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Is It Lawful to Bring a Man Back to Pennsylvania by Extradition on the Charge of Desertion under the Act of March 13 1903 for the Purpose of Proceeding against Him under the Act of April 13 1867

William H. Baldwin

IS IT LAWFUL TO BRING A MAN BACK TO PENNSYLVANIA BY EXTRADITION ON THE CHARGE OF DESERTION UNDER THE ACT OF MARCH 13, 1903, FOR THE PURPOSE OF PROCEEDING AGAINST HIM UNDER THE ACT OF APRIL 13, 1867?

WILLIAM H. BALDWIN.[1]

The act of 1867 was in addition to the remedies then provided by the poor law of 1836, which it resembles. (*Demott v. Com.,* 64 Pa. 302, 1870; *Com. v. Teel,* 30 Pa. C. C. 566, 1905). The procedure in each was practically the same, but under the act of 1867 it was not necessary that the wife or children should be in destitute circumstances, and either of them or any other person could make the complaint, whereas under the poor law the complaint could be made only by the overseers or directors of the poor.

The defendant was not charged with any crime under either law, but on complaint before a magistrate could be arrested and bound over with surety to the next court of quarter sessions to answer the charge of desertion.

Upon such appearance the court of quarter sessions had power to order the defendant to pay such sum as the court thought desirable and proper for the comfortable support and maintenance of his wife and children, and to commit him to the county prison, there to remain until he comply with the order or give security for such compliance.

An amendment to the act passed two years later provides for the release of the defendant at the end of three months if he is unable to comply with the order or give security, and though this has been the practice there is no limit to the duration of the imprisonment if the court is of the opinion that the accused can pay, or can in some way obtain security for the payments ordered. (*Com. v. James,* 142 Pa. 32, 1891; *Com. v. Baldwin,* 149 Pa. 305, 1892).

A further amendment in 1907 removed the limit of $100 a month to the sum ordered to be paid as fixed by the original act, so that the amount of payment as well as the time limited only by the judgment of the court; though the act of June 15, 1911, which provides that where an order for support is not complied with for thirty days, the

[1]After graduating at Western Reserve College, Mr. Baldwin was engaged in business for many years until 1901. Since then he has devoted himself to social work. He published, several years ago, a careful study of the "Family Desertion and Non-Support Laws" of all the states, and has written numerous articles on that subject, including one in this Journal, Vol. III, No. 3, based on the first annual report of the Court of Domestic Relations in Chicago.

court may issue an attachment and adjudge the person in contempt with power to commit him to the county jail for not more than six months and which repeals inconsistent acts, seems to limit the imprisonment to that period.

The act is of a quasi-criminal nature, and this has given occasion for numerous decisions in the years which have elapsed since its passage, some of which will be spoken of hereafter.

The act of 1903 is a criminal statute, which provides that if any husband or father within the state shall thereafter separate himself from his wife or children who are destitute, without reasonable cause, and shall wilfully neglect to maintain them, he shall be guilty of a misdemeanor, and on conviction be sentenced to imprisonment not exceeding one year, or to pay a fine not exceeding $100 or both.

The statute further provides that upon conviction the court may suspend sentence during compliance of the defendant with any order for support theretofore made against him, or upon compliance with an order for support which the court is then given power to make.

The proceeding under this act, as the law stands, must be by indictment with a trial by jury, though this might be avoided for this crime if the legislature saw fit to provide that it should be tried upon complaint without a jury; and the expense and delay of this have limited the number of prosecutions under this act, by far the greater number of suits for desertion or non-support being brought under the act of 1867.

In many cases the deserting husband leaves the state, and under the act of 1867 he could not be brought back by extradition proceedings, because no crime was charged. The question as to reaching him with a requisition from the governor under the act of 1903 was raised shortly after its passage, and in an opinion in Wetzel's case (28 Pa. Co. Cts. 379, Sept. 10, 1903) Attorney General Carson declared that, as the offense is misdemeanor, a requisition should be allowed when application under it was made in proper form. In accordance with this many requisitions for such deserters have been issued each year since. In order to avoid the delay and expense of trial by jury which this act requires, further proceedings under it have often been dropped after the men have been brought back, and they have been prosecuted instead under the act of 1867. The question is whether or not it is lawful to bring them back under the act of 1903 with the expectation of prosecuting them under the act of 1867.

It has been held that a man delivered up under the constitutional provision for one offense cannot be tried for another until he has had an opportunity to return to the surrendering state. In Daniel's case

(Binn's Justice, 11th Ed., 1912, p. 624), decided April 22nd, 1848, Judge Parsons, of the Court of Quarter Sessions of Philadelphia, is reported to have held that a fugitive could not be tried for an offense other than that on which his rendition was obtained without an opportunity to return to the state from which he was recovered.

In *State v. Hall* (40 Kas. 338, 1888), the court said:

"To try a person for an offense other than the one for which he was extradited would be an abuse of judicial process."

In discharging him from a count in the indictment added after his return the court said that sister states have more reason for applying the above principle than exists between a state and a foreign country, because they cannot make such a provision in treaties. It cited *U. S. v. Hauscher* (119 U. S. 407, 1886) and other international cases where trial was limited to the offense for which a man was extradited, and said that, as in these treaties there was no provision that a person should be tried only for the crime for which he was extradited they applied perfectly in this case as to the principle enunciated.

On the other hand, there are a number of cases in which the contrary opinion is expressed. One of the most important of these was *Ham v. State* (4 Tex. App. 645, 1878) where it was held that a man brought back from Missouri might be tried upon an indictment found after his return for a different offense.

In *State v. Stewart* (60 Wis. 587, 1884) the defendant was arrested on a different charge after being acquitted on the charge of embezzlement under which he had been brought back from Indiana. In this opinion the court said that no provision in the constitution provided for any delay in arresting a prisoner after acquittal for another offense than that for which he was extradited; that the constitutional provision was intended to make each state to a certain extent an agency in the administration of the laws of every other state; that the surrendering state was not complaining and the prisoner could not.

The Pennsylvania Supreme Court made a similar ruling in Dow's case (18 Pa. St. 37, 1851), where a man brought back from Michigan on a charge of forgery claimed that his arrest was illegal. The court said:

"Had the prisoner's release been demanded by the executive of Michigan, we would have been bound to set him at large."

It was not, and he could not plead irregularity so long as the crime had been really committed.

So in *Ker v. Illinois* (119 U. S. 436, 1886) it was held that although a man brought back from Peru had been kidnaped, the prisoner could not plead irregularity of his arrest so long as it appeared that he had

been guilty of the crime, in the absence of any demand from the country from which he was taken.

In his discussion on this subject Spear (The Law of Extradition, 1879, p. 346) inclines to the opinion that a fugitive cannot properly be tried for another offense than that for which he has been brought back, saying:

"Good faith, in both cases (international and interstate), requires that the custody thus obtained should not, by other arrests and processes, be extended beyond the purpose for which it was asked on the one hand, and granted on the other."

On the other hand, Professor Moore (Moore on Extradition, 1891, p. 1044), after discussing the arguments on both sides, inclines to the opinion that a man brought back from another state may be tried for a crime other than that for which he has been surrendered, giving as reasons that the constitution and laws of the United States do not recognize the right of asylum as between the states and territories of the Union; that the obligation to surrender is absolute; and that the danger of trial for political offenses, one of the main reasons for limiting the causes for surrendering fugitives as between independent states, does not exist between the states of the Union.

The weight of authority seems to be on the side of the latter opinion, and where the trial is for another crime for which the party might have been extradited if the demand had been based on that instead of the crime for which he was actually surrendered.

There is also authority for holding that a man can be arrested in a civil suit after being brought back by extradition proceedings, if the proceedings were not instituted for reaching him in the civil suit. In *Williams v. Bacon* (10 Wend. 636, 1834) the defendant had been brought back from Massachusetts on the charge of obtaining goods under false pretenses and acquitted. Before the trial he was arrested on writs founded on contracts, and after release again arrested on a capias. A motion to set this aside was denied on the ground that there was no pretense that the extradition was a pretext to a civil suit, though it is stated that, had such a fact appeared as to the motive in the arrest, the defendant would have been discharged.

In *Brownings v. Abrams* (51 How. Pr. 172, 1876) a man brought back to New York from California, sentenced to state prison and afterwards acquitted on appeal, was arrested on a civil suit before his second trial. His release was demanded on the ground that he had been brought back for that purpose, but the court being satisfied that the plaintiff had not caused the defendant to be returned with a view to a civil suit, the motion was denied.

It is clear, however, that a man cannot be held in a civil suit if there is reason to believe that he has been extradited for that purpose under a criminal charge. In *Underwood v. Fetter* (6 N. Y. Leg. Obs. 66, 1848) the defendant had been brought back from Louisiana on a charge of obtaining goods on false pretenses, released on bail, and arrested in a civil suit. The plaintiff denied having had any thought of arrest in a civil suit until after the defendant's arrival in the state, but the court held that his arrest in the civil suit was improper, and ordered that he be discherged on giving common bail.

In Lagrave's case (14 Abbt. Pr. 343, 1873) the defendant, who had been brought back from France by an illegal process, was arrested in a civil action. The legality of this arrest depended on whether the parties who arrested him had been responsible for the abuse of legal process by which he had been brought within the jurisdiction, and since it appeared that they had been, he was discharged.

But service in a civil suit later, which evidently did not involve arrest, as it was said not to restrain the defendant's liberty, was held to be vaild because this plaintiff had had no part in the illegal extradition.

Also in *Adriance v. Lagrave* (59 N. Y. 110, 1874) evidently growing out of the same transactions, it was said that it had been held, in other actions by parties concerned in the illegal extradition for the purpose of arresting the defendant in a civil action, that he should be discharged, but that the rule did not apply in this case because the present plaintiffs were not so concerned. This clearly implied that the defendant would have been discharged if there had been ground for believing that they had been concerned.

Another important case on this point is *Compton v. Wilder* (40 O. St. 130, 1883) in which the defendant had been brought from Pennsylvania to Cincinnati on a requisition under the charge of obtaining a promissory note by false pretenses, and was released after giving bond for his appearance. Suit was brought on that day on indebtedness, and he was arrested before he could leave for his home in Pennsylvania. The court held that he had been surrendered by Pennsylvania for the sole purpose of being prosecuted for the alleged crime, that good faith demanded that he should not be deprived of any other rights, and that it was bad faith to begin suit in a civil action before he had returned to his home. In this decision the prior case of *Work v. Corrington* (34 O. St. 64, 1877) was cited, in which references were made to numerous instances of the abuse of the requisition for similar purposes, which led to a joint resolution of the Ohio Legislature in 1870 protesting against

it, and the omission of the words "or other crime" from the Ohio statute relating to the issuing of requisitions.

Nor will a civil proceeding be held valid, even though in itself it might be warranted, if the defendant had been brought back from the jurisdiction by a trick; and discharges were granted in *Metcalf v. Clark* (41 Barb. 45, 1864), where a man who lived in Canada had been induced to come inside the United States line for the purpose of arresting him on a civil claim, and *Wanzer v. Bright* (52 Ills. 35, 1869), where a man had been induced to come to Chicago from Wisconsin by a fraudulent telegram and letter for the purpose of arresting him on a civil action. In the latter decision reference was made to *Snelling v. Watrous* (3 Paige 314, 1830) where an insolvency proceeding was used as a means for bringing the defendant within the reach of process; *Carpenter v. Spooner* (2 Sandf. 717, 1850) where the defendant was brought from Brooklyn to New York by a decoy letter, and *Seaver v. Robinson* (3 Duer 622, 1854), in which the defendant, who lived in Connecticut, was arrested on coming to New York as a witness.

These cases clearly establish the principle that extradition proceedings cannot be used to bring a man back with a view to prosecuting him on any charge which would not in itself have been a ground for his extradition. Cannon's case (47 Mich. 481, 1882), which has been repeatedly cited in later decisions without criticism, bears directly on this question, which is similar to the one under consideration. In this the defendant had been brought back from Kansas on a criminal charge of seduction, released on bail, and two days later committed to jail on an arrest in bastardy proceeding. He refused to plead. The suit for seduction was dismissed ten days later on the admitted ground that it was unfounded. It was not charged that the extradition was with fraudulent design, but the prosecuting attorney knew the complaint would not lie when he began the bastardy proceeding. The question was,

"Whether an arrest made for a different purpose, on which no extradition could have been demanded, was lawfully made, when the prisoner was brought into this state under a requisition, and no proceeding had or attempted for the crime on which he was delivered up to his state.

"The power of demanding or of extraditing is confined to such criminal cases. Bastardy proceedings, although of a mixed character, involve no indictable offense on which a conviction could be had in their course, and they are not criminal proceedings in the proper sense of the term. (*Cross v. People,* 8 Mich. 113, 1860.) It is not pretended that any demand of extradition could be made on such a charge.

"If the requisition had been made for an expressly fraudulent purpose, and with no expectation of prosecution for the crime which was its pretext, we do not think any department of government could sanction such a use without the perversion of justice. No ingenious reasoning could remove from such a transaction the disgrace which no decent commonwealth could afford to incur." The defendant was discharged.

To show how closely the last decision applies to the question before us, it is necessary to consider the nature of the proceeding under the act of 1867. In some respects it is like a criminal prosecution in that the defendant is charged with a breach of duty, and the law considers such a desertion as an offense (*Com. v. Keeper,* S. & R. 505, 1818), and it is prosecuted in the name of the commonwealth (*Com. v. Reed,* 5 Pa. Dist. 57, 1895). It is also to be noted that the proceedings is directed against the person of the defendant rather than against his property (*Demott v. Com.* 64 Pa. 302, 1870, and *Com. v. Reed,* just cited). Moreover, there have been numerous decisions that, after being once convicted and undergoing the sentence prescribed, the defendant cannot be again proceeded against, unless he resumed relations and again deserted, which seemed to depend on the principle that a man cannot be twice put in jeopardy or punished for the same crime.

Com. v. Bailey, 8 Phila. 485, 1870.

Com. v. Bowman, 6 Luz. Leg. Rep. 176, 1890.

Com. v. Cawley, 7 Luz. Leg. 539, 1894.

Com. v. Markley, 5 Pa. Dist. Rep. 134, 1895.

Com. v. Rudy, 27 Pa. C. C. 450, 1904.

In the same line is the holding that the proceeding is so much like a prosecution for a crime that the defendant cannot be compelled to testify in his own case. (*Com. v. Reed,* cited above.)

But the weight of opinion indicates that it cannot be considered a criminal proceeding. An early decision by Judge Sharswood (*Demott v. Com.* 64 Pa. 302, 1870) declares that the act grants additional relief, an additional remedy to those of the overseer of the poor, which is not a criminal proceeding; and in *Com. v. Teel* thirty-five years later (30 Pa. Co. C. 566, 1905) this opinion is referred to with the further statement that the act is designed to enforce a civil obligation. It is also in addition to a civil suit which the wife might bring for mantenance. It is like the act of 1836 (*Com. v. Tragle,* 4 Pa. Super. Ct. 159, 1897), the poor law, and the argument that it is a criminal prosecution is not sustained.

Numerous decisions declare that the sole purpose of the act is maintenance. This is asserted in each of the three decisions just cited, and is affirmed in *Keller v. Com.* (71 Pa. 413, 1872), and *Carey v. Carey* (25 Pa. Super. Ct. 223, 1904), which distinctly state that maintenance is the sole object of the act of 1867.

Nor can the offense be held to be a crime as the statute stands. It is clearly stated that it is not in *Com. v. Rudy,* (29 Pa. C. C. 450, 1904); also that in the act no offense is defined and no punishment prescribed, in *Com. v. Tragle* (4 Pa. Super. Ct. 159, 1897). An im-

portant decision as to this is that in *Com. v. Kerbey* (8 Pa. Dist. 671, 1899), in which the defendant claimed that, as the desertion of his wife occurred more than two years before, the action was barred by the statute of limitations. The court held that under the act of 1867 wife desertion is not a crime, and that the statute of limitations does not run.

Moreover, it is not necessary under this act to bring the prosecution in the county where the desertion occurred, as it is in the case of a crime. In a *habeas corpus* proceeding in connection with *Demott v. Com.* (64 Pa. 302, 1870), above cited, Judge Agnew, after referring to it as an "additional" remedy at the instance of deserted wife or children, says that it refers to no distinct locality, but provides for arrest of the husband or father if within the limits of the commonwealth. In *Barnes v. Com.* (11 W. N. C. 375, 1882) it is held that the court has jurisdiction without reference to where the original desertion may have been, and in *Com. v. Hart* (12 Pa. Super. Ct. 605, 1900) the prosecution was held to be valid, although the actual desertion had occurred some time before in another state.

The county has also been declared not to be liable for costs in proceedings under this act, as it is, under the act of May 19, 1887, P. L. 138, in criminal proceedings. In *Sepp v. Lehigh County* (4 Del. Co. 391, 1890) an alderman failed to recover costs from the county in a proceeding under the act of 1867, in which the defendant was discharged; and in *Terrill v. Crawford* Co. (22 Pa. C. C. 469, 1899) the county was held not to be liable for witness fees in a case under the act of 1867, because it was very apparent that the legislature did not consider it a crime in passing the act as to costs in criminal cases.

Even without these decisions, which are plain, the opinion of Stone, Secretary of the Commonwealth (9 Pa. Co. Court Repts. 27, 1890), which has been repeatedly referred to in later decisions, is conclusive as to the point under consideration. This grew out of an application for a requisition under the act of 1867, which was refused on the ground that although some aggravated cases of desertion seemed to render proper the exercise of such power, the governor had not power to grant a requisition, because the act of 1867 is remedial and not penal, and wife desertion under it is not a crime.

Another case bearing directly on this question is *Com. v. Johnston* (12 Pa. C. C. 263, 1892). In this the defendant, after being indicted for rape and bastardy, fled to Ohio, where he was arrested on a requisition and taken before the court which ordered him to be taken back to Pennsylvania to be tried for rape only. On being taken

back, the charge for this was dropped, but he was convicted of bastardy, and a motion was made for his discharge on the ground that the trial was not in accordance with the direction of the court in Ohio, where bastardy is not a criminal offense, as it is in Pennsylvania.

The Pennsylvania court held that the conviction was proper because the offense for which is was had is a crime in Pennsylvania. Reference is made to the release of the defendant in Cannon's case (47 Mich. 481, 1882), with the explanation that that prosecution was for bastardy, which was not an extraditable offense as it is in Pennsylvania. Taking the two cases together, it appears to be definitely established by the Pennslyvania decision that it would not be lawful to bring a man back to Pennsylvania on a criminal charge and then prosecute him on a non-criminal charge for which he could not be extradited, even though it were closely connected with conduct on which the alleged criminal charge was based.

It is especially important to notice the particular danger of injustice which is likely to arise if prosecutions under the act of 1867 are allowed, after prosecutions under the act of 1903 have been dropped against a man who has been brought back to Pennsylvania on a criminal charge under that act. The crime under the act of 1903 consists of the desertion of and the failure to support a wife and children who are destitute, or dependent wholly or in part on their earnings for adequate support. If they are not destitute, or thus dependent on their earnings, desertion is not a crime under the statute; but the act of 1867 applies also where the wife and children are not in destitute circumstances, so that for the same conduct, and under the same circumstances, a man may properly be convicted in a prosecution under the act of 1867, even though the charge of crime under the act of 1903 could not be sustained at all. This fact is brought out in *Com. v. Teel* (30 Pa. Co. C. 566, 1905), in which the court says that it is possible that a decree for maintenance under the provisions of the act of 1867 may in some circumstances be made when conviction by indictment under the act of 1903 would not be justified, and that the legislature probably intended by this act to provide an additional remedy only in those instances where a man left his wife and children destitute.

In the civil suits above referred to, the arrest was held to be vaild only where the plaintiff was not concerned in the extradition proceedings; and in Cannon's case emphasis was laid on the fact that the prosecuting attorney was familiar with the circumstances when extradition proceedings were instituted, and knew that extradition for the offense for which he attempted to prosecute the man after dropping the prose-

cution for the alleged crime for which he was extradited would have been impossible.

Prosecution under either desertion act in Pennsylvania, after a man has been brought back under the act of 1903, depends upon the same circumstances, which were known to the district attorney when the requisition was asked for, and it is clear that, if a man is extradited under the act of 1903, the prosecution should be carried on under that act, and that it is not lawful to drop it and punish him instead under the act of 1867. If it be held that imprisonment under the act of 1867 may be continued indefinitely, as in *Com. v. James* and *Com. v. Baldwin,* above cited, the man might in this way suffer more severely for something which is not a crime than he could be made to for the alleged crime for which he was extradited, and for which the imprisonment cannot be longer than a year, with a fine of not more than $100.

The legislature has power to provide for trial without jury in cases arising under the act of 1903, for this offense was not subject to jury trial when the constitution was adopted, and to make hard labor a necessary part of the punishment, or to include compensation to the family, but until it does men brought back under this act must be tried and punished under it, if tried at all, as now provided by law.