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DUTIES OF THE ASYLUM STATE UNDER THE UNIFORM CRIMINAL EXTRADITION ACT

P. WARREN GREEN*

As indicated by the title of this paper, discussion is limited to a consideration of the duties of the asylum state under the uniform criminal extradition act. The act, drafted and recommended by the Interstate Commission on Crime and the National Conference of Commissioners on Uniform State Laws, has been enacted in nineteen states.¹

The uniform act was first approved by the National Conference of Commissioners on Uniform State Laws in 1926; and in 1932 the Conference approved a revised draft of the act, changes being made in Sections 5, 6, 13 and 14, which Act has been adopted by twelve states.² A complete revised draft of the act was made by the National Conference of Commissioners on Uniform State Laws and by the Interstate Commission on Crime in 1936 and important changes were made in Sections 5 and 6 and minor changes in other sections.

The present subject relative to the duties of the asylum state, or the state in which a wanted person is found, is divided into the following four subjects and will be considered in the named order, viz.:

- A. Arrest upon requisition.
- B. Arrest prior to requisition.
- C. Arrest without a warrant.
- D. Surrender of an accused person although not physically present in demanding state at the time of crime.

A. ARREST UPON REQUISITION

Under the original law passed by Congress and approved by President Washington, being the Act of Congress February 12, 1793,

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¹ Arizona, California, Delaware, Kansas, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Utah, Vermont, Washington, West Virginia.

² Alabama, Arkansas, Idaho, Indiana, Maine, Nebraska, New Mexico, North Carolina, Oregon, South Dakota, Utah, Vermont, Wisconsin, Wyoming.

and now with a slight modification known as Section 5278 of the United States Revised Statutes of 1875 (18 U. S. Code Ann. No. 662), it is made the duty of the executive authority of another state for a person as a fugitive from justice, upon receipt of proper extradition papers "to cause him (fugitive) 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," and Section 2 of the Uniform Criminal Extradition Act likewise provides:³

"FUGITIVES FROM JUSTICE; DUTY OF GOVERNOR. Subject to the provisions of this act, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, 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."

Section 3 of the Uniform Act provides for the form of demand which shall be submitted to the Governor of the asylum state which must be accompanied by a copy of an indictment found or by a copy of a warrant supported by a proper affidavit, which according to practice must fully set forth the facts and circumstances of the alleged offense in order that the Governor of the asylum state may determine therefrom whether he should grant or refuse the demand. If the person wanted is an escaped convict then a copy of the judgment of conviction or of a sentence imposed in execution thereof must be submitted together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. Such papers must be authenticated by the executive authority of the demanding state. When such a demand is received by the Governor of an asylum state from the executive authority of another state for the surrendering of a person charged with a crime, as provided by Section 4 of the Uniform Act, the Governor may call upon the Attorney General or any prosecuting officer in the State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered. These provi-

³ At the Interstate Extradition Conference, held in New York in August, 1887, the Governors of the States adopted Rules of Practice governing interstate requisition which are being followed today.

sions immediately present some of the most important questions relative to interstate rendition, all involved in the major question of whether the duties of the Governor of an asylum state in extradition proceedings are discretionary or mandatory.

(a) *Substantially Charged With a Crime*

Upon the receipt of a request for extradition two questions are presented to the Governor of the asylum state: (1) Is the person for whom extradition is requested substantially charged with a crime against the laws of the demanding state from whose justice it is alleged that flight has been made? (2) Is he a fugitive from justice from the demanding state?

"The first question is a question of law and the latter is a question of fact."⁴

The law requires that the demand or request for requisition shall be in writing and must allege that the accused was present (except in cases arising under Section 6) in the demanding state at the time of the commission of the alleged crime and that thereafter he fled from the State, which must be accompanied by a copy of an indictment found, or by information supported by affidavit, or by a copy of an affidavit made before a Magistrate there, together with a copy of any warrant issued thereupon, or by a copy of a judgment of conviction or of sentence imposed in execution thereof together with a statement by the Governor of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. While the Uniform law does not require copies of such papers to be certified, the rules of practice heretofore existing, having been adopted by the Interstate Extradition Conference in 1887, require a certification thereof and the uniform law requires that such papers "must be authenticated by the executive authority making the demand." The authentication need not be in any particular form as long as it clearly appears that the documents are what they purport to be, as the Federal Statute for the authentication of public acts and judicial proceedings does not regulate the manner in which the authentication by the Governor shall be made.⁵ The manner of authentication is left to each State and the question of authenticity is one for the determination of the Governor of the demanding State and his certificate

⁴ *Munsey v. Clough*, 196 U. S. 364; *Hyatt v. Corkran*, 188 U. S. 691; *Roberts v. Reilly*, 116 U. S. 80, 95.

⁵ *State v. Curry*, 2 Ala. A. 251, 56 S. 736.

to this fact is all that is required.⁶ If these provisions are not complied with, it is universally held that the person demanded is not substantially "charged" with a crime and the Governor of the asylum state has no duty to grant the demand.⁷ Some decisions hold that inasmuch as the person wanted is not substantially charged with a crime that the Governor of the asylum state has no authority under such defective demand to grant extradition. This conclusion is expressed by the U. S. Supreme Court in the case of *Compton v. Alabama*, 214 U. S. 1 at page 6:

"Undoubtedly, the statute does not make it the duty of a Governor to issue a warrant for the arrest of an alleged fugitive from justice, unless the executive of the demanding State produces to him either a copy of an indictment against the accused in the demanding State or an affidavit before a magistrate of such State charging the fugitive with the commission of crime in the State making the demand. It is, we think, equally clear that the executive of the State in which the fugitive is at the time may decline to honor the requisition of the Governor of the demanding State if the latter fails to furnish a copy of an indictment against the accused, or of any affidavit before a magistrate. But has the executive of the State, upon whom the demand is made for the arrest and extradition of the fugitive, the power to issue his warrant of arrest for a crime committed in another State, unless he is furnished with a copy of the required indictment or affidavit? We are of opinion that he has not, so far as any authority in respect to fugitives from justice has been conferred upon him by the statute of the United States. The statute, we think, makes it essential to the right to arrest the alleged fugitive under a warrant of the executive of the State where the alleged fugitive is found that such executive be furnished, before issuing his warrant, with a copy of an indictment or an affidavit before a magistrate in the demanding State, and charging the fugitive with crime committed by him in such State."

As stated the question of whether a person demanded is substantially charged with a crime under the Federal Constitution, the Federal law and the Uniform Extradition Act, is a question of law, and if the Governor of the demanding State has any doubts thereon he should refer this question to his legal adviser, the Attorney General, which, while he has the general authority so to do, is specifically provided for by Section 4 of the Uniform Act.

⁶ *Ex parte Baker*, 244 P. 459; *Munsey v. Clough*, 196 U. S. 364; *Compton v. Alabama*, 214 U. S. 1; *In re Gundy*, 236 P. 440.

⁷ *McNichols v. Pease*, 207 U. S. 100 at 108; *Marbles v. Creecy*, 215 U. S. 63; *Roberts v. Reilly*, 116 U. S. 80 at 95; *Hyatt v. Corkran*, 188 U. S. 691; *Pierce v. Creecy*, 210 U. S. 387.

(b) *Fugitive From Justice*

If it is determined that the submitted papers are in proper form it then becomes the duty of the Governor to determine whether the person demanded is a fugitive from justice from the demanding State. This is a question of fact and must be determined by the Governor of the asylum State. If he is satisfied of this fact by the authenticated papers before him, it becomes his duty to grant the demand and issue his warrant of arrest and surrender, and he need not look beyond the authenticated papers.⁸

However, in many cases the Governors of asylum States are often requested to grant a hearing before honoring extradition. It is solely within the province of the Governor whether to grant such a hearing and his refusal to do so is for his own determination and not reviewable.⁹

As a practical matter the Governors of our States seldom, if ever, refuse to grant a hearing when timely applied for, especially if the person demanded claims that he is not a fugitive from justice.

If a hearing is granted and thereat it is conceded that the alleged fugitive was not in the demanding state at the time of the alleged crime,¹⁰ or if he establishes such fact to the entire satisfaction of the Governor, then it becomes his duty to refuse to grant the request and to surrender the alleged fugitive. On the other hand, if there is a conflict of evidence on whether the person sought was in the demanding state at the time of the charged crime, and the Governor is not convinced "by clear and satisfactory evidence that he was outside the limits of" the demanding state at the time of the crime, it becomes the duty of the Governor to grant requisition.¹¹

The general principles here stated are well summed up in *McNichols v. Pease*, 207 U. S. 100 at 108: the opinion stating the following conclusions are to be deduced from former decisions of that Court:¹²

"1. A person charged with crime against the laws of a State and who flees from justice, that is, after committing the crime, leaves the State, in whatever way or for whatever reason, and is found in another

⁸ *Pettibone v. Nichols*, 203 U. S. 192 at 204; *Marbles v. Creecy*, 215 U. S. 63; *McNichols v. Pease*, 207 U. S. 100 at 108.

⁹ *Munsey v. Clough*, 196 U. S. 364. For list of cases see 51 A. L. R. p. 810. 25 C. J., §33, p. 267.

¹⁰ *Munsey v. Clough*, 196 U. S. 364; *South Carolina v. Bailey*, 289 U. S. 412.

¹¹ *Munsey v. Clough*, 196 U. S. 364; *South Carolina v. Bailey*, 289 U. S. 412; *McNichols v. Pease*, 207 U. S. 100 at 108; *Hyatt v. Corkran*, 188 U. S. 691.

¹² See also *Munsey v. Clough*, 196 U. S. 364 at 372.

State, may, under the authority of the Constitution and laws of the United States, be brought back to the State in which he stands charged with the crime, to be there dealt with according to law.

2. When the Executive authority of the State whose laws have been thus violated makes such a demand upon the Executive of the State in which the alleged fugitive is found as is indicated by the above section (5278) of the Revised Statutes—producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding State—it becomes, under the Constitution and laws of the United States, the duty of the Executive of the State where the fugitive is found to cause him to be arrested, surrendered and delivered to the appointed agent of the demanding State, to be taken to that State.

3. Nevertheless, the Executive, upon whom such demand is made, not being authorized by the Constitution and laws of the United States to cause the arrest of one charged with crime in another State unless he is a fugitive from justice, may decline to issue an extradition warrant, unless it is made to appear to him, by competent proof, that the accused is substantially charged with crime against the laws of the demanding State, and is, in fact, a fugitive from the justice of that State.

4. Whether the alleged criminal is or is not such fugitive from justice may, so far as the Constitution and laws of the United States are concerned, be determined by the Executive upon whom the demand is made in such way as he deems satisfactory, and he is not obliged to demand proof apart from proper requisition papers from the demanding State, that the accused is a fugitive from justice.

5. If it be determined that the alleged criminal is a fugitive from justice—whether such determination be based upon the requisition and accompanying papers in proper form, or after an original, independent inquiry into the facts—and if a warrant of arrest is issued after such determination, the warrant will be regarded as making a *prima facie* case in favor of the demanding State and as requiring the removal of the alleged criminal to the State in which he stands charged with crime, unless in some appropriate proceeding it is made to appear that he is not a fugitive from the justice of the demanding State.

6. A proceeding by habeas corpus in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the State in which he is found to the State whose laws he is charged with violating.

7. One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding State, and thereby overcoming the presumption to the contrary arising from the fact of an extradition warrant."

In the concluding paragraph of the opinion the Court states:

"* * * ¹ he should not be discharged from custody unless it is *made clearly and satisfactorily* to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States. We may repeat the thought expressed in Appleyard's case, above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the States, and that 'while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union shall equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State.'"

(c) *Completed Crime or Length of Presence Immaterial*

There are a series of cases holding that a fugitive from justice includes one who while present does an overt act intended to be a material step towards the accomplishment of a crime and further that it is immaterial the length of time such a person is present in the demanding State. The leading case thereon is *Strassheim v. Daily*, 221 U. S. 280. In part the Court held that if the accused led to a betrayal of a trust and induced a fraud, "the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the State until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, *if the State should succeed in getting him within its power*. (Cases cited.) We may assume therefore that Daily is a criminal under the laws of Michigan."

"Of course we must admit that it does not follow that Daily is a fugitive from justice. *Hyatt v. Corkran*, 188 U. S. 691, 712. On the other hand, however, we think it plain that the criminal need not do within the State every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. *In re Cook*, 49 Fed. Rep. 833, 843, 844. *Ex parte Hoffstot*, 180 Fed. Rep. 240, 243. *In re William Sultan*, 115 No. Car. 57. For all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State a fugitive from justice is that he should have left the State after having incurred guilt there, *Roberts v. Reilly*, 116 U. S. 80, and his overt act becomes retrospectively guilty when the contemplated result ensues.

Thus in this case offering the bid and receiving the acceptance were material steps in the scheme, they were taken in Michigan, and they were established in their character of guilty acts when the plot was carried to the end, even if the intent with which those steps were taken did not make Daily guilty before. *Swift v. United States*, 196 U. S. 375, 396."

To the same effect is *Getzendanner v. Hiltner*, 185 S. E. 694, decided by the Supreme Court of Appeals of West Virginia in 1936. The evidence showed that if the relator was guilty of false pretences as charged in the indictment, it was while he was in Maryland where he set in motion the fraudulent scheme which culminated in later obtaining the money at a time when he was not present:

"A fugitive from justice, in contemplation of the Federal Constitution, need not have been in the demanding state at the time of the completion of the crime, if, while in the state, he has committed some overt act in furtherance of the offense, subsequently consummated 'to be a "fugitive from justice," it is necessary that the person charged as such must have been, actually present in the demanding state at the time of the commission of the crime, or having been there, has then committed some overt act in furtherance of the crime subsequently consummated, and has departed to another jurisdiction.'" (Cases cited.)

To the same effect are the following cases: *People v. Enright*, 217 N. Y. S. 288; *Ex parte Hoffstat*, 180 F. 240, Aff'd 218 U. S. 665; *Ex parte Finch*, 182 N. W. 565, 106 Neb. 45; *Zulch v. Roach*, 151 P. 1101, 23 Wyo. 335; *Ex parte Forbes*, 85 So. 590, 17 Ala. App. 405; Cert. denied 85 So. 921, 124 Ala. 698; *Ex parte Graham*, 216 F. 813; *State v. Gerber*, 126 N. W. 482, 111 Minn. 132; *In re Malicord*, 191 S. E. 730, 211 N. C. 684; *People v. Gargan*, 168 N. Y. S. 1027, 181 App. Div. 410; 11 R. C. L., §24, pp. 731-2; 25 C. J., §12, p. 258.

In *Ex parte Montgomery*, 244 Fed. 967, affirmed 246 U. S. 656 the alleged fugitive admitted his presence in the demanding State and it was shown that there was opportunity for an actual conference with a co-conspirator during the period of the conspiracy as charged in the indictment.

Included in these cases are those in which an alleged fugitive voluntarily surrendered himself in the demanding State and after giving bond or being tried and convicted departed therefrom, and such are held to be fugitives and within the extradition law, although as a matter of fact such persons were not present in the demanding State at the time the crime was committed. *State v. Brown*, 64 S. W. (2d) 841, 166 Tenn. 669, 91 A. L. R. 1246. Cert.

denied 292 U. S. 638; *Ex parte Morris*, 101 S. W. (2d) 259; *Keeton v. Gaiser*, 55 S. W. (2d) 302, 331 Mo. 499; *Grogan v. Welch*, 227 N. W. 74, 55 S. D. 613, 67 A. L. R. 1474; *Ex parte Taylor*, 101 S. W. (2d) 579.

To this principle there should be added those cases holding where an alleged fugitive is charged with desertion or non-support, a continuous crime, and it appears that the alleged fugitive was in the demanding State, even though for a few hours during the time when he is charged that the crime was committed, that such a person is a fugitive from justice, although he went into the demanding State for a lawful purpose and not in furtherance of the crime and left before an indictment was found. *People v. Brown*, 237 N. Y. 485, 143 N. E. 653, 23 A. L. R. 1164. Reversing 201 N. Y. S. 862; (See annotations in 32 A. L. R. 1164); *Ex parte Heath*, 287 P. 636, 87 Mont. 370; *Chase v. State*, 113 So. 103.

Arrest of Fugitive

As provided by Section 7 of the Uniform Act:

"If the Governor decides that the demand should be complied with he shall sign a warrant of arrest, which shall be sealed with the State seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance."

This warrant of arrest can be issued only by the Governor (but a statute of the State may authorize the Lieutenant Governor to issue it in his absence) as the statute provides the warrant "must substantially recite the facts necessary to the validity of its issuance"; which means (a) that the fugitive has been demanded by the Governor of the State from which he made flight as a fugitive from justice; (b) that he is charged with a specified crime; (c) that such a demand is supported by the proper papers required by the Uniform Act; (d) and that such have been certified as authentic by the Governor of the demanding State.¹³

The Governor's warrant, by Section 8, authorizes a "peace officer or other person to whom directed to arrest the accused at any time and any place . . . and to deliver the accused . . . to the duly authorized agent of the demanding State."

¹³ *Compton v. Alabama*, 214 U. S. 1; *Roberts v. Reilly*, 116 U. S. 80, 95; *Hyatt v. Corkran*, 188 U. S. 691; *Pierce v. Creecy*, 210 U. S. 387; *Marbles v. Creecy*, 215 U. S. 63; *Appleyard v. Massachusetts*, 203 U. S. 222, 227; *Biddinger v. Commissioner of Police of New York*, 245 U. S. 128; *McNichols v. Pease*, 207 U. S. 100 at 108.

As a practical matter the Governor's warrants issued by the several States show that such are addressed "To any Sheriff, Coroner or any other Peace Officer in the State" and authorizes, as provided by the Act, any such officer "to command the aid of all peace officers or other persons in the execution of the warrant."

(a) *Right to Apply for Writ of Habeas Corpus*

While the Governor's warrant directs the authorized peace officer to arrest the accused "and to deliver the accused . . . to the duly authorized agent of the state" such can be done only as provided by Section 8 "subject to the provisions of this Act." These provisions are set forth in Section 10 granting to the person arrested the right, and requires, that he shall before delivery to the authorized agent "first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus." Before the adoption of this provision giving to the alleged fugitive the right to apply for a habeas corpus there was a wide conflict in the decisions on whether there could be a judicial review of the issuance of the Governor's warrant by a writ of habeas corpus. This is stated in *Biddinger v. Commissioner of Police of the City of New York*, 245 U. S. 128 as follows:

"The scope and limits of the hearing on habeas corpus in such cases has not been, perhaps it should not be, determined with precision. Doubt as to the jurisdiction of the courts to review at all the executive conclusion that the person accused is a fugitive from justice has more than once been stated in the decisions of this court, *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Appleyard v. Massachusetts*, 203 U. S. 222; but the question not being necessary for the disposition of the cases in which it is touched upon, as it is not in this, it is left undecided. This much, however, the decisions of this court make clear; that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred

for investigation to the trial of the case in the courts of the demanding State."

Is Duty to Surrender Obligatory?

Recently there has been much discussion on whether a Governor of an asylum state must honor requisition and surrender a fugitive from justice when the demand is in proper form and it is clearly established that the person wanted is a fugitive from justice.

The Federal Constitution provides that such a fugitive ". . . shall on demand of the executive authority of the state from which he fled *be delivered up* . . .," and the Federal law provides "It shall be the duty of the executive authority . . . to cause him (fugitive) to be arrested and secured . . . and to cause the fugitive to be delivered" to the named agent.

By Section 2 of the Uniform Act it is likewise provided:

"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 *seized* charged in that State with treason, felony or other crime, who has fled from justice and is found in this State."

The first expression on this subject by the U. S. Supreme Court was in the case of *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717. In speaking of the Constitutional provision¹⁴ Chief Justice Taney said:

"This compact engrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives *the right* to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to demand implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled."

* * *

"This duty, of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceedings upon which the demand was founded; and as the duty of the Governor of the State where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State * * *."

¹⁴ U. S. Constitution Art. IV, Sec. 2.

Further:

"* * * The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the Executive of the State under this law, when the demand is made upon him and the requisite evidence produced. The Governor has only to issue his warrant to an agent or officer to arrest the party named in the demand."

In 1873 in the case of *Taylor v. Taintor*, 16 Wallace 366, 21 L. Ed. 287, the Supreme Court in affirming the judgment of the Supreme Court of Errors of Connecticut in part said:

"It is true that the constitutional provision and the law of Congress, under which the arrest and delivery were made, are obligatory upon every State and a part of the law of every State. But the duty enjoined is several and not joint; and every governor acts separately and independently for himself. There can be no joint demand and no joint neglect or refusal. In the event of a refusal, the State making the demand must submit. There is no alternative."

An indirect reference is made to this matter in *Robb v. Connolly*, 111 U. S. 624 at p. 638. This case holds that an agent appointed by the demanding State to receive a fugitive is a State and not an officer of the United States. In answer to the propounded question by the court whether "could it be claimed that the arrest of the fugitive would be in pursuance of the Acts of Congress, or that the agent of the demanding State had authority from the United States to receive and hold him to be transported to that State?" The Court answers:

"This question could not be answered in the affirmative, except upon the supposition, *not to be indulged*, that, so far as the Constitution and the legislation of Congress are concerned, the transporting of a person beyond the limits of the State in which he resides, or happens to be, to another State, depends entirely upon the *arbitrary will* of the executive authorities of the State demanding and of the State surrendering him."

Hyatt v. Corkran, 188 U. S. 691, 712, states that Section 5278 of the Revised Statutes upon the presentation of a demand accompanied by proper papers duly authenticated "makes it the *duty* of the executive authority of the State to which such person has fled to cause him to be arrested and secured" and later quotes, and thereby apparently approves, the statement of the Court in *Kentucky v. Dennison*, *supra*, that such a duty is ministerial, and not discretionary, a "moral obligation" binding upon the Governor of an asylum State, but with no power in the courts to compel the fulfillment of this duty.

Similarly is the Court's opinion in *Marbles v. Creecy*, 215 U. S. 63 at 67:

"And when the Governor of Missouri was furnished, as he was, with a copy of the indictment against Marbles, certified by the Governor of Mississippi to be authentic, it then *became the duty* of the Governor of Missouri, under the Constitution and laws of the United States, to cause the arrest of the alleged fugitive. So reads the statute enacted in execution of the constitutional provision relating to fugitives from justice. Rev. Stat. No. 5278."

Justice Holmes in passing upon the right of the State of New York to secure the return of Thaw from the State of New Hampshire after his escape from the Matteawan State Hospital states in reversing an order discharging Thaw:

"In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but *peremptorily requires* that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime."¹⁵

South Carolina v. Bailey, 289 U. S. 412, 53 S. Ct. 667 is noted for its analogous ruling, as therein it is stated in reference to the duty of the State Court to pass upon the "irreconcilable conflict of evidence" as to the presence of the alleged fugitive in the demanding State:

"It was the *duty* of that Court to administer the law prescribed by the Constitution and statute of the United States, as construed by this Court." (Cases cited.)

Whether the duty of the Governor of an asylum State to surrender a properly charged fugitive from justice is obligatory or discretionary is summed up in 25 C. J., p. 265, as follows:

¹⁵ *Drew v. State*, 235 U. S. 432 at 439.

"This duty is ministerial and not discretionary and has been described as imperative, although in the absence of statute there is no power to compel the executive to act."

See also annotation to *Ex parte Germain*, 51 A. L. R. 789. Also *People v. Murray*, 192 N. E. 198, 357 Ill. 326, 94 A. L. R. 1487.

B. ARREST PRIOR TO REQUISITION

Due to the present rapid means of communication between the police systems of the various States by air mail, telegraph, radio and teletype, when a State desires a person as a fugitive from justice, it is a common practice to request arrest and detention prior to the preparation of extradition papers, and in most cases the person wanted is in the custody of the police officials or on bail in the asylum state at the time the demand for extradition is presented to the Governor.

Section 13 of the Uniform Act sanctions an arrest prior to requisition. This provision authorizes the arrest of a fugitive whenever he "shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state," and is believed to be in the asylum state, whereupon "the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit."

That this provision is fully authorized and such an arrest is legal is passed upon in *Burton v. N. Y. Central R. R. Co.*, 245 U. S. 315 at 318.

"These provisions of the Constitution and federal statutes do not deal with arrest in advance of a requisition. They do not limit the power of a State to arrest, within its borders, a citizen of another State for a crime committed elsewhere; nor do they prescribe the manner in which such arrest may be made. These are matters left wholly to the individual states. Whether the asylum state shall make an arrest in advance of requisition, and if so, whether it may be made without a warrant, are matters which each state decides for itself. Such has been the uniform practice, sanctioned by a long line of decisions and regulated by legislation in many of the States."

There to is attached the following footnote:

"The decisions appear to be uniform that at common law arrest in advance of requisition is legal." (Cited cases.) See also 11 R. C. L. p. 720, §10.

C. ARREST WITHOUT A WARRANT

Heretofore many questions have arisen as to the right of a peace officer or of a private citizen to cause an arrest without a warrant of an alleged fugitive.

Section 14 of the Uniform Act specifically authorizes and makes legal the arrest of a person by any peace officer or a private person "without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year." If such an arrest is made, the act requires the arrested person to be immediately taken before a Judge or Magistrate and a complaint must be made against him under oath setting forth the ground for his arrest; thereafter the proceedings shall be same as if he had been arrested on a warrant.

While this provision was intended to overcome many of the problems heretofore existing it is found by actual experience that many questions still exist.

As stated, most of the present arrests of fugitives from justice are made upon a receipt of a wanted message by telegraph, radio or teletype, and such, while indicating the nature of the alleged crime, often do not indicate whether the alleged crime is a misdemeanor or felony, or is punishable "by death or imprisonment for a term exceeding one year." In the case of a telegraphic message there is a possibility that such might have been sent other than by a police authority, but not when the message is sent by radio or teletype, as certain code methods are used to establish authenticity and the teletype system used by the police is a distinctive service solely established for police work. While at the common law any person, whether a peace officer or a private citizen, had the right to arrest a person known to have committed a felony, or one whom he had reasonable or probable grounds to suspect of having committed a felony,¹⁶ but could only arrest a person charged with a misdemeanor when such criminal act was committed in the presence of the peace officer or private person.¹⁷ Further, while at the common law there was a well established distinction between felonies

¹⁶ 6 C. J. S. p. 586 and 606; *Kurtz v. Moffitt*, 115 U. S. 487, 504; *Burton v. N. Y. Cent. & H. River R. R. Co.*, 245 U. S. 315; *Stallings v. Splain*, 253 U. S. 339 at 341.

¹⁷ 6 C. J. S. 589 and 607.

and misdemeanors the line of demarkation does not now exist in most of the States and in those states where the common law principle does not exist a felony is a crime where the possible imprisonment exceeds a term of one year.¹⁸

It is for this reason that Section 14 authorizes an arrest without a warrant by a peace officer or private citizen for a crime punishable by death or imprisonment for a term exceeding one year.

In view of these provisions it is suggested that if a local officer, upon the receipt of a message that a person is wanted as a fugitive from justice for a crime, is doubtful whether the crime is a felony or a misdemeanor, or the possible punishment therefor is imprisonment exceeding one year, if he believes the message has come from a recognized peace authority, the better course to be pursued would be for the officer to go before a magistrate and make oath, that he is advised by the police authorities of the demanding state that the named person is charged with a specific crime and is a fugitive from justice, whereupon it would become the duty of the magistrate to issue his warrant for the alleged fugitive under the provisions of Section 13 of the Uniform Act, often called a fugitive warrant. Such a course of action would fully protect the arrested person and the peace officer making the arrest, as unquestionably he had authority to make the complaint against the alleged fugitive.

In the case of *People v. Ormsby*, 241 N. Y. S. 225, 136 Misc. 637 it was held that peace officers are justified in making an arrest without a warrant of a non-resident within the State, upon telegraphic information received from a police department of a city of another State that the person designated is suspected of a felony; and in *Cunningham v. Baker*, 16 So. 68, 104 Ala. 160, 53 Am. S. R. 27 it was held that to support such an arrest without a warrant there must be a reasonable cause to believe the crime committed was a felony. These cases are sufficient authority to say that upon the receipt of a message that a named person is wanted, a local peace officer, if he believes the message is an authentic one and from a recognized police source, is empowered to cause the arrest of the named person without a warrant, if the crime charged is a felony or the possible punishment exceeds a year, or to swear out a fugitive warrant before a magistrate based upon the message, preserving the message as authority for his action.

In this connection notation is made of the case of *Malcolms v. Scott*, 23 N. W. 166, 56 Mich. 459 holding that an officer is not au-

¹⁸ This is the Federal rule—See U. S. C. A.

thorized to make an arrest without a warrant based upon a letter signed by an unknown person when it does not appear that a prosecution for the alleged offense has been commenced in another State and the letter does not set forth the facts constituting the offense.

D. SURRENDER OF AN ACCUSED PERSON ALTHOUGH NOT PHYSICALLY PRESENT IN DEMANDING STATE AT TIME OF CRIME

The present Uniform Criminal Extradition Act by Section 6, embodies an entirely new provision and confers upon the Governor of an asylum state the discretionary power to cause the arrest and surrender by extradition of persons not present in the demanding State at the time of the commission of a crime, who commit an act intentionally resulting in a crime in the demanding State, even though the accused was not in that State at the time of the commission of the crime, and has not fled therefrom.

Section 6 in full provides:

"EXTRADITION OF PERSONS NOT PRESENT IN DEMANDING STATE AT TIME OF COMMISSION OF CRIME. The Governor of this state may also surrender, on demand of the Executive Authority of any other state, any person in this state charged in such other state in the manner provided in Section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand, and the provisions of this act not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

This provision was included to definitely confer upon the Governor of a State, statutory authority to permit the extradition of such criminals, as it is now well recognized that the leaders or brains of criminal gangs while sending their henchmen into a State to do an unlawful act, purposely refrain from going themselves, and if linked to a crime and arrested claim they are not fugitives from justice and not subject to extradition proceedings. This provision is also intended to reach persons engaged in unlawful conspiracies, obtaining property by false pretenses, "get-rich-quick" schemes, perpetrated by telephone, telegraph, mail or through an innocent local agent.

The decisions, heretofore, have been practically of one accord in holding that only a person who was in the demanding State at the time of the commission of a crime and thereafter made flight

therefrom could be arrested and surrendered in interstate rendition.¹⁹

Often it was urged before the Court that if it could be shown that the alleged defendant committed or participated in the crime in the demanding State, that extradition should be granted based on a constructive presence. The U. S. Supreme Court has uniformly held that actual presence is necessary and requisition cannot be granted based upon the doctrine of a constructive presence of the accused in the demanding State. The leading case thereon in the U. S. Supreme Court is *Hyatt v. Corkran*, 188 U.S. 691 to the following effect:

"It is, however, contended that a person may be guilty of a larceny or false pretense within a State without being personally present in the State at the time, therefore the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the State of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the State.

The exercise of jurisdiction by a State to make an act committed outside its borders a crime against the State is one thing, but to assert that the party committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that State, is quite a different proposition.

The language of section 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the State which demands his surrender. It speaks of a demand by the executive authority of a State for the surrender of a person as a fugitive from justice, by the executive authority of a State to which such person has fled, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, shall be produced, and it makes it the duty of the executive authority of the State to which such person has fled to cause him to be arrested and secured. Thus the person who is sought must be one who 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

¹⁹ 25 C. J., §12, p. 257; 11 R. C. L., §24, p. 731. Scott on Interstate Rendition, Chapter VII, pp.64-88. For list of cases see 51 A. L. R. 798 and 55 A. L. R. 349.

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. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a State, one who had not been in the State at the time when, if ever, the offense was committed, and who had not, therefore in fact, fled therefrom."

The Court then reviews *Ex parte Reggel*, 114 U. S. 642, 651, to the following effect:

"* * * Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required, by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the State or Territory where the accused is found, the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding State, and, therefore, could not be said to have fled from its justice. Upon the executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State."

From this case and also from *Roberts v. Reilly*, 116 U. S. 80 the Court concludes:

"It is clear that it was regarded by the court as essential that the person should have been in the State which demanded his surrender

at the time of the commission of the offense alleged in the affidavit or indictment, and that it was a fact jurisdictional in its nature, without which he could not be proceeded against under the Federal statute."

The Court further holds:

"Many state courts before whom the question has come have held that a merely constructive presence in the demanding State at the time of the alleged commission of the offense was not sufficient to render the person a fugitive from justice; that he must have been personally present within the State at the time of the alleged commission of the act, or else he could not be regarded as a fugitive from justice. Spear and also Moore on Extradition are to the same effect. Those authorities and text writers are referred to in the margin." (Cases cited.)

For other U. S. Supreme Court decisions see *Prigg v. Commonwealth*, 16 Pet. 539; *Ex parte Reggel*, 114 U. S. 642 at 651; *Roberts v. Reilly*, 116 U. S. 80; *Munsey v. Clough*, 196 U. S. 364; *Pierce v. Creecy*, 210 U. S. 387.

In the report of the Commission jointly appointed by the National Conference of Commissioners on Uniform State laws and the Interstate Commission on Crime, which drafted the present uniform law, in recommending the draft thereof the report shows that fifteen rules are laid down as embracing the best features in various State statutes and codifies the better views contained in judicial decisions and the rule relative to Section 6 is stated as follows:

"That an asylum state, in the discretion of the governor, has power to surrender on demand of another state, a person not required under the Constitution to be extradited because he was not in the demanding state at the time when the alleged crime was committed, and has not fled therefrom, if the law of the asylum state would provide for punishment of the person claimed had the acts with which he is charged taken effect in that state; with authority in the governor of the asylum state, in case of such surrender, to impose a condition that the person claimed shall be tried only for the crime for which he is extradited.

Many states including New York provide for trial of persons for crimes committed outside the state but having their effect within the state. It is to be assumed, therefore, that such states will desire to obtain jurisdiction of such persons by means of extradition, and conversely will be willing to extradite persons for trial under similar laws of other states, if appropriate safeguards are thrown around such extradition. It is interesting in this connection that, for purposes of international extradition, a person has been held to be a 'fugitive' who was not in the requesting state when the crime in question was committed. See *Rex v. Godfrey* (K. B., 1922) 39 Times Law Rep. 5; Note, 23 Columbia Law Rev. 176.

If opposition should be great to extradition of a person who was not in the demanding state when the crime in question was committed, it

would seem that it would be necessary to strengthen the laws of conspiracy in each state so as to impose appropriate penalties upon those who participate in a conspiracy in one state which results in the commission of a crime in another state."

This study then makes reference to the "Constitutional Considerations" relative to Section 6 and such are included herein as such presents the study made by this Commission on this subject and not easily attainable elsewhere.

"Constitutional Considerations"

Section 6 of the Uniform Extradition Act provides for extradition from one state to another, *in the discretion of the Governor*, of a person charged with a crime in the requesting state *although he was not in the state at the time the alleged crime was committed* and therefore has not fled therefrom. It is proposed to add that the act alleged to have been done shall also be a crime in the requested state, and that the Governor may extradite upon condition that the person claimed to be tried for the extradition crime only. As this section is entirely novel in providing legislative authority in an asylum state for surrender on demand of a class of persons not required to be surrendered under the Constitution, no judicial pronouncement heretofore made can be looked to as direct authority for declaring the proposed section or any action taken thereunder to be either constitutional or unconstitutional. The provision has not apparently been passed upon in any of the ten jurisdictions which have adopted the uniform act.

There are a number of cases in which the surrender of a fugitive has been held invalid because 'not authorized by the Constitution'; and dicta appear in these and other cases stating or implying that State action is limited to the requirements of the Constitution, and that the rights of a person accused of crime are violated if he is delivered up in a case not 'authorized by the Constitution.'

Among these cases, the more important are: *Prigg v. Commonwealth*, 16 Pet. 539 (1842); *Hyatt v. People ex rel Corkran*, 188 U. S. 691, 23 Sup. Ct. 456 (1903), affirming 172 N. Y. 76 (1902); *Ex parte Reggel*, 114 U. S. 642, at 651; *Roberts v. Reilly*, 116 U. S. 80 (1885); *Innes v. Tobin*, 240 U. S. 127, 36 Sup. Ct. 293 (1916).

Analysis of these decisions and statements, however, shows that they are not applicable to state legislation, not passed in fulfillment of the constitutional duty of extradition, but passed under the residuum of sovereign power remaining in the states. On the other hand general principles of constitutional law and of constitutional interpretation appear to support such legislation as is incorporated in section 6 of the Uniform Act.

(1) Sovereignty inheres in the several states over all matters as to which they have neither surrendered their authority to the federal government, nor restricted themselves to a certain course of action, by the provisions of the Constitution. The question then resolves itself to this:

Whether subdivision 2 of Article IV of the Constitution was intended either as a delegation to the federal government of exclusive authority to regulate the rendition from one state to another of persons charged with crime, or as a prohibition on the several states against surrendering on request of another state a person found within their borders, except as provided by the Constitution; or if, on the contrary, it was not intended merely as a requirement of cooperation in certain specified cases, leaving to the states full power in this field beyond the constitutional requirements.

In *Prigg v. Commonwealth*, 16 Peters 539 (1842), the same problem of construction was raised with respect to subdivision 3 of No. 2, of Article IV, which provided for return of fugitive slaves. From the opinion of the court, delivered by Mr. Justice Storey, it is not clear whether the Pennsylvania statute was regarded as unconstitutional in toto because exclusive authority to regulate the return of fugitive slaves was vested in the federal government, or whether only so much of the statute as was repugnant to the Constitution and the federal act was held invalid. The concurring opinion of Taney, J., insisting on the latter construction seems most consonant with ordinary rules of construction, and seems equally applicable to the extradition provision.

Upon such a construction, the decisions holding invalid extradition of persons not fugitives within the meaning of the Constitution may be read as holding merely that the action of the Governor was invalid because unauthorized by the Constitution—there being no state law upon which to support it.

(2) It has been held that a person illegally taken into a state which wishes to prosecute him cannot compel his own return to the asylum state nor object to the ensuing prosecution. (*Pettibone v. Nichols*, 203 U. S. 192 (1906)). This doctrine of 'non asylum' shows that there is nothing unconstitutional in his transfer from state to state in a way other than that expressly provided by the Constitution. It would seem fairly to follow that if there were a law in the asylum state providing for such transfer, that transfer would be *neither illegal nor unconstitutional*.

(3) The power of a state to deal with alleged criminals for its own protection has been made the basis of a number of decisions upholding state legislation dealing with arrest preliminary to extradition proceedings, though the Constitution does not authorize such arrest.

(4) The police power of a state over persons within the state may be invoked to authorize extradition not only for the purpose of expelling undesirables, but also for the purpose of aiding other states. On this ground statutes providing for rendition of witnesses in criminal cases have been upheld.

(5) In the exercise of its police power each state is, of course, limited by the requirements of due process of law. Unlike the requirement that the extradited person be substantially shown to be charged with crime, a requirement of actual presence in the demanding state at the time of the alleged crime, has no logical or practical relation to due process. In view of the fact that a person may be no less a fugitive

from *justice* and from the constituted authorities of the demanding state because he took the preliminary precaution of operating from without the state, and in view of the fact that as the decisions now stand actual flight, in the sense of seeking to escape, is not required, and mere departure makes the person charged a fugitive, insistence upon the technical interpretation of 'fleeing from' seems an unreasonable limitation to place upon the power of a state to deal with persons within its borders.

* * * *

The constitutionality of section 6 of the Uniform Act as drafted by the Commissioners on Uniform Laws seems clear, not being in conflict with the extradition provisions of the Constitution or of the federal laws, but being supplementary thereto, and within the states police power in dealing with crime and criminals: The Committee on Uniform State Laws of the Association of the Bar of the City of New York has taken this view. Since the section is *extra*-constitutional, that is, is entirely outside the constitutional requirements pertaining to interstate rendition, there can be no question of the validity of the qualifications, recommended in this report, giving discretion to the Governor of the State, or permitting him to impose conditions to his surrender of the person demanded."

In support of the conclusion that this section is "extra-constitutional and is constitutionally permissible is the U. S. Supreme Court decision of *Roberts v. Reilly*, 116 U. S. 80, which upheld the right of a Governor of an asylum State to waive the right of that State to retain the claimed fugitive and to surrender him to the demanding State.

The same conclusion was reached by the Superior Court of Pennsylvania in *Commonwealth v. Ashe*, 173 Atl. 715, 114 Pa. Sup. 119, holding that a law of Pennsylvania is valid that authorizes a permissible surrender by the Governor of that State of a person imprisoned for a term less than life upon demand of the Governor of another State, when the demanded person is charged in the latter state with murder with the proviso that prior to the removal of such a fugitive from the State of Pennsylvania the executive authority of a demanding state shall agree that the person so delivered up is to be returned immediately to Pennsylvania at the cost of the demanding state to serve the balance of his term of imprisonment in the event of his acquittal in the demanding state or in the event of his conviction in the demanding state of manslaughter or of any degree of murder, the punishment for which is less than death or imprisonment for life.

The Court holds that the Governor surrendering such a fugitive "he is delivered to the other state for trial as a matter of comity, and it becomes a matter of agreement between the executives

of the states, made previously or later, as to what shall afterwards be done with the prisoner," and such surrender is not governed by the Federal Constitution or its laws.²⁰

A similar thought is expressed in *State v. Brown*, 64 S. W. (2d) 841, 166 Tenn. 669 as follows:

"There is no language in the constitutional provision, nor in the statute enacted by Congress, expressly making presence in the demanding state, at the time the crime was committed, essential to the right of extradition. The language of the Constitution (Const. U. S. art. 4, §2) is that the right shall exist with respect to one 'who shall flee from Justice, and be found in another State.' The statute (18 USCA, §662) gives effect to that provision by directing that the demand shall be made by the Governor of the state 'from whence the person so charged has fled.'

"The constitutional provision that a person charged with crime against the laws of a state, and who flees from its justice, must be delivered up on proper demand, is sufficiently comprehensive to embrace any offense, whatever its nature, which the state, consistently with the Constitution and laws of the United States, may have made a crime against its laws.' *Appleyard v. Massachusetts*, 203 U. S. 222, 227, 27 S. Ct. 122, 123, 51 L. Ed 161, 163, 7 Ann. Cas. 1073. 'The provision of both the constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done.' *Lascelles v. Georgia*, *supra*.

The Supreme Court has not undertaken to limit or restrict the scope and application of the constitutional direction by strict construction. On the contrary, it has declared that 'a faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states'; and that it should 'be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.' *Appleyard v. Massachusetts*, *supra*. The constitutional and statutory provisions 'have not been construed narrowly and technically by the courts as if they were penal laws, but liberally, to effect their important purpose.' *Biddinger v. Commissioner of Police*, 245 U. S. 128, 133, 38 S. Ct. 41, 43, 62 L. Ed. 193, 198."

An extreme authority is the case of *Ex parte Gornostayoff*, 298 P. 55, 113 Cal. App. 255, decided in 1931, without any citation of a supporting authority. A return to the petition for a writ of habeas corpus showed that the prisoner was detained by virtue of a warrant issued by the Governor of the State of California directing the extradition of the petitioner to the State of Ohio. The Governor's warrant was based upon indictment filed against the petitioner in the State of Ohio in 1927 charging him with having committed a felony in 1927 "to-wit, with having failed to support

²⁰ See also *People v. Klinger*, 319 Ill. 275, 149 N. E. 799, 42 A. L. R. 585.

two minor children. Petitioner claims he was not within the demanding state on said last-mentioned date. There is no merit in the petition. Considering the character of the offense with which he is charged, his presence within the state was not necessary to enable him to commit the same." The Court denied the habeas corpus petition.

The conclusion of the committee and the validity of Section 6 is fully supported by the decision of the Kansas Supreme Court in *Kansas v. Wellman*, 170 P. 1052, 102 Kan. 503, L. R. A. 1918D 949, Ann. Cas. 1918D 1006. Therein it is to be noted that the defendant contended that not being in the State at the time of the alleged commission of the offense charged he was not a fugitive from justice and therefore was not within the province of the Federal statute. In part the Court said:

"In this contention so far as relates to the regularity of the arrest, he is borne out by the authorities. The rule invoked results in the unfortunate and anomalous possibility that a murderer standing in North Carolina, for instance, may shoot and kill a man just over the line in Tennessee, and escape conviction in the former state on the ground that he had committed no crime within its jurisdiction (cases cited), and avoid prosecution in the latter cause, not being a fugitive from justice he is not amenable to interstate rendition" (Citations).

More directly the Court says:

"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 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 surrendering 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. 19 Cyc. 85; 11 R. C. L. 732; *Innes v. Tobin*, 240 U. S. 127."²¹

Is Section 6 "Extra-Constitutional?"

While the report of the committee which drafted this provision

²¹ The text in 11 R. C. L. p. 732 is:

"Moreover, it has been held that a state may, in the exercise of its reserved sovereign powers, provide by statute for the surrender, on requisition, of persons who are indictable for a crime committed through their constructive presence in a sister state, although they have not been corporally within such state and have never fled therefrom to escape arrest and punishment, but in the absence of such statute such persons are not subject to extradition by the latter state."

To the same effect see *Id.* pp. 722-3. An examination of the references given do not support this text. The same is true relative to the citation in Cyc.

states that this section is extra-constitutional, it is submitted that this conclusion is questionable, especially considering the words used in the Federal Constitution and the Federal statute enacted to carry the constitutional provision into effect.

The constitutional provision applies to persons who "shall flee" and shall be delivered up "on demand of the executive Authority of the State from which he fled."

Section 5278 similarly refers to the asylum State "to which such person has fled" in two instances and to the demanding State as "from whence the person . . . has fled" with notice of the arrest to the demanding State or its agent appointed "to receive the fugitive, and to cause the fugitive to be delivered to such agent."

It is submitted that this matter is considered by the U. S. Supreme Court in *Innes v. Tobin*, 240 U. S. 127 and that the effect of this opinion is to hold that the Federal constitutional provision and the statute passed pursuant thereto is exclusive and permits the extradition of only a person who is in the true sense of the word a fugitive, that is, was physically present in the demanding State, as heretofore detailed, and after the commission of a crime made flight therefrom. In part the Supreme Court in this opinion said:

"First. For the purpose of the solution of the inquiry under this heading we treat the following proposition as beyond question: (a) That prior to the adoption of the Constitution fugitives from justice were surrendered between the States conformably to what were deemed to be the controlling principles of comity. *Kentucky v. Dennison*, 24 How. 66, 101, 102; 2 Moore on Extradition and Interstate Rendition, p. 820 *et seq.* (b) That it was intended by the provision of the Constitution to fully embrace or rather to confer authority upon Congress to deal with such subject. *Prigg v. Pennsylvania*, 16 Pet. 539; *Kentucky v. Dennison*, *supra*; *Taylor v. Taintor*, 16 Wall. 366; *Appleyard v. Massachusetts*, 203 U. S. 222. (c) That the act of 1793 (now Rev. Stat., No. 5278) was enacted for the purpose of controlling the subject in so far as it was deemed wise to do so, and that its provisions were intended to be dominant and so far as they operated controlling and exclusive of state power. *Prigg v. Pennsylvania*, *supra*; *Kentucky v. Dennison*, *supra*, pp. 104, 105; *Mahon v. Justice*, 127 U. S. 700; *Lascelles v. Georgia*, 148 U. S. 537.

Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding

State. *Ex parte Reggel*, 114 U. S. 642; *Roberts v. Reilly*, 116 U. S. 80; *Hyatt v. Corkran*, 188 U. S. 691; *Bassing v. Cady*, 208 U. S. 386, 392.

* * * *

We are thus brought to the remaining heading,

Second. Although the order for rendition was not in conflict either expressly or by necessary implication with any of the provisions of the Constitution or statute, was it nevertheless void under the circumstances because it dealt with a subject with which it was beyond the power of the State to deal and which was therefore brought as the result of the adoption of the statute within exclusive Federal control although no provision dealing with such subject is found in the statute? To appreciate this question, the proposition relied upon needs to be accurately stated. It is this: The Constitution provides for the rendition to a State of a person who shall have fled from justice and be found in another State, that is, for the surrender by the State in which the fugitive is found. This, it is conceded, would cover the case and sustain the authority exercised, as the accused was a fugitive from the justice of Georgia and was found in Texas. But the proposition insists that the statute is not as broad as the Constitution since it provides not for the surrender of the fugitive by the State in which he is found but only for his surrender by the State into which he has fled, thus leaving unprovided for the case of a fugitive from justice who is found in a State but who has not fled into such State because brought into such State involuntarily by a requisition from another. And the argument is supported by the contention that as the statute exercises the power conferred by the Constitution and is exclusive, it occupies the whole field and prohibits all state action even upon a subject for which the statute has not provided and which therefore in no manner comes within its express terms. But we are of the opinion that the contention rests upon a mistaken premise and unwarrantedly extends the scope of the decided cases upon which it relies. The first, because it erroneously assumes that although the statute leaves a subject with which there was power to deal under the Constitution unprovided for, it therefore took all matters within such unprovided area out of any possible state action. And the second, because while it is undoubtedly true that in the decided cases relied upon (*Kentucky v. Dennison, supra*; *Roberts v. Reilly, supra*; *Hyatt v. Corkran, supra*) the exclusive character of the legislation embodied in the statute was recognized, those cases when rightly considered go no further than to establish the exclusion by the statute of all state action from the matters for which the statute expressly or by necessary implication provided.

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 whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, 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. 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.”

Supporting this conclusion is also *Appleyard v. Massachusetts*, 203 U. S. 222 at 227, quoted with approval in *Biddinger v. Commissioner of Police of the City of New York*, 245 U. S. 128, as follows:

“A person charged by indictment or by affidavit before a magistrate with the commission within a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. *Such is the command of the Supreme law of the land, which may not be disregarded by any State.*”

Also in *State of South Carolina v. Bailey*, 289 U. S. 412, the Supreme Court in stating that the rights of the party depended upon the proper construction and application of the Federal Constitutional provision and the Federal legislation decreed:

“It was the duty of that Court to administer the law prescribed by the constitution and statute of the United States, as construed by this Court.” (Cases cited.)

The remarks of Mr. Justice Peckham in *Hyatt v. Corkran*, 188 U. S. 691 have been referred to in support of the principle that a State may provide for the extradition of a person not physically present in the demanding State at the time of the crime and is also referred to as opposed to this principle.

Scott in his work on Interstate Rendition commenting thereon states:

"Mr. Justice Peckham facetiously, yet truthfully, reminded these executives of their error in these words." (Quotation given below.)²²

The reminder being:

"The exercise of jurisdiction by a State to make an act committed outside its borders a crime against the State is one thing, but to assert that the party committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that State, is quite a different proposition."

This duty of all tribunals and persons to administer the law prescribed by the Federal Constitution and by the Federal legislation are stated as "obligatory upon every state and a part of the law of every state,"²³ and "which each state is bound, in fidelity to the Constitution to recognize . . ."²⁴

Likewise the exclusiveness of the Federal Constitution and law and the duty of the State Courts to adhere to it as interpreted by the U. S. Supreme Court is expressed in the following cases: *Ex parte Hagan*, 245 S. W. 336 at 338, 295 Mo. 435; *Ex parte Bergman*, 130 S. W. 174 at 176 and 180; *Hibler v. State*, 43 Texas 197 at 203; *People v. Murray*, 192 N. E. 198, 357 Ill. 326, 94 A. L. R. 1487; *Commonwealth v. Hare*, 36 Pa. Sup. Ct. 125 at 129 and 130; *In re Henke*, 177 N. W. 880, 13 A. L. R. 409; *People v. Baldwin*, 174 N. E. 51 at 53, 341 Ill. 604; *Ex parte Roberts*, 56 P. (2d) 703, 704; *Grogan v. Welch*, 227 N. W. 74, 67 A. L. R. 1474 at 1476 and 1479.

While I do not question, in view of the foregoing considerations, a State may pass legislation in aid of and supplementary to the Federal Constitution and the Federal Statute, or as termed in the report "extra-constitutional" legislation, I most humbly submit that I have grave doubts that Section 6 is extra-constitutional legislation for to me it is apparent that the constitutional provision and the Federal statute permits the extradition only of a fugitive who was actually present in the demanding State at the time of the com-

²² Scott on Interstate Rendition, p. 77. See also *Id.* §8, p. 10.

²³ *Taylor v. Taintor*, 16 Wallace 366.

²⁴ *Appleyard v. Massachusetts*, 203 U. S. 222, 227-8.

mission of the crime or there committed an act which constituted a part of a later consummated crime, and thereby, or at least by necessary implication, prohibits the surrender of the person as a fugitive when that person was not in the demanding State at the time of the commission of the crime, although he had committed an intentional act or acts resulting in a crime in the demanding state. Such I believe to be the decision of the Supreme Court in *Innes v. Tobin*, *supra*, which stated:

"It is not open to question that its provisions expressly or by necessary implication prohibit the surrender of a person in one state for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding state."

Because the Uniform Extradition Act has been enacted in many States unquestionably the constitutionality of Section 6 will come before our highest tribunals for decision, and in the event that this section should be declared unconstitutional it is submitted that the States are not without power to secure the return of a criminal contemplated by this section, as the various states could enter into a compact similar to that now existing for the supervision and return of parolees. Under the compact provision of the Constitution of the United States consent for such compacts have already been granted by the Federal Congress by an act effective June 6, 1934, entitled "An Act granting the consent of Congress to any two or more States to enter into Agreements or Compacts for cooperative effort and mutual assistance in the prevention of crime, and for other purposes."²⁵

²⁵ See remarks and charge to Grand Jury by Judge William Clark, then District Judge of the District Court of New Jersey, now Judge of the Third Circuit of the U. S. Circuit Court, in *U. S. v. Flegenheimer*, 14 Fed. Sup. 584, wherein he states:

"As the Constitution as now written gives the federal government no power over interstate extradition, we are compelled to resort to the legislation of the different members of the federation, namely, the sovereign states."

And also in which he states that the constitutional provision relative to compacts is "in the form of a prohibition against, and not a grant to the states," and urges the drafting of an extradition act under Art. 4, Sec. 2, Clause 2 of the Constitution or the passage by the State of New Jersey of an effective Uniform Extradition Act.