

1892

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Recommended Citation

Conely, Edwin F. "A Suggestion Concerning the Law of Inter-State Extradition." Mich. L. J. 1 (1892): 149-53.

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MICHIGAN LAW JOURNAL.

VOL. I.

JUNE, 1892.

No. 5.

A SUGGESTION CONCERNING THE LAW OF INTER-STATE EXTRADITION.

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While yet the nation was forming—indeed as early as 1643—the impolicy of the colonies' suffering themselves to become asylums for criminal refugees was seen and appreciated by the public men of the time. But, though continued efforts were made in the right direction and much was accomplished, the rendition of fugitives from justice remained, either legally or practically, a matter of comity for nearly a century and a half, or until the adoption of the Constitution of the United States. Then, made mandatory by the organic law of the Nation, inter-state extradition ceased to be subject to State control or dependent upon State consent.

The Constitution, Art. IV, Sec. 2, provides that a person charged in any State with treason, felony, or any 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 provision is not self-executing. It does not prescribe:

1. The *authority* upon whom the demand shall be made.
2. The *form* of the demand.
3. The *method* of procedure.

The difficulty of enforcing it without the aid of appropriate legislation was discovered in 1791, through a demand made by Governor Mifflin of Pennsylvania, upon Governor Randolph of Virginia, for the rendition of an alleged fugitive criminal. Surrender having been refused, Governor Mifflin brought the matter to the attention of President Washington, who immediately submitted the subject of inter-state extradition to Congress for consideration and action. The result was the Act of 1793, now in force as sections 5278 and 5279 of the Revised Statutes.

These statutes provide that "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 which the person so charged 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."

The validity of this sort of legislation was sustained by the Supreme Court of the United States in *Prigg v. Commonwealth*, 16 Pet., 539; *Kentucky v. Dennison*, 24 How. 66, *Roberts v. Reilly*, 116 U. S., 80.

It may be considered as settled by the decisions of that tribunal:

1. That inter-state extradition is a constitutional principle.
2. That the practical application of it may be enforced by national authority; and,
3. That, in legislating upon it, Congress may prescribe:
 - (a.) The authority upon whom the demand shall be made.
 - (b.) The form of the demand.
 - (c.) The method of procedure.

The Act of 1793 covers points (a), (b) and (c), but if any part of the statute is invalid or unwise, it is that which requires that the demand shall be made upon the executive authority of the State into which the fugitive has fled:

1. Because the Governor of a State as such cannot be compelled to act as the ministerial officer of the United States.
2. Because, as the Governor may decline to act, with or without reason, the mandatory policy of the constitution is defeated.

Mr. Justice Story, in *Prigg v. Commonwealth*, expressed doubt concerning the constitutionality of that part of the Act of 1793 which conferred authority upon State officers, but in *Kentucky v. Dennison*, the Supreme Court held that the Governor of a State could act if he wished to do so, but could not be coerced.

This decision is sound, though it left the statute without positive force except as a rule of procedure.

Through the voluntary action of the Governors of the several States, and the efforts of fugitive criminals to avoid rendition, the National and State courts have had occasion to further construe the law of interstate extradition and the following may be considered as determined:

1. That the constitutional provision relative to the demand and surrender of fugitives from justice includes every offense made punishable by the law of the State in which it was committed.*

**Kentucky v. Dennison*, 24 How. 66. *Ex parte Reggel*, 114 U. S. 642.

2. That the right to demand arrest and surrender implies the correlative duty to apprehend and deliver without reference to the policy or laws of the State to which the fugitive has fled.*

3. That, to be a fugitive from justice, in the extraditional sense, it is not necessary that the party charged should have fled to avoid prosecution anticipated or begun; but, simply, that having within a State committed that which by its 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.†

4. That, in extradition proceedings, the guilt or innocence of the fugitive is not in question.

5. That objections to the forms of pleadings and process must be referred to the courts of the demanding State.‡

6. That the constitutional requirement, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, applies to extradition proceedings.

7. That the Governor of a State in proceeding in a case of extradition, acts under National, not State authority.

From the foregoing it results that the Governor of the asylum State, in considering an application for the rendition of an alleged fugitive criminal, has but *three* questions before him, viz:

1. Does the showing made by the demanding State, *in form and authentication*, conform to the requirements of the laws of the United States?

2. Does it appear, from such showing, that the alleged fugitive is *charged* with having committed a crime within the demanding State?

3. Is the person charged, a *fugitive* from the justice of the demanding State, in the extraditional sense?

The *first* and *second* are questions of law, and are to be determined by the inspection of the requisition and accompanying papers.

The *third* is a question of fact, the affirmative of which may be established by oral testimony or by affidavit. For practical reasons, the latter course is usually followed, though the Constitution and the Statutes are silent as to the method of proof. The Governor may hear the person charged on the question, whether he is a fugitive, etc., but this is a matter of discretion.

With what has been stated kept well in mind, the duty of the Governor of the asylum State, in a case of interstate extradition, is simple, clear, and of easy performance.

But, unfortunately, through ignorance of the law, or through failure to comprehend or appreciate its broad, national policy, or, through a spirit of particularism, Governors of asylum States have not infrequently enter-

*Kentucky v. Dennison, 24 How. 66.

†Roberts v. Reilly, 116 U. S. 80.

‡Ex parte Reggel, 114 U. S. 642.

tained the opinion that, in extradition cases, they act as representatives of the State, rather than of the Nation, and have exercised powers not conferred by the Constitution and laws of the United States.

In thus acting without the scope of National authority, Governors of asylum States have assumed to consider and determine:

1. Whether the person charged, etc., had committed an offense in the demanding State?
2. Whether the requisition of the demanding State was made in good faith?

That a Governor upon whom a demand is made, rarely, if ever, directly and openly proceeds to try the question of guilt or innocence, is quite true; but that he, often, indirectly assumes the function of the trial court by investigating and determining whether the acts charged constitute an offense under the laws of the demanding State, or, whether such acts show a completed offense in that or some other State, is equally true.

This is usually done under the guise of solving the question, whether the person charged was within the demanding State when—as it is put—the *crime* was committed, instead of—as it should be put—the *acts which are alleged to constitute the crime*, were committed.

It is also true,—and that it is, is to be regretted—that Governors of asylum States, with indubitable evidence before them of the rectitude of the extradition proceeding, nevertheless presume to question its good faith.

A recent instance will serve as an illustration.

The agent of the demanding State presented to the Governor of the asylum State a requisition for the arrest and surrender of the fugitive, together with the indictment of the grand jury of the county in which the offense was perpetrated, duly charging the accused with having committed a crime against the laws of the demanding State; the affidavit of the complaining witness, a reputable citizen, showing that at the time the acts alleged to constitute the crime were committed the accused was bodily—not constructively—at the place of their commission and within the territorial limits of the demanding State, that he had left that State and had taken refuge in the State upon whose Governor the requisition was made, and that the proceedings against him were instituted and prosecuted in good faith and for no private end; and the affidavit of the official prosecutor of the demanding State—a lawyer of more than local reputation and a gentleman whose personal and official integrity would be put beyond question by the mere mention of his name—and the deposition of his assistant—less known, but an able and honorable member of the profession—showing that not only had the indictment been found and the requisition made without design or expectation of furthering selfish ends, but also that their use for any purpose other than the vindication of the *public* justice of the demanding State would not be tolerated.

All this was approved and authenticated, according to law, by the demanding Governor, under the Great Seal of his State, and, after careful

examination, pronounced legally unassailable by the Attorney General of the asylum State.

In the face of this, of the constitutional mandate that full faith and credit shall be given in each State to the judicial proceedings of every other State, and of the admission of the fugitive that he was in the demanding State when the acts charged against him were committed, the Governor upon whom the demand was made, on the interested testimony of the fugitive and his friends, held:

1. That the accused was not guilty of violating the laws of the demanding State; and,

2. That the requisition was made in bad faith!

As there is no appeal from such a determination, would it not be well to relieve the impotency of the present law of inter-state extradition by conferring upon the National Courts exclusive authority to cause the arrest and surrender?