

CORRESPONDENCE

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THE INCAMPE EXTRADITION CASE.

Editor, CANADIAN BAR REVIEW,

SIR,—I cannot understand why Mr. Norman Mackenzie went to the trouble in your January number of this year to criticise the decision in the *Incampe Extradition* case, when in his article he admits that Mr. Justice Carroll, the extradition commissioner, in discharging the prisoner from custody was "probably" within the strict letter of the law in so doing. If Mr. Justice Carroll was "probably right," as Mr. Mackenzie contends, he then was doing his duty in discharging the defendant in extradition from custody.

Mr. Mackenzie probably knows that since 1840 both England and the United States have abandoned the opinion of the older writers like Vattel and Grotius, English lawyers like Campbell and Brougham, and American jurists Kent and Story, who entertained the view that the extradition of a fugitive from justice was a matter of comity or of international duty on the part of the Government of the country where the fugitive sought asylum. Ever since the cases of the *United States v. Davis*, 2 Sumner 482, and *Holmes v. Jennison*, 14 Peters 540, and the opinion of the Law Officers of the Crown (Sir John Campbell, A.G., and Sir R. M. Rolfe, Solicitor-General) in 1830 in the Spanish Convicts' Case, the English and American view has prevailed that a fugitive from justice can only be surrendered under the provisions of a treaty or statute. Clarke on Extradition, p. 126, 4th edition.

In the *Incampe* case counsel for the French Republic boldly proclaimed to the extradition commissioner that the demand was being made by the government of France. Now, the government of France has only one extradition treaty with Great Britain and in the first Article thereof it is expressly stipulated that the High Contracting Parties engage to deliver up those persons who have been accused or convicted of a crime committed in the territory of the one party and who shall be found within the territory of the other party. What did Mr. Justice Carroll have before him at the hearing? First, depositions taken in Germany before a German magistrate for an offence against the German Criminal Law—which I maintain disclosed an offence committed on German territory; and a copy of a requisition of the French Ambassador addressed to the British Foreign Secretary requesting the extradition of Incampe. It is true that at the present time the Saar Basin where Incampe's alleged offence was committed is under the control of the Saar Commission and is being occupied and administered for Customs and other revenue purposes. If the Saar Basin is not German territory, certainly it is not French territory, and the French treaty therefore cannot apply. It may be at the present time

legally speaking, as far as sovereignty is concerned, a sort of "No Man's Land"; or perhaps if the German Republic made a requisition on Great Britain under the German treaty that Incampe could have been surrendered. It is also true that the Saar Commission has asked the French Government to look after the interests of those living in that Basin abroad. Mr. Mackenzie surely cannot contend that this request of the French Government to look after the personal affairs of these citizens abroad along personal, commercial or civil lines, can affect the Anglo-French Extradition treaty; or establish any extradition authority either in Great Britain or France other than is contained in the extradition treaties now in existence. As I have pointed out, the English juridical view in regard to the surrender of fugitives which necessarily involves the Liberty of the Subject, is that there must be some express authority founded on treaty or statute before a person who has sought asylum can be handed over to a demanding state. Adequate machinery at the present time I contend does not exist in respect to fugitives who have committed offences in the Saar Basin.

I have read over the cases cited by Mr. Mackenzie in his article and with the greatest deference I submit that they have no application to the *Incampe* case, and they do not seem to me to be germane to the precise point involved in that case, and I think Mr. Mackenzie's complaint is that Mr. Justice Carroll applied the law as he found it instead of ignoring it and establishing some new precedent to meet the changed conditions which have arisen since the Peace of Versailles.

W. J. O'HEARN,
Formerly of Counsel with Incampe.

Halifax.

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Editor, CANADIAN BAR REVIEW,

SIR,—I have read His Honour Judge O'Hearn's letter with a great deal of interest, in which he comments on a statement of mine in the January number of the CANADIAN BAR REVIEW, 7 C.B. Rev. 55 *et seq.*—relating to the case of *In re Incampe* [1928] 3 D.L.R. 240.

I feel that Judge O'Hearn mistakes my real aim, in commenting on that case. I did not suggest that the case was necessarily wrongly decided from the strictly legal point of view, and I congratulate Incampe on his good fortune in having been able to retain the services of Mr. O'Hearn, under whom I sat when a student at the Dalhousie Law School and for whose ability as a criminal lawyer I have every respect.

My point is this. An alleged embezzler Incampe was discharged from custody, not on the grounds that he was innocent, but because of a legal technicality,—a gap in the Law. I am concerned with pointing this out, and with suggesting that the present development in international affairs is far in advance of the legal machinery for dealing with situations that may, and do arise.

Suppose Mr. X, an inhabitant of the Saar territory, kills a French official there, and escapes to Nova Scotia—in accordance with Mr. Justice Carroll's

decision, Mr. X. would be discharged in turn, and there would appear to be no legal remedy available.

From this impasse there seems to be two or three possible escapes, e.g., legislative action, which in international affairs is slow and cumbersome, or, judicial interpretation. I agree that the cases I cited are not "on all fours" with *In re Incampe*. I cited them, however, as instances of judicial law making in which the courts "stretched" the law at hand to cover unforeseen emergencies that arose out of unusual international situations. A possible remedy of a simpler character might lie in having the minister of immigration order the deportation of the accused as an undesirable, but that need not be discussed here.

On the point of law involved, I submit that the Saar is not at present a part of German territory; that by sec. 19 of the annex to article 50 of the Treaty of Versailles the Governing Commission of the Saar Territory—within that territory—has "all the powers of government hitherto belonging to the German Empire, Prussia, or Bavaria." That these powers, as regards the protection abroad of the interests of the inhabitants of the Saar Territory, were entrusted to the Government of the French Republic, by an arrangement entered into between the League of Nations and the Governing Commission of the Saar.

I submit too the following statement of Sir Ernest Wilton, President of the Governing Commission of the Saar Territory when applying (December 4th, 1928) to the Council of the League for its approval of an "international loan on behalf of the Saar Territory." "Legally, the Governing Commission is unquestionably entitled to contract loans, as appears from the provisions of the Peace Treaty which confer on the Saar Territory all the powers of government hitherto belonging to the German Empire, Prussia or Bavaria," and more explicitly still from the terms of paragraph 39 of the Saar Annex of the Treaty of Versailles which lays down that, if the present regime of the Saar were to terminate in 1935, the Council of the League of Nations would take such steps as might be necessary for the establishment of a new regime 'including' (as the passage runs) 'an equitable apportionment of any obligations of the Government of the Territory of the Saar Basin arising from loans raised by the Commission or from other causes. It follows that the Governing Commission is entitled to raise loans redeemable subsequent to 1935' (see official League Document C.613.M.190. 1928 II F. 616).

I submit that among "the powers of government hitherto belonging to the German Empire" was the power to deal with the extradition of fugitive offenders; that this power was given, under proper authority, to the Government of the French Republic, and that that Government was the proper party, and the only party, to apply for the extradition of *Incampe*.

I agree that extradition "was largely a matter of comity or of international duty" and that it is now governed by the terms of treaties or statutes. I suggest, however, that under the theories of succession held by certain writers on international law, that the Governing Commission of the Saar Territory replaces the German Empire for the government of that territory (including extradition), in so far as it affects the Saar, and that it was this right which was claimed by the Government of the French Republic in applying for the extradition of *Incampe*.

In conclusion, I suggest that this situation lends point to the demand made for the establishment of an international criminal court. (See the proceedings of the Vienna Congress of the International Law Association held during August, 1926. P. 106 *et seq.*)

NORMAN MACKENZIE.

Toronto.

LORD HALDANE'S AUTOBIOGRAPHY.

In her preface to the book Miss Haldane says: "This book is perhaps less of an autobiography than an account of a life-work, a narrative of what was attempted—where there was success, where failure, and what in the writer's view was the meaning of a life which was at least one of constant and strenuous endeavour."

The last chapter Lord Haldane gives a detached estimate of his own life and of human life in general. The following observations are of value to those who have arrived at the stage of being when philosophy must be related to experience:

"I have no sense of success on any very large scale in things achieved. But I have the sense of having worked and of having found happiness in doing so. Better that than more honours and more wealth, and more esteem from men."

"I incline to the view that, despite its drawbacks, old age is preferable to youth. Friendships continue in it, but in a form adopted to the years of the friends."

"So far as external circumstances are concerned, I would not, if I could, take the chance of living life over again."

C. M.