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INTERSTATE EXTRADITION AND STATE SOVEREIGNTY

By EUGENE COOK*

Since the first days of the Federal Union the problem of defining and delimiting the sovereignty of the states has occupied our courts, our Congress, and our legislatures, and, sadly, even at times our armies. The concept of dual sovereignty is an abstract one representing a compromise between the conflicting principles of local autonomy and national authority, and, like many another constitutional principle, it has occasionally been restated and rearranged to meet the demands of new and shifting governmental philosophies.

Today, when state sovereignty has been diminished on every side by the ever increasing power of the national government, issues of state sovereignty, as such, do not often provide the basis for litigation on constitutional questions. The courts usually view the issue of sovereignty from the other end of the telescope by inquiring not as to what sovereignty the states have, but as to what they have not and, therefore, cannot bar to the national government. The reality of state sovereignty has been so thoroughly covered by the web of thinly woven gossamers upon which federal powers have been hung, as to have lost its sharp outline. Yet it is still there, and on occasion the national courts are wont to recognize not only its existence but its almost forgotten eminence in the architecture of our governmental structure.

Recently a comparatively minor aspect of state sover-

*Attorney General of Georgia.

eignty has given rise to a series of legal battles of unusual bitterness and rancor; the sovereign right in question is that of the state to demand the return of its escaped prisoners, convicted or accused, who have been apprehended in other states.

What may be described as the distrust which some states hold for the penal systems of other states in other geographical areas, together with the decreasing emphasis being placed on state sovereignty by some federal courts, has led to some amazing extremes in judicial efforts to prevent extradition of escaped prisoners to the states from which they have fled.

The recent case of *Dye v. Johnson*[1] will serve as an example of the capacity of some courts to lend credibility to any charge against the penological practices of southern states. Before considering this case at length it will be well to review the background of interstate extradition of escaped prisoners.

Nowhere in the Federal Constitution is the sovereign power of the individual states more sharply outlined than in those clauses providing for the return of escaped prisoners by the process of extradition. Article IV, Section II, Clause II of the Federal Constitution provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

This section of the Constitution has been implemented by Federal statute.[2]

1. ..... U.S. ....., 70 S.Ct. 146, ... L.Ed. ....., decided November 7, 1949, *reversing* Johnson v. Dye, 175 F. 2d 250 (2d Cir. 1949), and *affirming* 71 F. Supp. 262 (W.D. Pa. 1947).
2. 18 U.S.C. § 3182 (1948): "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic

I. The Mechanics of Extradition

The mandate of the Constitution is clear, and the mechanics of interstate extradition are, therefore, quite simple. Upon proper demand made by the state from which the fugitive escapes, the asylum state is required to deliver up the fugitive. There is no provision for inquiry into the merits of the accusation or conviction of the fugitive; certainly the framers of the Constitution would not seem to have provided for the trial by one state of the penal or judicial systems of another. Further, the federal courts have, over the years, buttressed these limitations by declaring that the only issues open to inquiry are whether the requisition papers are in order and whether the person sought is in fact a fugitive.

However, if the extradition provisions of the Constitution are clear and inexorable, other provisions of the Constitution are of a more ductile nature. Lawyers and courts faced with the bar set up by the extradition clause have used the due process clause of the 14th Amendment to the Constitution almost creatively in their efforts to combat extradition of escaped prisoners. In recent years, through repeated cases a certain pattern of procedure and strategy on the part of the fugitives has grown up: A prisoner convicted or accused of a crime escapes confinement and flees to another state. Upon re-arrest there and requisition being made by the governor of the state from which he escaped, the fugitive combats extradition before the governor of the asylum state.

II. The Duty of the Governor

Under the federal law the duty of the governor of the asylum state is clear, but although the terms of the federal

by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

statute are mandatory in form, the immunity from legal compulsion granted the chief executive of a sovereign state makes it impossible for the demanding state to force him to render an escapee, if he refuses to do so. Various courts have used unusually harsh language in criticizing governors who on proper cause shown have still refused to execute the clear mandate of the Federal Constitution and statutes:

> ". . . The performance of this duty (the duty of a governor to render a fugitive) 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. . . ."[3]

The Constitutional provisions have been likened to a treaty between sovereign nations,[4] and words heavy with moral connotations have been applied when the governors of various states have from time to time chosen to ignore the clearly defined duties put upon them by such provisions.[5]

All judicial castigations and rebukes to the contrary, when the governor of an asylum state refuses to render a fugitive, such refusal effectively terminates the matter, and the commands of the demanding governor are reminiscent of King Canute's exhortations to the sea.

A different situation arises when the governor of the asylum state grants the request of the demanding state and issues his rendition warrant. If he follows the pattern, the fugitive then makes application for writ of habeas corpus, charging some or all of the following: That he was denied a fair trial and that his conviction was illegal; that he was

3. Kentucky v. Dennison, 24 How. 66, 109, 16 L.Ed. 717, 730 (U.S. 1861).

4. Appleyard v. Massachusetts, 203 U.S. 222, 227, 27 S.Ct. 122, 126, 51 L.Ed. 161, 163 (1906): " . . . (the obligation) is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states,—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize."

5. Biddinger v. Commissioner of Police, 245 U.S. 128, 38 S. Ct. 41, 62 L.Ed. 193 (1917).

subjected to cruel and unusual punishment while imprisoned in the demanding state; that if returned to the demanding state he will again be subjected to cruel and unusual punishment to the extent that he fears for his life and, for all of these grounds, that his rights under the 14th Amendment to the Federal Constitution have been and will be invaded.

The fugitive is immediately met with a fundamental question, to wit: What tribunals are available to him for the hearing of these charges and the granting of appropriate relief? Obviously habeas corpus is the remedy to be used, but in which court—that of the asylum state, of the demanding state, or of the federal government?

Notwithstanding the fact that interstate rendition is made pursuant to an Act of Congress, the Supreme Court of the United States decided in 1884, in *Robb v. Connolly*,[6] that Congress in the passage of the Interstate Rendition Act did not undertake to invest the judicial tribunals of the United States with exclusive jurisdiction for the issuance of writs of habeas corpus in such proceedings, and that it was entirely proper for state courts to inquire into the grounds upon which any person is restrained of his liberty and to discharge him, notwithstanding the fact that the alleged illegality of the detention may arise from a violation of the Constitution and laws of the United States and in connection with an interstate rendition. The writ, as used in this field, to investigate the jurisdiction of the detaining authority in the asylum state, conforms to general habeas corpus law. Specifically, state courts will investigate: (1) the correctness of the requisition papers; (2) the relator's identity; (3) whether the relator is a fugitive; and (4) whether a crime is substantially charged. The scope of the hearing is restricted, no inquiry being made into conformity with due process of law or other jurisdictional defects in the proceedings which were had in the demanding state. With minor exceptions, if it be shown that the restraining power acted within its authority, the writ must be

6. 111 U.S. 624, 4 S.Ct. 544, 28 L.Ed. 542 (1884).

denied.[7] This narrow scope of inquiry is not only a limitation upon state courts but applies with equal force to the courts of the United States. In the famous case of *Drew v. Thaw*,[8] Mr. Justice Holmes, speaking for the full bench, in review of a decision initially rendered by the United States Court for the District of New Hampshire, said:

> ". . . When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once."[9]

To the same effect is the decision of the Supreme Court in *Biddinger v. Commissioner of Police*.[10] Biddinger earnestly contended that he had continued to be usually and publicly a resident of the demanding state until the expiration allowed by the period of limitations on a prosecution of a crime with which he was charged. He therefore insisted that he was not a fugitive. Mr. Justice Clark, speaking for the full bench, said:

> ". . . 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."[11]

7. Note, *Habeas Corpus in Interstate Rendition*, 47 COL. L. REV. 470 (1947).
8. 235 U.S. 432, 35 S.Ct. 137, 59 L.Ed. 302 (1914).
9. *Id.* at 440.
10. 245 U.S. 128, 38 S.Ct. 41, 62 L.Ed. 193 (1917).
11. *Id.* at 135.

As is pointed out in the Columbia Law Review article above cited,[12] the only relief which the asylum state can give is unsatisfactory, because it is both drastic and inconclusive. It is drastic, because if the accused is not turned over, he must be freed; and it is inconclusive, because the demanding state can still pursue him in every other state in the union. Moreover, these issues are matters more appropriately determined in the state where the alleged crime was committed. If no trial has been had and prospective denial of due process is urged as a basis for release, certainly the demanding state should be allowed to assume control. Where there has been a trial, such errors are remediable there by the ordinary means of retrial or appeal or, if their statutory period has elapsed, by writ of error coram nobis or habeas corpus in the state courts.

The remedy provided by state courts being admittedly incomplete and unsatisfactory, the applicants for the writ have naturally turned to the federal courts. Here they have collided with the definite trend of the federal judiciary towards withholding jurisdiction of applications for habeas corpus until state remedies have been exhausted. No rule has been more clearly stated nor more stringently enforced than that enunciated by *Ex parte Hawk*[13] to the effect that federal jurisdiction of habeas corpus applications may not be had until state remedies have been exhausted. Yet, in *Johnson v. Dye*,[14] Circuit Judge Biggs, speaking for the majority, concluded that it was unnecessary in an extradition case to exhaust state remedies. In reaching this conclusion he stated that the decision of the Court of Appeals for the Third Circuit, in *United States* ex rel. *Darcy v. Superintendent*,[15] to the effect that the writ may be allowed by either state or federal courts to review the action of the chief executive of the asylum state, was overruled sub silentio in *Powell v. Meyer*.[16] The court thereupon proceeded to overrule *Powell v. Meyer* and to adhere to the

12. *Supra* note 7.
13. 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944).
14. 175 F. 2d 250 (2d Cir. 1949); see note 1 *supra*.
15. 111 F. 2d 409 (3d Cir. 1940), *cert. denied*, 311 U.S. 662 (1940).
16. 147 F. 2d 606 (3d Cir. 1945).

ruling in *United States* ex rel. *Darcy v. Superintendent.* It is pertinent to review briefly the *Darcy* case and the *Powell* case.

In the *Darcy* case, Circuit Judge Maris stated:

> ". . . The Supreme Court has construed this act (Interstate Rendition Act) as placing the burden upon the governor of the asylum state to determine, before complying with the demand, whether the person demanded is substantially charged with a crime and whether he is a fugitive from justice. This determination may be made by the governor without a hearing, but if the alleged fugitive considers himself aggrieved by the order he may obtain a hearing upon writ of habeas corpus. The writ may be allowed either by a state or a federal court."[17]

With respect to the scope of review, however, Circuit Judge Maris quoted Mr. Justice Holmes in *Drew v. Thaw* —the same excerpt above cited—and said of that decision that the statement quoted ". . . epitomizes our conclusion in the present case and indicates why it is impossible for us to consider the relator's contention that his prosecution in California is pressed to punish him for his political views and activities rather than for the crime averred in the indictment."[18] Further, in the same connection, the Court stated:

> ". . . The duty of the court reviewing the status of the case upon habeas corpus is quite restricted."[19]

Powell v. Meyer dealt with a case where Georgia sought rendition from New Jersey and the applicant for habeas corpus insisted that he should be discharged upon the writ for the reason that he was denied equal protection of laws in the Georgia trial. The court very promptly concluded that this was no ground for his discharge in the New Jersey courts unless he showed that he had exhausted his remedies under state law. Powell did not seek to review the extradition proceedings. By way of explanation of the court's action in the *Powell* case, Circuit Judge Biggs stated that the

17. 111 F. 2d 409, 411 (3d Cir. 1940); see note 15 *supra.*
18. *Id.* at 412.
19. *Ibid.*

Court there followed the decision of the Fourth Circuit in *Sanderlin v. Smyth.*[20] In speaking of the *Sanderlin* case, he states:

> ". . . The Sanderlin case, however, was not in point for in that case the application for habeas corpus was made to release the petitioner from a sentence imposed by a state court and the usual rule of exhaustion of state remedies necessarily applied."[21]

The decision in *Johnson v. Dye,* holding that state remedies need not be exhausted in applications for habeas corpus arising from extradition proceedings, was flatly overruled by the Supreme Court.[22]

This latter decision was based on *Ex parte Hawk,* which held that the federal courts were not open to persons seeking the writ of habeas corpus until state remedies had been exhausted. This decision was subsequently codified[23] as part of the efforts of the federal judiciary to gain relief from the great flood of applications for the writ which had in recent years clogged the federal system.[24]

The decision of the Court of Appeals for the Third Circuit in *Johnson v. Dye* operated to engraft an exception upon the rule laid down in *Ex parte Hawk.* The decision of the Supreme Court on the appeal of that case seemed to put this question to rest, and properly so. It should be noted that even under *Ex parte Hawk* and the new Judicial Code, the federal courts are still open to the petitioner who claims the absence of available state corrective process, or who alleges the existence of circumstances rendering such processes ineffective to protect his rights.[25] Neither of these exceptions, however, has yet been effectively used by fugitives combating extradition, nor would they seem to be applicable when the prisoners are escapees from the State

20. 138 F. 2d 729 (4th Cir. 1943).
21. 175 F. 2d 250, 257 (2d Cir. 1949); see note 1 *supra.*
22. See note 1 *supra.*
23. 28 U.S.C. § 2254 (1948).
24. Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171 (1949).
25. Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406 (1935).

of Georgia, for the Constitution of the State of Georgia of 1877 and the Constitution of 1945 provide that the writ of habeas corpus shall not be suspended.[26] Further, this provision of the State Constitution has been implemented by statute.[27]

III. Remaining Questions

Although the question of the proper court would seem to have been finally answered by *Dye v. Johnson,* there still remain important questions as to the invasion of constitutional rights of fugitives by demanding states.

Basically, the question of whether or not the provisions of the 8th Amendment to the Federal Constitution are brought forward by the 14th Amendment has not been definitively answered. It has long been held that the first eight amendments to the Constitution are not, as such, incorporated in the 14th Amendment. The most recent consideration of this more general question was in the case of *Wolf v. Colorado.*[28] Mr. Justice Frankfurter, speaking for the court, stated:

> ". . . The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e.g., Hurtado v. California, 110 U. S. 516; Twining v. New Jersey, 211 U. S. 78; Brown v. Mississippi, 297 U. S. 278; Palko v. Connecticut, 302 U. S. 319. The issue is closed."[29]

However, as was pointed out in the Court of Appeals' decision of *Johnson v. Dye,* the Supreme Court has upon occasion held that the due process clause of the 14th

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26. Ga. Const. Art. I, § I, Para. XI (1877); Ga. Const. Art. I, § I, Para. XI (1945); Ga. Code Ann. § 2-111 (1948 Rev.).
27. Ga. Code § 50-101 *et seq.* (1933).
28. ..... U.S. ....., 69 S.Ct. 1359, ... L.Ed. ..... (1949).
29. 69 S.Ct. at 1360.

Amendment includes by implementation the protection of certain "basic" and "fundamental" rights.[30]

The Third Circuit flatly held that the 14th Amendment prohibits the infliction of cruel and unusual punishment by a state, holding that the right to be free from such punishment is such a basic and fundamental right as to warrant 14th Amendment protection. To date this decision has not been specifically refuted. In the light of the fact that *Johnson v. Dye* has been summarily reversed by the Supreme Court on other grounds, and the additional fact that the Supreme Court has so emphatically denied the proposition that the 14th Amendment includes the first eight amendments, this holding in *Johnson v. Dye* certainly cannot be said to have closed the question, but it seems safe to predict that it will arise again.

IV. State Responsibility for the Acts of Its Employees

A further remaining question is that of the degree of responsibility of a state for the illegal acts of its employees. It is regrettable but foreseeable that from time to time such employees may illegally punish or assault prisoners. The question is: Shall such acts be considered official state actions, or merely violations committed outside the scope of official authority? The Supreme Court of Georgia has decided that where an employee of the prison system of Georgia illegally punishes a prisoner, the prisoner is *not* entitled to freedom, although the employee inflicting the punishment is, of course, subject to prosecution for his wrongful act.[31]

There is language in the Third Circuit decision of *Johnson v. Dye,* however, which would seem to indicate that where a prisoner is cruelly treated by a prison employee,

30. Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937); Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908); Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900); Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

31. Loeb v. Jennings, 133 Ga. 796, 67 S.E. 188 (1910).

such cruel treatment operates as a full pardon of the prisoner. Such a startling conclusion can hardly be legally supported, but along with the question of the enlargement of the 8th Amendment mentioned above, it stands as a loose end to the Third Circuit decision in the *Johnson* case. The famous *Screws* case is certainly authority to the effect that a state officer acting illegally may still be operating under the cloak of official authority,[32] but the proposition that the state is bound by such acts is the converse of the holding in the *Screws* case. Again it is safe to predict that this question must be answered eventually.

V. Conclusion

It seems safe to predict that these and other questions affecting both the rights of the states and the rights of the individual prisoners will be presented for consideration in the near future. It is to be hoped that the decision of the United States Supreme Court in *Dye v. Johnson* foreshadows a return to the recognition of state sovereignty in its original sharp outline. The questions at issue go far beyond the welfare of an individual prisoner, for they in fact affect the rights of all states and, hence, all citizens. Without arguing the question of sovereign statehood versus centralized government it may be safely stated that a return to state sovereignty is at least in keeping with the intent of the framers of the Constitution and the Constitutional tradition of this country.

32. Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, 162 A.L.R. 1330 (1945).