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Kentucky Vs. Dennison

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Court : US Supreme Court

Decided On : 1860

Appeal No. : 65 U.S. 66

Appellant : Kentucky

Respondent : Dennison

Judgement :

Kentucky v. Dennison - 65 U.S. 66 (1860)
U.S. Supreme Court Kentucky v. Dennison, 65 U.S. 24 How. 66 66 (1860)

Kentucky v. Dennison

65 U.S. (24 How.) 66

SYLLABUS

1. In a suit between two States, this court has original jurisdiction without any further act of Congress regulating the mode and form in which it shall be exercised.

2. A suit by or against the Governor of a State, as such, in his official character, is a suit by or against the State.

3. A writ of mandamus does not issue in virtue of any prerogative power, and, in modern practice, is nothing more than an ordinary action at law in cases where it is the appropriate remedy.

4. The words "treason, felony, or other crime" in the second clause of the second section of the fourth article of the Constitution of the United States include every offence forbidden and made punishable by the law of the State where the offence is committed.

5. It was the duty of the Executive authority of Ohio, upon the demand made by the Governor of Kentucky and the production of the indictment, duly certified, to cause Lago to be delivered up to the agent of the Governor of Kentucky who was appointed to demand and receive him.

6. The duty of the Governor of Ohio was merely ministerial, and he had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment.

7. The word "duty," in the act of 1793, means the moral obligation of the State to perform the compact in the Constitution when Congress had, by that act, regulated the mode in which the duty was to be performed.

8. But Congress cannot coerce a State officer, as such, to perform any duty by act of Congress. The State officer may perform it if he thinks proper, and it may be a moral duty to perform it. But if he refuses, no law of Congress can compel him.

9. The Governor of Ohio cannot, through the Judiciary or any other Department of the General Government, be compelled to deliver up Lago, and, upon that ground only, this motion for a mandamus was overruled.

A motion was made in behalf of the State of Kentucky, by the direction and in the name of the Governor of the State, for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to the State of Kentucky, having jurisdiction of the crime with which he is charged.

The facts on which this motion was made are as follows:

The grand jury of Woodford Circuit Court, in the State of Kentucky, at October term, 1859, returned to the court the following indictment against the said Lago:

" *WOODFORD CIRCUIT COURT."*

" *The Commonwealth of Kentucky against Willis Lago,* "

" *free man of color* "

"The grand jury of Woodford county, in the name and by the authority of the Commonwealth of Kentucky, accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c.;, committed as follows, namely: the said Willis Lago, free man of color, on the fourth day of October 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky."

"W. S. DOWNEY, *Com. Attorney* "

On the back of said indictment is the following endorsement:

"A true bill; L. A. Berry, foreman. Returned by grand jury, October term, 1859."

A copy of this indictment, certified and authenticated, according to the act of Congress of 1793, was presented to the Governor of Ohio by the authorized agent of the Governor of Kentucky, and the arrest and delivery of the fugitive demanded.

The Governor of Ohio referred the matter to the Attorney General of the State of Ohio for his opinion and advice, and received from him a written opinion, upon which he acted, and refused to arrest or deliver up the fugitive, and, with his

refusal, communicated to the Governor of Kentucky the opinion of the Attorney General, to show the grounds on which he refused. The written opinion of the Attorney General is as follows:

"OFFICE OF THE ATTORNEY GENERAL"

" *Columbus, Ohio, April 14, 1860* "

"SIR: The requisition, with its accompanying documents,

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made upon you by the Governor of Kentucky, for the surrender of Willis Lago, described to be a 'fugitive from the justice of the laws of' that State, may, for all present purpose, be regarded as sufficiently complying with the provisions of the Federal Constitution and the act of Congress touching the extradition of fugitives from justice, if the alleged offence charged against Lago can be considered as either 'treason, felony, or other crime' within the fair scope of these provisions."

"Attached to the requisition is an authenticated copy of the indictment on which the demand is predicated, and this, omitting merely the title of the case and the venue, is in the words and figures following:"

" The grand jury of Woodford county, in the name and by the authority of the Commonwealth of Kentucky, accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, &c.;, committed as follows, *viz:* the said Willis Lago, free man of color, on the fourth day of October, 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky."

"This indictment, it must be admitted, is quite inartificially framed, and it might be found difficult to vindicate its validity according to the rules of criminal pleading which obtain in our own courts or wheresoever else the common law prevails. This

objection, however, if it have any force, loses its importance in the presence of other considerations, which, in my judgment, must control the fate of the application."

"The act of which Lago is thus accused by the grand jury of Woodford county certainly is not 'treason,' according to any code of any country, and just as certainly is not 'felony,' or any other crime, under the laws of this State, or by the common law. On the other hand, the laws of Kentucky do denounce this act as a 'crime,' and the question is thus presented whether, under the Federal Constitution, one State is

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under an obligation to surrender its citizens or residents to any other State on the charge that they have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as *malum in se* by the general judgment and conscience of civilized nations."

"This question must, in my opinion, be resolved against the existence of any such obligation. There are many acts -- such as the creation of nuisances, selling vinous or spirituous liquors, horse racing, trespassing on public lands, keeping tavern without license, permitting dogs to run at large -- declared by the laws of most of the States to be crimes, for the commission of which the offender is visited with fine or imprisonment, or with both, and yet it will not be insisted that the power of extradition, as defined by the Constitution, applies to these or the like offences. Obviously a line must be somewhere drawn distinguishing offences which do from offences which do not fall within the scope of this power. The right rule, in my opinion, is that which holds the power to be limited to such acts as constitute either treason or felony by the common law, as that stood when the Constitution was adopted, or which are regarded as crimes by the usages and laws of all civilized nations. This rule is sufficiently vindicated by the consideration that no other has ever been suggested at once so easy of application to all cases, so just to the several States, and so consistent in its operation with the rights and security of the citizen."

"The application of this rule is decisive against the demand now urged for the surrender of Lago. The offence charged against him does not rank among those upon which the constitutional provision was intended to operate, and you have, therefore, no authority to comply with the requisition made upon you by the Governor of Kentucky."

"Entertaining no doubt as to the rightfulness of this conclusion, I am highly gratified in being able to fortify it by the authority of my learned and eminent predecessor, who first filled this office and who officially advised the Governor of that day that, in a case substantially similar to the one now presented, he ought not to issue his warrant of extradition.

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Other authority, if needed, may be found in the fact that this rule is conformable to the ancient and settled usage of the State."

To guard against possible misapprehension, let me add that the power of extradition is not to be exercised, as of course, in every case which may apparently fall within the rule here asserted. While it is limited to these cases, the very nature of the power is such that its exercise, even under this limitation, must always be guided by a sound legal discretion, applying itself to the particular circumstances of each case as it shall be presented.

"The communication, in a formal manner, of the preceding opinion has been long but unavoidably deferred by causes of which you are fully apprised. Though this delay is greatly to be regretted, it can have had no prejudicial effect, as the agent appointed by the Governor of Kentucky to receive Lago was long since officially, though informally, advised that no case had been presented which would warrant his extradition."

"Very respectfully, your obedient servant,"

"C. P. WOLCOTT."

"To the GOVERNOR."

Some further correspondence took place between the Governors, which it is not necessary to state; and the Governor of Ohio, having finally refused to cause the arrest and delivery of the fugitive, this motion was made on the part of Kentucky.

Upon the motion being made, the court ordered notice of it to be served on the Governor and Attorney General of Ohio, to appear on a day mentioned in the notice. The Attorney General of Ohio appeared, but under a protest, made by order of the Governor of Ohio, against the jurisdiction of the court to issue the mandamus moved for.

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Mr. Chief Justice TANEY delivered the opinion of the court.

The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

Some of them, however, are not now for the first time brought to the attention of this court, and the objections made to the jurisdiction, and the form and nature of the process to

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be issued, and upon whom it is to be served, have all been heretofore considered and decided, and cannot now be regarded as open to further dispute.

As early as 1792, in the case of *Georgia v. Brailsford,* the court exercised the original jurisdiction conferred by the Constitution, without any further legislation by Congress to regulate it than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of *Oswold v. the State of Georgia,* in which the court regulated the form and nature of the process against the State, and directed it to be served on the Governor and Attorney General. But in the case of *Chisholm's Executors v. the State of Georgia,* at February term, 1793, reported

in 2 Dall. 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel, and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions, as to the jurisdiction of the court and the mode of exercising it, are elaborately examined.

Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair decided in favor of the jurisdiction, and held that process served on the Governor and Attorney General was sufficient. Mr. Justice Iredell differed, and thought that further legislation by Congress was necessary to give the jurisdiction and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed. And in the case of *New Jersey v. New York,* in 1831, 5 Pet. 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of *Chisholm v. the State of Georgia,* and to the opinions then delivered, and the judgment pronounced, in terms of high respect, and, after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:

"It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in

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suits against a State, under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the State to appear after due service of process, has been also prescribed."

And in the same case, page 30 U. S. 289 , he states in full the process which had been established by the court as a rule of practice in the case of *Grayson v. the State of Virginia,* 3 Dall. 320, and ever since followed. This rule directs

"that, when process at common law or in equity shall issue against a State, the same shall be served upon the Governor or chief Executive magistrate and the Attorney General of such State."

It is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall v. United States,* 12 Pet. 615; *Kendall v. Stokes and others,* 3 How. 100.

So, also as to the process in the name of the Governor, in his official capacity, in behalf of the State.

In the case of *Madraso v. the Governor of Georgia,* 1 Pet. 110, it was decided that, in a case where the chief magistrate of a State is sued not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party on the record. This was a case where the State was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the Governor in behalf of the State, and was indeed the form originally used, and always recognised as the suit of the State.

Thus, in the first case to be found in our reports in which a suit was brought by a State, it was entitled, and set forth in

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the bill, as the suit of "the State of Georgia, by Edward Tellfair, Governor of the said State, complainant, against Samuel Brailsford and others," and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of

"His Excellency Edward Tellfair, Esquire, Governor and Commander-in-chief in and over the State of Georgia, in behalf of the said State, complainant, against Samuel Brailsford and others, defendants."

The cases referred to leave no question open to controversy as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789 that, in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice. And that it has also been settled that, where the State is a party, plaintiff or defendant, the Governor represents the State, and the suit may be, in form, a suit by him as Governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which everyone is entitled, where it is the appropriate process for asserting the right he claims.

We may therefore dismiss the question of jurisdiction without further comment, as it is very clear that, if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished.

This brings us to the examination of the clause of the Constitution which has given rise to this controversy. It is in the following words:

"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

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State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and

technical sense, embrace every act forbidden and made punishable to a law of the State. The word "crime" of itself includes every offence, from the highest to the lowest in the grade of offences, and includes what are called "misdemeanors," as well as treason and felony.

4 Bl. Com. 5, 6, and note 3, Wendall's edition.

But as the word "crime" would have included treason and felony, without specially mentioning those offences, it seems to be supposed that the natural and legal import of the word, by associating it with those offences, must be restricted and confined to offences already known to the common law and to the usage of nations, and regarded as offences in every civilized community, and that they do not extend to acts made offences by local statutes growing out of local circumstances, nor to offences against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the Attorney General of that State.

But this inference is founded upon an obvious mistake as to the purposes for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offences were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offence. The policy of different nations in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton

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on the Law of Nations 171; Foelix 312, and Martin, Verge's edition 182. And the English Government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought

an asylum within its dominions. And as the States of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations, altogether independent of each other, but was intended to embrace political offences against the sovereignty of the State, as well as all other crimes. And as treason was also a "felony" (4 Bl.Com. 94), it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible that, from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government, and that nothing would be more likely to disturb its peace and end in discord than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.

Indeed, the necessity of this policy of mutual support in bringing offenders to justice without any exception as to the character and nature of the crime seems to have been first recognised and acted on by the American colonies, for we find, by Winthrop's History of Massachusetts, vol. 2, pages 121 and 126, that, as early as 1643, by

"articles of Confederation

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between the plantations under the Government of Massachusetts, the plantation under the Government of New Plymouth, the plantations under the Government of

Connecticut, and the Government of New Haven, with the plantations in combination therewith,"

these plantations pledged themselves to each other that,

"upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an offender at the time of the escape, the magistrate, or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth shall forthwith grant such a warrant as the case will bear for the apprehending of any such person and the delivery of him into the hands of the officer or other person who pursueth him, and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof."

It will be seen that this agreement gave no discretion to the magistrate of the Government where the offender was found, but he was bound to arrest and deliver upon the production of the certificate under which he was demanded.

When the thirteen colonies formed a Confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But as these colonies had then, by the Declaration of Independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded so as to include treason and felony -- that is, political offences -- as well as crimes of an inferior grade . It is in the following words:

"If any person guilty of or charged with treason, felony, or other high misdemeanor in any State shall flee from justice, and be found in any other of the United States, he shall, upon demand of the Governor or Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence. "

And when these colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members, and it is introduced in the Constitution substantially in the same words, but substituting the word "crime" for the words "high misdemeanor," and thereby showing the deliberate purpose to include every offence known to the law of the State from which the party charged had fled.

The argument of behalf of the Governor of Ohio, which insists upon excluding from this clause new offences created by a statute of the State and growing out of its local institutions, and which are not admitted to be offences in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The Governor of the demanding State would probably draw one line, and the Governor of the other State another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it so conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill will.

The clause in question, like the clause in the Confederation, authorizes the demand to be made by the Executive authority of the State where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made and whose duty it is to have the fugitive delivered and removed to the State having jurisdiction of the crime. But, under the Confederation, it is plain that the demand was to be made on the Governor or Executive authority of the State, and could be made on no other department

or officer, for the Confederation was only a league of separate sovereignties, in which each State, within its own limits, held and exercised all the powers of sovereignty, and the Confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a State. In the present Constitution, however, these powers, to a limited extent, have been conferred on the General Government within the territories of the several States. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is (with the exception of an unimportant word or two) a literal copy of the article of the Confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the Confederation, must have been in the minds of the members of the Convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the Confederation -- that is, of demanding the fugitive from the Executive authority and making it his duty to cause him to be delivered up.

Looking, therefore, to the words of the Constitution -- to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the Confederated States, whose mutual interest it was to give each other aid and support whenever it was needed -- the conclusion is irresistible that this compact engrafted in the Constitution included, and was intended to include, every offence 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 is evidently the construction put upon this article in

the act of Congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost contemporaneously with the commencement of the Government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the Congress which enacted the law.

The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the State could not, upon a charge made before him, demand the fugitive, for, according to the principles upon which all of our institutions are founded, the Executive Department can act only in subordination of the Judicial Department where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority when its interposition for that purpose becomes necessary and is called for by the Judicial Department. The Executive authority of the State therefore was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the Executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.

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 proceeding 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 or of Congress to authorize it. These difficulties presented themselves as early as 1791, in a demand made by the Governor

of Pennsylvania upon the Governor of Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of Congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the Constitution which declares

"that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and the Congress may by general laws prescribe the manner in which acts, records, and proceedings shall be proved, and the effect thereof."

And, without doubt, the provision of which we are now speaking -- that is, for the delivery of a fugitive, which requires official communications between States, and the authentication of official documents -- was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power to Congress. And acting upon this authority, and the clause of the Constitution which is the subject of the present controversy, Congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words:

"Section 1. That whenever the Executive authority of any State in the Union, or of either of the Territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the Executive authority of any such State or Territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so 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 fled, it shall be the duty of the Executive authority of the State or Territory to which such person shall have fled to cause him or her to be arrested and secured, and 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;

but if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory."

"Section 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled, and if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."

It will be observed that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress, and the certificate of the Executive authority is made conclusive as to their verity when presented to the Executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. 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 and 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.

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated, and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky is a judicial question to be decided by the courts of the State, and not by the Executive authority of the State of Ohio.

The demand being thus made, the act of Congress declares that "it shall be the duty of the Executive authority of the State" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it, for if it

possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular State officer to perform a particular duty, but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that, in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the State to carry it into execution.

It is true that, in the early days of the Government, Congress relied with confidence upon the cooperation and support of the States when exercising the legitimate powers of the General Government, and were accustomed to receive it upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the District Court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were for some years exercised by State tribunals, readily and without objection, until, in some of the States, it was declined because it interfered with and retarded the performance of duties which properly belonged to them as State courts, and, in other States, doubts appear to have arisen as

to the power of the courts, acting under the authority of the State, to inflict these penalties and forfeitures for offences against the General Government, unless especially authorized to do so by the State.

And, in these cases, the cooperation of the States was a matter of comity which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the jurisdiction merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that, when the Constitution was framed and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either

through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground, the motion for the mandamus must be overruled.

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