

Convicts, Escape of. Escaped Convicts, Flight of to Foreign Jurisdiction. Requisition, Procedure.

Where a prisoner convicted of crime, and serving sentence, escapes and flees to a foreign jurisdiction, he should be charged with the commission of crime under Sec. 8222, R. C., and after instituting criminal proceedings pursuant thereto, application for requisition should be made in the usual manner.

April 17, 1914.

Hon. S. V. Stewart,
Governor of the State of Montana,
Helena, Montana.

Dear Sir:

On the 15th instant, Hon. Frank Conley, warden of the Montana State Prison addressed you as follows:

"On November 11, 1913, there escaped from the Flathead reserve road camp, one Richard Mills, a half-breed Indian, who was arrested in Portland and sentenced to fifty days with ten days good time which will put him out in forty days. I wish to get him on his release, and would like to have you make out a requisition on the Governor of Oregon, and insert the name of Harry Holland, Guard, as officer representing Montana. Return papers to me and I will take care of the matter. I will enclose you his commitment."

This letter was by you handed to me with the request that I outline the proper form of procedure to be adopted in cases of this kind. Complying with your request, I beg leave to advise that I have given the matter in hand due consideration, and announce the following as my conclusion:

In *ex parte Reggel*, 114 U. S. Rep. p. 642, the following doctrine is announced:

"Upon the executive of the state in which the accused is found, rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding state."

Cases in which similar questions have arisen are few in number, so far as my research discloses, but a similar question was before the Governor of New York in 1889, and the decision is found in *re Hope*, N. Y. supplement, p. 28:

"The governor of Delaware has issued a requisition upon me for the return to that state of the prisoner, James Hope. The papers accompanying the requisition consist of a copy of an indictment against Hope for burglary, and a record of conviction thereunder in Delaware, showing his sentence for 10 years, and proof by affidavit that he escaped from jail with over 9 years of such sentence unserved. His return to that

state is demanded for the purpose of compelling him to serve out the remainder of his unexpired sentence. The requisition was honored by me pro forma, and the prisoner arrested, and now, after a full hearing has been had, the question arises whether the warrant should not be revoked. Mr. Charles W. Brooks, the prisoner's counsel, insists that the requisition should be revoked, upon the ground that there is no authority under the constitution and the laws for the extradition of an escaped convicted prisoner. He argues that a person can only be returned to another state to answer a charge made against him upon which no conviction has yet been had. The broad ground is taken that there is no legal remedy whatever provided to secure his return where a convicted felon escapes from one state into another. If this be true, it is new doctrine, indeed, and discloses a lamentable defect in our criminal laws. The constitutional provision relating to interstate extradition, (Article 4, Sec. 2, Subd. 2) declares that a 'person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall * * * be delivered up, to be removed to the state having jurisdiction of the crime.' It is seriously urged that a person cannot be deemed to be 'charged' with a crime when he has already been convicted for such crime. It seems to be claimed that the 'charge' no longer exists because it is deemed merged in the conviction. It is also urged that the law-writers have laid it down in the books that the declared object of an extradition is the removal of the person charged with the crime for the purpose of his being subsequently tried upon the charge presented against him, and that extradition cannot be invoked for any other purpose. This is ordinarily so, and correctly states the general rule. These expressions to be found in the books, however, have reference, not to exceptional instances, but to the usual class of cases where offenders have fled from one state to another prior to apprehension or conviction. Such flights are common, while escapes after conviction are rare. It is clear that in enunciating a general proposition there was no intention of excluding or exempting convicted escaped persons from liability to extradition. No narrow or strained construction should be placed upon the word 'charged,' as used in the constitution in the federal statute. It is broad enough to include all classes of persons duly accused of crime. A person can be said to be 'charged' with crime as well after his conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a 'charge' within the true intent and meaning of the constitution. An indictment or affidavit merely presents the charge, while a conviction proves it. To warrant extradition the statute requires an indictment or affidavit charging a crime, but if, in addition thereto, there is also presented a record of

conviction, the case is not weakened but rather strengthened. The public purpose to be effected by extradition must be taken into consideration in determining the question. Its object is to prevent the successful escape of all persons accused of crime, whether convicted or unconvicted, and to secure their return to the state from whence they fled, for the purpose of punishment. It is invoked to aid the administration of criminal justice, and to more certainly insure the punishment of the guilty. The construction contended for by the prisoner's counsel would defeat the ends of justice in many instances, and it is conceded that there is no express decision favoring it. It has been usual to grant extradition in similar cases. The case of Carter (decided by me on July 10, 1885) was just such a case, although this precise point was not then raised. In Dolan's Case, 101 Mass. 219, and in Hollon v. Hopkins, 21 Kan. 638, the prisoners were returned by extradition to other states to serve out unexpired sentences, and no such question seems to have been raised as to the legality of the proceedings. This first point raised by the prisoner's counsel seems altogether too technical, and I am constrained to overrule it."

A like question was before the Conn. Supreme Court of Errors in the case of Driscoll vs. Spiegel, reported in 36 L. R. A., at page 486, and the doctrine was announced that one who escapes from prison before the expiration of his sentence for a crime for which he has been convicted and flees into another state, is within the provision of the United States Constitution, Article IV., Section 2,—that a person "charged with crime," who shall flee from justice and be found in another state, shall be delivered up for removal to the state having jurisdiction of the crime. See also 19 Cyc. pp. 86 to 90.

It will be observed that in the decisions referred to, there were apparently no criminal statutes dealing with the punishment of escapes, and were we without such a statute, I would be obliged to advise you that the procedure above outlined is the only proper one to follow in this state, but your attention is drawn to Section 8222 Revised Codes of 1907, which reads as follows:

"Every prisoner confined in state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term of not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would have otherwise been discharged from said prison.

It will thus be observed that a prisoner who escapes from the state prison is guilty of a crime, different from the one under which he was confined, and if apprehended, he should be prosecuted therefor, and this too as soon as possible under his apprehension.

Heretofore this office has held (Opinions Attorney General, 1910, 12, p. 357), that when a convict in the state prison escapes and is recaptured and resentenced for such escape, under the provisions of Section 8222, Revised Codes, supra, the second term of imprisonment

will commence at the time the convict's first term would have expired had he not escaped.

In view of the foregoing, I am of the opinion that Mr. Conley should make complaint to the county attorney of Flahhead county, apprising him of the facts, and requesting that official to institute criminal proceedings against the escaped convict, under the provisions of Section 8222, supra, and that upon this being done, application for requisition should be made to you in the usual manner.

Yours very truly,

D. M. KELLY,
Attorney General.