

Text Of Judgment In Extradition Case Tried At Summerside

Following is the full text of the judgment given by Judge Inman in the Extradition case of the Commonwealth of Massachusetts vs. Major Clark, tried recently at Summerside, upon which an order for extradition was made.

(The warrant in the case was the first extradition warrant to be signed by President Hoover since his election to office.)

This is an application from the Commonwealth of Massachusetts seeking Extradition of Major Clark on the charge of non-support of his wife Jennie Clark and his minor child, David Clark at Cambridge, Massachusetts.

Information was laid by the chief of police of Summerside and a Warrant issued for the defendant.

At the close of the hearing the prosecution abandoned the charge in regard to the non-support of the wife, but claimed extradition as against the accused in regard to non-support of the minor child.

The proceedings herein are under the Extradition Act, Revised Statutes of Canada 1927 Chap. 37. Section three of the said Act together the Harvey Curzon Treaty of 1922 (R. S. C. 1923 p. XX, XXI) and the publication of the latter Treaty in the Canada Gazette (Extra) of 14 October 1922 form the foundation upon which Extradition proceedings herein are based.

Section three is as follows: In the case of any foreign state with which there is an extradition arrangement, this Part shall apply during the continuance of such arrangement; but no provision of this Part, which is inconsistent with any of the terms of the arrangement, shall have effect to contravene the arrangement; and this Part shall be so read and construed as to provide for the execution of the arrangement.

The words of the Treaty covering the offence herein are as follows: "Wilful desertion or wilful non-support of minor or dependent children."

Procedure

The procedure as to the hearing of the case is governed by Section 13 of the said act which provides that subject to the provisions of the said act the Judge shall hear the case in the same manner as nearly as may be as if the person charged were brought before a Justice of the Peace on a Preliminary Hearing for an indictable offence.

By subsection (b) of Section 2 of the Extradition Act "A Fugitive" means "a person being or suspected of being in Canada who is accused or convicted of an extradition crime committed within the jurisdiction of any foreign state."

By sub-section (b) of Section 18 of said Act is provided "in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, justify his committal for trial, if the crime had been committed in Canada, the Judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison there to remain until surrendered to the foreign state, or discharged according to law.

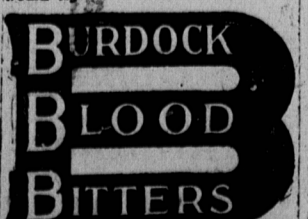
2. "If such evidence is not produced the Judge shall order him to be discharged."

Inspector Ackerly's Testimony

John M. Ackerly, Police Inspector of Cambridge Mass., testified as follows: That he lives in Cambridge, Massachusetts. Knows the accused Major Clark, and identified him in Court as the person for whom extradition is sought herein. That the accused left Cambridge the latter part of April 1928. He knew the wife of the accused, Jennie Clark and their son David Clark. That the accused has lived in Cambridge for years. The child David is about 9 years old. That the said wife and

Weak and Run Down Didn't Want to Eat Could Not Sleep

Mrs. D. Leone, Saint Ste. Marie, Ont., writes: "I was weak and run down; did not want to eat, and could not sleep. I felt tired of living and often longed for death to free me from my terrible misery as I felt I would never be strong again. I thought I would try



and really I soon felt like eating and living, and new life seemed to come to me. Manufactured only by The T. Millburn Co., Ltd., Toronto, Ont.

child have lived in Cambridge during the past 12 months, during which time he had frequently seen both wife and child. That the son David is living with his mother. That both of them are in very needy circumstances. That during the past year both have been receiving aid from Cambridge Public Welfare, a charitable institution supported by the public for the help of the poor. That she received \$5.00 a week cash from this institution for herself and child, and also her groceries. That he knows this of his personal knowledge, as he has given orders personally for Mrs. Clark for aid in this institution. That Mrs. Clark and son have also during the past year received aid from Cambridge Welfare Union which is another charitable institution in Cambridge, and which has given clothing to both the mother and child during the past year. That previously to his leaving Cambridge accused had been arrested on another charge of non-support of his wife. That he knew that accused and Jennie Clark had lived together as man and wife. That in regard to the extradition charge herein he knew that Jennie Clark had gone before a Grand Jury at Cambridge, Mass., charging the accused with non-support of herself and son David; and that as a result the said Grand Jury had brought down an indictment in the Superior Court of Massachusetts against the accused containing six counts. That in connection with the said proceedings he carried the indictment from the District Attorney Clark's Office to the Grand Jury Room. A copy of the said indictment was produced before me duly authenticated and contained six counts as follows:

1. Non-support of wife, Jennie Clark.
2. Desertion of wife, Jennie Clark.
3. Abandoning wife Jennie Clark, leaving her a burden on the public.
4. Unreasonably neglecting to provide for the support of his minor child David Clark.
5. Unreasonably neglecting to provide for the support of certain minor children named David Clark.
6. Being under a legal duty to provide for the support of his minor child named David Clark did abandon and leave said minor child in danger of becoming a burden on the public.

This indictment was found by a Grand Jury of the County of Middlesex, Mass., on the first Monday of November 1928 and in pursuance of said indictment a Warrant was issued thereon out of the Superior Court of Massachusetts to apprehend the accused, a copy of which Warrant has been duly proved before me.

Charge in Warrant

The charge in the Warrant covers in a general way the six counts in the indictment. There is also attached to the copy of the said indictment an affidavit of the said Jennie Clark stating that she is the wife of Major Clark who stands indicted in Massachusetts for non-support of herself and minor child. That she was married to accused 12th January 1919, and that he is the father of their nine year old boy David. That she has not received any support from accused for herself or said minor child since 15th May, 1928 and that she and said child were receiving aid from Cambridge Public Welfare.

In another affidavit filed herein she states that when accused left Cambridge, Mass., in May 1928 he was furnished with funds to cover all expenses, including his return. That after he left in May 1928 she did not hear from him for two months, when he sent a letter enclosing \$2.00 and asking her to hear from him she wrote him stating she was in destitute circumstances and obliged to work in order to supply herself and child with the necessities of life. That this letter was written to him addressed to Kensington, P. E. I. Island where his address had been furnished her in accused's letter. That she received no reply to this, nor has the same been returned to her from the post office, and that she has not heard from him since. The latter affidavit is dated 30th April, 1929.

The foreign law on the subject matter of the charge herein was proved by John M. Ackerly who deposed that in the Commonwealth of Massachusetts it is a crime for a father 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. That it is a crime against the Statute law of Massachusetts and is punishable by \$200.00 fine, one year imprisonment, or both. That this law is in force now and has been in force continuously during the past year.

On being recalled this witness deposed that Section 2 of the act he

had referred to covered neglect of minor children while Section 1 of the act covered both wife or children; that Section 2 of the Act covered children alone.

That the exact words of the law is "unreasonably neglects or refuses."

Objection Taken

Counsel for the accused took the objection that John M. Ackerly was not competent to prove the foreign law as he was not an expert. As to his qualification in the regard the said witness stated as follows:

That he had been 23 years on the police force of Cambridge and that during the past nine years he had done all the police Court work for Cambridge Public Welfare, a charitable organization in aid of the poor. That he conducts the cases of desertion of wife and children in this Court. And that he has been in the matrimonial Bureau of the Police department there for nine years and that he is in charge of the Department of Domestic Relations in Police Court and in all the Courts. That he had personally handled many such cases from start to finish and was well acquainted with the law of non-support of wife and child having read it many times and having personally handled cases of this kind for nine years.

A person to prove the foreign law must satisfy the court as to his competency and knowledge and he is then allowed to give evidence of such law. I am satisfied that the said witness is sufficiently conversant with this branch of the law of Massachusetts to give evidence thereof whether he be called an "expert" or "peritus virtute officii." Phipson 6th Ed 388; Taylor on evidence 10th Ed. Vpl. 2 Sec. 1425. In further proof of the foreign law there is the case of re Deering (1915), 23 D. L. R. 818 cited by the Attorney for the Commonwealth of Massachusetts as an authority for the proposition that the foreign law might be inferred or presumed from the indictment for the offence being found in the foreign state. This case was decided by the full bench of the Supreme Court of Nova Scotia.

The attorney for the accused, however, points out that in the case of re Wagner (1928) 4 D.L.R. 615 O'Hearn Co. Ct. J. refused to follow the Deering case on this particular point.

Judge's Ruling

The learned Judge held that no inference could be drawn or presumption arise from a document not admissible in evidence. Reference to the last paragraph of the judgment in the Wagner case shows that when it was written the Judge's attention had not been directed to the cases of re Goodman (1916) 28 D.L.R. 197; 26 O.C.C. 84; affirmed in 29 D.L.R. 725; 26 O.C.C. 284 and Ecrement v. Seugin (1921) 39 O.C.C. 113 both of which cases decide that in Extradition proceedings a foreign indictment is receivable in evidence under Section 23 of the Canada Evidence Act. The Deering case was followed in British Columbia in N. Y. V. Israelowitz 29 O.C.C. 323.

No decision of our Courts on this point has been cited and in the absence of binding authority I regard the Deering case as a precedent to which due recognition should be given. On the charge (form no 20 of the Criminal Code) being read to the accused he stated he would give evidence on his own behalf.

The prisoner came to the box and was sworn. The prosecuting attorney objected to the accused's giving any evidence save as to the defences mentioned in Section 15 of the Extradition Act which mentions two defences available namely: That the offence charged is of a political nature or that the offence charged is not an extradition crime: citing Ecrement vs. Seugin 39 O.C.C. 125; U. S. v. Webber 39 O.C.C. at p. 5; and re Rosenberg 28 Man. L. R. at p. 460. On the other hand in Crankshaw's Criminal Code (1924) at p. 1371 it is stated on the authority of Ford and Fry 28 D.L.R. 66 that the judge must hear any evidence produced by the accused against the charge. There is also a dictum of the Chief Justice of the Supreme Court of Canada in Buck v. The King 28 S. C. R. at p. 135 to the effect that in an extradition case the accused at the hearing has the right to adduce evidence on his own behalf. Inasmuch as the authorities cited were in apparent conflict I allowed the evidence of the accused subject to Mr. Campbell's objection. In brief the witness testified as follows:

That he was born in Hamilton in Prince Edward Island 1885, that he is a Carpenter by trade and went to United States about 16 years ago where he has lived ever since. He was married twice. His first wife died in 1914. He had one boy by the first marriage. Then in 1920 he again married to which union there was born a child David, who is now about 9 years of age. At his trade he earned \$8.00 a day and during the year prior to his coming to Prince Edward Island he had fairly continuous employment. That he and his wife kept house in rented rooms

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at Cambridge. That about a year ago he came to Prince Edward Island and with the remains of his mother for burial returned a return ticket and intending to return to Massachusetts. That on his return to the United States he was stopped by the Immigration authorities because he had not complied with certain immigration regulations. The payment to re-enter United States would cost him about \$8.00 for head tax plus \$10.00 expenses and not having the money on his person and being unable conveniently to procure it he returned to Prince Edward Island. That on attempting to reenter United States he had told the authorities that he was going home to Cambridge. That he did not come to Prince Edward Island with the intention of remaining here but intended to return and intends to return to the United States. The accused went into full detail of what he did during the past year. He said he had difficulty in getting work and all the money he was able to send his wife and child was \$14.00. And that his clothes and working tools are still in United States, he never having sent for them. He denied that he received a letter from his wife stating that she was in destitute circumstances. That his wife had previously prosecuted him for non-support. That before the close of the Great War he had been in Canada for a short time having enlisted in a Company in Quebec but had never gone overseas.

Question 26 Issue

The question that now arises is what effect, if any, can I give to the evidence of a defendant in an en-

quiry such as that before me. In preliminary inquiries under the Criminal Code which procedure governs that of the present case it is open to the accused if he so wishes, to go in to his full defence before the Magistrate but the latter cannot try the case nor weigh evidence as between the parties. It is for the Magistrate to consider whether or not a prima facie case has been made out and if such has been done it is his duty to send the case up to the Supreme Court. Such is also the law in regard to Extradition proceedings.

The accused deposed to having sent his wife money on several occasions while her oath is that he sent her money only she says, once. She states she wrote him stating that she was in destitute circumstances while the accused says that he never received such letter. Here we have conflicting testimony which is a matter which should be left to a Jury. From the evidence of the accused it would appear to me that he is domiciled in the United States in as much as he left that Country with the intention of returning and intends to return yet. On his way back to Cambridge he told the Immigration officers at the border that he was going home to Cambridge and his actions in not sending for his clothes nor his working tools are compatible with his testimony of his intention to return. The accused claims that he was not allowed to re-enter United States. The stopping of the accused was a result of the latter's failing to comply with the immigration regulation of the United States. He had not on his person sufficient money to pay head tax and

other papers which would probably cost \$18.00 in all. All this is raised by way of defence and whether the same is a valid defence at law or not is not my province to determine, in a preliminary hearing such as this under the Extradition Act. In the case of re Latimer 10 O.C.C. 244 (being extradition proceedings) Sifton C. J. at p. 247 says:

"This constitutes the evidence that has been adduced before this Court; and the question then arises as to my duty under the circumstances as shown by this evidence. As has been stated, this is in no manner a trial of the accused. He may be innocent or guilty of the offence of which he is charged. The duty that is laid upon me is to consider as to whether the evidence that has been adduced in the absence of contradiction would be such as to justify a magistrate in a similar case under our law committing him for the purpose of standing his trial. Practically it amounts to the same thing as if in a trial with the Judge and Jury there was such evidence that the Judge would not be justified in withdrawing the case from the Jury." In Habeas Corpus proceedings in Ecrement v. Seugin (Supra) at p. 128 Lamothe, C.J. says "We have no authority to review, revise or reverse their finding, nor did the extradition commissioner have any such right or authority. It is not a question of guilt or innocence but to say if a prima facie case is made out which according to the law of Canada, would justify the petitioner's committal for trial if the crime had been committed in Canada. These are all matters to be ventilated and

determined on the trial before a petit jury." See also judgment of Martin acting C.J. in Grossberg v Choquet (1923) 3 D.L.R. 252 at p. 260, and that of Wallace, Extradition Judge (Continued on Page 11)

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