10-1-1954

Extradition vs. Removal From United States Territories

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COMMENTS

EXTRADITION VS. REMOVAL FROM UNITED STATES TERRITORIES

INTRODUCTION

An interesting problem has arisen recently, concerning the procedure for the removal of a prisoner, under grand jury indictment, from one United States territory to another. May the court employ the removal procedure afforded by the Federal Rules of Criminal Procedure, or must it compel the demanding territory to resort to extradition?

One court has recently answered the question in the case of *U.S. v. Wright*,[1] where the United States Commissioner sought removal of the defendant, Vernestine Wright, from the Territory of Hawaii to the Territory of Alaska. The attempted removal was based on an indictment returned by a grand jury for the District Court of Alaska, charging the defendant with the offenses of assault with intent to rob, and of robbery, in violation of the laws of Alaska.

The court, Wiig, J., found that it had no authority to order the removal of the defendant, and suggested that the extradition laws of Alaska and Hawaii offered the appropriate procedure for return of the defendant.

It is our purpose in this comment, to analyze and evaluate the reasoning of the court in this holding, and to compare the legal problems which arise under the law of extradition with those arising under the removal procedure afforded by the new Federal Rules.

ANALYSIS OF PRINCIPAL CASE

Under the new Federal Rules of Criminal Procedure,[2] adopted September 1, 1945, it appears that the United States Commissioner had a plausible enough argument to invoke Rule 40 (b) providing for the issuance of a removal warrant, based on the facts of this case. The pertinent sections of the Federal Rules are as follows:

> Rule 40 (b) Arrest in Distant District
>
> (3) Hearing – Warrant of Removal or Discharge.
>
> ... If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been

1. 15 F.R.D. 184 (D. Hawaii 1954).

2. 18 U.S.C. (1952).

> shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.
>
> Rule 1. Scope.
>
> These rules govern the procedure in the courts of the United States and before the United States commissioners in *all* criminal proceedings, with the exceptions stated in Rule 54.
>
> Rule 54. Application and Exception.
>
> (a) Courts and Commissioners.
>
> (1) Courts. These rules apply to *all* criminal proceedings in the United States district courts, which include the District Court for the Territory of Alaska and the District Court of the Virgin Islands; in the United States Court of Appeals; and in the Supreme Court of the United States.... (Italics supplied)

Applying the above rules to the facts in the *Wright* case, it appears that all the requirements of the Rules were met, and that the court should have issued its removal warrant almost as a matter of course. However, the court refused to do so, because, it said, the offense charged was not one against the United States, but against the Territory of Alaska only.[3] As authority for this position the court relied principally on two cases, Ex parte *Krause*,[4] and *U.S. v. Sloan*,[5] in both of which removal was refused because a local, rather than a federal, offense was involved. We believe, however, that neither of these two cases created authority for the holding in the *Wright* case, and that this court, although it may have arrived at a sound result, nevertheless did so through fallacious reasoning.

First, consider the *Krause* case. Here the court refused to order the removal of the defendant from the state of Washington to the Territory of Alaska to face a charge of kidnapping, which, at that time, was not an offense against the United States. The significant words in the court's opinion were as follows:[6]

> It is fundamental that the United States courts, as such, can only entertain jurisdiction of offenses against the United States. If the offense charged is not an offense against the United States, this court would not have jurisdiction to try the petitioner if it had been within this district....

However, when the court made the foregoing comment, in 1915, the present Federal Rules were, of course, not in effect, and the opinion, to be in-

3. 15 F.R.D. at 187.
4. 228 Fed. 547 (W.D. Wash. 1915).
5. 61 F.Supp. 439 (D. Mont. 1945).
6. 228 Fed. at 549.

telligently applied, should be read in conjunction with the removal law then in effect, which provided as follows:[7]

> ...that for any crime against the United States... it shall be the duty of the judge of the district where he is imprisoned to issue, and of the marshall to execute, a warrant for his removal to the district where the trial is to be had.

In the *Sloan* case, a United States district court, sitting in Montana, refused removal of the defendant, charged with perjury in violation of the laws of Alaska, from Montana to Alaska, and, like the court in the *Wright* case, decided that the demanding auhtorities should resort to extradition.[8] The *Sloan* case was decided on June 18, 1945, a few months before the new rules went into effect, and again, in order to properly appreciate its significance, we must refer to the wording of the removal provisions then in force:[9]

> ...For any crime or offense against the United States...it shall be the duty of the judge of the district court where he is imprisoned seasonably to issue, and of the marshall to execute, a warrant for his removal to the district where the trial is to be held.

It will be seen that the removal provisions in effect when each of these two cases was decided, although not identically worded, clearly provided that the offense must be one *against the United States*. These words logically supported the *Krause* and *Sloan* holdings that Federal removal procedure could not be used where a purely territorial offense was involved. Today, however, the key words, "against the United States" are conspicuously absent from the removal provisions of the Federal Rules; rather, the Rules merely designate the various court in which the procedure may be employed,[10] without regard to the type of offense or the identity of the sovereign. For this reason we believe the court in the *Wright* case erred in treating the holdings in Ex parte *Krause*, and *U.S. v. Sloan* as authority, based as they are, on rules no longer in effect.

It further appears that the *Wright* decision is based on unnecessarily shaky grounds, since the court might have arrived at the same result in a more plausible fashion by considering the special status of the Alaska

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7. REV. STAT. § 1014 (1875).

8. 61 F. Supp. at 441. At this point the court quotes from U.S. *ex rel* McDermott v. Jaeger *et al*, 126 F.2d 1002 (2d Cir. 1942):

> Whether the crime is an offense against the United States or is merely a local offense turns not on the procedural entitlement of the case but on the nature of the crime. If it were only a local offense then it seems that extradition would be required... but the situation is otherwise as to a charge of a federal crime.

The court also relied on U.S. v. Jones, Adm'r, 236 U.S. 106 (1914); *In re* Moran, 203 U.S. 96 (1906); Maxwell v. Federal Gold and Copper Co., 155 Fed. 110 (8th Cir. 1907); U.S. v. Burt, 25 Fed. Cas. 187, No. 14694 (C.C.D. Va. 1807).

9. 18 U.S.C. § 591 (1940).

10. FED. R. CRIM. P. 1, 54(a) (1), supra.

court. The District Court for the Territory of Alaska has four divisions,[11] and acts in a dual capacity, having jurisdiction over cases arising under the laws of the United States and of the Territory.[12] It could be reasoned that the "District Court for the Territory of Alaska" referred to in Rule 54 (a) (1) was logically intended to designate this court in its capacity as a United States district court, rather than in its purely local capacity. Respectable authority for this interpretation may be found in *Mookini v. U.S.*[13], where Mr. Justice Hughes pointedly brought out the basic constitutional differences between the United States district and territorial courts.[14]

Seemingly contradictory, however, to the language used by Justice Hughes is Note 5, Advisory Committee on Rules, following Rules 54 in the United States Code. This note makes the following observation, in referring to the District Court for the Territory of Alaska:[15]

> Although a legislative rather than a constitutional court, it is, nevertheless deemed a court of the United States, and has the jurisdiction of district courts of the United States....

These words, taken in conjunction with Rule 1,[16] could readily justify a decision in which the Alaska court were regarded in all respects as a non-territorial United States district court, and, if such a view were taken, a result contrary to that in the *Wright* case would almost certainly follow.[17]

Apparently, then, it is possible to find substantial authority to support either view on the propriety of removal of extradition where facts such as those in *U.S. v. Wright* are involved. Possibly the court should have considered another factor in making its decision, namely public policy. What are the advantages and disadvantages of removal procedure as opposed to extradition? If precedent does not clearly point the way, should not the court choose that policy which will result in greater uniformity in the law

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11. 62 STAT. 986 (1948), 48 U.S.C. § 101 (1952).

12. *Ibid. Cf.* Carscadden v. Territory of Alaska, 105 F.2d 377 (9th Cir. 1939). See also note 5, Notes of Advisory Committee on Rules, FED. R. CRIM. P. 54.

13. 303 U.S. 201 (1938).

14. *Id.* at 205:

> The term 'District Courts of the United States' as used in the rules, without an addition expressing a wider connotation, has its historic significance. It describes the constitutional courts created under Article 3 of the Constitution. Courts of the Territories are legislative courts, properly speaking, and are not District Courts of the United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States.'

Justice Hughes then cited U.S. v. Burroughs, 289 U.S. 159 (1933); Summers v. U.S., 232 U.S. 92 (1913); Stevens v. Cherokee Nation, 174 U.S. 445 (1899); McAllister v. U.S., 141 U.S. 174 (1891); *In re* Mills, 135 U.S. 263 (1890); Reynolds v. U.S., 101 U.S. 145 (1878).

15. The note gives the following as authority for its contention: McAllister v. U.S., *supra* note 14; Coquitlam v. U.S., 163 U.S. 346 (1896); *Ex parte* Krause, *supra* note 4; 62 STAT 986 (1948), 48 U.S.C. §§ 101, 101a (1952).

16. The significant words are "in the courts of the United States."

17. Note that the same problem does not arise in the case of the United States District Court for the Territory of Hawaii, since this court has the same status as a non-territorial United States district court. See 28 U.S.C. § 91 (1952).

relating to fugitives, and the minimum of dilatory court procedure? To answer this question we will go on to make a brief comparison between the legal problems arising under the law of extradition and those arising under removal procedure.

HISTORICAL

At one time, it was not at all certain that extradition proceedings could be put into effect where a United States Territory was one of the parties. To understand this uncertainty we must take a look at the Constitution itself, where the extradition clause provides as follows:[18]

> A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in any other 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.

Note, at this point, the repeated use of the word "state" in the above. Standing alone, this clause indicates that the framers of the Constitution either overlooked or did not anticipate the use of extradition to and from United States territories. However, the First Congress in 1793, decided that this constitutional provision was not self-executing,[19] in that it did not provide for suitable "machinery" to enforce it, and, accordingly enacted the first federal extradition act,[20] reading as follows:

> Whenever the executive authority of any state or territory demands any person as a fugitive from justice, ... it shall be the duty of the executive authority of the state or territory to which such person has fled...to cause the fugitive to be delivered to such agent [of the demanding authority].

It will be seen that while the Constitution makes no mention of United States territories, the federal extradition act specifically provides for extradition between both states and territories. Inevitably, this discrepancy was brought to issue, — in the early case, Ex parte *Morgan*,[21] where the court, Parker, J., remarked:[22]

> Of course Congress cannot legislate beyond the power given to it by the Constitution. The exercise of its legislative authority must be because of a power expressly given, or of one which is necessary to carry out and make effective one expressly given in the Constitution. The Constitution uses the word 'state' alone, and the act of Congress uses the words 'state' and 'territory'. It

18. U.S. CONST. ART IV, § 2.
19. This is discussed as dicta in Roberts v. Reilly, 116 U.S. 80 (1885), at page 94.
20. 1 STAT. 302 (1793).
21. 20 Fed. 298 (W.D. Ark. 1883).
22. *Id.* at 303.

> is a question which will admit of serious discussion. But it must be remembered that, under Article 4, Section 3 of the Constitution, Congress has the power to make all needful rules and regulations relating to the territories of the Union, to extradite their fugitive criminals, and it has the power to pass such a rule, not, perhaps under the extradition clause of that instrument, but under the clause relating to the territories, and this rule is binding on the states and to be observed and obeyed by them. I believe therefore, that this part of the act of Congress is valid....

It must be added, as an anticlimax, that this quotation must be regarded as dicta only,[23] since the court, notwithstanding the conclusiveness of the foregoing, based its actual holding on other grounds.[24] Nevertheless, this dicta has been drawn upon to support the holdings in a few subsequent cases.[25]

One year later, the United States Supreme Court was confronted with the same issue in Ex parte *Reggel*,[26] and settled it with the following forthright, if not entirely logical, statement:[27]

> Although the constitutional provision in question, does not, in terms, refer to fugitives from the justice of any state, who may be found in one of the territories of the United States, the Act of Congress has equal application in that class of cases ...

A few other early cases may be found, in which the extra-constitutional nature of the federal extradition act is raised as an issue,[28] but all avoid meeting the problem head-on, and, today, the constitutionality of extradition to and from United States territories might be considered settled, if at all, by default rather than by decision.[29]

TYPICAL PROBLEMS ARISING IN THE LAW OF EXTRADITION

Extradition has traditionally been a source of difficulty and frustration to law enforcement authorities.[30] Much of the difficulty involves problems in

23. *Id.* at 304:
> But in my view of this case, this question need not be decided....

24. In this case, the Chief of the Cherokee Nation sought extradition of the defendant from Arkansas. The court denied extradition on the theory that the Cherokee Nation was neither a state nor a territory, and was thus unable to initiate valid extradition proceedings under any interpretation of the law.

25. *Ex parte* Krause, *supra* note 4; Kemper v. Metzger, 169 Ind. 112, 81 N.E. 663 (1907); *Ex parte* Hagen, 295 Mo. 435, 245 S.W. 336 (1922).

26. 114 U.S. 642 (1884).

27. *Id.* at 650.

28. *In re* Romaine, 23 Cal. 585 (1863); *Ex parte* Dickson, 4 Ind. T. 481, 69 S.W. 943 (1902).

29. The present-day version of the federal extradition act (18 U.S.C. § 3182) has substantially the same wording as the act in force when the foregoing cases were decided.

30. See, 1 ALEXANDER, THE LAW OF ARREST 769-798 (1st ed. 1949); 24 OHIO BAR ASSOC. REP. 761 (1951); HANDBOOK ON INTERSTATE CRIME CONTROL (1942); 21 AM.BAR ASSOC. J. 89.

the conflict of laws, since, in addition to the Constitutional provision, and the federal extradition act discussed above, each state has enacted its own extradition laws.[31] Thirty-eight states[32] and the Territory of Hawaii have adopted the Uniform Criminal Extradition Act,[33] but even between such states conflicts do arise. These may be due to slight modifications made by the state legislatures from the wording of the Uniform Act,[34] or to different court interpretations of identical sections.[35] Obvious constitutional issues have had to be settled.[36]

A few examples of the problems outlined above may prove interesting. *State v. Hall*,[37] a landmark case, illustrates a problem in constitutional interpretation; in this case the defendant, standing in North Carolina, shot a bullet across the state line into Tennessee, killing his victim. The Tennessee authorities attempted to extradite the defendant from North Carolina, but it was held that since he was not physically present in Tennessee when the crime was committed, he was immune from Tennessee's extradition proceedings. The basic problem represented by this case, namely, how to extradite the perpetrator of an act, performed in one state and resulting in the commission of a crime in another, has arisen in several cases[38] which have generally held that extradition will not lie. Section 6 of the Uniform Extradition Act attempts to plug this loophole by providing:

> The governor of the state may also surrender, on demand of the Executive Authority of any other state, any person in this state charged in such other state in the manner provided in Section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand... even though the accused was not in

31. The federal act is, of course, very general in its terms. State acts provide for the procedural details of extradition, — method of arrest and detention, exemption from civil process, habeas corpus proceedings and so on.

32. Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachussets, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dokota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

33. 9 U.L.A. 169.

34. *Compare* the Massachussets version of § 10 of the Uniform Act (Mass. G.L. c. 276 § 19) *with* the corresponding section in the Oklahoma act, (22 OKLA. STAT. ANN. § 1141.10) Also *compare* § 18 of the Uniform Act as enacted in California (PEN. CODE § 1553) *with* the Maryland act (MD. CODE 1951, Art. 41, § 31.)

35. For example, the term "fugitives" found in § 2 has given rise to a variety of legal definitions and interpretations. *Compare* State v. Whitlock, 32 Ala. App. 560, 28 So.2d 172 (1946); *Ex parte* Koelsch, 212 Ark. 199, 205 S.W.2d 186 (1947); *Ex parte* King, 139 Me. 203, 28 A.2d 562 (1942); Com. *ex rel* Bucksburg v. Good, 162 Pa. Super. 557, 5 A.2d 842 (1948); *Ex parte* Williams, 71 S.D. 95, 21 N.W. 593 (1946).

36. See, Application of Middlebrooks, 88 F.S. 943 (S.D. Cal. 1950), *rev'd*, 188 F. 2d 308 (9th Cir. 1951); Gulley v. Apple, 213 Ark. 350, 210 S.W. 2d 514 (1948); McLarnan v. Hasson, 243 Iowa 379, 49 N.W. 2d 887 (1951).

37. 115 N.C. 811, 20 S.E. 729 (1894).

38. *Ex parte* Hoffstot, 218 U.S. 665 (1910); Munsey v. Clough, 196 U.S. 364 (1905); People *ex rel* Corkran v. Hyatt, 188 U.S. 691 (1903); Muney v. State, 88 Fla. 354, 102 So. 547 (1924); Seeley v. Beardsley, 194 Iowa 863, 190 N.W. 498 (1922).

that state at the time of the commission of the crime, and has not fled therefrom.

As we have indicated, a problem in constitutional interpretation presents itself here, since the effect of this provision is to enlarge the scope of interstate rendition[39] to cover a three-state situation not specifically provided for in the Constitution.[40] In fact, it requires a decidedly liberal (perhaps "loose" would be a better word) interpretation of the words used therein to reconcile the Constitution with Section 6 as quoted above. Nevertheless, in the few cases which have passed on this question, the constitutionality of Section 6 has been upheld.[41] Questionable though the reasoning of these decisions may be,[42] they seem to do no greater violence to the Constitution than did Ex parte *Morgan,*[43] and Ex parte *Reggel,*[44] where the word "state" was judicially declared a synonym for "United States territory". The Commissioner's prefatory note[45] in the Uniform Laws Annotated expresses the opinion that the provisions of Section 6 are enforcible as a matter of comity[46] between the states, rather than any duty imposed on the states by the Constitution. This distinction seems somewhat academic, since, as we will mention later, the governor of the casylumig state may quite arbitrarily refuse to surrender the prisoner in any event, and, to this extent, all extradition proceedings might be looked upon as a matter of comity.

Problems in the substantive law of the demanding state frequently arise because of the duty of the executive authority of the asylum state (established by a long line of decisions[47]) to satisfy itself that a crime against the laws of the demanding state has been properly charged. Many decisions may be found in which extradition was refused because the wording of the

39. 1 ALEXANDER, THE LAW OF ARREST 769;
> While the term 'rendition' is preferably proper to 'extradition' referring to the surrender by states, they are used interchangeably throughout our law. And while 'extradition' is preferable to 'rendition' referring to such surrender between nations or sovereignties, yet nowadays, 'extradition' is generally used to apply to all such surrenders between international or national sovereignties.

40. Note 18, *supra.*

41. Ennist v. Baden, 158 Fla. 141, 28 So.2d 160 (1946); Faulds v. Herberich, 301 N.Y. 614, 93 N.E. 2d 913 (1949); English v. Matowitz, 148 Ohio St. 39, 72 N.E. 2d 898 (1947); Cassis v. Fair, 126 W. Va. 557, 29 S.E.2d 245 (1944).

42. For example, in English v. Matowitz, *supra* note 41 the court says:
> It is to be observed that there are no negative provisions in the U.S. Constitution forbidding the extradition of one not physically present at at the scene of the crime in the demanding state.

Similar to this kind of reasoning is the argument, advanced in some decisions, that the express terms of Article IV, § 2 may be by-passed through the exercise of the state police power. See, Notes, 26 NEB. L. REV. 649 (1947), 22 So. CALIF. L. REV. 60 (1948), 97 U. OF PA. L. REV. 439 (1949).

43. Note 21, *supra.*

44. Note 26, *supra.*

45. 9 U.L.A. 172.

46 Harlan, J., in Pettibone v. Nichols, 203 U.S. 192 (1906), said, at page 211:
> By 'comity' nothing more is meant than that courtesy on the part of one state by which within her territory the laws of another state are recognized and enforced, or another state is assisted in the execution of her laws.

47. Marbles v. Creecy, 215 U.S. 63 (1909); Compton v. Alabama, 214 U.S. 1 (1909); Pierce v. Creecy, 210 U.S. 387 (1908); Appleyard v. Massachussets, 203 U.S. 222 (1906) are cases of historic significance; a recent reaffirmation of the principle may be seen in Cassis v. Fair, *supra* note 41.

requisition issued by the demanding state was defective in some particular.[48] The hair-splitting niceties involved in some of these decisions illustrate a typical source of frustration to law-enforcement officials in extradition proceedings. The prisoner himself may raise the issue of the sufficiency of the charge, usually by habeas corpus proceedings.[49] This in turn may bring into issue the jurisdiction of the court entertaining the writ,[50] and in some cases, relief may be given to the prisoner by the federal courts.[51] The decisions seem to lack uniformity concerning the extent into which the asylum state should inquire into the validity of the charges made by the demanding state. An interesting comparison may be made between *People ex rel Woloshin v. Warden of City Prison,*[52] where the court in the asylum state saw fit to inquire in some detail into the issue of the prisoner's presence in the demanding state at the time of the commission of the crime, with *Paulke v. State,*[53] where the court sharply restricted itself to a mere perusal of the warrant, and refused to consider the fact that the prisoner had been previously discharged for the same offense by a court of competent jurisdiction.

Closely related to the question of the validity of the demanding state's charge, is that of the guilt or innocence of the prisoner. Section 20 of the Uniform Act expressly forbids the asylum state from inquiring into this question; however, if the prisoner can show that he is innocent as a matter of *law* rather than of *fact,* it is easy to argue that the requisition itself is invalid. Some decisions fail to make clear which of the two rules is really being applied, and, in effect, violate Section 20, under the guise of declaring the requisition invalid.[54]

As we indicated previously, a serious weakness exists in extradition procedure in that the governor of the asylum state may arbitrarily refuse to surrender the prisoner.[55] The Uniform Act does not provide for any discretion on the governor's part, rather, the wording of Section 2, describing his duties, is quite positive in tone.[56] An early case, *Kentucky v. Dennison,*[57] held that mandamus would not lie to compel the governor of Ohio to deliver

48. See *Ex parte* Davis, 333 Mo. 262, 62 S.W.2d 1086 (1933); *Ex parte* Hubbard, 201 N.C. 472, 160 S.E. 569 (1931).

49. As provided in § 10 of the Uniform Act.

50. As in Morgan v. Horrall, 175 F.2d 404 (9th Cir. 1949), *cert. denied,* 338 U.S. 827 (1949); *Ex parte* Wallace, 38 Wash. 67, 227 P.2d 737 (1951).

51. See Day V. Keim, 2 F.2d 966 (4th Cir. 1924); *Ex parte* Thaw, 209 Fed. 56 (D. N.H. 1913).

52. 197 Misc. 609, 95 N.Y.S.2d 370 (Sup. Ct. 1950).

53. 25 Ala. App. 212, 143 So. 585 (1932).

54. People *ex rel* Higley v. Millspaw, 257 App. Div. 40, 12 N.Y.S.2d 435 (3d Dep't 1939); Com. *ex rel* Mattox v. Superintendent of County Prison, 152 Pa. Super. 167, 31 A.2d 576 (1943).

55. This point is discussed in the following cases; Taylor v. Taintor, 16 Wall. 366 (U.S. 1873); *In re Murphy,* 321 Mass. 206, 27 N.E.2d 413 (1947); State v. Wynn, 356 Mo. 1095, 204 S.W.2d 927 (1947); People *ex rel* Higley v. Millspaw, *supra* note 54.

56. ...Subject to the provisions of this act ... it is the duty of the governor of this state to have arrested ....

57. 24 How. 66 (U.S. 1860).

the prisoner to the demanding state. This case has been consistently followed, where, for some reason or other, the governor so refuses.

Such are but a few of the more important problems which arise under extradition law, and which we mention to illustrate its inefficiency in many instances. However, problems also arise when removal procedure is employed, and we will discuss these next.

TYPICAL PROBLEMS ARISING UNDER THE LAW OF REMOVAL – FEDERAL RULES OF CRIMINAL PROCEDURE.[58]

In the first place, since the law governing the removal of prisoners from one district to another concerns one sovereign only, namely the United States, conflicts problems would seem theoretically impossible.[59] Hence one fertile source of litigation is eliminated, and defendants such as the one in *State v. Hall*[60] are less likely to slip through the outraged fingers of the state prosecutor.

Somewhat remniscent of extradition law is the provision in the Federal Rules that, prior to removal, the prisoner is entitled to appear before the judge of the "asylum" district, and that the judge must be satisfied that "there is probable cause to believe that the accused is guilty of the offense charged" before granting removal.[61] Questions as to the identity of the accused[62] and his probable guilt[63] may be raised and may defeat removal. As in the case of extradition, habeas corpus proceedings may be instituted by the prisoner to bring these matters into issue. Other grounds for denial of removal are invalidity of the indictment,[64] lack of jurisdiction of the trial court,[65] or that removal is sought to a district other than the one where the offense was allegedly committed.[66] Likewise analogous to extradition law is the holding that the question of the guilt or innocence of the prisoner may not be raised.[67] According to the Notes of the Advisory Committee on Rules, following Rule 40, the purpose of the rules estab-

58. In this section, we have cited cases arising under the new Federal Rules, wherever possible. However, several cases decided under the old rules have been included where the corresponding provisions in effect today are of the same signigicance.

59. Tinsley v. Treat, 205 U.S. 20 (1906) is concerned with a 'conflict' between state and federal law, which arose due to the wording of the removal provisions then in effect. The question in this case was whether state or federal procedure should apply to the inquiry hearing on application for removal.

60. Note 37, *supra*.

61. FED. R. CRIM. P. 40(b) (3).

62. Mathues v. U.S., 19 F.2d 7 (3d Cir. 1927); Duffy v. Keville, 16 F.2d 828 (D. Mass. 1926).

63. Johnson v. Hotchkiss, 35 F.2d 914 (9th Cir. 1929); Bartletta v. Mulheron, 9 F.2d 963 (D. N.J. 1925). It is important at this point to distinguish between the issue of *probable* guilt and *actual* guilt; see note 67, *infra*, and the related text.

64. *Ex parte* Black, 147 Fed. 832 (E.D. Wisc. 1906), *aff'd* 160 Fed.431 (7th Cir. 1908).

65. Horner v. U.S., 143 U.S. 207 (1892).

66. Kay V. Snyder, 20 F.2d 273 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 550 (1927); Ireland v. Henkle, 179 Fed. 993 (S.D. N.Y. 1910).

67. Hawkins v. Borthwick, 5 F.2d 564 (6th Cir. 1925); U.S. *ex rel* Semel v. Fitch, 66 F.Supp. 206 (D.Conn. 1946); U.S. v. Frankfeld, 34 F.Supp. 17 (D.Mass. 1940).

lished for the removal of prisoners is to provide safeguards against their "improvident removal to a distant district." This represents a basically different legal concept from the "purpose" of the extradition laws, which is to overcome the barrier of state sovereignty, rather than to furnish protection to the prisoner. A disadvantage to the removal procedure, as far as the prisoner is concerned, has recently been established in *Heltzer v. U.S.*,[68] where it was held that an order of removal is not appealable, where the prisoner is under indictment.

A few attacks have been made on the constitutionality of removal proceedings; in *Beavers v. Haubert*,[69] on the grounds that the accused was denied the right to a speedy trial; and in a recent case, *U.S. v. Binion*,[70] where the defendant asserted that the proceedings violated Article III, Section 2, clause 3, guaranteeing trial "where the said crimes shall have been committed" also the Sixth Amendment, which says that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed". In both cases the constitutionality of the removal proceedings was upheld.

CONCLUSION

Comparing the legal problems which arise under extradition law, with those arising under the removal procedure afforded by the Federal Rules of Criminal Procedure, we believe the most important distinctions are the absence of problems in Conflict Law where removal is employed, and in the absence of procedural delays attendant to negotiations between two different sovereigns. Of the remaining legal problems, many, such as the question of the validity of the indictment, are pretty much the same in both instances, and the others are of a miscellaneous and relatively unimportant character.

For these reasons then, we believe that it would be in the public interest to encourage the use of removal procedure in borderline cases such as the *Wright* case, rather than to force the parties concerned into the uncertain field of extradition law. Furthermore, the result in *U.S. v. Wright* seems fundamentally unsound in that extradition procedure is intended to defeat the asylum afforded to criminals because of *difference in sovereignty*. As far as Hawaii and Alaska are concerned, the sovereign is the same, and we are faced with the anomalous result that, in this case, the United States has to employ extradition to move criminals around within its own possessions.

From another point of view, however, the decision in the *Wright* case is commendable, even though we may not entirely agree with its reasoning. The result tends to strengthen the position of the Alaska court as an in-

68. 188 F.2d 916 (9th Cir. 1951).
69. 198 U.S. 77 (1905).
70. 13 F.R.D. 238 (D. Nev. 1952), *cert. denied*, 345 U.S. 935 (1953).

dependent unit, approaching, if not actually reaching, the status of a state supreme court.

John C. Whitehouse

EXTRA-TERRITORIAL EFFECT OF FOREIGN GUARDIANSHIP PROCEEDINGS IN FLORIDA

A rather involved litigation culminating in the decree rendered on rehearing in *Beverly Beach Properties, Inc. v. Nelson*[1] presented several problematic points of conflict law for the resolve of the Florida Supreme Court.

Briefly, the facts involved were: the decedent, domiciled in Florida for many years, sojourned to California, where he spent the last remaining five years of his life and died. While he was living in California, the California court adjudicated him an incompetent, appointed Dora Miller as his guardian, and authorized her to vote shares of stock which the incompetent owned in a Florida corporation. Dora Miller voted the shares (by proxy) to ratify a sale of Florida land, which was the main asset of the corporation. The California court validated the sale. After the decedent's death, Dora Miller was appointed in California as executrix of his will in original probate proceedings upon a finding that the decedent was domiciled in California. Later, Samuel Nelson was appointed administrator c.t.a. in an original administration proceeding in Florida, predicated on a finding by the Florida court that the decedent was at all times prior to and at his death domiciled in Florida.[2]

The primary purpose of the litigation was to set aside the sale of the corporation's land which the guardian's vote of the decedent's stock authorized.

An analysis of the Court's final decree adjudicating this claim will be attempted towards the end of divining the court's position on the conflicts of law problems presented.

Reversing its position on rehearing, the court held that the California appointed guardian could vote shares of stock in a Florida corporation which her ward owned: that it was incumbent upon Florida to recognize the validity of the acts of the California guardian by virtue of the mandates of the Full Faith and Credit Clause of the Federal Constitution.

It is elementary that the appointment of a guardian of the person of an incompetent by a state having personal jurisdiction over the incompetent is due recognition in sister states by virtue of the Full Faith and Credit Clause.[3] However, it is equally well settled that the guardian has no rights as concerns property of the ward, real or personal, which is situate in another than the state which appointed him.[4]

1. 68 So.2d 604 (Fla. 1953).
2. Miller v. Nelson, 160 Fla. 410, 35 So.2d 288 (1940).
3. *In re* Baxter, 191 Iowa 407, 182 N.W. 217 (1921); *In re* Chase, 195 N.C. 143, 141 S.E. 471 (1928).
4. Hoyt v. Sprague, 103 U.S. 613 (1880); Brown v. Fox, 51 Atl. 621 (N.J. (1901); George v. Cleveland Trust Co., 22 Ohio 1, 153 N.E. 914 (Court of Appeals of Ohio 1926); *In re* McGuigan's Estate, 349 Pa. 581, 37A.2d 717 (1944).