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THE COMITY OF INTER-STATE EXTRADITION
OF FUGITIVES FROM JUSTICE.

George Dallas Stanton Jr.

From the time when the thirteen colonies sent delegates to the first Continental Congress in 1774, and entered into a "mutual pledge of united action" to resist the ministerial policy of England, down to the present day, the relation of the States to the Central Government, and of the several States to each other, has been a subject of the greatest importance to our union. During this period there has been a class of people, who have striven to maintain the Sovereignty and independence of the State, as against the United States; but the fallacy of this theory was shown, when South Carolina in 1831 openly advocated the right of a State to nullify an act of Congress, and it was conclusively established, by the Civil War. Those claiming the sovereignty of the State declared that the relation of the States to each other was that of International Comity, and this word surviving the downfall of that theory has been grossly misapplied in defining the duties, rights, and privileges of the respective States down to the present day. In the subject of, the so called, Inter-State Extradition we find one of the incidents of its misapplication. Here Comity has claimed a most important part and has mislead both judge and lawyer in interpreting Article IV, Section 2, clause 2 of the United States Constitution. Sedgwick (Statutory and Constitutional Law) states the following, on this subject,-

"The doctrine of Comity has been established and applied by powers wholly foreign, entirely distinct from, and independent of each other, the mutual relations of whose citizens are comparatively rare and almost if not quite, exclusively commercial, and the rules of whose intercourse rests entirely on the great unwritten law of nations, of which this Comity forms in fact but a part. Such is not at all the condition of the United States. They are mutually dependent on each other in various ways, and all recognize in certain cases a common sovereign . . . and they have undertaken by means of a carefully prepared instrument to declare with precision their relative rights and duties. In this case to substitute for the clear . . . language of the Constitution anything so vague and uncertain as the Comity of Nations, is not only to subject the relations, and independence of the States to a condition of alarming perplexity, but to make the judiciary the sole arbiter of the gravest political questions, and to give them, in framing decisions no better guide than a fluctuating and unsettled notion of international Comity." Judge Cooley in his work on the "Principles of Constitutional Law" (178) says: "It often happens that a right asserted or privilege claimed in one State will depend for its validity upon something done by the parties concerned, in some other State, whereby the right or privilege be-

came initiate, or perhaps perfected. . . . In these cases the questions which arise are questions of comity, and they are governed by the same rules as they would be if the two States had been to each other foreign nations". But further on (183) he admits that there is a clause in the Constitution providing that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and that Congress may legislate on this provision. It is apparent, therefore, that in thus attempting to retain this word in defining the relations of the States, not only has the relation of State to State been confounded as being synonymous to that of sovereign nations, but it has had the effect of causing the greatest confusion among our legislators, and, even in the Supreme Court of the United States (Prigg V. The Commonwealth of Penn., 16 Peters, 539 as against, Kentucky V. Dennison, 24 How., 66) in construing the power given to the National Congress by the United States Constitution.

EXTRADITION.

Before the epoch of the Constitution many enlightened rulers had on various occasions refused to extend the protection of their sovereignty over criminals fleeing from justice; but still in theory, among writers upon public law, the obligation to make such surrender was by many regarded

as one of a questionable character. No one doubted that a nation had the right to deliver up a criminal to justice, but the positive duty to do so as a part of the doctrine of the law of nations, was by no means universally conceded. Besides this imperfection, the grade of the crime which created this imperfect obligation to give up the offender, could not in the nature of things but be a point of perplexing uncertainty. As a matter of fact, there has been only one case (that of Arguelles, in 1864) in the history of the United States in which a rendition has been made, without a treaty stipulation to that effect between the United States and the nation seeking the delivery and return of the fugitive. Spear in his work on Extradition says that-"All of the cases show that the international surrender of fugitive criminals, except as provided for by treaty, has no basis or sanction in the usages of the United States." It must be conceded, therefore, that the rules of international law on this point would not have been adequate to the exigencies arising from the consolidation of the several States of the Republic into one Nation, We find that before this event, the evils resulting from the absence of a definite rule on the subject had given rise to a treaty stipulation between the New England Colonies in 1643; and again, for the same purpose, a provision in the Articles of Confederation; and finally, in Article IV Section 2, of the Constitution of 1789.

The purpose then, of this provision in the Constitution was, in view of the preceding facts, to accomplish three objects:

FIRST

To impose an absolute obligation on each State to surrender criminals fleeing from the justice of another State, and

SECOND

To define clearly the class of criminals so to be surrendered, and,

THIRD

To vest in Congress the requisite power to regulate the means by which this provision should be carried out between the several States of the Union. In the first, and second, the rules of international comity were defective and the design was consequently to create a substitute without these defects. As to the third, the power of deciding whether a fugitive from a sister State should, or should not be surrendered was necessarily a part of the powers thus granted to the general government, for when the people of the States in convention assembled, discussed, and ratified the Constitution, history tells us that they were aware of the defects in the preceding Articles of Confederation, and of the lack of power there given to the central government to protect the State and its citizens, and even the members of the Congress itself. The fact of the violent struggle in several of the

State Conventions, bears evidence to us that the people realized that in order for the central government to protect the union, and the "life", "liberty", and "property" of its citizens, it must have the adequate powers for legislation, and, for the enforcement of such legislation: In other words, there must be a mutual concession of authority by each State to the General Government. Such being the case, and having in mind the inability of the Congress of the Confederation to enforce its own provisions, how can it be doubted that, in the ratification of the constitution by the states, for the purpose of "securing justice, domestic tranquility, and a common defense," it was intended that Congress should be competent to legislate and to carry out its legislation, to the exclusion of a single State. The public importance of a correct construction of the provisions of law which regulate this delicate relation between the States is self-evident. There is no doubt that in some of the States the practice in rendition cases is based on the principle that the executive may lawfully exercise a judicial discretion, and may institute an inquiry upon points not specially within the law of 1798; and a few of the States have Statutes based on that theory. In many States, on the contrary, a different theory is held; and hence, since under present conditions a State has no remedy in case of

refusal, however unsatisfactory the reasons on which it is based may seem, the result is that grave misunderstandings often arise, and renditions are sometimes altogether suspended between two States by way of retaliation for a refusal, in consequence of which, criminals go free and the ends of justice are defeated. In such cases this important provision is no longer a "bond of peace and union, but a source of controversy and irritating discussion." These undesirable consequences arise from a want of uniformity in the construction of the law and their occurrence would be obviated by a settlement of that construction upon a sound and uniform basis. The source and history of this provision indicate an intention to make it one of perfect obligation and unconditionally.

James Madison (Madison's Writings 66) in reply to a letter written by Edmund Randolph on a case of extradition between Virginia and South Carolina in 1784, after saying that if each one of the compilers of the text had been asked to disclose his meaning, the answers would have been as various as the comments made upon it; he proceeds: "Waiving the doctrine of the confederation my present view . . . would admit of few exceptions to the propriety of surrendering fugitive offenders. My reasons are these

First; By the express terms of the union the citizens of

every State are naturalized within all the others, and being entitled to the same privileges, may with the more justice be subjected to the same penalties. This circumstance materially distinguishes the citizens of the United States from the subjects of other nations not so incorporated.

Second; The analogy of the laws throughout the States.... seems to obviate the capital objections against removal to the State where the offence is charged. In the case against removals to England it was based on very different grounds. In that case the accused was deprived of his right to a trial by jury of the vicinage, and his witnesses could not be had."

Third; Unless citizens are given up they cannot be tried anywhere, and it seems to be for the common interest of the State that a few hours, or at most a few days, should not be sufficient to gain a sanctuary, in a word, experience will show, if I mistake not, that the relative situation of the United States calls for a "Droit Public" much more minute than that comprised in the Federation Articles." These words from so eminent a member of the Philadelphia Convention as James Madison are of the greatest importance in helping us to determine as to what were the intentions of the framers of that provision in our Constitution relating to the rendition of fugitives; in fact, this is the only

expression of opinion of any kind that can be found on that subject; but, from the fact that it was written to one who was also a member of that Convention, and of its non disputation, we may presume it to have been the intention expressed by Mr. Madison, and that the particular object to be effected by the clause in question was to supply the defect in the administration of criminal justice resulting from the rule that courts have no control over offenses committed beyond their jurisdiction. The State to which the criminal escapes having no power to try the offense it was enjoined by the Constitution to surrender him in order that within the United States, the administration of criminal justice might be perfect.

The obligation on the State to surrender
criminals fleeing from justice.

The Constitution was not formed merely to guard the State against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be obtained there would be but little danger from abroad, and to accomplish this purpose the statesmen who framed the Constitution felt, and also the people who adopted it, that it was necessary that many of the rights of sovereignty should be ceded to the general government, and that in the

the general government,
 sphere of action assigned to ~~it~~ it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authority. It was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local prejudices, or passions, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State on the rights of another, which would ultimately terminate in resistance and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, And hence; in the ratification of the Constitution, we find the recognition by the several States of the absolute obligation imposed upon them in the clause providing that "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, 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."

dur. Cartter, acting as chief executive of the District of Columbia,
~~The judges~~ in the case of In re, Perry, II Criminal Law

Magazine 84, says; "In those instances where fugitives were delivered up previous to the confederation, it is believed that it was done wholly through the intervention of the

courts, and that the chief executive of the State was not a party to such proceedings". The shallowness of this theory is self evident, for we know what the arbitrary will of the governor was during the colonial period, and the weakness of the judiciary: That private ends were more likely to be satisfied than justice: And that, at no time, where matters between the colonies were concerned, did the judiciary assume control, nor were their decisions final. The provision in the Articles of Confederation was, it seems, always deemed to be a matter of executive discretion; but, when the framers of the Constitution put in essentially the same clause and it was accepted by the State the idea of "executive discretion" was totally lost sight of. This we find by a reference to the cases of practice at different times during the early period of the Republic. It was not until about 1830 that the idea of "executive discretion" began to be promulgated, but after that time there was a steady development, of the theory, and the cause of this is attributed to the connection of this clause in the act of 1793 with that providing for the rendition of fugitive slaves. An illustration of this is shown in the history of Massachusetts legislation. "For a few years after the passage of the act of 1793 no legislation was had, then in 1801 at a period still almost contemporaneous with the passage of the act of

Congress, and the adoption of the Constitution, an act was passed (in Massachusetts) simply making obligatory upon the governor by State law, what the Constitution and law of 1793 required. Under that act no one would deny that a Governor could have been impeached for not obeying a requisition duly made in the form prescribed by the law of 1793. The State law was as imperative and unconditional as the Constitutional clause itself. This law was in force thirty-three years. Meanwhile cases must have arisen involving a conflict of jurisdiction and as appears from subsequent legislation the character of them was misconceived. It was thought that they constituted an exception to the ordinary obligation of the Governor to deliver up."

Other States having Statutes to the same effect are, New Hampshire, Ohio, Connecticut, and Maine. These appear to have been passed under the same mistaken view, i. e. a conflict of jurisdiction between the executive and judiciary. The judicial department was entirely capable of taking care of its own rights by the writ of habeas corpus. The demand being made the act of Congress declares that, "it shall be the duty of the Executive authority of the State" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. In *Kentucky V. Dennison* (24 How.) the Court said; "the words, it shall be the duty,"

in ordinary legislation imply the assertion of the power to command and to coerce obedience. But looking to the subject matter of this law the court is of the opinion that the words "it shall be the duty" were not used as mandatory and compulsory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution." This doctrine is universally accepted. But, it is also acceded that the several States, as States, may compel the performance of this "duty" by appropriate legislation, and, as a fact, nearly all of the States now have Statutory provisions stating, that on demand of the executive authority of another State for a fugitive from justice from that State the demand shall be honored and the fugitive delivered up, according to the Constitution and the act of Congress of 1793.

Some of these statutory provisions are but mere repetitions of the clause in the Constitution, and of the Act of 1793, as in New York, Alabama, and California. But unfortunately, all State legislation has not stopped at this point. Some of the States have considered it conducive to the ends of justice, and the liberty of its citizens, to prescribe rules for the governing of its Executive authority in both making, and receiving demands from the other States, which, are plainly inconsistent with the spirit, and the text of the Constitution, and the law of Congress, and hence,

can be of no force. Even the executive of the State, merely by virtue of his "executive discretion", has, in rendition cases, assumed powers completely beyond the scope of his authority--as in the case between Governor Mifflin, of Pennsylvania and Governor Randolph, of Va., which was the occasion of Congress passing the act of 1793. The State legislation was the outcome of the growth of the "executive discretion". The idea as to what really was the "Duty" of the executive, in a given case, began to cause a diversity of opinion, for each one understood the obligation resting upon him, in a different light; and thus, to the complicity of conceptions among the State executives, and again, to the dicta of the judges in some of the extradition cases, asserting that it was a right of the State to augment the provision in the Constitution, and the act of Congress by appropriate State legislation, can we attribute the non-uniformity, and incorrectness of the several State laws respecting inter-State Extradition. Massachusetts, Pennsylvania, Ohio, Delaware, Connecticut, California and Louisiana, have at the present time laws which are distinctly unconstitutional. For instance; section 95 of the Ohio revised Statutes, as amended in 1884 contains the following provision, that in a case of complaint, the copy of the instrument must be accompanied by "an affidavit, or affidavits,

to the facts constituting the offense charged, by persons having actual knowledge thereof." The inconsistency of this clause with the act of Congress is comprehensively stated by Spear, on the Law of Extradition (p. 231) He says; "there is no constitutional objection to this provision when the Governor of Ohio demands the delivery of a fugitive, since then the rights of that State are not involved in the requirement. But when the demand is addressed by the governor of another State to the governor of Ohio, then according to this provision, the "affidavit made before a magistrate" provided for by the law of Congress, will not be sufficient, unless it be supplemented by the "affidavit or affidavits" provided for by the law of Ohio. This is an attempt by the local law of a State to add, to the conditions of the obligations of delivery established by the supreme law of the land, which law is alike applicable and authoritative in all the States.

It is an attempt to change this law as the rule by which the Governor of Ohio is to be controlled in delivering up fugitive criminals, and hence as the rule by which the Governor of other States are to be controlled in asking for a delivery from the Governor of Ohio. It will not be sufficient for them to comply with the law of Congress, unless they also comply with this particular in the law of Ohio".

In Kentucky v. Dennison (24 How. 66) The Governor of Ohio in direct violation of the Constitutional provision that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state", claimed that an indictment against one Lago which was found by a grand jury in Kentucky, according to the Statutes of that State, would not hold good in the State of Ohio. Governor Dennison, in his refusal to comply with the demand, said, "A line must be drawn somewhere". But, the United States Supreme Court delivered the following opinion on the subject: "When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio duly certified, and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in the indictment . . . is a judicial question to be decided by the courts of the State (Kentucky) and not by the executive authority of the State of Ohio". Since the decision of this case the very same question came before the United States Supreme Court in, Reggel v. United States, (114 U.S.,

642) and it was decided on the same ground as Kentucky V. Dennison. The greatest assumption of State power in any of the State legislatures is shown in Massachusetts (General Statutes, chap. 177, §1) There the Statute provides that a complaint from a demanding executive of another State must "be accompanied by affidavits to the facts constituting the offense charged, by persons having actual knowledge thereof; and such further evidence in support thereof as the Governor may require." The assumption of power in this provision is simply astonishing. It not only authorizes the Governor to act in accordance with the law of Congress, and the law of Massachusetts, but also to require "such further evidence in support" of the "complaint" as he may think necessary or expedient. These two examples of State legislation are but the prototype of the legislation of the five other States above mentioned. Now what does the Constitution mean when it says that no State shall "enter into any agreement or compact with another State (Art. 1, Sec. 10, cl.2)? And what is the relation of a State which says that its executive authority shall follow one certain prescribed form of procedure in the rendition of a "fugitive from justice," or whose executive authority himself publishes that he will hold himself to a certain form of procedure; to a State demanding the rendition of a fugitive from that State?

What remedy has a State who, acting under its own laws, refuses to conform to those of another State on the ground that the Constitution, and the act of Congress does not require it? Simply no remedy at all, for it is exclusively within the discretion of the executive, and there is absolutely no way to compel him (otherwise than by his own State) to make a rendition unless he so sees fit. (Kentucky V. Dennison, Reggel V. U.S.) There is only one way in which to obviate the anomaly in this State legislation i.e. for Congress to take up the work begun in 1793 and complete it.

The class of crimes for which the surrender is to be made.

The second point that is expressly set out in the provision of the Constitution, is the class of crimes for which it shall be the "duty" of the State to surrender a fugitive. Once again is the struggle over this provision in the Constitution shown, in this second class. What the intention was of those who incorporated into the Constitution the words "treason, felony, or other crime", as to their meaning, at one time presented a serious question for discussion, and "the ends of justice" were more than once defeated by the different constructions put upon these words. By some it has been held that the phrase applies only to

such acts as were crimes under the laws of the several States when the Constitution was adopted. Others have claimed that it means only those acts that are criminal by the laws of the State from which the fugitive is demanded, as well as by the laws of the State making the demand. Others have adopted the theory that the phrase denotes only "offenses known as crimes at the common law, or recognized as such by the State of which the fugitive is demanded". Still others have held that the phrase embraces "all such acts as are made criminal by the laws of the State where they are perpetrated" (Hurd's Habeas Corpus, pp. 601,602.) The question has twice come before the U. S. Supreme Court (Kentucky V. Dennison 24How.,66. Taylor V. Taintor 16 Wall., 366) and at both times it has been held that. "Every viola-tion of the criminal laws of a State is within the meaning of the Constitution, and may be made the foundation of a requisition". This decision has been adopted by all of the States. Although it includes all from the gravest felony, to the petty misdemeanor, still, as no person is likely to flee from a State to escape a petty misdemeanor, or if he does that the State will pursue him and bring him back for trial and punishment, there can come no injustice from it. But, if so required the State is under obligation to give him up. (Spear on Extradition, 357, 358.)

The Power in Congress to Regulate the Means for the
Rendition of Fugitives inter-State.

When the Constitution was framed it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this Constitutional provision by the Executive of every State, for every State had an equal interest in the execution of this provision, so absolutely essential to their peace and well-being in their internal concerns, as well as members of the union. But we can see from the words used in this provision, that it was also intended to be made obligatory, resting on all the States alike, and was not left merely to what one State should consider to be justice, or called for by the law of comity. Like other provisions in the Constitution the meaning and scope of this provision had to be explained, and this duty devolved upon Congress in the following manner. In the year 1790 Governor Mifflin, of Pennsylvania addressed a communication to Governor Beverly Randolph, of Virginia, in which he represented that three persons, then in Virginia, had kidnapped a free negro in Pennsylvania, and sold him into slavery in Virginia, and requested their surrender that they might be tried and punished under the laws of Pennsylvania. He accompanied the request with the copy of an indictment found against these parties, certified

by the prothonotary of the court. Governor Randolph refused the request, on the ground that the act charged was not a crime in Virginia, "but only a trespass or a breach of the peace," and was not included in the provision of the Constitution, and the further ground that there could be no surrender of fugitive criminals under the Constitution, until the provision should be supplemented by legislation defining the manner of carrying it into effect. Governor Mifflin then sent all the papers to President Washington. These papers were referred to Mr. Edmund Randolph the Attorney-General of the U.S., who prepared a careful opinion upon the whole subject. The President then submitted the whole matter to Congress, and the result was that Congress passed a bill which was approved by the President and on February 12, 1793 it became a law. (American Law Review, vol. 13, pp. 181-243) (For bill, see appendix.) This constitutes the whole law of Congress on this subject. The constitutionality of this act being questioned it was brought before the United States Supreme Court, (Prigg V. Commonwealth 16 Peters) where it was expressly declared to be within the powers vested in Congress. Mr. Justice Story in delivering the opinion of the Court said: "No one has ever supposed that Congress could constitutionally, by its legislation, exercise powers or enact laws beyond the powers delegated to it by the Con-

tution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also, or in other words that the power follows as a necessary means to accomplish the end". With the decision of this case, virtually ended all questioning of the authority of Congress to legislate on this provision, and up to the present day this act has been used as the basis for all inter-State extradition. But the requirements of to-day are different from what they were in 1793. By the introduction of the telegraph and the railroad the facility for the escape of the criminal is greatly increased. And again; by the passing of arbitrary State laws, before mentioned, this provision has at times been reduced almost to a nutility, by reason of the technicalities required; the result of which is an escape of the fugitive by a release under the State habeas corpus. (Robb V. Connelly 111 U.S. 624)

The exigencies of to-day call for an exercise of that power acknowledged to be in Congress, reducing to one uniform practice of procedure all law respecting the inter-State extradition of fugitive criminals, whereby the administration of criminal justice may be made uniform throughout the

Union, as it was intended that it should be by those who framed our Constitution in the National Convention of 1793. For the object of that provision in our Constitution stating that it "shall be the duty" to give up a fugitive criminal, was to aid each State in the administration of its own laws, leaving it to judge what those laws shall be. But if a State asked to make the surrender of a fugitive criminal, is, so far as the performance of this "duty" is concerned, also to be the judge of what those laws shall be, then, as remarked by Chief Justice Taney in Kentucky V. Dennison, (24 How. 66) it would be better to omit the provision altogether and to leave the whole matter to be settled by State comity without any constitutional regulation.

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————— Apendix —————

United States Constitution.

Article IV. Section 2- Clause 2-

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.

United States Revised Statutes, Section 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 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 with-

in six months from the time of 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.

"Section 5279. Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars or be imprisoned not more than one year."

