

## Opinion No. 15-1604

July 29, 1915

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Honorable William C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

**As to honoring of requisitions by Governor of Arizona.**

### OPINION

{\*176} I have carefully examined the requisition from the Governor of Arizona for the rendition of Patrick Crowe, charged with the crime of contempt of court, together with accompanying papers, and I have also discussed the matter quite fully with Mr. C. B. Wilson, {\*177} County Attorney for Coconino County, and with Mr. E. A. Martin, of Gallup, counsel for Crowe. Mr. Wilson submitted to me some other papers relating to the case, and from the examination which I have made of all the papers, and from the rather prolonged discussion with counsel, I have reached the conclusion that the requisition cannot properly be honored.

It appears that Crowe was a member of a firm in Arizona in which William McCoy was his partner, doing business under the name of Crowe & McCoy, and that the Sherwood & Sherwood Commercial Company brought suit against John Casad, and garnisheed Crow & McCoy as debtors of Casad. Thereafter Crowe & McCoy filed a suit in the court of Coconino County to require various persons who claimed the money which they owed to Casad to interplead and settle their respective disputes. It seems that in their complaint or bill of interpleader they admitted that they had in their hands the sum of \$ 817.15, and on July 9, 1914, the court made an order requiring them to pay to the Clerk of the Court the said sum, and to require the various defendants to interplead and litigate their claims among themselves. As nearly as I can understand, this interpleader suit was begun after Crowe had left Arizona and had come to New Mexico to reside.

The next step in this litigation, as far as shown here, was on March 8, 1915, when there was a judgment entered as to various pleadings, and a further order that the plaintiffs, Crowe & McCoy, deposit with the Clerk of the Court, on or before ten days from the date of the order, the full amount of \$ 817.15, "as proposed by them, and as required by the order of this court, made and entered on the 9th day of July, 1914." It was agreed between counsel, as a matter of fact, that since the making of this order of March 8, 1915, Crowe has never been in Arizona except once, and that was for one day on March 12, 1915.

On May 24, 1915, the case appears to have come on for trial, but the plaintiffs did not appear, either in person or by attorney. The court entered judgment as to amounts that should be recovered by the different creditors of Casad from the plaintiffs, Crowe & McCoy, after which follows an order that those plaintiffs deposit with the Clerk of the

Court, \$ 1,109.00 less the sum of \$ 782.15, which had already been deposited, or the sum of \$ 326.85, then follows this paragraph:

"That plaintiffs having failed to obey the order of the court made on the 8th day of March, 1915, to deposit with the said Clerk of the Court the sum of \$ 817.15, they are acting in contempt of court, and that the 28th day of June, 1915, be set for the said plaintiffs to show cause, if any they have, why they should not be punished for so acting in contempt."

It was further ordered that a copy of the decree be served on each plaintiff and their attorney of record by the Clerk mailing to each of said persons, to their last known address, a copy thereof. It seems that this must have been done, and a copy or a citation received by Crowe at Gallup on the 26th of March, 1915, as this fact is set out in Crowe's answer which Mr. Wilson showed me, although it is not made a part of the record attached to the requisition. {<sup>\*178</sup>} In that answer Crowe swears that he had never heard or known anything of the order of March 8, 1915, until he received the citation on May 26, 1915, and that he did not then know what was in it, except so far as indicated in the judgment of May 24, 1915, or the citation as he calls it, which was sent to him. The merits of the answer are immaterial to us, but the court found that it was insufficient, on June 28, 1915, and made an order that the time for the payment to the Clerk of \$ 326.85 should be extended to July 20, 1915, by Crowe & McCoy, "and that upon failure to pay said amount, as ordered, they will be deemed in further contempt of court and a warrant for their arrest be issued and they severally dealt with according to law."

On July 20, 1915, the court entered an order reciting that the plaintiffs, not having complied with the order of June 28, 1915, were found to be acting in contempt of court and warrants for their arrest ordered issued.

It further appears from the record that Crowe and McCoy made a claim to the court to be allowed, for various expenses incurred in connection with the garnishment and other proceedings, which claims have not been passed on by the court, but the amount of which they have retained in their hands. On this condition of the record two questions arise, the first being as to whether Crowe can be considered as a fugitive from justice within the meaning of the law, and second, whether the requisition complies with the requirements of the United States statute, which are, in substance, that it must be based upon an indictment or an affidavit made before some magistrate.

Mr. Wilson urged that failure to comply with the order made in July, 1914, was an act of contempt and made the offense complete, but I am unable to agree with this. It seems that on March 8, 1915, the court gave Crowe & McCoy ten days within which to deposit the \$ 817.15. The judgment of May 24, 1915, shows that Crowe & McCoy did deposit with the Clerk \$ 782.15, or \$ 35.00 less than the full amount of \$ 817.15, but it is not shown when that deposit was made, whether before or after March 8, 1915. In a finding of facts made by the Judge, which Mr. Wilson showed me, it is made to appear that Casad was indebted to Crowe & McCoy in the sum of \$ 35.00, but it does not appear in

any way that this is connected with the deduction of \$ 35 which Crowe & McCoy made from the sum of \$ 817.15. This seems to make it clear that the alleged contempt consists in the shortage of \$ 35.00 in the amount paid into court by Crowe & McCoy, but I am unable to discover that any offense was committed by Crowe in Arizona, and that he afterwards left the state so as to become a fugitive from justice within the meaning of the law on this subject. The only opportunity that he had of violating the order of March 8, 1915, was when he was there for one day on March 12, 1915, but it cannot be said that his offense could be completed until the expiration of the time limited by the court within which the \$ 817.15 should be deposited, or rather, the additional \$ 35.00 to make that amount. I am, therefore, of opinion that he is not a fugitive from justice.

As to the second point to be considered, it must be borne in {\*179} mind that extraditable offenses are treason, felony or other crime. Any offense against the laws of the state making the requisition comes under the heading of "other crime." By the statutes of Arizona, Section 156 of the penal code, it is declared that every person guilty of any contempt of court of the kind specified in that section is guilty of a misdemeanor, and among the things enumerated is "wilful disobedience of any process or order lawfully issued by any court." The fact, however, that such things are misdemeanors and may be prosecuted as such, will not deprive the court of power to punish for contempt without any formal prosecution as in the case of other misdemeanors, but if one is to be prosecuted for a misdemeanor I am of opinion that he must be prosecuted the same as for any other crime of that sort. By Section 835 of the penal code of Arizona, it is provided that all criminal actions or proceedings shall be commenced by complaint in writing under oath, setting forth the offense charged, with particulars of time, place, person and property. In Section 729 of the same code, it is declared that "A criminal act is not the less punishable as a crime because it is also declared to be punishable as a contempt," and in view of this section, which indicates a separation between things punishable merely as a contempt and otherwise as a crime, I believe that such misdemeanors as are created by Section 156 of the code must be prosecuted by complaint before a magistrate, in accordance with Section 835. If that is the proper way that they should be prosecuted, then a copy of the complaint should accompany the application for the requisition, but it is quite clear in the present case that no such prosecution was ever begun. I am forced to the conclusion that the present requisition, and the application therefor which accompanies the same, are defective because there is no copy of any complaint, and it affirmatively appears from the record presented, that there never has been any complaint, charging Crowe with a misdemeanor under the laws of Arizona. It was argued to me by Mr. Wilson that the adjudication of the court ought to be taken as a substitute for an indictment or affidavit, but I am unable to agree to this, and I believe that we are so restricted by the act of Congress that requisitions ought not to be made except in cases founded upon an indictment or affidavit of the kind prescribed in the statute.

I have reached this conclusion with great reluctance, because, as you know, I am always of opinion that any requisition should be honored if possible for you to do so.