EDITORIAL COMMENT

THE EISLER EXTRADITION CASE

Gerhart Eisler, an alien Communist, while at liberty on bail pending decisions on appeals from criminal convictions in United States courts, illegally departed from New York on May 12, 1949, by stowing away on the Polish steamship *Batory* bound for Gdynia, Poland. Two days later his presence on board the *Batory* was made known by wireless message from the purser to the steamship company's office in New York, and upon its instructions a passenger ticket was issued to the stowaway at sea. Before the *Batory* reached its first port of call—Southampton, England—the United States Government sent to the British authorities a request for the fugitive's arrest and detention for extradition to the United States. The warrant for Eisler's arrest was served on board the *Batory* in British territorial waters. The captain refused to surrender the fugitive, whereupon the British police officers forcibly removed him from the Polish ship and lodged him in jail. Later, the prisoner was remanded to the Bow Street Magistrate's Court, London, where the extradition proceedings took place in accordance with British law on May 27, 1949, before Sir Laurence Dunne. The Government of the United States and Eisler were both represented by English counsel.

Eisler had been duly convicted of two crimes in the United States: (1) contempt of Congress for refusing to take the stand or to be sworn when duly summoned and brought before the Committee on Un-American Activities of the House of Representatives;[1] (2) knowingly making false statements in an application for permission to depart from the United States with intent to induce and secure the granting of such permission (U. S. Code, Title 22, Sec. 223). The statements in Eisler's application were sworn to by him before a notary public and duly attested by the notarial seal.[2]

Neither of the offenses of which Eisler was convicted is included by name in the extradition treaty between the United States and Great Britain.[3] The request for extradition was made as for conviction on a charge of perjury, a crime made extraditable by the treaty. The documents submitted in support of the application showed that it was based upon Eisler's conviction of the second offense stated above, namely, knowingly making false

[1] The facts and law in this case are set out in Eisler *v.* U. S., U. S. Ct. App., District of Columbia, The Washington Law Reporter (1948), Vol. LXXVI, p. 1045.

[2] The facts in this case appear in U. S. *v.* Eisler, U. S. Dist. Ct. for the District of Columbia, The Washington Law Reporter (1948), Vol. LXXVI, p. 273.

[3] Treaty of Dec. 22, 1931, in force June 24, 1935. Department of State, Treaty Series, No. 849; Treaty Information Bulletin, June, 1935, p. 12.

statements in an application for permission to depart from the United States. Sir Valentine Holmes, representing the United States Embassy in London, argued that if the facts established to justify the conviction were facts which would justify a conviction for perjury in England then the offense was extraditable.[4]

British law on the subject is contained in the Act of 1911 "To consolidate and simplify the law relating to perjury and kindred offences," the official title of which is the Perjury Act of 1911. The pertinent provisions of the first section of the Act read as follows:

> (1) If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury. . . .
>
> (2) The expression "judicial proceeding" includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath.
>
> (3) Where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorized by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.

After hearing both sides, the British magistrate denied the application and discharged Eisler from custody. In reaching his decision, the magistrate pointed out that "Perjury is a somewhat technical matter. It is thought by certain people that if you merely tell a lie on oath you have committed perjury." But, he added, "You have done nothing of the sort. You have committed something akin to perjury, but not necessarily perjury." In his summary of the facts, Magistrate Dunne stated: "The false statement alleged to have been made by Eisler was made for the purpose of departing from the United States. It seems to me that no judicial proceeding was then contemplated. It was purely an administrative action performed by the officer in question." He then stated the legal question to be, whether what Eisler was convicted of is both an extraditable crime in the United States and Great Britain. In his opinion, he held: "It is abundantly clear that in no circumstances whatever could the offence of which he was convicted in America come under the technical head of perjury in this country." Accordingly, he concluded, "The United States requisitioning power has failed to show that Eisler has been guilty of an extradition crime, and this application fails."[5]

Generally accepted principles of international law require that to be extraditable the crime charged must not only be included in the extradition treaty but must, in addition, be made criminal by the laws of both con-

[4] The Times (London), May 28, 1949 (air edition), p. 2.

[5] *Ibid.*

tracting parties. This principle of law is affirmed in Article 9 of the extradition treaty under consideration.

The prompt release of Eisler on the ground that he was not charged with an extraditable offense, made it unnecessary to consider whether the crime for which his extradition was asked was in the nature of a political offense, or whether his forcible removal from the Polish ship and Poland's prompt protest to the British Government of this alleged violation of her sovereignty would have any effect upon the fugitive's status before the British court. It is to be regretted that the atmosphere created in London by these political issues apparently prevented adequate consideration of the strictly legal question decided adversely against the United States. Law and precedents exist for the rule laid down by the Supreme Court of the United States in a case involving the extradition treaty then in force with Great Britain that absolute identity of the crimes charged is not required if the essential character of the transaction is the same and made criminal by both statutes. In that case, Chief Justice Fuller stated that "Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent."[6]

When Sir Laurence Dunne referred in his decision to "something akin to perjury," he doubtless had in mind the second section of the British Perjury Act which deals with "kindred offenses." The section provides:

> If any person, being required or authorized by law to make any statement on oath for any purpose, and being lawfully sworn (otherwise than in a judicial proceeding) wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true, he shall be guilty of a misdemeanor.

Conviction carries the same penalty as conviction of perjury.

Although Eisler was not convicted of the crime of perjury in the United States, the crime of which he was convicted might also have been charged under the perjury statute which reads:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury. (U. S. Code, Title 18, Sec. 231.)

It is to be noted that according to United States statutory definition, perjury is not restricted to false swearing in the course of judicial proceedings.

[6] Wright *v.* Henkel, 190 U. S. 40, 57. See also precedents reported in Hackworth, Digest of International Law, Vol. IV, § 315.

It would seem to be open to serious argument that if the crime of which Eisler was convicted fell within the United States general definition of perjury and came specifically within the British law of offenses expressly legislated as being kindred to perjury, the essential character of the act would be the same, and that act being subject to severe punishment by the laws of both countries, a proper case for extradition might be made. Under Magistrate Dunne's decision, Eisler would not have been extraditable even had he been indicted for the Federal crime of perjury in the United States.

Obviously, sufficient time was not allowed to develop the case for extradition. Eisler was taken into custody on May 14 and released May 27. Before releasing the accused, the British magistrate refused an application of American counsel for further adjournment in order that more documents could be sent from the United States. A period varying from forty to sixty days, depending upon the distance and means of communication between the demanding and asylum states, is usually provided as the limit for the detention of alleged fugitives from justice following arrest and pending the production of documents upon which the claim for extradition is based.[7] Article 11 of the present extradition treaty between the United States and Great Britain provides that this period shall not exceed two months, or such further time as may be granted.

The unsatisfactory nature of the proceedings in this case demonstrates the need for the codification of the law of international extradition. As a contribution toward this end, the Harvard Research in International Law after several years of intensive research and careful study by some fifty competent authorities in the United States, proposed in 1935 a draft convention in which the traditional method was abandoned of enumerating a detailed list of extraditable crimes. This new approach followed the recommendations of a report of the Committee of Experts of the League of Nations of 1926.[8] The Harvard draft proposed that extradition should be granted for any act made criminal by the laws of both the requesting and the requested states, provided the possible penalty in each case would be death or deprivation of liberty for a period of two years or more.[9] As

[7] Hackworth, Digest of International Law, Vol. IV, p. 111.

[8] Publications of the League of Nations, V. Legal, 1926, v. 8, p. 3; AM. JOUR. INT. LAW, SPEC. SUPP. (1926), Vol. 20, p. 253.

[9] The penalty for perjury and kindred offenses under the British Perjury Act is seven years penal servitude or imprisonment with or without hard labor for not exceeding two years or a fine, or to both such penal servitude or imprisonment and fine. Under the United States Code, perjury may be punished by imprisonment for not more than five years and a fine of not more than $2,000; knowingly making false statements in an application for permission to depart from the United States is punishable by imprisonment for not more than twenty years or a fine of not more than $10,000, or both. Probably the greater penalty attaching to the last-mentioned offense was taken into consideration in determining under which section of the United States Code Eisler was to be indicted.

stated in the comment of the Harvard Research, "From an international point of view the introduction of lists of indictable offenses into an ever-increasing number of bipartite treaties tends towards uncertainty and disorder, where effective coöperation is needed." [10]

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THE CORFU CHANNEL CASE

The Corfu Channel Case originally came before the International Court of Justice on the basis of a British application in conformity with a resolution of the Security Council of April 9, 1947. Albania objected to the jurisdiction, denying the British contention that a Security Council recommendation under Article 36 was a "decision" binding, according to Article 25, on Members (or non-Members which had accepted an invitation to participate in discussions before the Security Council as provided in Article 32). Without passing on this point, the Court found that Albania had, in fact, accepted the Court's jurisdiction by its note of July 2, 1947. Immediately after this decision on March 25, 1948,[1] the parties announced an agreement to implement the Security Council's resolution by submitting to the Court for decision the following questions:

> (1) Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?
>
> (2) Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction? [2]

The form of this agreement caused the Court some difficulty in its judgment on the merits of the case, April 9, 1949,[3] because it left it unclear whether the Court could decide the amount of damages which Albania must pay if the first question were answered affirmatively. The Court, however, held on this point that the agreement could not be regarded as narrowing the jurisdiction which the Court had already decided it had.[4]

The facts of the case indicated that the disaster occurred as the result of a mine field which had been laid shortly before the disaster and after the British had found the Channel clear of mines in 1945.[5]

In dealing with the first question, the Court had to consider the British contention that the mines had been laid with wrongful intent by Albania,

[10] AM. JOUR. INT. LAW, SUPPLEMENT, Vol. 29 (1935), pp. 15, 21, 75.

[1] I.C.J. Reports, 1947–1948, p. 15; this JOURNAL, Vol. 42 (1948), p. 690.

[2] I.C.J. Reports, 1949, p. 6.

[3] *Ibid.*, p. 4; this JOURNAL, p. 558.

[4] I.C.J. Reports, 1949, p. 26.

[5] *Ibid.*, pp. 13–15.