, New York and the Uniform Criminal Extradition Act, 8 Panel No. 1, 10 (1930). Sec. 6 of this Act has been held to be constitutional. See note, 37 Cornell L.Q. 780, 782 and footnote 18. See also Ex parte Morgan, 78 F. Supp. 756 (S.D. Calif. 1948).

[39] See note 23 supra.

[40] Ex parte Dalton, 56 N.M. 407, 244 P.2d 190 (1952); Lincoln v. State, 199 Md. 194, 85 A.2d 765 (1952). For discussions of history and judicial interpretations of § 6, see Notes 51 Mich. L. Rev. 599 (1952), and 37 Cornell L.Q. 780 (1952).

[41] Ex parte Colier, 140 N.J. Eq. 469, 55 A.2d 29 (1947), cert. den. 338 U.S. 829, 68 S. Ct. 446 (1948).

held [42] that the fugitive is not entitled to demand a hearing where a question of fact must be determined by the governor as to whether the fugitive is the person named in the warrant.[43]

When the executive of the asylum state complies with the request of the demanding state and issues his rendition warrant, the prospective extraditee may then petition for a writ of habeas corpus. His petition may be addressed to the State Court or the Federal Courts within the asylum state.

There is concurrent jurisdiction between State courts and Federal Courts in the issuance of writs of habeas corpus in extradition proceedings even though extradition is provided for by the Federal Constitution and by Federal legislation.[44] Section 10 of the Uniform Criminal Extradition Act[45] affirms the jurisdiction of state courts to issue writs of habeas corpus in these proceedings. Since extradition is provided for by the Constitution and by Federal Statute, a prospective extraditee while incarcerated under a governor's warrant is being held under color of authority derived from the Constitution and laws of the United States and hence may invoke the judgment of the Federal Courts.[46] The prospective extraditee's choice of forum may be limited by "the exhaustion of state remedy" doctrine judicially engrafted upon the Federal court's power to issue the writ.[47]

In order to prevent a collision between the Federal and State courts, as a result of overlapping jurisdiction, and to avoid the spectacle of a Federal court upsetting a State court proceeding without an opportunity having been first afforded the state court to correct a constitutional violation, the doctrine of comity between the Federal and State courts was developed.[48] This simply meant that one court would ordinarily defer acting on matters properly within its jurisdiction until the court of another sovereignty with concurrent jurisdiction, and which had already accepted jurisdiction, would have an opportunity to pass upon the matter. The "exhaustion of State court remedies" before resort to Federal courts has now been codified into statutory law.

28 U. S. Code § 2254 (Supp. 1952) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the States, or that there is either an absence of available

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42 In re Murphy, 321 Mass. 206, 72 N.E.2d 413 (1947).

43 See Ex parte Cohen, 23 N.J. Super. 209, 92 A.2d 837, affmd., 12 N.J. 362, 96 A.2d 794 (1953); In Re Acton, 90 Ohio App. 100, 103 N.E.2d 577 (1952).

44 Robb v. Connolly, 111 U.S. 624 (1884).

45 9 Uniform Laws Annotated 169, 200.

46 28 U.S.C. § 2241 (1952); 55 Colum. L. Rev. 196.

47 Ex parte Hawk, 321 U.S. 114 (1943).

48 Darr v. Burford, 339 U.S. 200 (1950).

> State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Mr. Justice Black, speaking for a majority of the Court, in *Frisbie, Warden v. Collins,* 342 U. S. 519, 520, 72 S. Ct. 509 (1952) stated:

> There is no doubt that as a general rule federal courts should deny the writ to state prisoners if there is 'available State corrective process.' . . . As explained in *Darr v. Burford,* 339 U.S. 200, 210, this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals.

Apparently the State of Michigan in the *Frisbie* case conceded that there was no further State corrective process available. The Court thus refers to one of the two exceptions to the exhaustion of State remedy doctrine: that is, special circumstances. While the Rule and its exceptions are clearly stated, no guides are indicated to determine the existence of either of the two exceptions to the rule.

The doctrine of exhaustion of state remedy affects the extraditee's choice of forum because it limits the Federal court's jurisdiction to entertain the petition and circumscribes the scope of the inquiry available in the Federal courts in extradition proceedings. For the most part, the scope of inquiry in State courts has been limited to the following questions: (1) Are the request and accompanying papers regular in form? (2) Is the relator the person accused of the crime in the demanding state? (3) Is the relator a fugitive from justice? (4) Does the indictment or affidavit substantially charge the relator with the commission of a crime? [49] However, although not clearly defined, the scope of inquiry has on occasion been enlarged to consider the effect of the guaranties contained in the Fourteenth Amendment upon the extradition process.[50]

In this connection, the fact that 39 states and the Territory of Hawaii have adopted the Uniform Criminal Extradition Act facilitating the rendition of fugitives would indicate a broad policy among the states to restrict rather than enlarge in state courts the scope of judicial inquiry in extradition proceedings by the writ of habeas corpus. Presently, it may be stated that the position of the overwhelming majority of the States can be summed up in the holding of *Cassie v. Fair,*[51] to

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[49] See comment, J. Pub. L. 467, 468.

[50] People ex rel Jackson v. Ruthazer, 196 Misc. 34, 90 N.Y.S.2d 205, 212, (Sup. Ct. 1949); Commonwealth ex rel Mills v. Baldi, 166 Pa. Super. 321, 70 A.2d 439 (1950); but see Commonwealth ex rel Brown v. Baldi et al, 378 Pa. 504, 106 A.2d 777 (1954), cert. den, 348 U.S. 539 (1955), where Pennsylvania State Supreme Court refused to consider past or prospective denials by the demanding state.

[51] 126 W. Va. 557, 29 S.E.2d 245 (1944).

the effect that extradition is based on the fact that the petitioner is merely charged with having committed a crime, and matters extrinsic to that point are not in issue.[52]

It has been suggested that the jurisdiction and scope of the inquiry in the Federal courts are broader in extradition proceedings by a writ of habeas corpus than in state courts.[53] Arguments are advanced as to why the Federal court in the asylum state should discharge the fugitive thus preventing his return to the demanding state by orderly legal process. It is suggested that where the fugitive has been illegally incarcerated in the demanding state or where to return him will subject him to cruel and inhuman punishment and deprivation of rights granted to him under the 14th Amendment to the Constitution that the asylum state is itself acting illegally and depriving the fugitive of his constitutional rights.[54] However, the Federal court of the asylum state gener-

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[52] See note 49 supra.

[53] See note 25 supra; The Supreme Court in Ponzi v. Fessenden, 258 U.S. 254, 260 (1922), stated: "One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial."

[54] In Application of Middlebrooks, 88 F. Supp. 943, 948 (S.D. California 1950), the court posed the questions presented as follows:

"(1) Was the failure to assign counsel, under the facts and circumstances and in the light of petitioner's age, education and experience, a deprivation of due process of law?

"(2) Was the sentence without plea or trial, namely the Kangaroo court a deprivation of due process of law?

"(3) Is cruel and unusual punishment, which is prohibited by the Eighth Amendment, included within the protection of the Fourteenth Amendment against State action?

"(4) Assuming questions 1, 2 and 3 are answered in the affirmative, does the action of the State of California, through the Sheriff of Santa Barbara county in arresting and detaining petitioner, constitute a violation of the due process clause of the Fourteenth Amendment?

"(5) Should relief be denied because of the Uniform Extradition Act of the State of California, § 1548.2 of the Penal Code of the State of California, and the Federal provisions, Art. IV, § 2, Cl. 2 of the Constitution of the United States and the acts of Congress, regulating interstate extraditions, 18 U.S.C.A. § 3182?

"(6) Has petitioner exhausted his remedies in the California courts so as to permit him to sue for relief in a Federal court?

"(7) Must petitioner have also exhausted his remedies in the State of Georgia? . . .

"(8) It follows that the action of the State of Georgia, in making use of the chain gang in carrying out the sentence imposed upon the petitioner is denial of due process, violative of the Fourteenth Amendment."

The Court went on to hold that the action by California in arresting and holding petitioner for extradition was state action violative of the due process clause of the Fourteenth Amendment. After finding that petitioner had exhausted his state remedies in California, the court held that he need not exhaust his remedies in the demanding state prior to relief in a Federal court of the asylum state.

"To sustain respondent's argument would require that a prisoner exhaust his remedies in every state in which a remedy was available, and in an extradition matter this would involve at least two states and possibly more.

But the argument is fallacious upon another ground. To sustain respondent's argu-

ally limits the scope of inquiry so as to preclude questions bearing on the legality of the petitioner's trial and his incarceration.[55]

Until 1949 the Federal courts uniformly limited the questions open to the sufficiency of the papers, the identity of the person and whether the extraditee is a fugitive. The so-called "chain gang cases," arising in 1949, stimulated and revived this question of scope in the Federal courts. Five fugitives from Georgia, each petitioned for a writ of habeas corpus in a Federal District Court in Pennsylvania,[56] New York,[57] District of Columbia,[58] Missouri,[59] and California.[60] In *Johnson v. Dye,* the Court of Appeals for the Third Circuit granted the writ on the ground that the extraditee had been incarcerated as a result of an illegal trial, that while serving his sentence he has been subjected to cruel and barbaric treatment and his life endangered, and that if he should be returned to Georgia, he would be placed in further jeopardy. In *People ex rel. Jackson v. Ruthazer,* the writ was denied on grounds that petitioner's rights had been protected in the asylum state. Courts in the other three cases concluded that the petitioners must resort to the state court of the demanding state in order to raise these constitutional questions. In reversing *Johnson v. Dye,* by a Per Curiam opinion, the Supreme Court cited *Ex parte Hawk.*[61] This matter now seems to be firmly put to rest by *Sweeny v. Woodall,*[62] where the Supreme Court of the United States by a Per Curiam decision stated:

> In the present case, as in the others, a fugitive from justice has asked the federal court in his asylum state to pass upon the constitutionality of his incarceration in the demanding state, although the demanding state is not a party before the federal court and although he has made no attempt to raise such a question in the demanding state. The question is whether, under these circumstances, the district court should entertain the fugitive's application on its writs.
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> Respondent makes no showing that relief is unavailable to him in the courts of Alabama. Had he never eluded the custody of his former jailers

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ment would require this District court to close its eyes to the violation of constitutional rights and basic liberties which have occurred, and to permit the return of the petitioner to the State of Georgia. If constitutional rights and basic liberties are to be protected, they must be protected in the courts where the questions arise and when the questions arise, and the shunting of a case from one court to another should as far as possible, be avoided." However, the Middlebrooks case was reversed. See, 188 F.2d 308 (9 Cir. 1951). Cert. den. 342 U.S. 862 (1951).

55 Biddinger v. Commissioner, 245 U.S. 128 (1917); Drew v. Thaw, 235 U.S. 432 (1914); Adams v. State, 253 Ala. 387, 45 So. 2d 43 (1950); Ex parte Koelsch, 212 Ark. 199, 205 S.W.2d 186 (1947).

56 Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949) rev'd, 338 U.S. 864 (1949).

57 Supra, note 50.

58 Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950), cert. den., 340 U.S. 828, (1950).

59 Davis v. O'Connell, 185 F.2d 513 (8th Cir. 1950), cert. den., 341 U.S. 941 (1951).

60 Supra, note 54.

61 Supra, note 47.

62 344 U.S. 86, 89 (1952).

he certainly would be entitled to no privilege premitting him to attack Alabama's penal process by an action brought outside the territorial confines of Alabama, under the provisions of 28 U.S.C. § 2254, and under the doctrine of Ex parte Hawk, he would have been required to exhaust all available remedies in the state courts before making any application to the federal courts sitting in Alabama.

By resort to a form of "self help," respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not affect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned.

It would now appear that the Federal court of the asylum state can hear matters relating only to the validity and sufficiency of the extradition papers[63] and even then only after the remedies available in the State court have been exhausted.[64] It would appear further that the power of the Federal court of the demanding state to hear questions relating to alleged constitutional invasions is limited by the exhaustion of the state remedy doctrine.[65]

It has been suggested that the rationale of *Sweeney v. Woodall* is not applicable where the constitutional questions are raised in the asylum state court.[66] In this situation the issue is not clouded by the federal-state relation and the exhaustion of state remedies doctrine. Even though a state court may conclude that it will not permit its officers to aid in the denial of constitutional and legal rights, the denial of certiorari in the *Brown* case[67] would seem to indicate that the Supreme Court is not prepared to compel the state court to do so.

III. Rights and Remedies of Extraditee in the Demanding State:

When approaching this problem of interstate rendition and return of fugitives from the point of view of the extraditee, it appears, upon closer scrutiny, that the character of his rights and remedies in the

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63 Supra, note 55.

64 Hawk v. Olson, 326 U.S. 271 (1945); Darr v. Burford, supra, note 47; Brown v. Allen, Warden, 344 U.S. 443 (1953).

65 Ibid.

66 See note, 28 Temp. L.Q. 272 (1954).

67 Supra, note 50.

demanding state are largely illusory. There appear to be three different methods by which a fugitive may be returned to the demanding state: (1) by a valid rendition proceeding; (2) by a defective rendition proceeding; (3) by force, fraud, duress or other illegal means. The rights and remedies of a fugitive who has been returned to a demanding state depend largely upon which of these methods was used to secure the fugitive's return. The rights and remedies afforded the extraditee by valid or defective rendition proceedings are largely governed by the rationale and rules developed out of the situations where the return is effected by forceful and illegal means.

Frequently, over zealous police officers or other officials acting under color of state authority[68] remove an accused from another jurisdiction without resorting to the available legal machinery of interstate rendition. In most cases the accused is not apprized of his rights under the laws of the asylum and demanding states. In many instances, as in *State v. Waitus*[69] confessions are obtained during the course of this illegal conduct. When the return is secured by fraud, duress, force or other illegal means the rights and remedies available to the returnee are inadequate to effectively protect him against this conduct and its attendant evils. The authority seems almost unanimous[70] that a prisoner so returned is unable to successfully contest the jurisdiction of the state trial court either during the trial or by post-conviction remedies in the state or federal courts.

In *Frisbie v. Collins,*[71] Shirley Collins brought habeas corpus proceedings in a United States District Court seeking his release from a Michigan State prison where he was serving a life sentence for murder. He alleged in his petition that some eight years prior he had been forcibly seized and illegally taken from Chicago, Illinois by Michigan police officers to Flint, Michigan, where he was tried and convicted. Although this was conduct of "state" officers, the Supreme Court overruled the Court of Appeals and affirmed the District Court's denial of the writ. The Supreme Court took the position that the only new question involved here was whether the enactment of the Federal Kidnapping Act[72] had changed the rule that a state could constitutionally try and convict a defendant after acquiring jurisdiction by force. The Court stated:

> This Court has never departed from the rule announced in *Ker v. Illinois,* 119 U.S. 436, 444, that the power of a court to try a person for crime is

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[68] As to what constitutes state action see Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

[69] 83 S.E.2d 629 (S.C. 1954), cert. den. 348 U.S. 951 (1955).

[70] "Kansas alone may be said to support a contrary view." State v. Wise, 58 N.M. 164, 267 P.2d 992 (1954).

[71] 342 U.S. 579 (1952).

[72] 18 U.S.C. § 1201 (1952 Supp.).

> not impaired by the fact that he has been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

The Court recognized that the return here was in violation of Federal law, apparently ignoring the purpose of the Federal Fugitive Act.[73] The Court considered itself bound by *Ker v. Illinois,* supra, *Mahon v. Justice,*[74] *Lascelles v. Georgia,*[75] and *In re Johnson.*[76]

In the *Ker* case, which seems to be the only case where this question was raised by direct appeal to the Supreme Court, the accused was contending that the Illinois court had committed error by sustaining the demurrer to the jurisdiction where the accused had been illegally taken from Peru and brought to California and therefrom extradited to Illinois. The Supreme Court held that it was not violative of the Fourteenth Amendment for Illinois to try and convict the accused where he had been taken illegally out of Peru and not by Illinois officers. It should be noted that the *Ker* case was decided at the same term as *U.S. v. Rauscher*[77] and the Court makes the obvious distinction between international and interstate transactions. When the conduct complained of involves two states within our federated system, considerations are applicable which are not a propos in the *Ker* case and hence were not discussed there.

In *Mahon v. Justice,* supra, which followed the *Ker* case, the State of West Virginia sought a writ of habeas corpus against the Kentucky officials who were holding the accused in Kentucky, after he had been illegally seized and brought out of West Virginia. The Court held that the writ should be denied since neither the Constitution nor the statutes passed pursuant thereto had provided any remedy to a state so injured.

In the *Lascelles* case, the accused was properly surrendered by the Governor of New York, and the only question was whether the accused could be tried in Georgia for an offense different from the one for which he was surrendered. The Court held that he could be so tried. However, the Court underlined the distinction between the rules operative in extradition between nations and those operative in rendition between the states.

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[73] 18 U.S.C. § 1073 (1952 Supp.).
[74] 127 U.S. 700 (1888).
[75] 148 U.S. 537 (1893).
[76] 167 U.S. 120 (1897).
[77] 119 U.S. 407 (1886).

In the *Johnson* case, the petition for a writ of habeas corpus was denied because the Court found that the accused's arrest, trial and conviction had not been in violation of any Acts of the United States, thus rejecting the accused's contention that the United States Court for the Southern District of the Indian Territory had no jurisdiction of the case. The Court further found that the crime had been committed, and the accused arrested within the Territory and within the local jurisdiction of the territorial court.

Although petitioner in the *Frisbie* case cited *Pettibone v. Nichols,*[78] the Court apparently did not rely upon it. In that case, the question was raised by habeas corpus where the accused sought a writ for his discharge since he had been taken illegally from Colorado, with the connivance of Colorado officials, to Idaho. The Court defined the issue to be whether the particular method by which the accused was brought within the jurisdiction of Idaho and held by its authorities for trial was at all material in the proceeding by habeas corpus. The Court answered this in the negative. It is material that all these cases except the *Ker* case were presented by habeas corpus and only the *Pettibone* and *Frisbie* cases involved state action.[79]

All the cases cited above as a result of their particular procedural postures validated the conduct therein complained of, by starting from the point that the jurisdiction of the Court was not vitiated because an accused was unlawfully returned to the State. This view has been persisted in since *Ker* without a proper examination of that case and the cases upon which *Ker* was predicated.[80] The Supreme Court in the *Ker* case stated at p. 444:

> The question of how far his forcible seizure in *another country,* and transfer by violence, force, or fraud, to this *country,* could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to this trial in such court. Among the authorities which support the proposition are the following: *Ex parte Scott,* 9 B. & C. 446 (1829); *Lopez & Sattler's Case,* 1 Dearsly & Bell's Crown Cases, 525; *State v. Smith,* 1 Bailey, So. Car., Law 283 (1829); S.C. 19 Am. Dec. 679; *State v. Brewster,* 7 Vt. 118 (1835); *Dow's Case,* 18 Penn. St. 37 (1851); *State v. Ross and Mann,* 21 Iowa 467 (1866); *Ship Richmond v. United States* (The Richmond) 9 Cranch 102. (Emphasis added).

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78 203 U.S. 192 (1906).

79 61 Harv. L. Rev. 567 (1948).

80 Ker v. Illinois, 119 U.S. 436 (1886).

That the jurisdiction of the Court in which the indictment is found is not impaired by the manner in which the accused is brought before it is a correct principle of international law, but improperly extended to our federated system of producing an "incongruous excrescence" upon that system. The *Scott, Lopez & Sattler's, Brewster,* and the *Ship Richmond* cases were all international law situations involving different countries. The remaining cases cited in the question involved relationships between our federated states, but in none did the courts find state action in returning the accused to the jurisdiction.

In *Mahon v. Justice,*[81] the Court recognized that an accused had constitutional rights and statutory rights in the rendering State, but the Court was able to avoid considerations of due process, privileges and immunities, and full faith and credit since they had determined that there was no State action there. Justice McKenna, dissenting in the *Pettibone* case sought to distinguish *Pettibone* from *Ker* and *Mahon* on the grounds that these two cases did not involve state action while *Pettibone* did.

Where the accused is illegally taken from one *country* to another *country* there are no constitutional privileges accruing to him, and the Supreme Court of the United States so held in the *Ker* case, supra; so, too, where the accused is illegally returned to the jurisdiction by private citizens; for the constitutional protections in our federated system by their very nature are proscriptions against governmental action rather than against acts of private citizens. It, therefore, cannot follow from cases affirming these propositions that state officers may deny an accused the processes of law provided in the state from which an accused is abducted, for this state action would do violence to the privileges and immunities, full faith and credit, and extradition clauses of the Federal Constitution. None of the cases discussed above deals with the demanding state's denial of the processes of law provided for an accused in the rendering state.

As one writer observed:[82]

> It seems that the courts have simply fallen into the habit of repeating, parrot-like, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle. In these days of low moral standards among public officials, both law enforcement officers and others, it is especially important to re-establish public respect for law. This simply cannot be done if the very people who enforce the law are themselves guilty of serious violations of law. A rule of procedure which would forbid courts to try accused persons who have been subjected to the type of lawless treatment covered in this article would help to resurrect something we seem to have lost and which we badly need to find — a spirit of respect for law and order.

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81 See note 74 supra.

82 Scott, Austin W., Jr., Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud, 37 Minn. L. Rev. 91, 107 (1953).

The evils inherent in this practice are such that the practice should be repressed by setting aside the convictions.[83] True the illegal conduct complained of, since not privileged, may form the basis for civil recovery or criminal action against the persons acting illegally, but this is usually of no avail. The principal objection in the cases to a defendant's right to assert lack of jurisdiction of the court to try him where he had been forcibly brought into the jurisdiction had been that a defendant might escape prosecution, and certainly so if an asylum state should thereafter refuse to turn him over to the demanding state. But the Federal courts now have jurisdiction over the fugitive so that he could be surrendered to the demanding State, thus obviating the impasse reached in *Kentucky v. Dennison.*[84] It seems incongruous to hold now, that unlawful conduct on the part of State officials which also violates a specific provision of federal criminal law does not deny a defendant his constitutional rights where there is no impediment to the States obtaining jurisdiction over the defendant by lawful means.[85]

Where one is returned to the demanding state by an invalid or defective rendition proceeding following the rationale of the rule stated above, once found within the jurisdiction, the method by which his presence was secured will not vitiate a trial against him.[86] The regularity of the extradition proceeding can only be attacked in the asylum state and such proceedings can not be questioned on habeas corpus after the alleged fugitive has been delivered into the jurisdiction of the demanding state. The Illinois Court held[87] that on the trial of one who had been voluntarily surrenderd as a fugitive by the governor of the asylum state, the demanding state will not inquire into the regularity or irregularity of the surrender. It would appear then that the regularity or irregularity of the rendition must be inquired into, if at all, in the asylum state by writ of habeas corpus in the state court of the asylum or in the Federal court of the asylum. In that event only when

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[83] Moore v. Dempsey, 261 U.S. 86 (1923); Harris v. South Carolina, 338 U.S. 68 (1949); Mooney v. Holohan, 294 U.S. 103 (1935); Powell v. Alabama, 287 U.S. 45 (1932); DeMeerleer v. Michigan, 329 U.S. 663 (1947).

[84] 24 How. (U.S.) 66 (1860); State ex rel Middlemas v. District Court of First Judicial District, 125 Mont. 310, 233 P.2d 1038 (1951).

[85] There is serious question whether Frisbie v. Collins, supra note 71 will be followed where the kidnapping or other unlawful action is by federal officials preliminary to trial in a federal court. This question was raised in the second circuit in United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), cert. den. 344 U.S. 838 (1952). The Court did not decide the question on grounds that there had been a waiver. Under the rule laid down in McNabb v. United States, 318 U.S. 332 (1943), illegal conduct by federal officials preliminary to trial in a federal court may deny the court jurisdiction. There appears no reason why this rule would not apply to obtaining jurisdiction of the defendant's person through illegal acts of federal officers.

[86] See note, 27 Ind. L.J. 292 (1951).

[87] People v. Klinger, 319 Ill. 275, 149 N.E. 799 (1925).

the State remedy has been exhausted or where there exist special circumstances within the rule of the *Darr* case.[88]

On the other hand, where the returnee has been unable to secure a forum in the asylum state, in which to attack the demanding states' denial of his due process of law, occasioned by either an illegal detention, cruel and abusive treatment or prior and future jeopardy of life and safety, under the *Sweeney* case rule, an opportunity within the demanding state must be accorded him so that he might assert these matters. To deny him this opportunity would appear to place him in the operation of the rule of *Cochran v. Kansas*.[89]

A fugitive when returned by a valid rendition may be tried for offenses other than those specified in the requisition even though those offenses were committed prior to the requisition.[90] Returnees by valid legal rendition proceedings may be afforded additional protection and immunity by the law of the demanding state. But section 25 of the Uniform Criminal Extradition Act[91] affords a person immunity against service of personal process in civil actions arising out of the same facts as the criminal proceeding for which he has been returned.

In summary, it may be stated that in this matter of interstate rendition, the tendency on the part of the Supreme Court of the United States, the lower Federal courts and the state courts is to accord a greater measure of respect and deference to the criminal machinery of each sovereign state. This laudable purpose ought not induce the courts to overlook the realities of the situation. The Constitution has lodged within the courts a responsibility of guaranteeing to individuals certain rights, and this responsibility must be constantly guarded against erosions however praiseworthy the motivation for the erosion may be.

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[88] See note 48 supra.

[89] 316 U.S. 255 (1942). Where it was held that a denial of an opportunity to appeal is grounds for issuing a writ of habeas corpus.

[90] Supra, note 16; The Uniform Extradition Act § 26 provides for the trial of fugitives for other crimes which they may be charged in the demanding states as well as for that crime specified in the requisition for their extradition.

[91] Supra, note 18.

COMMENTS

JUDICIAL PUNISHMENT OF MARITAL MISCONDUCT*

Howard Jenkins, Jr.†

If a statute . . . is apt to reproduce the public opinion not so much of today as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday.[1]

THUS did Dicey sum up the problem of statutory construction and the sociological implications thereof. He might well have been writing on some aspects of divorce law in the United States. Max Rheinstein has pointed out that our difficulties with divorce are "directly traceable to the fact that we are dealing with a problem which is loaded with moral and religious connotations and about which we find a deep clash" within our population.[2]

The literature is filled with discussions of various aspects of the problem faced by legislators and judges as they attempt to create standards for resolving the difficulties engendered by the termination of the relationship of husband and wife through the use of legal process. One area which has understandably received marked attention is that having to do with the disposition of property jointly owned by the marital partners. Within this area is a narrower segment in which the law has attempted to resolve the problem of the effect of marital misbehaviour on property division attending or following a divorce. It would be beyond the limits of this paper to examine in a comprehensive manner the whole of this aspect, though such a project would probably be fruitful.[3]

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1 Dicey, Law and Opinion in England 369 (1926).

2 Chi. U. Law School, Conference on Divorce 43 (1952); and see 2 Vernier, American Family Laws (1932) 7: "Divorce statutes are not a product of logic alone. They are a resultant of many mixed elements. Religion, sentiment, logic, historical accident, commercialism, and other matters—all have combined to form an inharmonious and incongruous whole."

3 Some courts tend to confuse a wife's right to permanent alimony with the problem of property division, following the granting of a divorce a vinculo matrimonii. See 34 A.L.R.2d 313-355. Daggett points out that in all jurisdictions the alimony idea is sometimes merged into and sometimes concurrent with property division, frequently without regard to whether the property be joint, community or separate. Daggett, Division of Property Upon Dissolution of Marriage, 6 Law and Contemporary Problems 225, 227 (1939).