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The Relative Powers of the States and of the National Government to Regulate the Subject of Inter-State Extradition

Frank Knowlton Nebeker

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THE RELATIVE POWERS OF THE STATES AND OF THE NATIONAL GOVERNMENT TO REGULATE THE SUBJECT OF INTER-STATE EXTRADITION.

---OOO---

THESIS PRESENTED BY
FRANK KNOWLTON NEBEKER
FOR THE DEGREE OF BACHELOR OF LAWS.

------OOOOO------

CORNELL UNIVERSITY.
SCHOOL OF LAW.
1895.

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CHAPTER I

Sec. I  STATEMENT.  The subject of Inter-state rendition of fugitives from justice is broad in its scope and has given rise to a great amount of litigation. Immediately on the adoption of Art. 4 Sec.2 of the Constitution, the difficulties of the question began to present themselves, and courts have been wrestling with various phases of it since that time. For many years prior to the Civil War this question was the occasion of many judicial battles between the slave-holding States of the South and the non slave-holding States of the North. Bitter hatreds were engendered, and too often the courts were led to sacrifice judicial precision and fairness upon the altar of political contention. With the abolition of slavery many of the more vexatious questions connected with the law of inter-state extradition found their solution; others have finally come to rest in the decisions of the courts of last resort. There yet remains a branch of the subject, however, upon which the courts have arrived at widely differing, and, in certain cases, directly conflicting conclusions. This branch of the subject embraces the delicate question as to the
proper field for the exercise of State and National legislation in matters pertaining to Inter-state extradition.

The subject naturally falls into two parts:

1. As to the character of the substantive right created by Article 4 Section 2 of the Constitution, and,

2. As to Procedure under the right thus created.

Under (1) will be considered (a) the implied restraints upon the States and (b) the express restraints.

Under (2) will be considered (a) the procedure provided for by the Act of Congress of Feb. 12th 1793, and (b) the opportunity for State legislation.

As to the Character of the Right.

Sec. 2 IMPLI ED RESTRAINTS UPON STATE LEGISLATION. The Constitution of the United States Art. 4 Sec. 2 Clause 2 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".

At the outset the following questions confront us:

1. Does this clause of the Constitution merely declare the already existing right of a State to demand an offender
against the laws from another State to which he has fled for refuge; or,

2. Does it impliedly take from the States this attribute of sovereignty and make the right enforceable only under the sanction of the National government?

The question is largely one of construction, and it will be the immediate purpose of this article to show that the latter view was the one entertained by the framers of the Constitution. True the National government is one of strictly limited powers: only such powers are exercised by it as are given expressly or by implication by the Constitution. In express words the exclusive power over Inter-state extradition has not been given to the National government, but from the earliest colonial experience, it has been perfectly clear that the subject is peculiarly a proper one for National regulation. The close proximity of the States rendered it a very easy matter for a criminal to flee from one and take sanctuary in another. It was apparent that action based upon State comity would very inadequately cope with the evils that would arise if criminals might set the laws of an offended State at defiance by merely stepping across an imaginary line.

Sec. 2 a EARLY LEGISLATION. As early as the year 1643
the plantations under the government of Massachusetts, New Plymouth, New Haven, and Connecticut, respectively, by their Articles of Confederation were compelled to deliver criminals and escaping convicts to the plantations having jurisdiction of the offence. (a) The same article was renewed substantially in the year 1670. (b) These regulations remained in force until they were supplanted by the Articles of Confederation adopted in the year 1777. Article 4 of the Articles of Confederation provided, "If any person guilty of, or charged with, treason, felony or other high misdemeanors in any State shall flee from justice and be found in any other of the United States, he shall upon the demand of the governor or executive power of the State from which he fled be delivered up to the State having jurisdiction of the offence". This article as well as those of 1640 and 1670 referred to above evidently intended to leave no room for discretionary action on the part of the States. The language is imperative, not conditional. So far as the right itself was concerned it was the plain intention to make it strictly National.

(a) 1 Winthrop's Hist. of Mass. vol.2 pp.131, 126.
Sec. 2 b. Ten years after the adoption of the Articles of Confederation, the present clause of the Constitution was agreed upon. By comparison it will at once be seen that the clause in the Articles of Confederation was in spirit and intent incorporated in the Constitutional clause referred to. The object aimed at in both was the same, viz; to make the right to demand a fugitive from justice an absolute one. C.J. Catron in Holmes v Jennison(a). Such being the effect of Art. 4 Sec. 2 of the Constitution, it follows as a necessary conclusion that any legislation on the part of a State that conflicts with this clause is null and void, since the Constitution is the "supreme law of the land". To what extent State legislation may be invoked to carry the right into execution is a topic to be considered later.

Sec. 3 EXPRESS RESTRAINTS UPON STATE LEGISLATION. By necessary implication therefore, State laws that derive their force or effect from a source other than Art. 4 Sec. 2 of the Constitution are of null force or effect. But there are express as well as implied restraints. It has been maintained by certain State courts that the right to deliver up fugitives from justice was originally exercised by the States, and that (a) Holmes v Jennison 14 Peters 597.
it had never been taken away. For example, in the case of State v Buzine, (a) the court said, "The right to deliver over fugitives from justice was certainly not abrogated by the colonies severing the ties which bound them to the mother country. It was not therefore derived from the Constitution but existed independent of it". This may be true and yet the States may not now have the right even as it existed as a matter of comity prior to the adoption of the Constitution.

There are certain clauses of the Constitution to which the reader's attention is now invited which apparently preclude any possibility of the exercise by the States of the right in question. In the Constitutional clause immediately preceding the one in question as if intended to be a limitation, it is provided: "The citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States. The right of a citizen to reside in any State certainly falls within these privileges. Any person therefore who removes from one State and takes up his residence in another can not be expelled from his new home in any other way than that provided for in the Constitution. (b)

(a) State v Buzine. 4 Harr. 574.
(b) Ex parte Smith 3 McLean 121; State v Huffard 28 Iowa 39. Ex parte Clark 9 Wend. 212; In re Hayward 1 Sandif. 701. Ex parte White 49 Cal. 433; Ex parte Thornton 9 Tex. 655.
Article 1 Sec. 10 Clause 3 of the Constitution provides "No State shall without the consent of Congress----enter into any agreement or compact with another State, or with a foreign power". This clause received an interpretation by the Supreme Court of the United States in the celebrated case of Holmes v Jennison.\textsuperscript{(a)} The facts of the case so far as pertinent in the present connection are as follows: George Holmes, the plaintiff, in error, was arrested in the State of Vermont on a warrant issued by Silas A. Jennison as Governor of the State. The arrest was in pursuant to an indictment for murder found by a grand jury of Quebec, L. C. The sheriff was commanded to conduct the prisoner to a designated place on the confines of the State of Vermont and there deliver him to such agents of the Canadian province as should be empowered to receive him. On application to the Supreme Court of Vermont a writ of Habeas Corpus was granted Holmes, and upon a hearing of the parties, the judgment of the court was as follows:"\textit{Wherefore after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined it is adjudged by the court here that the aforesaid cause of detention and imprisonment of the said George Holmes is good and suffic-}\textsuperscript{(a) Holmes v Jennison 14 Peters 561.}
ient in law". From this decision, the plaintiff in error appealed to the United States Supreme Court. The Chief Justice in delivering the opinion of the court expressed himself as follows: "It remains for us to inquire whether the power in question has been surrendered by the States. We think it has; and upon two grounds.

1. According to the express words of the Constitution it is one of the powers that the States are forbidden to exercise without the consent of Congress.

2. It is incompatible and inconsistent with the powers conferred on the Federal government".

Again he says, "The Supreme Court of Vermont, as we have already mentioned, has decided that the warrant of the Governor and the detention of Holmes under it are authorized by law. Consequently, the seizure for the purpose of delivery, the agreement on the one side to deliver and on the other side to receive, is an agreement made by the authorized servants of the State; and of course, in contemplation of law, made by the State itself." On these grounds the action of the State of Vermont was held unconstitutional and on principle the fact that the "agreement" was between Vermont and a province of Canada would not be less an "agreement" if between Vermont and
a sister State. What would amount to a "compact or agreement" in one case would be the same in the other.

By considering the express and implied restraints imposed upon State legislation as set forth above, in connection with each other it is confidently believed that the following propositions have been established, or follow as corrolaries to those which have:

1. That the right on the part of a State to demand an offender against its laws from the State to which he has fled exists only by virtue of Art. 4 Sec. 2 Clause 2 of the Constitution; and that the obligation to deliver on the part of the asylum State is absolute.

2. State laws which are in conflict with this clause of the Constitution are unconstitutional and void.

3. In the absence of Art. 4 Sec. 2 Clause 2 of the Constitution no State would have the power to deliver a fugitive from justice to the State having jurisdiction of his crime.

Such being the conclusions arrived at with reference to the substantive right, it yet remains to explain the means employed to carry this right into execution, and to discover if possible what portions of the procedure fall under the purview respectively, of State and National legislation. This will
form the subject if inquiry in the two succeeding chapters.

CHAPTER II.

Sec. 1 DIVERSITY OF PROCEDURE AMONG THE STATES. The number of judicial decisions required to establish the law as set forth in Chapter I is by no means so great as will be found to be the case with the question now to be considered. for the questions coming under this head have more frequently come before the State courts for adjudication. This is owing to the fact that many of the steps necessary to be taken in the process of demanding and delivering up a fugitive from justice are left unprovided for by Congress, and the States themselves have adopted rules for their own guidance. Certain States as Ohio and Massachusetts have passed laws regulating the entire matter of procedure. A number of other States have substantially re-enacted the Act of Congress of 1793. The Statutes of still other States are wholly silent, in which case of course, the rules established by Congress are followed in the same way as if re-enacted by their own Statutes. This utter lack of uniformity is significant to show how widely differing are the opinions with respect to the propriety of State legislation. Ohio for example, has undertaken to regulate the entire matter and in certain cases has adopted rules
which conflict with the Congressional Act of 1793. It shall be the purpose of the remainder of this article to discover how far such powers are properly exercised.

Sec. 2 THE CONSTITUTION AND ACT OF 1793. By a recurrence to Article 4 Section 2 Clause 2 of the Constitution, it will be seen that like many other clauses of the Constitution, it is self-acting. Legislation became necessary to give it force and effect. The language is, "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 and removed to the State having jurisdiction of the crime". Here the right itself is rendered certain and unequivocal but the mode of execution is wholly unprovided for. It speaks of "a person charged" &c, but the manner in which the charge is to be made must be determined separate and apart from the clause itself. The person charged must be one "who shall flee from justice", but nothing is said as to how the fact of fleeing shall be ascertained. The proper authority to make the demand is pointed out but no one is specified upon whom the demand is to be made. The fugitive "shall be delivered up" &c, but how
he may be arrested is not indicated. The necessary inference to be made from these facts is that the States should provide means for making the Constitutional clause operative. As was said in In Re Romaine, (a) "This provision being a part of the supreme law of the land, it is a part of the law of each State. Being a part of the law of each State it is but reasonable to suppose that the States could give it force and effect in their own peculiar way. Had all the States taken this view of the case and acted consistently with the purpose of the Constitutional provision, no Congressional legislation would have been necessary. But the State of Virginia having failed to do this, an early case arose which gave great difficulty and finally led to an Act of Congress which settled the main questions of the case. (b)

Sec. 3 REVIEW OF THE CASE. In the year 1790, Governor Mifflin of Pennsylvania, made a demand upon Governor Randolph of Virginia, for the delivery of three persons alleged guilty of kidnapping a free negro in Pennsylvania and selling him into slavery in Virginia. The demand was accompanied by a memorial from the Society for the Abolition of Slavery, and (a) In Re Romaine 23 Cal. 525. (b) See Article by J.A. Haaghe in Sen.L.Rev. vol. 12 pp 181-243.
by an indictment against the parties, sworn to by the prothonotary of the court in which the indictment was found. Governor Randolph referred the matter to the Attorney General of Virginia and the latter wrote an opinion adverse to delivering the parties in accordance with the demand. Among the reasons urged by Governor Randolph in his answer justifying his refusal to deliver the fugitives up was the following: "No means have been provided for carrying into effect such an important clause of the Constitution of the United States. Legal control of a person ought to be acquired by no force not specified and by positive law."

20 State Papers pp. 29, 43.

Here then was the violation of a right established by the organic law of the nation but rendered null and of no effect by the lack of the means of its exercise. The wonder is that Virginia did not grasp the import of the Constitutional clause and provide the means herself of doing justice to the parties. Without a doubt the question of slavery had much to do with the decision arrived at.

However, in 1791 Governor Mifflin sent all of the correspondence that had passed between him and Governor Randolph with reference to the matter, to Pres. Washington and recom-
mended that the question be submitted to Congress. President Washington referred the matter to Attorney General Edmund Randolph who after careful consideration wrote an opinion in which he defined the necessities of the situation, and the Act which followed simply embodied the Attorney General's recommendations.

Sec. 4 THE ACT OF FEB. 12th 1793. This Act consisting of but two sections as found in the Revised Statutes comprehends the whole Congressional legislation upon the question of inter-state extradition. The first section of the Act as it appears in Sec. 5278 of the Revised Statutes of the United States, is as follows: "Whenever the executive 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 an 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 arrest, the prisoner may be discharged. All costs or expenses incurred in apprehending, securing, and transmitting such fugitive to the State making the demand shall be paid by such State or Territory.

(Note. Sec. 5279 U.S.R.S. is not important in this connection so is omitted here.)

Sec. 5 CONSTITUTIONALITY OF THE ACT. The constitutionality of the law was vigorously attacked in the celebrated case of Prigg v The Commonwealth of Pennsylvania decided in the year 1842. The case arose under another section of the Act viz: the one which provided for the surrender of fugitive slaves, but the grounds of attack were equally vital to the section now under consideration. It was contended on the part of the State that no clause in the Constitution conferred upon Congress the right to pass the Act in question. The court were unanimously of the opinion, however, that Congress was clearly within the scope of the powers given by implica-
tion in the Constitution. Said Mr. Justice Story in his opinion, "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 Constitution. 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". And again, "From that time (1793) down to the present hour not a doubt has been breathed upon the constitutionality of this Act. And every Executive in the Union has acted upon and admitted its validity". Then if this law is constitutional simply because it was for the purpose of carrying into effect "rights expressly given", it must follow that any and all laws that have the same object in view would be constitutional unless in conflict with some other clause or clauses of the Constitution. In other words, Congress may, should it see fit, pass laws regulating the whole course of procedure necessary to the efficient exercise of the extradition power. For example, should the Governors of various States refuse to respond to demands properly made, so as practically to threaten the continuance of the power to extradite offenders, Congress could designate some other person upon whom to make the
demand. And it must be remembered in this connection that the case of Kentucky v Dennison (a) decides nothing as to the constitutionality of such laws further than this, that the Governor of a State, being the chief State official cannot be compelled to perform Federal duties. For if he could in one case, he could in any number of cases, and in theory at least, the chief State officer might thus be converted into a Federal official. If Congress, therefore, should deem it advisable to codify the laws of procedure relating to the subject of inter-state extradition, there would seem to be no valid objection. And in passing it might be remarked that in the year 1837 such a code was formulated by a convention of delegates representing the Governors of nineteen different States, which met in New York City.(a) There can be little doubt that proper legislation by Congress would greatly reduce the present difficulties of the question.

Having found that Congress may regulate any and all matters pertaining to inter-state rendition of fugitives from justice, it yet remains to discover what laws passed by the States, having the same object in view would be constitutional. This will form the subject for discussion in the next chapter.

CHAPTER III.

Sec. 1 PRIGG v THE COMMONWEALTH. Utterances have been made by Judges of the greatest respectability and learning which seem to decide that inasmuch as Congress has the power to pass laws covering the whole field of inter-state extradition, the States are thereby precluded from passing any laws whatever on the same subject. Much of the confusion on this question had its origin in the case of Prigg v Commonwealth (a) referred to supra. Judge Story in that case referring to the Act of 1793 spoke as follows, "In a general sense this act may be said to cover the whole ground of the Constitution both as to fugitives from justice and fugitive slaves.......If this be so then it would seem upon just principles of construction, that the legislation of Congress, if constitutional must supercede all State legislation upon the subject and by necessary implication prohibit it......

..In such a case the legislation of Congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the matter". But these words of Judge Story are by no means the words of the Supreme Court of the United States. On this point both Chief Justice Taney and Justice Thompson dissented. At best
the words are obiter dicta since this point was not necessary to the decision of the case. Said C.J. Taney, "I do not consider this question as necessarily involved in the case before us; for the law of Pennsylvania, under which the plaintiff in error was prosecuted, is clearly in conflict with the Constitution of the United States, as well as with the law of 1793. The opinion of the court maintains that the power over this subject is so exclusively vested in Congress that no State, since the adoption of the Constitution, can pass any law in relation to it. I think the States are not prohibited; and that on the contrary, it is enjoined upon them as a duty". This seems to be the better rule, and coincides with the understanding of those States which, as has been pointed out, have enacted laws of their own to guide them in these proceedings. Mr. Spear whose opinion is worthy of respect in this connection, says, "The provision is to be carried into effect so as on the one hand to secure the right which it creates, and on the other hand secure the duty which it imposes. Congress has legislated upon the subject. If it had not done so, it would clearly be the duty of each State to supply the requisite legislation for the delivery up of fugitive criminals when demanded by other States in accordance
with the Constitution". (a) However it would clearly be surplusage for the States to pass laws covering the same ground as those passed by Congress. State legislation on the subject should be supplementary to National legislation. With this in view the closing inquiry of this thesis will be to determine:

1. How much of the procedure in inter-state extradition proceedings has been provided for by Congress, and

2. What remains as a proper field for State legislation.

Sec. 2 PROCEDURE PROVIDED FOR BY CONGRESS. By a careful analysis of the Act of Feb. 12th 1793 it will be found that the following details of procedure are prescribed:

1. That the demand must be made by the executive authority of the State from which the fugitive has fled.

2. That the demand must be made upon the executive authority of the asylum State.

3. The specific manner of making the charge and of issuing the requisition is provided.

4. The person to whom the fugitive is to be delivered is designated.

It will be seen at once that but a portion of the pro-

(a) Spear on Extradition p.294: For decisions of different States see Ex Parte White 49 Cal.433; Com. v Tracy 46 Mass.536; Robinson v Flanders 29 Ind.10; Bump's Notes on Can. Decisions p.297.
The procedure is covered by the four provisions above. What remains is for the States to regulate, so long as it remains unregulated by Congress.

Sec. 3 OPPORTUNITY FOR STATE LEGISLATION. The machinery of the Federal government is not set in motion until a demand has been made. The steps, therefore, which are merely preliminary to the demand must be taken in accordance with State laws. For example, the States must say what evidence of guilt shall be necessary to justify the demand. They may place limitations upon the discretionary power of their own Governors both as to making the demand as well as granting the requisition papers. So far as the Constitution and Act of Congress are concerned, the Governor of the offended State may demand or refuse to demand a fugitive from justice. Likewise, as has been shown, the Governor of the asylum State has full discretion as to making the surrender. The Act of Congress provides that when proper steps have been taken, it shall be the duty of the Governor to have the fugitive "arrested and secured", but the precise manner in which the arrest is to be made is of necessity to be provided for by the States.(a) Also the Act of Congress speaks of the criminal who has "fled" from justice, but not a word is said as to the.

(a) Ex Parte Armons 34 Ohio St. 518.
manner of proving that he has fled. Nor does the Act of Congress provide any rule for determining the identity of the party charged. The following specific details of procedure therefore, fall properly under the purview of State legislation:

1. The States may prescribe rules for determining what circumstances shall compel the Governor of the offended State to make the demand.

2. The States may prescribe rules for determining what circumstances shall compel the Governor of the asylum State to make the surrender.

3. The States may prescribe rules to determine how the arrest shall be made; also to provide that arrest may be made prior to demand.

4. The States may prescribe rules to determine what evidence shall be sufficient to prove that the person sought to be extradited has "fled" from justice.

5. The States may prescribe rules to determine the identity of the person charged. (a)

CONCLUSION.

After the investigation which has been necessary to arrive at the proper understanding of the question with which (a) See Spear on Extradition 1.509.
this thesis has to do, the writer has become convinced that there is a pressing need for legislation that shall secure greater uniformity in the practice connected with inter-state extradition proceedings. It has been shown that there is a more or less broad field open to the exercise of the legislative power by either the States or the National government. If the States continue to exercise the power, there will be a great variety of rules which shall inevitably be in conflict, unless some means be adopted to arrive at uniformity of action. Conflicting laws will occasion a certain amount of friction between the States, and will interfere with the speedy administration of justice. While it is of paramount importance that due regard shall be had for the rights of the individual charged with an extraditable crime, it is equally essential that crime shall be swiftly pursued and justly punished. So that any legislation which shall facilitate the prompt delivery of fugitive criminals ought to be provided in one or the other of the two ways.

Whether Congress or the States shall provide uniform rules of practice is a question that admits of some argument. The States at best could adopt no system of rules not subject to change by any State at its discretion. Rules adopted by
Congress would, on the contrary, have the force and effect of law equally binding upon all of the States. And as there can be no valid reason why the matter should not be regulated by Congress, it would seem that this would be preferable to State regulation.

Frank Hamilton Walker