
Contesting Election; Undertaking.

CONTESTING ELECTION; UNDERTAKING.

Attorney General's Office,
Columbus, December 22, 1859.

SIR:—Official engagements of so pressing a nature as not to admit of delay have engrossed all my time and attention since the receipt of your letter of the 24th ult., and a reply thereto has been necessarily delayed until now.

Upon an examination of the question which you therein submit to me, I have arrived at the conclusion that the undertaking which has been filed in the office of the probate judge of Perry County (and approved by that functionary) with the view of contesting the validity of the votes cast at the recent election in that county on the question of removing the county seat, is not such an undertaking as the statute authorizing contests of this nature plainly requires.

The limitation of the liability of the makers of the undertaking is, in my opinion, clearly fatal to its sufficiency, and as no step can be taken in aid or furtherance of the intended contest until the prescribed undertaking and notice have both been duly filed, I am of opinion that in the Perry County case as it is now presented, you have no legal warrant for the appointment of a commissioner.

Time is not allowed me to state more than the simple result of my examination.

Very respectfully,
C. P. WOLCOTT.

To the Governor.

FUGITIVE FROM JUSTICE.

Attorney General's Office,
Columbus, February 1, 1860.

SIR:—I have the honor to acknowledge the receipt of your letter of the 14th instant, covering a requisition addressed to you by the Governor of Kentucky for the surren-

Fugitive From Justice.

der of Willis Lago, therein alleged to be a "fugitive from justice from the State of Kentucky," and "now at large in the State of Ohio." With the requisition there was also transmitted a paper which is duly certified to be an authentic copy of an indictment presented by the "grand jury of Woodford County," in which Lago is "accused" of an offence against the laws of Kentucky, and also a paper purporting to be the affidavit of "Wm. A. Cotton," in which the "affidavit" asserts that Lago, being imprisoned in the jail of Woodford County upon the above charge, escaped therefrom, and that according to "affidavits, information and belief," Lago "is in the State of Ohio." This statement further purports by the same paper to have been sworn to before "W. J. Steele, P. J. W. C. C.," but there is no certificate verifying the signature of this gentleman, or showing that he held any official position from which an authority to administer oaths could be inferred, nor is there any indication that he held any official position whatever other than such as may be gathered from the letters "P. J. W. C. C.," which immediately follow his name as subscribed to the jurat. What these letters do signify is purely a matter of conjecture.

Referring me to these papers, you desire my "opinion on the propriety of granting a warrant" for the surrender of Lago.

Events altogether beyond my control, and of which you are fully apprised, have prevented an earlier compliance with your request. Meanwhile, however, I have carefully examined the papers thus submitted to me, and have now to advise you that in my opinion they do not make out a case for the issuing a warrant of extradition. There is no legal evidence, which for the purpose in hand is the same as if there was absolutely no evidence of the alleged flight from justice of Lago, although the existence and due proof of this flight are in the nature of a condition precedent without which the exercise of the power of extradition cannot be lawfully in-

Fugitive From Justice.

voked. The paper purporting to be the affidavit of Cotton cannot be regarded as an affidavit at all, for it does not appear to have been verified before any proper authority, or, indeed, any authority whatever. It stands, therefore, upon the same footing with any other statement unsupported by oath or affirmation, and cannot warrant the exercise of a power which not only deprives the citizen or inhabitant of his liberty, but constrains his departure beyond the limit of the State.

This objection is clearly fatal, and the application ought, therefore, to be denied.

I am, sir,

Very respectfully,
Your obedient, servant,
C. P. WOLCOTT.

To the Governor.

FUGITIVE FROM JUSTICE.

Attorney General's Office,
Columbus, March 7, 1860.

SIR:—I have thoroughly considered the requisitions of the Governor of Virginia made upon you as Governor of Ohio, of the extradition of Francis Merriam and Owen Brown, which you have submitted for my opinion.

These cases are essentially alike—the charges against each of the persons substantially similar—the annexed documents of the same general import, and the requisition as to each in precisely the same form, so the disposition of the one is in effect the disposition of the other. To avoid the needless multiplication of words, I shall herein consider only the requisition for Francis Merriam.

The requisition begins with a preamble reciting that “Whereas, it appears by the annexed documents which are hereby certified to be authentic, that Francis Merriam be a fugitive from justice from this State (Virginia) charged

Fugitive From Justice.

with conspiring with slaves to rebel and make insurrection, and for conspiring with certain persons to induce slaves to rebel and make insurrection," and then proceeds in the ordinary form to "demand of the executive authority of the State of Ohio the said Francis Merriam as a fugitive from justice, to be delivered to M. Johnson, who is hereby appointed agent to secure him, on the part of this commonwealth." These are the parts of the requisition itself material now to be noticed. The only "documents annexed" are (1) a transcript of certain proceedings had before the Circuit Court of Jefferson County, Virginia, from which it appears that an indictment had been duly presented against Merriam, (2) a copy of that indictment in which he is charged with the offences mentioned in the requisition, (3) an attestation by Robert J. Brown, clerk of that court, under its seal "that the foregoing is a true transcript form" its records, and (4) the certificate of John Kenny, "judge of the Twelfth Judicial Circuit of Virginia, holding a special term of the Circuit Court of Jefferson County" that Robert J. Brown is clerk of that court, and "that his said attestation is in due form."

Upon this state of case question is made concerning your power to issue a warrant for the surrender of Merriam to the authorities of Virginia. No enactment of this State has clothed its governor with authority to surrender to another state, fugitives from its justice, seeking refuge here. Whatever power he may have in this behalf, must be derived from the constitution of the United States, and the act of Congress "respecting fugitives from justice," approved February 12, 1793, since these are the only enactments assuming to confer this authority which have force in Ohio. These are so well known as to need no recitals here. The act of Congress, it is to be noticed, does not seek to enlarge the power of extradition beyond the limits imposed on it by the constitution, and any attempt at such enlargement would be utterly void.

Fugitive From Justice.

Recognizing those limitations, it simply defines the mode in which the power, as established by the constitution, shall be executed. This power, both as to the condition of its existence and the manner of its exercise, is of the most special and limited nature. By their very terms no person can be summoned from one State to another in virtue of these constitutional and statutory provisions, except in the simultaneous occurrence of those distinct conditions.

1. He must have been charged in another State, by indictment or affidavit, with the commission then of "treason, felony or other crime."

2. He must have fled from that State to escape its justice, and

3. Demand for his surrender, accompanied by an authentic copy of the indictment or affidavit on which the demand is predicated, must have been made to the executive authority of the State, to which fled, by the executive authority of the State from which the flight was made.

When these do concurrently happen, the power to remove exists and must be executed. Each, however, is in the nature of a precedent condition, so that the absence of any one of them is not less fatal than the absence of all.

These, and not less than these, are the limitations with which the right of extradition had been carefully hedged about by the constitution and the act of Congress. In the very spirit indicated by these jealous safeguards, the right ought always to be exerted; for this power, which subjects the citizen to another jurisdiction, and deprives him of that protection which, as a general rule, the State owes to every sojourner within its limits, is of so high a nature as to exact the utmost care in its application even to the prescribed cases. Every one charged with its execution should see to it that all the securities with which it has been so anxiously surrounded are observed with rigorous fidelity.

Examining in the light of these rules the requisition of

Fugitive From Justice.

Merriam, it will at once be seen that no case is made for the exercise of this power.

There is no allegation, still less is there any evidence that Merriam ever fled from the State of Virginia. True, the preamble to the requisition recites that "it appears by the annexed documents that Merriam is a fugitive from justice from Virginia," but the recital does not accord with the fact. No flight whatever is shown by the "documents annexed." As previously stated, these consist only of the copy of an indictment found against Merriam in a Virginia court, with such attestation and certificate as was deemed requisite to establish its authentic nature. In all these "documents," from the beginning to the end, there is no word, no letter from which human ingenuity can draw the vaguest hint that Merriam had fled from Virginia. Nay, more, there is nothing to show that he was ever within the State, save the allegation in the indictment that the offence of which he was accused was there committed. Certainly, this is not conclusive as to the fact of his presence, for this formal averment of venue would equally have been made, because essential to every indictment, whether the part borne by Merriam in the alleged conspiracy and offence had been acted altogether within or altogether without the limits of the State. In its legal effect this averment is entirely consistent with the hypothesis that he has never been within the boundaries of Virginia. Granting, however, that this declaration imparts the actual presence of Merriam at the place where the commission of the offence is laid, it still remains true that there is absolutely nothing in the papers accompanying the requisition to indicate that he has since fled from or otherwise left the State. If within it, then, he may, for aught that appears in those papers, have continuously bided them up to the very moment when the requisition was made, or even until now. Nor is there anything in the requisition itself which can supply this defect in its "annexed documents" as that nowhere avers a flight by Merriam. It

Fugitive From Justice.

merely refers to these documents as growing evidence of such flight, and does nothing more. These, as has been seen, do not furnish any evidence whatever upon that subject, so that the case stands without even an allegation of the existence of this vital condition.

But if it should be admitted that the recital in the requisition is tantamount to a direct assertion that Merriam was, in the language of that recital, "a fugitive from justice from Virginia," the admission would avail nothing. That assertion is by no means equivalent to an averment that he fled from that State to elude its justice. It may lead to inference of *actual* flight, or it may mean a *constructive* one only. Whether it means the one or the other, it is sufficient to say that this extraordinary power is not to be exercised on a surmise or inference. Beyond this, however, no mere formal, unsworn allegation of flight, be it never so clear and unequivocal, can be deemed sufficient. In this, as well as in all other proceedings which affect the right of personal liberty, every fact upon which the power of removal depends must be established by a demand of satisfactory evidence. The necessity of insisting on rigid proof of flight will not be doubted by any one familiar with the fact, disclosed by the records of this office, that a practice has grown up in some of the states demanding the surrender, as fugitives from justice from these states, of persons who have never been within their limits, on the legal fiction of construction, presence and flight. It is not known that this practice has obtained in Virginia, nor is it material to inquire, as all requisitions from whatever state must be governed by a uniform rule. Moreover, while this custom sufficiently vindicates its propriety, the rule itself rests on larger foundations. It grows out of the very nature of the power. The immunity of the citizen from arrest and exile would stand on the frailest ground, if held subject to the mere, unverified declaration of even the highest functionary in the land. It is not

Fugitive From Justice.

too much to say that a power so arbitrary can have no lawful existence in a free government.

These considerations, it seems to me, are entirely decisive. For the reason that the requisition, with its "annexed documents" furnished no evidence of the flight of Merriam from Virginia, it altogether fails, in my judgment, to make out a case which will warrant his extradition. Whether this difficulty can be cured is a question which addresses itself solely to the authorities of that State. Finding one barrier to the exercise of the authority invoked by this proposition, it has not seemed proper to inquire as to the existence of any other. For all present purposes it is enough to know that, as the case now stands, the objection is fatal.

Very respectfully,

Your obedient servant,

C. P. WOLCOTT.

To the Governor.

TURNPIKE CONVENTION.

Attorney General's Office,
Columbus, March 24, 1860.

SIR:—The attorney general has considered the questions presented by resolution No. 95 of the House of Representatives, adopted February 21, 1860, instructing him "to communicate to the House whether in his opinion the acts of the convention" mentioned in the resolution, and which consisted of delegates representing certain turnpike companies of the State, "have the binding force and effect of law," and now begs leave to say:

1. That he has no knowledge of the mode in which that convention was organized, of the authority conferred upon the persons who assumed to act as delegates thereto, or of the proceedings of the convention, except as they may be gathered from a pamphlet which was delivered to him

Attendance of Officers of General Assembly.

with the resolution, and which contains, among other things, a "report" of "proceedings of the turnpike convention, which met in Columbus April 22, 1844, for the purpose of establishing uniform rates of toll, etc." This report does not contain data sufficient to warrant the expression of any opinion as to the legality of the organization of the convention or the regularity of its proceedings.

2. Assuming that the convention was duly constituted, and its proceedings regularly conducted, then the "orders, rules and regulations" which it adopted as set forth in the pamphlet already mentioned, have, in the opinion of the attorney general, "the binding force and effect of law," as to the rates of toll therein presented and established. Whether the penalties declared by these "orders," in so far as they differ from the remedies given by the charters of the respective companies or by general law, have any force is a question of some doubt, and one in regard to which the attorney general prays to be excused from expressing any opinion.

To the Speaker of the House of Representatives.

ATTENDANCE OF OFFICERS OF GENERAL ASSEMBLY.

Attorney General's Office,

Columbus, March 20, 1860.

SIR:—In reply to your note of this date I beg leave to say that the president of the Senate and the speaker of the House have authority to certify the number of days for which any officer of their respective houses has been engaged in the discharge of his official duties, and that, in the absence of fraud or mistake, the certificate of the president or speaker should be deemed conclusive as to the length of time the officer had served.

Very respectfully,

C. P. WOLCOTT,

Attorney General.

Hon. R. W. Taylor, Auditor of State.

Vacancy in Office of County Treasurer; Election.

VACANCY IN OFFICE OF COUNTY TREASURER;
ELECTION.

Attorney General's Office.

Columbus, August 4, 1860.

DEAR SIR:—I have carefully examined the question submitted in your letter of the 24th ult., and now offer the following conclusions as the result of that examination:

1. That any treasurer elected by the people at the general election is entitled to hold the office for the full term of two years, commencing on the first Monday of September next after his election, and this, too, without any regard to the fact that the previously elected incumbent did not serve out his full term. In the present state of legislation the people cannot elect for the residue of an unexpired term of the office of county treasurer, but only for the full term.

2. If a vacancy occur in the office of county treasurer more than twenty days before the general election the people ought to elect a treasurer at the very first general election after the happening of the vacancy.

3. If the vacancy occurs within twenty days preceding a general election, then the people cannot elect a treasurer until the second general election after the happening of the vacancy (unless the first general election should be the one at which a treasurer is regularly elected, in due course).

4. The treasurer elected by the people cannot enter upon the duties of his office before the first Monday of September next after his election.

5. The person appointed of the commissioners to fill a vacancy in the office of county treasurer, which happens more than twenty days prior to a general election, is therefore entitled to hold the office until the first Monday of September next following the then first general election. If the vacancy happened *within* twenty days of a general election (unless such general election be the one at which a treasurer should be elected in regular course) then the appointee is entitled to hold the office until the first Monday of September next after the then second general election.

Vacancy in Office of County Treasurer.

All of the propositions here asserted have been formally adjudicated by the Supreme Court in the case of *The State ex rel Ellis vs. The Commissioners of Muskingum County*, 7 Ohio State Reports 125, and are therefore hardly open to question.

Applying these rules to the facts stated in your letter, it follows:

1. That John C. Goodman, the appointee of the commissioners, is entitled to hold the office of treasurer of Morrow County until the first Monday of September, 1861.

2. That the people of Morrow County ought to elect a county treasurer at the election to be held on the second Tuesday of October next.

3. That if a treasurer be then elected, and duly qualify therefor, he will be entitled to hold the office for the term of two years, beginning on the first Monday of September, 1861.

Absence from the city has prevented an earlier answer.

Very respectfully yours,

C. P. WOLCOTT,

Attorney General.

W. Smith Irwin, Esq., Auditor of Morrow County.

CHECKS OF COMMISSIONERS OF BOARD OF
PUBLIC WORKS.

Attorney General's Office,

Columbus, August 2, 1860.

DEAR SIR:—The correspondence submitted to me by your note of this date, between yourself and Hon. Abner L. Baekus, presents the question whether, as the law now stands, it is the duty of the commissioners to issue checks to the collectors, weighmasters and inspectors of their several divisions, for the salaries which have become due to these officers respectively.

This question I have carefully examined, and after giv-

Board of Public Works.

ing the reasons urged by Mr. Baekus the utmost consideration, I am constrained to say that this duty is clearly devolved on the commissioners. Indeed, the twelfth section of the "act defining the powers and prescribing the duties of the board of public works," passed March 24, 1860, absolutely concludes this question. After prescribing the salaries of these respective officers, that section proceeds to enact that "it is hereby made the duty of such acting commissioner to ascertain the amount due for the services of each of said officers, quarterly, and to issue his check accordingly, in the same manner as for any other claim against the State." This language is singularly explicit, and in the most imperative and unmistakable terms, it imposes this very specific duty upon each commissioner.

Without questioning this construction or application of the act, Mr. Baekus nevertheless insists that he is excused from obedience to it, upon the ground that no appropriation has been made for the payment of the salaries, and that the constitution "ordains that no money shall be drawn from the treasury except in pursuance of an appropriation made by laws."

With great deference to the opinion of Mr. Baekus, I think that he is mistaken that no appropriation has been made, and that, even if right in this, the constitutional provision cited has no application to these checks.

The act making appropriations for the public works, passed March 26, 1860, sets apart a specific sum "for the general superintendence, construction and repair" of each section of the public works. The phrase superintendence is one of large and somewhat indefinite import, but there are some things which it does certainly comprehend, and among these, I think, are the services of the officers now in question. It has been the policy of the State founded on obvious motives of economy and accountability to commit to various hands the performances of the multifarious duties necessary to the efficient regulation and management of

Board of Public Works.

the public works. Accordingly, it has created, in a regular and considerate graduation, first the board itself which is charged with the general supervision and care of these important interests; and then the office of superintendent, engineer, collector, inspector and weighmaster, and to each of these subordinate officers there has been entrusted the oversight and discharge of the specific details which constitute the general system of management. The conduct of the details thus committed to these officers is, in the plainest sense, a part of the scheme of superintendence cautiously established by the laws of the State. This appropriation for "general superintendence" (that is, for *superintendence generally* of the public works) does therefore, in my judgment, cover beyond all cavil, the salary of every officer charged with the administration of any part of the system thus devised for the regulation of the public works, excepting only those instances in which an appropriation has been made specifically for the payment of such salaries. Here no provision has been made for the salaries of collectors, inspectors or weighmasters, and hence these salaries are comprised in appropriation for "general superintendence."

But whether there is or is not an appropriation is after all beside the question. The statute makes it the unconditional duty of the commissioners to issue their checks quarterly to these officers, and I can conceive of no reason which will warrant the commissioners to make the discharge of this imperative duty depend on a condition which the legislature has not seen fit to impose. The constitution, however, is invoked, and that instrument, it is said, prohibits the payment of any money from the treasury save by virtue of a specific appropriation. Unquestionably it does, but then I am unable to discover how that prohibition affects this question. No money can be drawn from the treasury on these so called "checks." Perhaps some confusion has grown out of this singularly inapt designation, and as ordinarily a check necessarily imports an order for the payment of money,

Abortion; Manslaughter.

it may have been inferred that these commissioners' "checks" bear the same character and have the same legal value. This, however, is a great mistake. These instruments are simply a species of voucher, and their sole function is to furnish evidence to the proper accounting officers that the person in whose favor they are drawn has a valid claim against the State. This evidence the official whose salary is due may justly demand from the commissioner whether there be or be not an appropriation. If there be one available to that object, and if there is money in the treasury belonging to the fund, out of which the salary is to be paid, the auditor and comptroller will, upon the evidence furnished by this voucher, draw and countersign a warrant upon the treasury, and this warrant (not the "check") will be duly paid by the treasurer. If there is no such appropriation the auditor will not draw, the comptroller will not countersign any warrant; or if they should, the treasurer will not pay it. It seems too clear for argument that the constitutional prohibition can have no application to the making of a mere voucher, certifying that a given sum is due to a named person, but upon which not a dollar can, in any event, be drawn from the treasury.

I have now considered all the reasons which Mr. Backus has assigned for his action in the premises for his division, and take leave of the subject by reiterating my conviction that it is his plain duty to issue his checks for the salaries due to the collectors, inspectors and weighmasters upon his division.

Very respectfully yours,

C. P. WOLCOTT.

Hon. R. W. Taylor, Auditor of State.

ABORTION; MANSLAUGHTER; CONSENT.

Attorney General's Office.

Columbus, October 19, 1860.

SIR:—I have considered the question submitted in your letter of the 17th ult., and now beg leave to say that upon

Abortion; Manslaughter.

the facts stated by you, Martha M. Runyon has not, in my opinion, incurred any liability to the penalty pronounced by either the first or second section of the "act to punish certain offences therein named," passed February 27, 1834.

The first section reaches all attempts to produce abortion at any period of gestation, while the second section is aimed solely at attempts to destroy an unborn child after it has quickened, which shall result in the death of either the mother or the child. The primary objects of both sections is plainly not so much to guard the mother from injury affecting herself alone, as to protect the infant while yet in the womb. It is only where pregnancy exists that the use of means intended to produce abortion or to destroy a "quick child," is declared criminal by this act. Accordingly, where, as in this instance, there has been no conception, no gestation, the very condition under which alone the offences defined by these sections can be perpetrated is utterly wanting. No mistaken assumption in that behalf can supply the absence of the very fact of pregnancy itself.

Your letter does not set forth facts sufficient to warrant the expression of any opinion as to whether the woman Runyon is or is not guilty of manslaughter, and I can, therefore, only state what I suppose to be the general rule upon the subject under the laws of this State. If, without any intent to take life, but for a purpose unlawful in itself (and a purpose to produce abortion is not a lawful one) a person administers to another a known noxious substance dangerous to human life, thereby causing the death of the latter, he is clearly guilty of manslaughter. Nor will the offence be at all mitigated by the consideration that the substance was administered with the consent of the deceased, or if given to produce abortion, by the fact that pregnancy did not exist. No consent of the deceased can excuse the homicide, and the inability of the party to consummate the offence, which alone he attempted and intended to commit, can hardly be held to protect him against the liability for

Fugitive From Justice.

the direct, though unintended consequences flowing from the use of the unlawful means by which he endeavored, though vainly, to accomplish his sole criminal purposes.

Applying this rule, it follows that if the woman Runyon intended only to produce abortion, administered to the girl Quimby, any drug known by her to be dangerous to human life, and this drug caused death, she is guilty of manslaughter, even though she had no purpose to take life, and though the drug was given to the girl at her own instance.

Very respectfully yours,

C. P. WOLCOTT.

A. Osborne, Esq., Prosecuting Attorney, Marion, Ohio.

P. S.—I did not see your letter until a day or two ago, which has prevented an earlier answer.

FUGITIVE FROM JUSTICE.

Office of the Attorney General,

Columbus, April 14, 1861.

SIR:—The requisition, with the accompanying documents, made upon you by the Governor of Kentucky, for the surrender of Willis Lago, said to be "a fugitive from the justice of the law" of that State, may, for all present purposes, 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

Fugitive From Justice.

Kentucky, accuse Willis Lago, free man of color, of the crime of assisting slaves to escape, etc., committed as follows, to-wit: The said Willis Lago, free man of color, on the 4th 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. Nustols, 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 my 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 under obligations 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 ruinous or spirituous liquors, trespassing on public lands, keeping tavern without license, permitting dogs to run at large, declared by the

Fugitive From Justice.

laws of most of the States to be crimes for the commission of which the offender is visited with fine or imprisonment, or both, and yet it will not be insisted that the powers 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* form 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 treason or felony by the common law, as that stood when the constitution was adopted, or which are regarded 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. 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

Fugitive From Justice.

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.

FUGITIVE FROM JUSTICE.

Attorney General's Office,

Columbus, November, 1860.

SIR:—I have the honor to acknowledge the receipt of your note of the 30th ult., transmitting for my examination a requisition "with its annexed papers," made upon you by the Governor of Maryland for the surrender, "under the constitution and laws of the United States," of John C. Clutch, James C. Jackson and Lucus C. Buell, who, it is alleged, are fugitives from the justice of that State.

The only "papers" accompanying the requisition are authenticated copies of two indictments found by a grand jury of the "State of Maryland, for the City of Baltimore."

One of these charges Clutch and Jackson with obtaining goods by means of false pretences, and the other charges these same two persons and Buell with a conspiracy to cheat by obtaining goods through false representations. There is nothing to indicate that the accused parties are fugitives

Fugitive From Justice.

from the State of Maryland, except the recital in the preamble of the requisition, "that it has been represented to me (the Governor of Maryland) that they have fled from the justice of this State, and have taken refuge within the State of Ohio." On the other hand your note states that information has reached you to the effect that one, at least, of these persons had not been within the territorial limits of Maryland. Upon this state of case you desire my opinion as to your duty in the premises.

This question I have carefully considered, and now beg leave to say that, in my judgment, you ought not to surrender the accused.

Assuming that the offences sought to be charged are of the nature contemplated by the constitutional provision relating to fugitives from justice, it is to be observed that the "nature and cause of the accusation" are set forth in the vaguest terms. However may be the rule in this respect which obtains in Maryland, it is quite doubtful whether, by the common law or by the laws of Ohio these indictments would be sufficient to put the accused to answer. The general principle certainly is that an indictment must set forth the specific facts constituting the offence with such certainty that the accused may know the act done which it behooves him to controvert, and that the court, applying the law to the facts charged, may see that a crime has been committed. This is a long recognized rule, framed for the protection of innocence and essential to its safety. It is by no means clear that either of these indictments satisfies this rule. But as to this, or the result which would follow if the indictments should be deemed insufficient, I express no opinion, because none is necessary to the present disposition of the case. When, however, the question shall so arise that it must be fairly met, it will deserve my grave consideration, whether a citizen of this State shall be deported to another jurisdiction upon a charge so vague in the statements of facts necessary to constitute the alleged offence, that it would

Fugitive From Justice.

neither subject him to arraignment under the general rules of criminal procedure, nor warrant his arrest by our own authorities, or his trial in our own courts according to our own laws. If from the facts patent on the indictment, it does not appear with certainty that a specific, legally defined crime has been committed, it is not easy to see how the accused can be surrendered without invading all the safeguards with which the law has hedged about the liberty of the citizen. Omitting, however, a further discussion of this point, I proceed to notice a defect in the case, as it now stands before you, which is utterly fatal to the reclamation.

The power of extradition vested in you by the constitution of the United States (and you have no other) depends by the very terms of the grant, on three conditions, namely:

1. A charge in due and sufficient form, of treason, felony or other crime, committed in some other State.
2. Flight of the accused from the State in which the charge is preferred, and
3. Demand for his surrender by the executive of the State from which the flight was made.

These conditions are elemental, and the presence of each must be affirmatively shown before the power can lawfully be exercised, or, indeed, before the power itself can be deemed to spring into existence. The first of these will be conclusively evinced by an authenticated copy of a sufficient indictment found in, or a valid affidavit made before a magistrate of the State claiming the surrender, while the third condition will, of course, be answered by the requisition itself. The manner in which the other pre-requisite shall be established is nowhere prescribed, and a wide range of discretion, both as to the method and measure of proof to be exacted, is unavoidably left to the executive upon whom the reclamation is made. The fact itself must be established, but no other general rule can be laid down than that in each case there must be evidence sufficient in quality and degree to satisfy the executive judgment. Of course, no

Fugitive From Justice.

mere statement, unattested by oath or affirmation, can be received as evidence, for the uniform policy of the law everywhere forbids the use of such declarations to establish any fact in any proceeding, civil or criminal. No right of property can be impaired upon evidence of this nature, and certainly the right of personal liberty must be no less carefully guarded. Nor in determining the question of fact is the executive limited to the testimony which may accompany the requisition. Legitimate evidence from whatever source, and upon either side of the question, may well be received, but, upon all the proofs, if he is not clearly satisfied of the fact of flight, it is his plain duty to withhold the warrant of extradition. In the present instance there is absolutely no evidence that the accused had fled from Maryland. The only allusion to a flight is the recital in the preamble to the requisition, that a representation to that effect had been made to the Governor of Maryland. How, or by whom made, or under what sanction, does not appear, and it would be a violation of settled principles to accept this unverified representation made in some unknown way, by some unnamed person, as sufficient evidence of the existence of the fact. In this posture of the case it is needless to inquire what heed ought to be given to the suggestion made to you, that one, at least, of the persons now demanded had not been within the State of Maryland. But since the flight of the accused from that State—which, of course, involved his bodily presence there—must in all cases be affirmatively shown, it is not seen that this suggestion requires anything not covered by your general duty to stand upon the strict observance of every condition by which this power has been chained down. It does, however, teach an impressive lesson. If it be true, it is only one in a series of like cases which have left their mark in the history of our State. Of late years it has frequently happened that requisition has been made upon the Governor of Ohio for the surrender of persons, alleged to be fugitives from justice, who, in fact, had never been

Fugitive From Justice.

within the State by which the demand was urged. The accused had first been construed into that State in order to make them guilty of a crime, and then straightway construed out of it, in order to reach them as fugitives from justice. Upon this double fiction, a citizen of Ohio was, in one memorable instance, forcibly sent into a State the limits of which he had never before entered, and subjected to punishment under a foreign law to which he owed no obedience. Of such an artifice, so used, it is difficult to speak with moderation and yet with the plainness due to truth and justice. It finds, too, as little confidence in the law of the land as it does in the law of good morals. The high power of extradition has been carefully limited to cases in which the fact of flight (which implies the fact of presence in the place fled from) is an element and no feigning of the fact, however cunningly contrived, can stand for the very fact itself. The constitution does not suffer itself to be cheated by a false pretense in a matter which concerns the right of personal security.

The rules prescribed for the execution of this power are doubtless quite rigid, and their exact fulfilment may require great care on the part of those charged with its exercise. To any complaint urged on this ground, it would be sufficient to answer that they are in the very spirit of the constitution itself, and, whether rigid or otherwise, must be obeyed. But, in truth, they are founded on the largest reasons of public policy and individual freedom. It is no light thing that a citizen shall be sent from home, from friends, to be tried in a foreign jurisdiction, by strangers, for his liberty or his life, and it will be a very dark day in Ohio, when it shall be held that the conditions which suffer this to be done may be answered by any feigned or merely formal observance. Nothing so clearly marks the civilization and good government of a State as the sleepless jealousy with which it watches the exertion of every power affecting the life or liberty of the citizen.

C. P. WOLCOTT,

Attorney General.

*Cleveland and Mahoning Railroad Company; Changing
Form of Indebtedness.*

Attorney General's Office,
Columbus, December 6, 1860.

GENT:—Your letter of the 27th ult. reached me a day or two since.

The whole case presented by you is simply that the Cleveland and Mahoning Railroad Co. owes the Penna. and Ohio Canal Co. eighty-five thousand dollars, and has given certain securities for its payment. The railroad company now proposes to change the form of the indebtedness and to substitute other securities, the effect of which, you represent, will be to increase the rate of interest which the debt is yielding without diminishing its safety. Upon this state of fact you inquire whether the directors of the canal company have the power to make the proposed change.

Replying to this inquiry, I have to say that, in my opinion, the canal company may lawfully agree to the proposed change. Whatever may be thought of the legal character of the transaction, at its outset, it seems to me quite clear that the companies now stand to each other in the ordinary relation of debtor and creditor, and I know of nothing in the charter of the creditor company, or in the general law of the land, which forbids it to enter into the suggested arrangement with the debtor.

You all ask my opinion as to the "prudential aspects" of the question, but I must respectfully beg to be excused from passing any judgment thereupon. You have much better means than myself for determining this question, and the law, in giving you the power to act, has wisely cast upon you the responsibility; and I ought to do nothing which can tend to exempt you from this accountability.

Very respectfully yours,

C. P. WOLCOTT,
Attorney General.

Richard Iddings, J. T. Porter, Esq., Directors, etc.,
Warren, Ohio.