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Forrest Revere Black

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INTERSTATE RENDITION AS APPLIED TO A PERSON BROUGHT INVOLUNTARILY INTO THE SURRENDERING STATE

FORREST REVERE BLACK*

On January 27, 1937, a Pennsylvania Common Pleas decision, *Church v. Hackenburg*,¹ emphasized anew the confusion growing out of interstate rendition proceedings in connection with prisoners who have been forcibly brought into the state for service of a Federal sentence and who on release from the Federal Penitentiary are wanted by another state. This decision by an inferior court challenges the legislative ingenuity of the states and of the nation.

The facts in the Church case were as follows: On March 29, 1932, the petitioner, Walter Church, pleaded guilty in a criminal court of the State of New York to attempted robbery, on which charge he was sentenced by the New York State court to serve a term of two and a half to five years in the New York State Penitentiary at Ossining, New York. On the 21st of August, 1933, the petitioner was paroled from the New York State Penitentiary by the New York State Parole Commission and required to report from time to time to the proper officer of said Parole Commission. On October 1, 1933, the Parole Commission revoked the parole of Church on the ground that he failed to report. On January 10, 1934, Church was arrested by New York State authorities at White Plains, New York, charged with passing and having in his possession counterfeit money and was then identified as a parole violator. On July 18, 1934, he was indicted in the United States District Court for the Southern District of New York for the unlawful passing and possessing of counterfeit money. On July 19, 1934, the petitioner was turned over by the New York State authorities at White Plains, New York, to the United States Marshal for the Southern District of New York. While in the custody of the said

* Special Assistant to the Attorney General, Department of Justice, Washington, D. C. Formerly Professor of Law in the University of Kentucky and in George Washington University.

¹ Commonwealth of Pennsylvania ex rel Walter Church v. Hackenburg, Sheriff of Union Co., Pa., by Curtis J. Leshner, Common Pleas Judge for Union Co., Pa., No. 100, January Term, 1937.

authorities of the State of New York, Church was interviewed by a representative of the New York State Parole Commission, who was informed as to the identity of the petitioner and as to the facts and circumstances surrounding his arrest on the charge of passing and possessing counterfeit money.

The petitioner, Church, on July 19, 1934, entered a plea of guilty to said charges and was sentenced to serve three years on three different counts in the indictment, all three sentences to run concurrently, and on August 14, 1934, he was removed from the State of New York to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, by the United States Marshal, at which place he remained confined until November 8, 1936, at which time he was released.

Prior to his release, the Governor of the State of New York instituted extradition proceedings against Church, charging that he was a parole violator and had fled from justice of the State of New York. The Governor of Pennsylvania had found that Church was a fugitive from justice of the State of New York. The Governor of Pennsylvania, in granting extradition, acted on the following statutory authority: "It is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, *who has fled from justice and is found in this State.*"²

Section 124 of the same title provides: "A warrant of extradition must not be issued, unless the documents presented by the executive authority making the demand show that the accused was present in the demanding state at the time of the commission of the alleged crime, and that he thereafter *fled from justice in that state and is now in this state*, and that he is lawfully charged, by indictment found, or by an information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he has been convicted of crime in that state, or has escaped from confinement or broken his parole."³

The petitioner contends that he did not request his removal from the State of New York to Lewisburg, Pennsylvania, but that on the contrary he was forcibly, and against his will, brought into the State of Pennsylvania, with the knowledge and presumably the

² Purdon's Pa. Stats. Ann., Title 19, sec. 121.

³ *Ibid.*, Title 19, sec. 124.

consent of the New York State authorities. It is the contention of the New York State Parole Commission that the fact that the petitioner was found within the confines of the State of Pennsylvania, and that he was a parole violator on a criminal charge, was sufficient ground to sustain extradition.

Common Pleas Judge Lesher denied this contention and held that Church was not a fugitive from justice of the State of New York. The court said "As a matter of fact, Church was not allowed the opportunity to return to his own state when released from the United States Penitentiary at Lewisburg, Pennsylvania. He was met at the gates of the penitentiary at the time of his release by the Sheriff of Union County, Pennsylvania, and immediately taken into custody and placed in jail. We feel that the Governor of Pennsylvania had no authority to issue a warrant for the delivery of the petitioner to the New York authorities for the purpose of returning him to the State of New York, and the prayer of the petition must be granted, and the Sheriff of Union County must be directed to release the petitioner, Church."

It shall be our purpose to explore the possibilities of State and Federal legislative remedies so as to provide for the effective interstate rendition of a person brought involuntarily into the surrendering state.

The constitutional sanction for interstate rendition is found in Article IV, Section 2, Clause 2 of the Constitution which provides: "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This constitutional provision is not self-executing. Mr. Justice Story in *Prigg v. Pennsylvania*,⁴ said, "The Constitution, although it expressly provides, that the demand shall be made by the executive authority of the state from which the fugitive has fled, is silent as to the party upon whom the demand is to be made, and as to the mode in which it shall be made . . . the right and the duty are dependent, as to their mode of execution solely on the act of Congress; and but for that, they would remain a nominal right and passive duty, the execution of which being entrusted to and required of no one in particular, all persons might be at liberty to disregard it."

⁴ 41 U. S. 539, 620.

I. *Federal statutes dealing with interstate rendition.*

(a) *The Act of February 12, 1793.* The fundamental Federal statute was passed on February 12, 1793, and was based on a report of Edmund Randolph, Attorney General of the United States, in the Washington administration; and grew out of a dispute between Pennsylvania and Virginia as to the right of interstate rendition. This statute is still in force and its constitutionality was upheld in the case of *Prigg v. Pennsylvania*.

The act of 1793 has been reproduced in the Revised Statutes of the United States in the following form:

"Sect. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."⁵

(b) *District of Columbia.* By the sixth section of the act of March 3, 1801,⁶ Congress made special provision for the rendition of criminals taking refuge in the District of Columbia. This provision is now embodied in the Revised Statutes relating to the District of Columbia, as follows:

"Sect. 843. In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief justice of the supreme court shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations

⁵ 18 U. S. C. A. 662 (1927).

⁶ 2 Stats. at L. 115.

as the executive authority of the several States are (sic) required to do by the provisions of sections fifty-two hundred and seventy-eight and fifty-two hundred and seventy-nine, Title LXVI, of the Revised Statutes, 'Extradition,' and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery."

(This law does not cover the case of a fugitive from the District. Such a case is covered by section 1014 of the Revised Statutes of the United States.)

(c) *Offenders against Federal Law.* By section 33 of the Judiciary Act of 1789,⁷ provision was made for the recovery of fugitive offenders against the laws of the United States. As amended, this provision is reproduced in the Revised Statutes of the United States, as follows:

"Sect. 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."⁸

II. *Decisions of the Supreme Court of the United States on the question of what constitutes a "fugitive from justice."*

At the outset, it should be noted that there is no decision by the Supreme Court of the United States that deals directly with the question raised in the Church case. There are, however, several

⁷ 1 Stat. at L. 91.

⁸ Removal from one Federal District to another under Sec. 1014 is unlike extradition or interstate rendition, in that the protection owed by a sovereign to those within its territory is not involved. *U. S. ex rel. Karrin v. Mulligan*, 295 U. S. 396, 399, 400. See Hardy, *Removal of Federal Offenders*.

Supreme Court decisions that attempt to define what constitutes a "fugitive from justice," and for purposes of convenience we have classified these under three headings.

(A) *Method of return to State where crime was committed (whether by forcible abduction or fraud) is not open to complaint.*

In *Mahon v. Justice*,⁹ one Mahon was indicted for murder in the State of Kentucky but before his arrest he fled to the State of West Virginia. The governor of the former State by requisition demanded of the executive of the latter State the arrest and surrender of Mahon as a fugitive from justice, this demand, for some reason was refused. Whereupon the agent of Kentucky with other citizens of his State, by force took possession of Mahon and brought him back to Kentucky. The chief executive of West Virginia demanded of the governor of Kentucky the return of Mahon, this also was refused; thereupon the governor of West Virginia sued out a writ of habeas corpus in the Federal court of Kentucky, praying for the discharge of Mahon, alleging that his (Mahon's) then detention in Kentucky was unlawful because he had not been removed from West Virginia in accordance with the Constitution and laws of the United States. Upon a hearing the writ was quashed and the petition was dismissed, the court holding that Mahon was lawfully held in custody in Kentucky.¹⁰ An appeal was taken to the Supreme Court of the United States and after due consideration the judgment of the lower court was affirmed. In the course of an able opinion the court used this language:

"So in this case, it is contended that, because under the Constitution and laws of the United States a fugitive from justice from one State to another can be surrendered to the State where the crime was committed, upon proper proceedings taken, he has the right of asylum in the State to which he has fled, unless removed in conformity with such proceedings, and that this right can be enforced in the courts of the United States. But the plain answer to this contention is, that the laws of the United States do not recognize any such right of asylum, as is here claimed on the part of a fugitive from justice in any State to which he has fled; nor have they, as already stated, made any provision for the return of parties, who, by violence and without lawful authority, have been abducted from a State. There is therefore, no authority in the courts of the United States to act upon any such alleged right."

⁹ 127 U. S. 714 (1887).

¹⁰ *In re Mahon* (1887) 34 Fed. 525.

In *Pettibone v. Nichols*,¹¹ the court said: "Even if the arrest and deportation of one alleged to be a fugitive from justice may have been effected by fraud and connivance arranged between the executive authorities of the demanding State and the surrendering State so as to deprive him of any opportunity to apply *before deportation* to a court in the surrendering State for his discharge, and even if on such application to any court, State or Federal, he would have been discharged, he cannot, so far as the Constitution and laws of the United States are concerned—*when actually in the demanding State, in the custody of its authorities for trial, and subject to the jurisdiction thereof*—be discharged on habeas corpus by the Federal court. It would be improper and inappropriate in the Circuit Court to inquire as to the motives guiding or controlling the action of the governors of the demanding and surrendering States.

"No obligation is imposed by the Constitution and laws of the United States on the agent of a demanding State to so time the arrest of one alleged to be a fugitive from justice and so conduct his deportation from the surrendering State as to afford him a convenient opportunity, before some judicial tribunal, sitting in the latter State, upon habeas corpus or otherwise, to test the question whether he was a fugitive from justice and as such liable, under the act of Congress, to be conveyed to the demanding State for trial there."¹²

In *Lascelles v. Georgia*,¹³ it was held that "a fugitive from justice who has been surrendered by one State of the Union to another State, upon requisition charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, no right, privilege or immunity to be exempt from indictment and trial, in the State to which he is returned, *for any other or different offense from that designated in the requisition*, without first having an opportunity to return to the State from which he was extradited."

The case of *Cook v. Hart*¹⁴ was an appeal from an order of the Circuit Court of the United States, for the Eastern District of Wisconsin, dismissing a writ of habeas corpus and remanding the relator, Charles E. Cook, to the custody of the Wisconsin authorities

¹¹ 203 U. S. 192 (1906).

¹² The same doctrine was announced in the cases of the co-defendants Haywood and Moyer; *Haywood v. Nichols*, 203 U. S. 222 (1906) and *Moyer v. Nichols*, 203 U. S. 222 (1906).

¹³ 146 U. S. 543 (1893).

¹⁴ 146 U. S. 183 (1892).

for trial in its courts. Cook had previously been arrested in the State of Illinois by virtue of a governor's warrant which was issued upon a requisition of the governor of Wisconsin, charging Cook with the commission of crime against the laws of that State and with being a fugitive from its justice. When arrested in Illinois he sued out a writ of habeas corpus, claiming that he was not a fugitive from Wisconsin and upon a hearing in the former State, his petition was dismissed and he was delivered to the agent of Wisconsin and at once carried to the demanding State. Cook acquiesced in the disposition of his case in the courts of Illinois, making no effort whatever to have the supreme court of that State review the judgment of the lower court. Upon his arrival in Wisconsin and just as his trial had begun in that State, he sued out another writ of habeas corpus in the circuit court of the United States, alleging that he was unlawfully deprived of his liberty, in that he was not a fugitive from Wisconsin when arrested in Illinois and that therefore he was illegally deported from that State. The Federal court in Wisconsin decided against him and he prayed an appeal to the Supreme Court of the United States which affirmed the judgment of the lower court. The court reaffirmed the doctrine in the case of *Mahon v. Justice, supra*, and held that "the supreme court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State. That the question of the applicability of this doctrine to a particular case is as much within the province of a State court, as a question of common law or of the law of nations, as it is of the courts of the United States." The court further held that it is too late for the alleged fugitive from justice to object to even jurisdictional defects, after he is brought within the territory of the demanding State and further declared that, the authorities tended to support the theory that the executive warrant has spent its force, when the accused has been delivered to the demanding State.

(B) *The Supreme Court of the United States has repudiated the doctrine of "constructive presence" within the State where the crime was committed.*

In the case of *Hyatt v. People ex rel. Corkran*,¹⁵ the court said: "The language of section 5278, Revised Statutes, provides, as we think, that the act shall have been committed by an individual who

¹⁵ 188 U. S. 691 (1903).

was at the time of its commission personally present within the State which demands his surrender. . . . Thus the person who is sought must be one that has fled from the demanding State, and he must have fled (not necessarily directly) to the State where he is found. It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect interpretation of the statute, it has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed."

In *Strassheim v. Daily*¹⁶ it was held that "One who is never within the State before the commission of a crime producing its results within its jurisdiction is not a fugitive from justice within the rendition provisions of the Constitution, but if he commits some overt and material act within the State and then absents himself, he becomes a fugitive from justice when the crime is complete; if not before. Although absent from the State when the crime was completed in this case, the party charged became a fugitive from justice by reason of his having committed certain material steps toward the crime within the State, and the demanding State is entitled to his surrender under article IV, section 2, of the Constitution of the United States and the statutes providing for the surrender of fugitives from justice."

In *Ex parte Hoffstot*¹⁷ the court held that the "Petitioner, a resident of New York, indicted in Pennsylvania for conspiracy to bribe members of the Pittsburgh city council, could not be extradited in the absence of some proof that he had been physically present in Pennsylvania when the offense was committed, as otherwise he could not be a fugitive from the justice of that State. Where there was specific evidence that petitioner, a resident of New York, participated there in a conspiracy to bribe members of the city council of Pittsburgh to select certain banks in Pittsburgh, one of

¹⁶ 221 U. S. 280 (1911).

¹⁷ 218 U. S. 665 (1910).

which petitioner was president, as city depositories, and there was substantial evidence from which a jury would be justified in drawing an inference that petitioner was in Pittsburgh on a day when some act or acts in furtherance of the conspiracy were performed, there was sufficient proof that he was a fugitive from justice to justify his extradition to Pennsylvania."

(C) *The alleged "fugitive" must have left the State in which the crime is alleged to have been committed. It is immaterial as to his motive, purpose or reason for leaving.*

(It should be noted that none of the cases referred to below deal with the problem of *involuntary* leaving of the State by the alleged criminal wherein the crime was charged to have been committed.)

The court, in *Roberts v. Reilly*,¹⁸ said, "To be a fugitive from justice in the sense of the act of Congress regulating the subject, under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by the laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."

In *Bassing v. Cady*¹⁹ it was held that "One charged with crime and who was in the place where, and at the time when, the crime was committed, and who thereafter leaves the State, no matter for what reason, is a fugitive from justice within the meaning of the interstate rendition proceedings of the Constitution, and of section 5278, Revised Statutes, and this none the less if he leaves the State with the knowledge and without the objection of its authorities."

The court, in *Ex parte Hoffstot*,²⁰ said that "Where accused has committed a crime in one State, and afterwards leaves it, the right of extradition exists, without reference to his purpose in going."

The case of *Drew v. Thaw*²¹ held that "A party to a crime who afterwards leaves the State is a fugitive from justice; and, for the purposes of interstate rendition, it does not matter what motive induced the departure."

¹⁸ 116 U. S. 80 (1885).

¹⁹ 208 U. S. 386 (1907).

²⁰ 218 U. S. 665 (1910).

²¹ 235 U. S. 432 (1914).

III. *The Act of 1793 is not coterminous with the constitutional provision.*

(a) In one respect, the Act of 1793 is *broader* than the constitutional provision. The act includes territories but the constitutional provision does not include territories. In *Ex Parte Morgan*,²² Judge Parker of the United States District Court for the Western District of Arkansas, expressed the opinion that the Act of 1793 as applied to territories was constitutional,—not perhaps, under the rendition clause of the Constitution, but under the clause conferring upon Congress power to regulate territories. But the Supreme Court of the United States, in *Ex parte Reggel*,²³ held that the Act of 1793 must be given the same effect in the case of a fugitive from a State to a territory as where the demand is made upon the Governor of a State. The theory of this case, apparently, is that the rendition clause would justify this broader legislation.²⁴

(b) The Act of 1793 is *narrower* than the constitutional provision in that the act provides not for the surrender of the fugitive by the State in which he is found, but only for a surrender by the State into which he has fled. The Act of 1793 was intended, beyond question, to emphasize the doctrine of flight, for it will be observed that the words "has fled" are used three times in this section in referring to the fugitive.²⁵

The leading case dealing with the problem outlined in III (b) *supra* is *Innes v. Tobin*.²⁶ Here the plaintiff had been extradited to Texas from Oregon, on charge of murder, and tried and acquitted in the courts of the former State. However, without being released from custody, the plaintiff was then surrendered, upon extradition proceedings, to the authorities of Georgia from whose justice she was charged to be a fugitive. Habeas corpus proceedings having been instituted, and the case having reached the Supreme Court upon writ of error, that court held that the case was not covered by the legislation of Congress,²⁷ and that this failure upon the part of Congress so to provide left the matter within the discretionary power of the States to act as they might see fit according to the general principles of comity. The court said:

²² 20 Fed. 298.

²³ 114 U. S. 642.

²⁴ See John Bassett Moore, *Extradition and Interstate Rendition*, Vol. 2, pages 849, 850.

²⁵ See Scott on *Interstate Rendition*, p. 70.

²⁶ 240 U. S. 127.

²⁷ Rev. Stats., sec. 5278.

"No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatsoever, State or National. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them,—State authority until it was deemed essential by further legislation to govern them exclusively by National authority. In fact, such conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt. This becomes manifest when it is considered that, if the proposition now insisted upon were accepted, it would follow that the delivery of a criminal who was a fugitive from justice by one State on a requisition by another would exhaust the power, and the criminal, therefore, whatever might be the extent and character of the crimes committed in other States, would remain in the State into which he had been removed without any authority to deliver him to other States from whose justice he had fled. And this, while paralyzing the authority of all the States, it must be moreover apparent, would cause them all to become involuntary asylums for criminals; for no method is suggested by which a criminal brought into a State by requisition, if acquitted, could be against his will deported, since to admit such power would be virtually to concede the right to surrender him to another State as a fugitive from justice for a crime committed within its borders. It follows from what we have said that the court below was right in refusing to discharge the accused, and its judgment, therefore, must be and it is affirmed."²⁸

IV. *The problem of "extraterritorial" crime.*

In 1920, Judge A. H. Reid of Wisconsin, delivered an address before the American Bar Association²⁹ dealing with the hiatus in the law governing the extradition between states of persons charged with "extraterritorial" crimes. The problem here involves a situa-

²⁸ For discussion of case see Willoughby on the Constitution, Vol. I, pp. 298, 299.

²⁹ 45 Am. Bar Assn. Reports 432.

tion where X in State B shoots Y in State A. In this case the crime is committed in State A, but X is in State B and is not a fugitive from justice.

The National Conference of Commissioners on Uniform State Laws approved, in 1926, The Uniform Criminal Extradition Act. That act, according to the latest figures, has been adopted in eight States. Section 6 of this act specifically deals with the hiatus outlined in Judge Reid's address and illustrates the effectiveness of auxiliary legislation on the part of the States. Section 6 of The Uniform Criminal Extradition Act reads as follows:

"The Governor of this state may also surrender, on demand of the Executive Authority of any other state, any person in this state charged on indictment found in such other state with committing an act in this State intentionally resulting in a crime in such other state; and the provisions of this act not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."³⁰

No cases have been found clearly upholding this type of legislation as applied to "extraterritorial" crimes. However, it is stated in Cyc. that:

"As the Constitution, however, applies only to fugitives from justice, a state may, in the exercise of its reserved sovereign power, provide for the surrender of persons indictable for crime in another state, but who have never fled from it."³¹

In *State v. Wellman*³² a Kansas court, by way of dictum, said: "While the Federal statute does not impose a duty upon the governor of a state to recognize a requisition for the delivery of a person who is accused of an offense committed while he was not personally present within the State whose laws he is charged with breaking, there would seem to be no legal obstacle to a state's providing by statute for the surrender of a person within its jurisdiction to a state whose laws he is accused of violating while not physically within its borders, although without such legislation no authority therefor exists."

Mr. Spear, in his work on Extradition and Interstate Rendition,³³ takes the position that the problem of "extraterritorial"

³⁰ 9 U. L. A. III.

³¹ 19 Cyc. 85; also II R. C. L. 732.

³² 170 Pac. 1052; see also *State v. Hall*, 20 S. E. (N. C.) 729).

³³ P. 316.

crimes can be dealt with only by State legislation and not by Federal legislation under the existing Constitution. He says:

"The Constitution may be amended, and then the laws of the United States may be amended so as to cover such cases; or state laws may be enacted to furnish a remedy which is not now supplied by either. Either method is possible, and there certainly should be some method for awarding justice in this class of cases."

V. Congress might impose the duty of interstate rendition on Federal authorities.

John Bassett Moore, in his treatise on Extradition and State Rendition,³⁴ says: "The act of 1793 is not, however, by any means to be considered as a finality. Congress might enact further laws covering the whole ground, or might impose the duty of arresting and surrendering fugitives upon the Federal authorities. There is nothing in the Constitution that requires the demand to be made upon the governor of a State, or upon any other State authority, executive or judicial."

On March 11, 1840, Mr. Lumpkin, of Georgia, submitted to the Senate a set of resolutions of the legislature of that State, with accompanying documents, in favor of Congress amending the act of Feb. 12, 1793, to carry into effect sec. 2, art 4 of the Federal Constitution, relating to surrender of fugitives from justice between States. By way of preface to its specific recommendations, the General Assembly of Georgia states:

"Doubtless the past legislation on this subject has been predicated upon the presumption that each State having, in the pledged faith of all the others, a sufficient guaranty, nothing more was requisite than to prescribe the forms which should give authenticity to the demand; doubtless, too, in the time which gave birth to the constitution, whilst the Union was young, and her revolutionary associations fresh and warm, this presumption found its warrant in the mutual fidelity which promptly responded to all executive demands. To this generation has been reserved the humiliating spectacle of a sovereign State making herself a city of refuge for fugitive felons from her sister confederates. Two such cases of recent occurrence demonstrate the utter inefficiency of the existing laws for carrying into effect this provision of the constitution. They, moreover, clearly indicate the cause of this inefficiency. These laws are dependent for their execution upon the mere will

³⁴ Vol. 2, p. 848.

of the executive officers of the several States, who neither are, nor can be made, responsible to the General Government. If, then, it be correctly assumed that the Federal Legislature is bound to make ample provision for the contemplated exigency, and if experience has proved that reliance on State authorities is delusive, the question occurs, whether there be any other mode which gives fairer promise of security. *May not the object be accomplished by employing in that service officers appointed by, and responsible to, the Federal Government?* Inasmuch as that Government has employed in every State of the Union competent, judicial, and ministerial officers, it is believed that this duty, enjoined by the highest obligations, and intimately connected with the harmony and perpetuity of the Union, may be appropriately and efficiently performed through their instrumentality. There would seem to be a peculiar fitness in providing that the aid which she is bound to afford to the State judiciaries should result from the action of her own judiciary. The process would be simple, and the agents directly responsible to the power whence the laws to be executed emanate.

“Be it therefore resolved, That the statutes of the United States enacted to carry into effect the latter clause of the second section of the fourth article of the constitution are wholly inadequate to the object.

“Be it further resolved, That, in the opinion of this General Assembly, those statutes should be so amended as, first, to authorize the demand in the cases contemplated to be made upon the circuit judge of the United States having jurisdiction in the State wherein such fugitive may be found; secondly, to require that such judge, upon such demand being made in due form of law, shall issue his warrant, to be directed to the marshal of the United States in the State wherein such fugitive may be, requiring his arrest and delivery to the agent duly authorized to receive him, who shall be named in such warrant; thirdly, to require each marshal to whom any such warrant shall be delivered, forthwith to execute the same.”³⁵

VI. *Conclusions.*

Is it possible by Federal or state legislation to effectuate the interstate rendition of persons who have been brought involuntarily into the surrendering state?

³⁵ Sen. Doc. Vol. 5, 26 Cong., 1st Sess., 273.

(A) *The possibility of Federal legislation.*

(1) Unquestionably, Congress might impose the duty of interstate rendition on Federal authorities.³⁶ There is nothing in the Constitution that requires the demand to be made upon the Governor of a state, or upon any other State authority, executive or judicial. This type of legislation might obviate the difficulty encountered in the case of *Kentucky v. Dennison*,³⁷ in which the court said that there was a "moral duty" resting on the Governor of Ohio, but that if he "refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him." The Supreme Court of the United States had intimated in the case of *Prigg v. Pennsylvania*,³⁸ nearly twenty years before, that there was no power lodged in the general government to compel State officers to perform the duties imposed upon them by the Act of 1793. Chancellor Kent had expressed the same view in his Commentaries many years earlier.³⁹

(2) In case Congress does not enact legislation coterminous with the constitutional provision, it is possible for the Federal authorities to cooperate with the States, in such a situation as is presented by the Church case, and to transfer the prisoner before his term has expired to a penitentiary within the demanding State, and it would be within the scope of constitutional power for Congress, in its control over Federal prisons, to authorize and require such transfer of prisoners and provide regulations governing the entire procedure.

(3) In the light of the *Innes v. Tobin* decision, if the Federal statutes were made coterminous with the constitutional provision, would it be possible to effectuate the interstate rendition of prisoners in Northeastern Penitentiary (Pennsylvania) who are serving sentences for crimes committed outside of that State; and who, upon release from the Federal penitentiary, are demanded by another State? The *Innes* decision, although by a unanimous court, is a typically prolix and abstruse piece of legal reasoning by Mr. Chief Justice White. However, there are two statements in the decision by way of dicta that might furnish the basis for an affirmative answer to the query posed supra. At one place Mr. Chief

³⁶ John Bassett Moore, *Extradition and Interstate Rendition*, Vol. 2, p. 848; *In Matter of Voorhees*, 32 N. J. L. 140, 146.

³⁷ 24 Howard 66 (1860).

³⁸ 16 Paters 539.

³⁹ 2 Kent Commentaries 32, note (h) (12th Ed.).

Justice White says: "It is conceded (that the Constitution) would cover the case and sustain the authority exercised, as the accused was a fugitive from the State of Georgia and was found in Texas."⁴⁰ Again, he declares, "The reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power, it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them—State authority *until it was deemed essential by further legislation to govern them exclusively by National authority.*"⁴¹ For the very good reason that Congress has never passed legislation coterminous with the Constitutional provision, it cannot be said that the problem of the right (under Federal law) of a demanding State to receive a person who has been brought involuntarily into the "surrendering" State, has been settled squarely by any decision of the Supreme Court of the United States.

It is true that the rendition in the Innes case was based on a Texas statute,⁴² and thus strictly, this decision stands for the proposition that auxiliary State legislation must be relied on for the remedy. However, John Bassett Moore, commenting on the case of *Mahon v. Justice*,⁴³ in which it was held that the Governor of the State had no legal right to demand from the Governor of another State the return of a person who had been wrongfully taken from the jurisdiction of the former by an agent of the latter said:

"But considering the case solely from the point of view of the prisoner, of what right can it be said that he is deprived by his delivery up to a third State? It is not his right to have the question of his surrender determined by the Governor of any particular State. That question is, under the Constitution, to be determined in any State in which he may be 'found.' That does not mean that, having once been found in a certain State, he is entitled thereafter to have the question of his rendition for all prior offenses determined by the Governor of that State, until he shall have left its jurisdiction voluntarily. Yet this is precisely what is signified by the right of return to the jurisdiction of the surrendering State, as held to exist in extradition cases; the reason being that the fugitive, when recovered, was under the protection of the surrendering nation. This principle (of asylum) possesses no relevancy to the States of the United States."⁴⁴

⁴⁰ P. 133.

⁴¹ P. 135.

⁴² Vernons Texas Stats., Art. 1088 C. C. P.

⁴³ 127 U. S. 700.

⁴⁴ Extradition and Interstate Rendition, Vol. 2, p. 1049.

However, from the practical point of view, it is extremely doubtful if Federal legislation that was coterminous with the Constitution would solve the problem. It is significant that the very statute construed by Judge Leshner in the Church case was worded in such a manner as to be coterminous with the constitutional provision rather than with the Federal Act of 1793. Section 2 of The Uniform Criminal Extradition Act adopted by the Pennsylvania legislature reads:

"It is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State of the United States any person charged in that State with treason, felony or other crime, *who has fled from justice and is found in this State.*"⁴⁵

In spite of this language, Judge Leshner holds that Church is not a fugitive from New York for the reason that he was brought into the State of Pennsylvania involuntarily.

It might be argued that Congress could amend the Act of 1793, making it coterminous with the Constitution, and then provide in addition for a definition of "fugitive" which would include specifically the case of a person brought into a State involuntarily. However, it is doubtful whether such legislation would stand the test of constitutionality, inasmuch as the constitutional sanction for this type of Federal legislation is found only in the interstate rendition clause.⁴⁶

(B) *The possibility of State legislation.*

The practical way to meet the problem involved in the Church case would be for the States, under their reserved powers, to expressly provide for the interstate rendition of persons who were brought to the State involuntarily and were charged with crime committed in the demanding State. The States, in enacting legislation of this type would not be conditioned by the "fugitive" concept of the provision of the United States Constitution dealing with interstate rendition.

(1) It will undoubtedly be conceded that the power to surrender fugitives from justice existed in the several states prior to

⁴⁵ 9 U. L. A. 110.

⁴⁶ Our conclusion with reference to the effectiveness of Federal legislation that is coterminous with the constitutional provision is in accord with the position of Mr. Charles A. McCarthy in his article, "A Constitutional Question Suggested by the Trial of William D. Haywood" in 19 Green Bag 636. This article was written prior to the Innes decision.

the adoption of the Constitution, as an attribute of sovereignty.⁴⁷ In *Prigg v. Commonwealth*,⁴⁸ Mr. Justice Story states that the right to surrender fugitive slaves as a matter of comity existed in the several states before the adoption of the Constitution; and the power to surrender fugitives from justice is clearly analogous in this respect.

(2) If the power existed before, as an attribute of sovereignty, then it subsisted after the adoption of the Constitution, upon the same ground, unless it was surrendered by the States. Whether or not it was so surrendered is the important question. Of course in this connection the writer is speaking of the power to deliver up a fugitive as a matter of comity, and not the power to demand such delivery. The latter power is not an attribute of sovereignty, and never existed in the states until it was created by the provision of the Federal Constitution. In *State v. Hall*⁴⁹ the court says, "But in the exercise of its reserved sovereign powers, the state may, as an act of comity to a sister state, provide by statute, for the surrender, upon requisition, of persons who, like the prisoners, are indictable for murder in another state, though they have never fled from justice."

(3) The statement of Mr. Justice Story in the case of *Prigg v. Pennsylvania*,⁵⁰ that the legislation of Congress on the subject of interstate rendition was exclusive, was only supported by two other members of that court, Mr. Justices Wayne and McLean. Chief Justice Taney, Mr. Justice Thompson and Mr. Justice Daniel dissented on the question of exclusiveness of congressional power. Mr. Justice Baldwin held the Act of 1793 to be unconstitutional. The case of *Innes v. Tobin* recognizes the power of the States to pass laws supplementary to and in aid of the Constitution and the Act of Congress dealing with fugitives from justice. John Bassett Moore,⁵¹ writing prior to the *Innes* case, says that the right of the States to pass auxiliary legislation "is firmly established. The Act of 1793 does not cover the whole ground. It makes no provision for the arrest of a fugitive pending a demand for his surrender, nor for the method of making arrests before or after such demand. It does not provide for the method of delivery. It refers to the

⁴⁷ In re *William Fetter*, 23 N. J. L. 311; *State v. Hall*, 115 N. C. 811, 28 L. R. A. 289.

⁴⁸ 16 Peters 535; 10 L. Ed. 1060, at page 1092.

⁴⁹ 115 N. C. 811, 28 L. R. A. 289, 292.

⁵⁰ 16 Peters 539, 632.

⁵¹ *Extradition and Interstate Rendition*, Vol. 2, p. 864.

'agent' of the 'executive authority making such demand,' but does not provide for his appointment nor for the method of delivering the fugitive to him. In these respects at least, in which the action of the State authorities is contemplated but not defined, it might be supposed that there was room for State regulation."

(4) Sec. 6 of The Uniform Criminal Extradition Act⁵² deals with the problem of "extraterritorial" crime and is not conditioned by the "fugitive from justice" concept. While there is no authoritative decision upholding its constitutionality, The Uniform Code was approved by the National Conference of Commissioners on Uniform State Laws more than a decade ago, and at least eight states have adopted it.

(5) Mr. Charles McCarthy, in a thought-provoking article dealing with interstate rendition,⁵³ submits the following analogy:

"Section 1 of Article IV of the Constitution of the United States provides 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof.' Congress has passed a statute to this end. Many of the states have passed statutes requiring less by way of certification or other proof, than is required by the Act of Congress. The constitutionality of these statutes has never been questioned, for they do not impair the constitutional obligation. The Supreme Court of the United States has held that a judgment in an action in personam, based upon service by publication, need not be given due faith and credit under the Constitution. *Haddock v. Haddock*, 50 L. Ed. 857, and other cases there cited. But while so holding the court says that it intimates no doubt as to the power of a state to give a judgment of that character 'such efficacy as it may be entitled to in view of the public policy of that state.' 50 L. Ed. at 884. If a state may act outside of the mandate of the Constitution in regard to the judicial proceedings of a sister state, so long as it does not violate its constitutional obligation, why may it not so act in regard to rendition of fugitives from justice?"

⁵² 9 U. L. A. III.

⁵³ 19 Green Bag 636, 642.