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Text of Judgment

(Continued from Page 10)

"It must be remembered that the magistrate investigating a case of demanded extradition is not in quite the same position as if he were deciding on a charge of crime committed within his own jurisdiction. In the latter case he has full discretion; he may, and often does, discharge a prisoner because although there is a prima facie evidence of guilt, the circumstances are so obscure, the intent so doubtful, the testimony so conflicting, that he thinks a jury would not be likely to convict. But in a case of extradition he cannot consider these matters. If he finds sufficient evidence of guilt to justify a commitment, the question of a probability of a conviction is not one for his consideration."

Defence Cannot be Heard

In view of the above authorities it seems to me that I cannot, at this hearing, consider the matters of defence put forward. All I can do is to decide whether there is, or is not a prima facie case made out.

Counsel for the accused raised the question that the evidence of the Defendant shows that there was no Mens Rea. That raises a matter of defence and it is not for me to try the case.

The case of Utah vs. Jones 44 C.C.C. 358 has been cited by Counsel for the accused as an authority in support of the latter's contention. The charge in that case was in a general way similar to that in the present one in that it was for non-support and desertion of wife and child and in pursuance of the same treaty of 1922; otherwise the essential facts are different and the case can be distinguished from the one before the Court. The head note of this case indicates that it decides two matters namely:

(1) The law of a foreign state cannot be proved on an application for extradition, by the certificate of the official of that state who is custodian of the Statutes, certifying that a particular statute exists. (2) It is not sufficient to establish a prima facie case for extradition under the new clause, child desertion for the wife to swear an affidavit that the husband has violated the law of the foreign state seeking extradition.

The Jones Case

In the Jones case the foreign law was proved as stated negatively in the head note, while the foreign law in the instant case was proved by a person familiar with this particular branch of the law of the foreign state.

In the Jones case the only proof and support of the charge was the Affidavit of the mother stating in the words of the Statute of her having been left in destitute and necessitous circumstances—there being no facts disclosed in the Affidavit in regard to her circumstances. On the other hand in the present case we have before us proof of an indictment having been found by a Grand Jury in the demanding State in respect of the charge under consideration and also the oral evidence of a witness from Cambridge who testified disclosing facts in regard to the destitute condition of mother and child and that they were receiving support from public charitable institutions. It does not appear to me that the decision in this case assists us in any material way. In the Jones case the charge was wilful desertion and non-support of wife and minor children in destitute and necessitous circumstances. The learned Judge in that case said that it had not been made clear that under the law of the demanding state non-support of the minor child was an offence apart from the non-support of the wife. That difficulty does not present itself in the present case as we have before us on that point not only the evidence of John M. Ackerly but also the foreign indictment containing six counts, three in regard to desertion and non-support of the wife, and also three distinct counts in regard to non-support of the minor child. I think therefore that the case immediately under review can be distinguished from that before the Court. Counsel for the accused raised the objection that part of the charge as laid is extraditable namely that pertaining to the non-support of the child and that the part as to the non-support and desertion of the mother is not extraditable.

In U. S. vs. Webber (No. 1) supra P. 2 Wallace, Extradition Judge, ruled that he could commit for any indictable offence disclosed by the evidence. See also judgment of Barry J. in Ex party Thomas 38 D. L. R. 716 at p. 724 to the same effect.

Another Objection.

Counsel for the accused also took objection to the proceedings on the ground that there was a difference between the law of the demanding State and that of Canada and that in such case Extradition proceedings would fall sitting the cases re

William Stagg (No. 2) 8 D. L. R. 287 and in re Windsor 34 L. J. M. C. (N. S.) p. 163. There can be no doubt that the law of both the demanding state and that of Canada as well as the provisions of the Treaty must all cover the same ground. But the question that arises is must the two laws be in exactly the same terms or will it be sufficient if they cover practically the same essentials though perhaps the Statutes of the different countries may be expressed in different phraseology?

In Ex part Thomas 38 D. L. R. 716 the head note is as follows: "If the crime for which Extradition is asked is a crime against the law of both countries and is in substance to be found in the Treaty, although under different heads, effect is to be given to the claim for Extradition, so where the offence is larceny under the foreign law but in Canada is only obtaining money or goods by false pretences, which is likewise an extraditable crime, a commitment for extradition on a charge of stealing will stand."

In re Collins (No. 3) 10 C.C.C. 80 it was held that in determining whether there is such evidence of criminality as according to Canadian law would justify a commitment if the crime had been committed in Canada, regard is to be had to the essence of the act charged, and extradition is permitted if there exists the component elements of the imputed offence according to the Canadian law.

This decision is approved of in the case of State of Washington vs. Fletcher (1926) 3 D. L. R. 426. McKenzie J. in delivering judgment states at p. 430, I may add that in deciding this as well as some of the other questions arising in this case, I have relied for authority upon the decision of Duff, J. in re Collins (1905) 10 Can. C. C. 80, 11 B. R. 6, 438, wherein he appears to hold that while the imputed offence must be a crime under the law of the demanding State, yet, in determining whether there is such evidence of criminality as according to Canadian law would justify a commitment if the crime had been committed in Canada, regard is to be had to the essence of the act charged and extradition is permitted if there exists the elements of the imputed offence according to Canadian law (see also Re Gaynor & Greene (no. 11) (1905) 10 Can. C. C. 154.)

Charge for Non-Support.

The charge as to the wife having been withdrawn there remains only the charge against the accused for non-support of his child, David Clark.

The 4th count in the said Indictment charges that the defendant did unreasonably neglect to provide for the support of a certain minor child named David Clark of whom the Defendant was the father.

The law of the demanding State is as stated in evidence is that "It is a crime for the father of a child to fail to provide for his wife or minor child, or desert or abandon them and leave them without funds to become a charge on the public."

It appeared that this covered section one of the Act of the demanding State and that section two covers neglect of minor children. Following the decision in the Deering case (above) the law is presumed from the fourth count above stated. The law in Canada is as follows:

Sec. Code 242 SS 3—"Every one is guilty of an offence and liable upon indictment or on summary conviction to a fine of five hundred dollars, or to one year's imprisonment, or to both, who, as a husband or head of a family, is under a legal duty to provide necessaries for his wife or any child under sixteen years of age; or as a parent or guardian is under a legal duty to provide necessaries for any child under sixteen years of age; and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries."

The words of the Treaty of 1922 as covering the extradition crime in both countries are:

"Wilful desertion, of wilful non-support of minor or dependent children."

The law of non-support of minor children though worded differently in Massachusetts and Canada to my mind covers practically the same offence, and is in both cases covered by the general words of the Treaty.

Authorities Cited.

It was held in Ex parte Feinberg 4 C. C. C. 270 that upon a preliminary inquiry in extradition proceedings, any reasonable doubt must go in favor of committal and not in favor of discharge.

Cameron C. J. in Re Rosenberg 28 Man. L. R. p. 439 at p. 448 in delivering judgment in a habeas corpus application in extradition proceedings says "In my opinion we find in these circumstances and the inferences to be reasonably drawn from them some evidence to justify, not necessarily a conviction, but the putting of the accused on his trial. There being some evidence it is not for us to examine it sufficiently. If

there be doubt it must be resolved in form of committal and not of discharge."

In view of the two affidavits of Jennie Clark and the evidence of John M. Ackerly together with production of an authenticated copy of the Bill of Indictment found in the demanding State I find that a prima facie case has been made such as to satisfy the requirements of section 18 of the Extradition Act.

I, therefore, make an order for the committal of the accused on the charge of wilful non-support of minor or dependent children at the City of Cambridge in the County of Middlesex in the Commonwealth of Massachusetts in the United States of America, and I commit him to the Common Goal of Prince County rendered to the demanding State under Summons in said County (being the nearest convenient prison) there to remain until surrendered to the foreign State or discharged according to law. Under Section 19 of the Extradition Act it is my duty to inform the accused (who is now in Court) that he will not be sur-til after the expiration of fifteen days and that he has the right to apply for a Writ of habeas corpus.

(At the trial before Judge Inman, Mr. J. O. C. Campbell appeared for the Commonwealth of Massachusetts and Mr. Heath Strong, K. C., for the accused).

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LUMBAGO

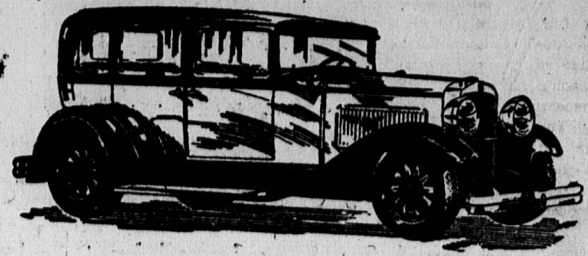
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