

EXTRADITION FROM CANADA: Of person convicted of robbery whose sentence has not been executed, effected by: application by governor for requisition; requisition by United States Sec. of State; judicial proceeding in Canada; order of surrender.

September 5, 1940

9-13



Honorable Thomas M. Scott, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated December 15, 1939, which is in the following terms:

"I kindly ask that you advise what legal procedure is to be followed in returning an escaped prisoner of this institution from Canada. The subject is a Canadian Citizen by birth and residence and at the present time is incarcerated in the Stony Mountain Penitentiary, Canada. A detainer, stating that the subject is wanted by this institution as an escape prisoner, has been filed with the Canadian authorities.

Your opinion as to what steps we should take in effecting the return of this escaped inmate to our institution will be greatly appreciated."

Your letter dated January 3, 1940, further stated in part:

"In further reference to our telephone conversation this morning, having to do with the above named subject.

I am enclosing herewith copies of correspondence between my office and the Cana-

dian authorities having to do with the return of this man to finish the remainder of his sentence at this institution.

Our records indicate that John Gunn, our #35921, was received at this institution December 18, 1929, from Cooper County to serve a sentence of 12 years for the crime of Robbery in the 1st degree and that while on detail duty at Ewing Farm he escaped September 27, 1931. This man is now incarcerated in the Stony Mountain Penitentiary, Canada, under the name of John Lynch, their register #4635. You will observe that Mr. Watson, (letter designated #1) states this subject apparently born in Hamilton, Ontario, and it is therefore not possible to return him to the United States via deportation.

* * * * *

Your opinion as to what procedure we should follow in this particular case will be greatly appreciated."

This opinion has heretofore been held in abeyance by agreement between your office and this office, in order that the Department of Penal Institutions may determine whether it wishes to proceed with the extradition of the fugitive now or later, and in order to try to ascertain whether the Canadian authorities will be willing to discharge the fugitive through some method other than extradition.

Extradition is international. It is defined in Moore on Extradition & Interstate Rendition, Section 1, page 3, as:

"Extradition has been defined as the act by which one nation delivers up an individual, accused or convicted of an offence outside of its own territory, to another nation which demands him and which is competent to try and punish him."

The return of a fugitive from one of the United States of America to another is correctly termed "inter-state rendition." 2 Moore, *supra*, Section 516, page 819,

International law recognizes no right to extradition apart from treaty. In *Factor v. Laubenheimer*, 78 L. Ed. 315, 1. c. 320 (2), 54 S. Ct. 191, 290 U. S. 276, the Supreme Court of the United States said:

"But the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, (see 1 Moore, *Extradition*, Section 14; Clarke, *Extradition*, 4th ed. p. 14) the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. See *United States v. Rauscher*, 119 U. S. 407, 411, 412, 30 L. ed. 425-427, 7 S. Ct. 234; *Holmes v. Jennison*, 14 Pet. 540, 569, 582, 10 L. ed. 579, 593, 600; *United States v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932; *Dos Santos's Case*, 2 Brock. 493, Fed. Cas. No. 4,016; *Com. ex rel. Short v. Deacon*, 10 Serg. & R. 125; 1 Moore, *Extradition*, Sections 9-13; cf. *Re Washburn*, 4 Johns. Ch. 106, 107, 8 Am. Dec. 548; 1 Kent, *Com.* 37. To determine the nature and extent of the

right we must look to the treaty which created it. The question presented here, therefore, is one of the construction of the provisions of the applicable treaties in accordance with the principles governing the interpretation of international agreements."

The extradition of this fugitive from Canada is governed by the following treaties made between the United States of America and Great Britain: Article X of the Webster-Ashburton Treaty of 1842, 8 Stat., page 576; 2 Moore on Extradition & Interstate Rendition, page 1095, et seq., in part provides:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of . . . robbery, . . . committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: . . . The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

The Treaty of 1889, 26 Stat., page 1508; 2 Moore, supra, page 1096, et seq. provides that it shall be "supplementary to the Tenth Article of the Treaty, concluded between the same High Contracting Parties on the 9th day of August, 1842." Said treaty of 1889 further provides in part:

"ARTICLE VI.

The extradition of fugitives under the provisions of this Convention

and of the said Tenth Article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering States.

ARTICLE VII.

The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime of which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

The list of crimes for which extradition may be granted between the United States of America and Great Britain and Canada was enlarged by a supplementary treaty between Great Britain and the United States, namely that of 1900, 32 Stat. page 1864, and by another supplementary treaty of 1905, 34 Stat., page 2903. The latest extradition treaty between Great Britain and the United States of America was that of 1932, 47 Stat., page 2122. It does not apply to the Dominion of Canada. Article XIV of said treaty in part provides:

"His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named -- that is to

say, the Dominion of Canada, . . .
Such accession shall be effected by
a notice to that effect given by the
appropriate diplomatic representative
of His Majesty at Washington . . . "

By a letter dated January 5, 1940, this office asked the Department of State of the United States whether said Treaty of 1932 had been made applicable to the Dominion of Canada by accession as provided by the above quoted Article XIV. By a letter dated January 11, 1940, Mr. Green H. Hackworth, Legal Adviser of that department, in part stated:

"The Treaty of Extradition with Great Britain of 1932 has not, through Article 14 thereof, been made applicable to Canada. Therefore, in accordance with the concluding paragraph of Article 16 of this same treaty the practice of extradition between the United States and Canada would be governed by the treaties of 1842, 1889, 1900, and 1905, which are referred to in your letter."

(The earliest treaty, namely that of 1794, 2 Moore, supra, page 1095, did not authorize extradition on the charge of robbery.)

The foregoing treaty provisions show that extradition of this fugitive, John Gunn alias John Lynch, may be granted because he has been convicted of the crime of robbery.

The above quoted treaty of 1842 provided that fugitives should be delivered up upon the making of requisitions. Applications for requisitions based on a violation of or conviction of violation of the laws of one of the United States of America must be made by the Governor of the demanding state to the Secretary of State of the United States. The latest memorandum issued by the Department of State regarding extradition

is that of September, 1921, of which a copy is in our file. At page 1 it states in part:

"Extradition will be asked only from a Government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated. When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the governor of the State or Territory."

The memorandum of the Department of State relative to extradition of July 1885 (and of May, 1890; 1 Moore, supra, page 333-339, Section 226 et seq.) is to the same effect.

It would be appropriate for the Warden of the Missouri State Penitentiary to inform the Governor of the facts, and to request him to make such application.

The application for a requisition should be in triplicate (memoranda of Department of State, supra). It should include duly authenticated, verified, complete copies of the record of conviction and sentence of the fugitive (Treaty of 1889, Article VII, supra). Regarding evidence of conviction, the memorandum of the Department of State of September, 1921, page 1, in part states:

"If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient."

Said application should include certified prison records and sworn statements showing that the sentence of the fugitive has not been executed, that is, that he escaped before serving the period of time for which he was sentenced.

Said records must be duly certified and authenticated by the officers of the court, the official character of the officers and their authority to act must be certified, and all of the documents must be "then authenticated under the great seal of the State making the application." The seal of said state will thereafter be authenticated by the Department of State of the United States (memorandum of Department of State of September, 1921, page 2). Also, see Department of State memorandum of May 1890, 1 Moore, supra, 335, l. c. 336.

Said memorandum of September, 1921, page 2, further states in part, regarding the contents of the application:

"Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States. It should also contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive, and not for any private purpose, and that if the application is granted, the criminal proceedings will not be used for any private purpose."

It is recommended that the application include authenticated records of the Missouri State Penitentiary and the Federal Bureau of Investigation of the Department of Justice of the United States, including fingerprints and photographs, in order to identify the prisoner as the convicted person who has escaped from the Missouri State Penitentiary.

Said application should include authenticated copies of the Laws of Missouri showing what crime the fugitive committed. The crime of robbery in the first

degree, of which this fugitive was convicted, is defined by Section 4058, R. S. Mo. 1929, (Mo. St. Ann., page 2856), and it includes such elements of the crime of robbery at common law that it clearly comes within the list of crimes for which extradition may be granted under the treaty.

Neither the Department of State of the United States nor the Governor of Missouri has any printed forms of application for requisitions. Reference may be made to an application written in March, 1934, by the Office of the Attorney General of Missouri, and used by others in an effort to effect extradition from Canada, in the case of State of Missouri v. Betty Jackson. It is a part of the official records of the Secretary of State of Missouri; it was filed there on March 22, 1934, in Box 208. Other forms are in 1 Moore on Extradition & Interstate Rendition, page 344-356, Section 233 et seq. Of course, we will prepare the above mentioned papers if and when the warden wishes us to do so.

The expense of this kind of proceeding must be borne by the State of Missouri. Treaty of 1842, supra, above quoted, states that such expense must be borne by the demanding nation. The memorandum of September, 1921, page 3, supra, states, "Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws." Also, see 1 Moore, supra, Section 399, page 604-606.

The Department of Penal Institutions of Missouri has a right to pay such expenses. Section 8437, R. S. Mo. 1929, (Mo. St. Ann., page 6213), as amended, Laws of Missouri, 1939, page 581, Section 1, provides:

"Whenever any convict shall escape from the penitentiary, it shall be the duty of the commission to take all proper measures for the apprehension of such convict; and for that purpose it shall offer to pay a reward, not exceeding one hundred

dollars, if such convict be apprehended outside of Cole county, and twenty-five dollars if such convict be apprehended in Cole County, for the apprehension and delivery of such convict; such reward shall be chargeable to the state. As amended, Laws 1939, p. 585, Section 1."

The reference to "the commission" in said Section 8437 is to the commission of the Department of Penal Institutions. That commission is created by Section 8316, R. S. Mo. 1929, (Mo. St. Ann., page 6174), as amended, Laws of Missouri, 1939, page 564, Section 1, and it has control and direction of the penitentiary.

It must have been intended by the legislature that the funds appropriated by it would be used to perform the duty of apprehension of criminals. The legislature appropriated One Million Dollars for, among other things, "travel within and without the state," as a part of the appropriation specifically for the Missouri Penitentiary in Laws of Missouri, 1939, Section 1, page 81. It appears that the expenses of this extradition may be paid from that appropriation.

The legislature appropriated \$25,000.00 "for the apprehension of criminals" as a part of the total appropriation for the expenses of penal institutions and criminal costs in Laws of Missouri, 1939, Section 2, page 91. That appropriation legally would appear to provide a fund for the payment of the expenses of this extradition case. However, the State Auditor has informed us that that appropriation has been exhausted by payment of expenses of interstate rendition.

The requisition of the United States is addressed by the Secretary of State of the United States to Canada through the British Minister at Washington, D. C. (1 Moore, etc., supra, page 328, Section 221; 25 C. J., Section 65, page 279, Note 53). Thereafter a judicial proceeding is necessary in Canada.

It is to be recalled that Article VI of the Treaty of 1889, heretofore quoted, provides "that extradition shall be carried out in conformity with the laws regulating

extradition for the time being in force in the surrendering states." The latest extradition law of Canada to which we now have access is the Extradition Act in Revised Statutes of Canada, 1906, Volume III, Chapter 155, page 2929-2940. Pertinent portions of that Act are quoted and cited below.

Section II provides that "extradition arrangement" means "a treaty, convention or arrangement made by His Majesty with a foreign state for the surrender of fugitive criminals and which extends to Canada * * * "

Section III provides in part: "In the case of any foreign state with which there is an extradition arrangement, this Part shall apply during the continuance of such arrangement;"

Section IX in part provides: "All judges of the superior courts and of the county courts of any province, and all commissioners who are, from time to time, appointed for the purpose, in any province by the Governor in Council, under the Great Seal of Canada, by virtue of this Part, are authorized to act judicially in extradition matters under this Part, within the province; and every such person shall, for the purposes of this Part, have all the powers and jurisdiction of any judge or magistrate of the province."

Section X provides that "a judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him * * *." The purpose of this warrant is merely to bring the fugitive before the judge for a hearing. The form of this warrant, which is a part of Second Schedule of the Act, recites that the fugitive is to be brought before the judge "to be further dealt with according to law."

Section XIII provides: "The fugitive shall be brought before a judge, who shall, subject to the provisions of this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada."

Sections XIV and XV provide that the judge is to hear evidence regarding the issues, in effect.

Section XVI provides that judicial documents, depositions or statements on oath may be received in evidence to prove a conviction, and Section XVII declares that such papers may be deemed duly authenticated if certified to be originals or true copies by a judge, magistrate or officer of the foreign state.

Section XVIII in part provides: "(a) In the case of a fugitive alleged to have been convicted of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, prove that he was so convicted; 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. R. S., c. 142, s. 11."

Section XIX requires that where a fugitive is committed for surrender, he must be informed that he has a right to apply for a writ of habeas corpus, and requires that the judge transmit a full transcript of the proceeding to the Minister of Justice. The Minister of Justice then may order the surrender of the fugitive to the foreign state (Section 25, form of order Second Schedule), and on that authority the authorized agent may remove the fugitive (Section 26).

The fugitive in this case is now confined in the prison in Canada. By a letter dated March 1, 1940, the commissioner of the Royal Canadian Mounted Police informed this office that "this convict's term is due to expire on the 16th of March, 1945." He further said, "It is, of course, quite within the bounds of possibility that the Remission Branch of the Department of Justice here may consider the release of this convict before 1945 in order that he may be returned to your custody."

In this connection, Section XXIV of said Act in part provides that: "A fugitive . . . who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence or otherwise."

And, Section XXVIII provides: "If a fugitive is not surrendered and conveyed out of Canada within two months after his committal for surrender, or, if a writ of habeas corpus is issued, within two months after the decision of the court on such writ, over and above, in either case, the time required to convey him from the prison to which he has been committed, by the readiest way out of Canada, any one or more of the judges of the superior courts of the province in which such person is confined, having power to grant a writ of habeas corpus, may, upon application made to him or them by or on behalf of the fugitive, and on proof that reasonable notice of the intention to make such application has been given to the Minister of Justice, order the fugitive to be discharged out of custody, unless sufficient cause is shown against such discharge. R. S. c. 142, section 19."

The circumstances above stated and the two sections last quoted above make it advisable to ascertain whether the Department of Justice of Canada would wish to discharge the fugitive from their custody if the extradition proceeding above described can be successfully consummated. If the extradition proceedings were commenced without such an understanding, and before expiration of the present sentence in Canada, the fugitive's imprisonment in Canada would delay his removal within the required period of two months after his committal for surrender, and thereby might furnish a ground for his discharge from custody under a premature extradition proceeding. Without such an understanding the present Canadian imprisonment would probably prevent the issuance of the warrant of committal for surrender by the judge, and the order of surrender by the minister of justice. Those obstacles would be obviated by the discharge or parole of the fugitive from the Canadian imprisonment while the extradition proceeding was pending, and after issuance of the preliminary warrant for the hearing.

If an agreement for discharge of the fugitive from Canadian custody is not made, then we suggest that the institution of extradition proceedings be withheld until about two months before the expiration of the fugitive's Canadian sentence for the reasons stated above. If you

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wish us to communicate with the Canadian authorities regarding such an arrangement, we shall be glad to do so.

The above quoted and cited Extradition Act of 1906 is the same in effect, if not exactly so, as the Canadian Extradition Act of 1886, Revised Statutes of Canada, 1886, Chapter 142, 1 Moore on Extradition, supra, Section 448, page 682-694; Section 421, page 630.

By our letter, dated January 5, 1940, to the Secretary of State of the United States, we inquired whether some representative of the government of the United States of America will represent the State of Missouri in the judicial proceeding in Canada above mentioned. The reply of Mr. Hackworth, dated January 11, 1940, in part stated:

"The Government of the United States has no facilities in extradition cases for effecting the identity of fugitives from the justice of the several States. It is therefore suggested that if the circumstances so warrant you consider the desirability of having your State effect the identity of the accused."

Therefore, if the Department of Penal Institutions decides to effect the extradition of this fugitive, a representative of the State of Missouri should conduct the judicial proceeding in Canada.

CONCLUSION

Under existing treaties and laws of Canada, extradition from Canada to the United States of America of a person convicted here of robbery, and whose sentence has not been executed, may be effected by: Application, by Governor of Missouri to the Secretary of State of the United States for a requisition; requisition by the United States on the British Ambassador at Washington, D. C.; a judicial proceeding in Canada; and, order of surrender by the Minister of Justice of Canada. The State of Missouri must pay the expenses. The Department of Penal Institutions of Missouri may legally pay said expenses.

Respectfully submitted,

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APPROVED:

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