
Slavery Papers, Speeches, and Manuscripts

MS/146-015

1840

Resolutions of the General Assembly of Georgia: in favor of so amending the Constitution of the United States as to authorize circuit judges of the United States to surrender fugitives from justice

26th Congress, 1st Session, Senate 273

For this and additional works see: <https://vtext.valdosta.edu/xmlui/handle/10428/718>

UUID: ae95f54b-54e0-4abf-9393-13dfe348d7d3

Recommended Citation:

Georgia. General Assembly.,(1840). Resolutions of the General Assembly of Georgia: in favor of so amending the Constitution of the United States as to authorize circuit judges of the United States to surrender fugitives from justice. [Washington]: Blair & Rives, printers.
<http://hdl.handle.net/10428/2206>

This item is free and open source. It is part of the Slavery Papers, Speeches, and ManuscriptsCollection at Odum Library Valdosta State University Archives and Special Collections. If you have any questions or concerns contact archives@valdosta.edu

RESOLUTIONS

OF

THE GENERAL ASSEMBLY OF GEORGIA,

IN FAVOR

Of so amending the constitution of the United States as to authorize circuit judges of the United States to surrender fugitives from justice.

MARCH 11, 1840.

Referred to the Committee on the Judiciary, and ordered to be printed, with the accompanying documents submitted by Mr. LUMPKIN.

The Federal constitution having been framed partially with a view to regulate the constitutional intercourse between the sovereign States that ordained it, and having conferred all the powers necessary and proper for carrying its provisions into full effect upon a Congress of the United States, it is incumbent on that body, by its legislation, to secure the several States in the enjoyment of their constitutional rights. Not the least important stipulation in that compact is, that "a" person charged 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.

Doubtless the past legislation on this subject has been predicated upon the presumption that each State having, in the pledged faith of all the others, a sufficient guaranty, nothing more was requisite than to prescribe the forms which should give authenticity to the demand; doubtless, too, in the time which gave birth to the constitution, whilst the Union was young, and her revolutionary associations fresh and warm, this presumption found its warrant in the mutual fidelity which promptly responded to all executive demands. To this generation has been reserved the humiliating spectacle of a sovereign State making herself a city of refuge for fugitive felons from her sister confederates. Two such cases of recent occurrence demonstrate the utter inefficiency of the existing laws for carrying into effect this provision of the constitution. They, moreover, clearly indicate the cause of this inefficiency. Those laws are dependent for their execution upon the mere will of the executive officers of the several States, who neither are, nor can be made, responsible to the General Government. If, then, it be correctly assumed that the Federal Legislature is bound to make ample provision for the contemplated exigency, and if experience has proved that reliance on State authorities is delusive, the question occurs, whether there be any other mode which gives fairer promise of security. May not the object be ac-

Blair & Rives, printers.

complished by employing in that service officers appointed by, and responsible to, the Federal Government? Inasmuch as that Government has employed in every State of the Union competent, judicial, and ministerial officers, it is believed that this duty, enjoined by the highest obligations, and intimately connected with the harmony and perpetuity of the Union, may be appropriately and efficiently performed through their instrumentality. There would seem to be a peculiar fitness in providing that the aid which she is bound to afford to the State judiciaries should result from the action of her own judiciary. The process would be simple, and the agents directly responsible to the power whence the laws to be executed emanate.

Be it therefore resolved, That the statutes of the United States enacted to carry into effect the latter clause of the second section of the fourth article of the constitution are wholly inadequate to the object.

Be it further resolved, That, in the opinion of this General Assembly, those statutes should be so amended as, first, to authorize the demand in the cases contemplated to be made upon the circuit judge of the United States having jurisdiction in the State wherein such fugitive may be found; secondly, to require that such judge, upon such demand being made in due form of law, shall issue his warrant, to be directed to the marshal of the United States in the State wherein such fugitive may be, requiring his arrest and delivery to the agent duly authorized to receive him, who shall be named in such warrant; thirdly, to require each marshal to whom any such warrant shall be delivered, forthwith to execute the same.

Be it further resolved, That our Senators in Congress be instructed, and our Representatives be requested, to have the act of Congress passed on the 12th of February, 1793, to carry into effect the second section of the fourth article of the constitution of the United States, so amended as to make it obligatory on the said district judge to surrender any person who may be found in any State or Territory, and who is charged in any other State or Territory with the commission of any act which is constituted a crime by the laws of said State or Territory where he is so charged, to the executive authority of the State or Territory where the offence is alleged to have been committed.

Be it further resolved, That his excellency the Governor be requested to forward to our Senators and Representatives in Congress copies of the above preamble and resolutions, with a request that they endeavor to procure such amendments of the statutes in question as in their judgment will be best calculated to effect the desired object.

ROBT. M. ECHOLS,
President of the Senate.

Attest:

DAVID J. BAILEY.

JOSEPH DAY,
Speaker of the House of Representatives.

Attest:

JOSEPH STURGES, *Clerk.*

Approved December 24, 1839.

CHARLES J. McDONALD,
Governor.

Governor Schley to the Governor of Maine.

EXECUTIVE DEPARTMENT, GEORGIA,
Milledgeville, June 21, 1837.

SIR: I herewith transmit to your excellency a copy of an affidavit of James Sagurs, taken before a lawful officer of this State, and other proceedings had thereon, charging Daniel Philbrook, late master of the schooner (or brig) "Susan," and Edward Kelleran, mate of said vessel, (fugitives from justice in this State,) with the offence of feloniously inveigling, stealing, and conveying away a negro man-slave, named Atticus, the property of said James Sagurs and Henry Sagurs: which copy I have caused to be carefully compared with the original, and certified accordingly. I have also, in pursuance of the act of Congress passed 12th of February, 1793, respecting fugitives from justice, &c., appointed an agent, on the part of this State, to receive and convey the fugitives to the county of Chatham, in this State, to be tried for the offence with which they stand charged.

Your excellency will, therefore, be pleased to consider this my demand, under said statute, for the said Daniel Philbrook and Edward Kelleran, and to order their arrest, if to be found in the State over which you preside, and cause them to be delivered to Mordecai Sheftall, junior, the authorized agent of this State for the above purpose.

I have the honor to be, very respectfully, your obedient servant,
WILLIAM SCHLEY.

His Excellency the GOVERNOR of Maine,
Augusta, Me.

James Sagurs's affidavit.

GEORGIA, Chatham county :

Personally appeared before me, Joseph Felt, a magistrate duly appointed in and for said county, James Sagurs, who, being duly sworn, deposes and saith: That one Daniel Philbrook, late master of the schooner Susan, of Boston, and one Edward Kelleran, late mate of said vessel, as deponent also believes, did, on or about the fourth day of May last, feloniously inveigle, steal, take, and carry away, without the limits of the State of Georgia, a negro man-slave, named Atticus, the property of this deponent and his brother, Henry Sagurs: and, further, he saith that the said Daniel Philbrook and Edward Kelleran have been guilty, as deponent is informed and believes, of a felony under the laws of this State; and, therefore, prays a warrant may issue against the said Daniel Philbrook and Edward Kelleran, that they may be dealt with according to law. And this deponent further saith, that, since the commission of said felony, the said Daniel Philbrook and Edward Kelleran have fled from this State, and are, as he believes, at this time within the limits of the State of Maine, in the United States.

JAMES SAGURS.

Sworn to, before me, this 16th June, 1837.

JOSEPH FELT, J. P.

Governor Dunlap to Governor Schley.

STATE OF MAINE, EXECUTIVE DEPARTMENT,
Augusta, August 16, 1837.

SIR: I have had the honor to receive your excellency's communication, enclosing the affidavit of James Sagurs, and demanding the arrest of Daniel Philbrook and Edward Kelloran, accused of having feloniously inveigled, stolen, and carried away, without the limits of the State of Georgia, a negro slave.

Whatever may have been urged relative to this or any kindred subject, by individuals or self-constituted societies, the offence indicated in the affidavit being made penal by the laws of Georgia, would, in my view, require Executive interference as really and as readily as offences of any other character. I am, however, dissuaded from complying with your excellency's request, not from any sympathies with those who would wantonly violate the laws of a sister State, but from considerations which I beg leave now to present.

So far as I have received any information relative to Philbrook and Kelloran, their visit to your State was in the course of their ordinary business as mariners. Their vessel being at the south, they navigated it homeward by the usual route and in the usual time. They had stated homes, to which they openly returned; at those homes they took up their residence and conducted their affairs there without concealment, and in all respects conformably to the usages of innocent and unsuspecting citizens. Whether such a course of conduct is to be a fleeing from justice, within the meaning of the act of Congress, and whether men so conducting are to be viewed as "fugitives," may present a question of some importance, but which it does not now seem necessary for me to decide.

The affidavit suggests two causes for the proposed arrest: one is, that the supposed fugitives have been guilty, *as the deponent has been informed and believes*, of a felony under the laws of your State. Felony is a generic term, embracing many descriptions of crime. In what acts the supposed felony consisted—whether they were acts aimed at the subversion of the Government, or affecting the life, liberty, or property of individual citizens, and when, where, or by what instrumentality committed, is not intimated. The deponent (as he asserts) may have been informed that some act which he had heard and believed the said Philbrook and Kelloran performed was denominated a felony. From whom, and with what accuracy, he learned the definition of a "felony," is unknown. Had he stated the act committed, the conclusion which I could have drawn from it relative to its character and criminality would be more satisfactory to me than the deponent's opinion that such an act (whatever it might be) constituted a felony. Surely a charge so vague, even when raised by oath, cannot justify the desired arrest. But this charge, indefinite as it is, is not sworn to as true. The allegation is merely that the deponent has been so informed and so believes.

The other allegation is, that the said Philbrook and Kelloran, as deponent believes, did feloniously inveigle, steal, take, and carry away, without the limits of the State of Georgia, a negro slave. Doubtless such an act, if committed, is an offence against the laws of Georgia; but the allegations of the affidavit do not, in my judgment, constitute such a charge as would justify me in surrendering the supposed fugitives. All rests in the depo-

ment's belief; no positive statement is made; and on what evidence his belief is founded does not appear. It might be the slightest suggestion of an excited mind; it might draw its origin from some indeterminate insinuation of interested persons whose motives we cannot scrutinize. Above all, it is not alleged that the crime has been committed by any one, but merely that the deponent believes it has.

By the constitution of the United States, no warrant is to issue except on probable cause, supported by oath or affirmation; and the constitution of this State furnishes the same protection to its citizens. In the case under consideration, it is not asserted that there is probable cause; nor are facts or circumstances presented, from which probable cause can be inferred. In a case arising in this State, no magistrate would feel justified to issue his warrant upon such evidence. It would not be sufficient authority to detain a man for trial.

From the foregoing considerations, I am constrained to think that the case which your excellency has presented is not of such a character as will permit me to order the proposed arrest.

I have the honor to be, with high consideration, your excellency's obedient servant,

ROBERT P. DUNLAP.

His Excellency WM. SCHLEY,
Governor of the State of Georgia.

Governor Schley to Governor Dunlap.

EXECUTIVE DEPARTMENT, GEORGIA,
Milledgeville, September 5, 1837.

SIR: I have the honor to acknowledge the receipt of your communication of the 16th ultimo, in answer to mine of the 21st June last, demanding of your excellency the persons of Daniel Philbrook and Edward Kelleran, fugitives from justice, and charged with the crime of feloniously inveigling, taking, and carrying away, without the limits of the State of Georgia, a certain negro man-slave, named Atticus, the property of James Sagurs and Henry Sagurs.

You refuse to comply with the demand on three grounds, if I rightly understand you: First, because the persons charged "visited Georgia in the course of their ordinary business as mariners, returned homeward by the usual route, and in the usual way; had stated homes, to which they openly returned; took up their residence and conducted their affairs there without concealment, and in all respects conformably to the usages of innocent and unsuspecting citizens." Secondly, "because the affidavit on which the demand was made is not positive, but only asserts the deponent's information and belief that the persons charged had committed a felony by inveigling, stealing, taking, and carrying away, without the limits of the State of Georgia, a negro slave." And, thirdly, because "felony is a generic term, embracing many descriptions of crime; and had the deponent stated the act committed, the conclusion you could have drawn from it relative to its character and criminality would have been more satisfactory to you than the deponent's opinion that such an act constituted a felony."

The fact that the individuals "charged returned to their homes (in Maine) and conducted their affairs *there* without concealment, and in all respects conformably to the usages of innocent and unoffending citizens," is no evidence of their innocence. If they had thus acted within the jurisdiction of the State where the offence is alleged to have been committed, I admit it would have been a circumstance well calculated to rebut the *presumption* of guilt; but they were in the *State of Maine*, beyond and without the jurisdiction of the laws they had violated, where they expected to be protected, and where, I regret to say, by the course your excellency has deemed it your duty to pursue, they will in fact be protected; and that, too, directly in opposition to a positive law of the United States, passed in pursuance of the constitution.

With due deference to your excellency's judgment, I must be permitted to differ from you in the construction of Mr. Sagurs's affidavit. He does not state the fact of stealing upon his belief, but the fact of the individuals charged *being the master and mate* of the schooner Boston. The affidavit states positively "that Daniel Philbrook and Edward Kellerman did, on or about the 4th day of May last, feloniously inveigle, steal, take, and carry away, without the limits of Georgia, a negro man-slave, named Atticus, the property of the deponent and his brother, Henry Sagurs." The deponent then states that "this act, *as he has been informed, and believes, is a felony* under the laws of Georgia."

The fact, therefore, which you desire to know, in order to draw your own conclusion relative to the character and criminality of the offence, has been distinctly and positively sworn to in the affidavit, to wit: that Daniel Philbrook and Edward Kellerman did feloniously inveigle, steal, take, and carry away, a certain negro man-slave, named Atticus.

But admitting the affidavit to be as you understand it, still I hold it amply sufficient to authorize the arrest of the persons charged. Indeed, it is very seldom possible to obtain the kind of evidence you seem to require. Crimes are generally committed in secret, and are usually established by the proof of facts which necessarily lead the mind to the conclusion that the crime was committed, and by a certain person. On such evidence convictions are usually obtained, and a much slighter proof is sufficient to authorize an arrest. Suppose a murder to have been committed, and an affidavit made stating "that the deponent had reason to believe, and did verily believe, that A B did the act;" will your excellency say that on such evidence the person charged could not be legally *arrested*? I hope not; for if such be the understanding of the law in the State of Maine, it would seem to me that a very low estimate is placed on the value of human life, and the preservation of order and good government. And in regard to the crime of which Philbrook and Kellerman stand charged, we, of the south, know that it is always committed secretly and under cover of night. The second ground, therefore, upon which your excellency has been pleased to place your refusal to comply with my demand, is totally untenable; and will continue so until the whole fabric of criminal jurisprudence, as heretofore known and understood in the United States, shall have been demolished, and a new order of things established.

But I am at a loss to conjecture by what authority your excellency assumes the right of judging the sufficiency of the affidavit, the nature and extent of the crime, or the guilt or innocence of the persons charged. These are the province of a court and jury of the county of Chatham, in

the State of Georgia. The act of Congress (2d vol. Laws U. S., page 165,) declares, "that whenever the executive authority of any State in the Union, &c., shall demand any person as a fugitive from justice of the executive authority of any such State or Territory to which said 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," &c. The only question, then, which your excellency is competent, under this statute, to decide, is this: Has the Governor of Georgia transmitted the copy of an affidavit charging Daniel Philbrook and Edward Kelleran with "*treason, felony, or other crime?*" That he has, your excellency admits; but you contend "that, as felony is a generic term, embracing many descriptions of crime, the deponent should have stated the act committed," from which you could have drawn a conclusion more satisfactory to yourself than the deponent's opinion that such an act (whatever it might be) constituted a felony. I forbear to answer this portion of your letter in the spirit my feelings would dictate; but really, sir, I cannot avoid expressing my utter astonishment at the assumption of powers like these; and I venture to say that, in the whole course of our history, under the constitution and the laws I have quoted, no such pretension has been heretofore set up. Is the Governor of Maine better qualified to determine what constitutes a felony in *Georgia*, than the Governor and the judicial authorities of *Georgia*? And have not the latter, by receiving the affidavit, issuing the warrant, and making the demand of your excellency, declared that the crime charged is a felony? But suppose the act not to be a felony; the demand is equally legal, and you are equally bound to comply, because the constitution and the act of Congress say "treason, felony, or other crime;" and the fact that the demand has been made is evidence that a *crime* of some sort has been committed against the laws of *Georgia*.

But if your excellency shall still be of opinion that it is your right to judge whether the act complained of be a felony, that opinion must, of course, be formed on the laws of *Georgia*; and, therefore, I respectfully refer you to the following section of the penal code of this State, by which you will see that all crimes including penitentiary punishment come under the definition of the term "felony," and that stealing of a slave subjects the offender to such punishment. The 13th section of the first division of the penal code of this State is in the following words: "Section 13th. The term *felony*, when used in this act, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished with death, or imprisonment in the penitentiary, and not otherwise." And the 20th section of the 6th division is as follows: "Section 20th. The stealing of a slave is simple larceny, and shall be punished by imprisonment and labor in the penitentiary for any term not less than four years, nor longer than ten years."

Having shown, as I think, that your excellency has misconceived the whole matter, and denied to *Georgia* a right guaranteed to her by the constitution and the law, I propose to view the subject as a political and international question.

The constitution of the United States was the result of a compromise between States having different, and, in some respects, antagonist interests and views. Subjects constituting property in one State ceased to be of that character when removed to other sections of the confederacy; and acts which constituted crimes in one State were not considered criminal in others. Under this state of things, no union under a federal government could be formed until all the States agreed that the laws of each should be respected, and that persons charged with offences against the laws of one State, escaping into another, should be delivered to the authorities of the offended State, without inquiring into the justice or propriety of the laws said to be violated. And, in pursuance of this compromise, the following clause was inserted in the constitution: "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 is a part of the organic law of the Union, and is equally obligatory on every part. But what sanction has it? Can the Chief Magistrate of a State, who thinks proper to refuse obedience to it, be forced to a compliance, or be punished for contumacy? No; and why not? Because he is the executive officer of a State, and acts in his official capacity as the representative of her reserved sovereignty. The act is not an individual, but an official one. Is there, then, no remedy for the injured State? None, except such as remains to independent States when treaty stipulations are violated—the *ultima ratio, war*; and this would produce a rupture of the Union and of our happy form of government. Will the State of Maine, under such circumstances, and in violation of her duty to a sister State, persist in refusing to obey the constitution and law of the United States? I hope not. And I am persuaded that, on a review of this subject, your excellency will become satisfied that Georgia has been denied a constitutional right, without the enactment of which she would never have become a member of the Union, and without the enforcement of which she cannot maintain her just rights and liberties.

I have the honor to be, very respectfully, your excellency's obedient servant,

WILLIAM SCHLEY.

His Excellency ROBERT P. DUNLAP,
Governor of Maine, Augusta, Maine.

STATE OF MAINE, EXECUTIVE DEPARTMENT,
Augusta, June 25, 1838.

SIR: I have the honor to acknowledge the receipt of the communication of your excellency, enclosing a demand for the arrest and delivery to the agent of the State of Georgia of the bodies of Daniel Philbrook and Edward Kelloran, to be transported to the county of Chatham, in said State, as fugitives from the justice of Georgia. A copy of a bill of indictment, found by the grand jurors of said county against said Philbrook and Kelloran, charging them with the crime of simple larceny in stealing a man, alleged to be a slave, within the boundary of said county, duly certified, accom-

panies the requisition. This demand is made as a matter of right, under the provisions of the constitution of the United States, in these 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 State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." I readily admit that, whenever a case is made out within the meaning of this provision of the constitution, it is the right of one Executive to demand, and the duty of the other Executive to comply without hesitation or delay. The language is imperative—he "shall" be delivered up.

The question of the guilt or innocence of the accused is not a matter of inquiry, except as it may bear upon the preliminary questions involved in the ascertainment of the fact whether the case comes within the provisions of this clause of the constitution. Whenever the constitution of the United States has imposed duties in express terms upon a State or its Executive, the absolute sovereignty of the State is qualified and impaired, and the action between States is rather the fulfilment of a compact than the intercourse between independent sovereignties. I most readily and cheerfully give my assent to the position, that the constitution of the United States is the supreme law of the land, and entitled to perfect respect and obedience; and I trust I shall never be instrumental, in any degree, in weakening its power or disregarding its provisions. The question, as I conceive, which is open for examination by the Executive upon such a demand as is now made by your excellency, is, whether the case presented comes within the language and intention of the constitution. If he is satisfied that it does, he is bound to comply, whatever his own views of the crime charged, or of the expediency of pursuing the fugitive, may be. It is apparent that not every case where a crime is charged, and the individual accused is found within another State, comes within the scope of this provision. Whenever a citizen of his State is *demand*ed as a fugitive from justice to be delivered up to be transported to a foreign tribunal to be tried before unknown judges, away from his friends and his home, for a crime the punishment of which is extremely severe; and when this demand is urged as a right, and not asked as a favor; it surely cannot be deemed improper for the Executive upon whom the demand is made to require evidence of every constitutional condition before yielding up a citizen of the State over which he presides.

The constitution of the United States requires the delivery, under this provision, whenever it is shown that the person has been accused or "charged with a crime in another State, that he has fled from justice, and that he is found in this State." The copy of the indictment furnished me is evidence of the first point, but I have seen no evidence or proof that those men are, or had been, fugitives from justice.

It is, perhaps, a matter of doubt whether the accusation must not precede the flight referred to. The language of the constitution seems to contemplate a flight after accusation—"a person charged who shall flee," &c. And I have little doubt that the framers of the constitution had chiefly in view the case of a flight after accusation, and before arrest or trial, to prevent one State from becoming a city of refuge for the indicted felons or escaped prisoners of another; but I am not disposed to dwell upon this view, but to examine the clause briefly in a more extended sense.

Has the Executive of this State a right to ask for satisfactory evidence to warrant the presumption that the accused are fugitives, as well as evidence that they are charged with a crime, before yielding to the demand? The evidence on the latter point, it is conceded, is properly required; but the constitution as clearly requires that the person should be a *fugitive*, as that he should be "charged with a crime." The framers of the constitution evidently regarded this particular as important, or it would not have been inserted in that instrument, which is never redundant in language or ideas. If it had been intended to give no discretion to the Executive upon whom a demand is made, but to make him simply a subordinate officer to execute the request or demand of another Governor, the provision doubtless would have been, that whenever any person should be charged or accused in one State of crime, and should be found in another, he should be delivered up upon request.

But the constitution has superadded another condition, viz: that the accused should have fled from justice. I do not suppose that a direct, immediate, and rapid flight is alone intended, or a capture upon fresh pursuit. But I do suppose that the departure must be in some degree connected with the crime; that there must be some manifest design to avoid the process of the law, and an intention of placing himself out of the reach of the officers of justice. If, for instance, a man has committed an assault and battery many years since in Maine, and had lived here for two or three years afterwards, and then removed to a neighboring State, where he had resided openly for a long time, I should not feel authorized to demand him as a fugitive from justice, because a bill of indictment had been found against him in this State, and he was found in another State; and, of course, I should not feel authorized in yielding to the demand for a person in such case by the Executive of another State. Circumstances and facts in many cases might distinctly indicate the intention of avoidance, by removal; and the presumption might be raised without direct evidence of such intention. But I do most respectfully maintain that such "fleeing from justice" is a distinct and explicit preliminary point to be satisfactorily established before the delivery can be demanded as a matter of right.

The views of the Legislature of this State are clearly indicated in the language of the statute of this State on this subject, in these words: "That when a demand shall be made upon the executive authority of this State by the Executive of any State, in any case authorized by the constitution and laws of the United States, for the delivery over of any fugitive from justice charged in such State with treason, felony, or other crime, and the Governor shall be satisfied, on investigation of the grounds of such demand, and that the same is made conformably to law and ought to be complied with, he shall issue his warrant under the seal of the State, authorizing the agent who may make such demand, either forthwith, or at such time as shall be designated in the warrant, to take and transport such person to the line of this State, at the expense of such agent, and shall also, by such warrant, require the civil officers within this State to afford all needful assistance in the execution thereof."

The opinion of the judges of our supreme judicial court, given to my predecessor, upon a case presented which arose prior to the questions in relation to Philbrook and Kelleran, (a copy of which I have the honor to enclose), is brief, but explicit upon this point.

Upon the face of the papers forwarded to me by your excellency, there is nothing which, in my view, establishes the position that these men are fugitives from the justice of Georgia, and nothing which invalidates the allegation made by them that they are not such fugitives. If the facts are as alleged by them, and as I have understood their representations to be, viz: "that they are citizens of Maine; that they visited Georgia in the usual course of their business as mariners—one as captain, and the other as mate of a vessel from Maine; that the vessel was loaded in the usual manner and time, and cleared and sailed in the common form, and made her homeward voyage in the accustomed track; and the aforesaid captain and mate returned to their homes, where they remained openly transacting their business for several months, and have so remained to this time; that they did not know that the negro man was on their vessel, until the lapse of several days after sailing, when he was discovered concealed in the hold"—I cannot regard such facts as evidence that they did "flee from justice." The indictment found against them in Georgia, it is true, charges them with a crime, but has no bearing, as I conceive, upon the question now under consideration. It was no part of the official duty of the grand jury to inquire into this part of the case, and they have found but one count in the indictment, viz: that charging a simple larceny as true; although there are divers other counts in the indictment presented to them."

In view of the whole matter, therefore, I have come to the conclusion that the case presented by your excellency does not, in its present aspect, come within the terms of the fundamental law, the provision of the constitution.

I beg leave to assure you that this opinion is not formed in reference to the nature of the property alleged to have been stolen, or to the peculiar relations existing in your State, and which, in some degree, are connected with this question. I fully recognise the constitutional right of Georgia to enact her own penal laws, and to make that a crime which is unknown to our laws as such, and to demand fugitives from her justice. I place the case upon the sole ground of the fair construction of the constitution in this particular, irrespective of particular and peculiar circumstances which may become connected with the discussion.

Maine assumes no right to disregard any provision of the constitutional compact, because she may incidentally aid in enforcing laws or sustaining institutions different from her own.

I have the honor to be, with great respect, your excellency's most obedient servant,

EDWARD KENT.

His Excellency GEORGE R. GILMER,
Governor of Georgia.

CASTINE, June 26, 1837.

SIR: The undersigned, justices of the supreme judicial court, to the following question propounded to them by the Governor, on the 22d instant, viz: "Is it the duty of the Executive of this State to cause to be delivered over to the agent of another State, at the request of the Executive thereof, a citizen of this State charged (by indictment in such other State) with fraud upon one or more of her citizens, in the sale of wild lands, or in contracts for the sale of such lands, lying within the bounds of this State, and

thereby obtaining the money and notes of said citizens under false pretences and representations in regard to the quality and value of said lands :” would respectfully answer, that, in their opinion, it is the [duty of the] Executive of this State to cause to be delivered over to the agent of another State, at the request of the Executive thereof, a citizen of this State charged in another State, by indictment, with the fraud before set forth, which, being indicted in such State, may be presumed to be regarded there as a crime, if the Executive of this State is satisfied that such citizen has fled from justice from the State making the demand, and not otherwise.

Mr. Justice Shepley being now engaged in official duty at Machias, the undersigned have not had it in their power to communicate with him, without postponing their answer to a later period than might be deemed convenient.

NATHAN WESTON,
NICHOLAS EMERY.

To the GOVERNOR of the State of Maine.

IN SENATE, *January 26, 1839.*

Mr. Litchfield, from the Committee on the Judiciary, to whom was referred the message of the Governor, transmitting certain documents in relation to the arrest of Philbrook and Kelleran, reported :

That the whole subject is exclusively within the province of the Executive Department, and that it is inexpedient for the Legislature to take any order in relation thereto ; and ask to be discharged from the further consideration of said subject, and that said message and documents be placed on the files of the Legislature.

Read, and accepted. Sent for concurrence.

Attest :

WILLIAM TRAFTON, *Secretary.*

The above was accepted in the House of Representatives.

EXECUTIVE DEPARTMENT, GEORGIA,
Milledgeville, August 23, 1839.

SIR : I have had the honor of receiving your communication notifying the Executive of Georgia that the renewed demand which has lately been made of the Executive of Maine for the arrest and delivery to the agent of this State of Philbrook and Kelleran, has, like the former, been refused.

I cannot perceive, in the reasons assigned by your excellency, any sufficient justification for this determined denial to Georgia of a right secured by each State to the others, by compact clearly expressed in the constitution, and absolutely necessary to the well-being of all.

The facts of this case are, that Philbrook and Kelleran being in Savannah, engaged as mariners, (one as the captain,) and the other the mate of a vessel, on leaving that port on the 4th of May, 1837, secretly carried off in their vessel a negro slave, the property of two citizens of that place ; that they returned directly to the State of Maine, where they have since remained ; that they were, on the 17th June thereafter, demanded by the Executive of Georgia, as fugitives from the justice of the State, of the Executive of Maine, upon the copy of a duly authenticated affidavit, charging them

with feloniously taking and carrying away said slave from Georgia, and having fled to the State of Maine; that this demand was refused; that, afterwards, they were indicted for the same crime in the superior court of Chatham county, (in which county the city of Savannah is,) and found guilty as charged in the affidavit upon which the first demand was made; that the demand upon the Executive of Maine was renewed upon a properly authenticated copy of that bill of indictment, and rejected by your excellency.

The question is, whether you and your predecessor have acted in accordance with the constitution?

The words of the constitution applicable to this subject are, that "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."

The States, in adopting this clause of the constitution, evidently intended to provide the means by which all offenders against the laws of the States should be brought to trial.

No power has been delegated to the General Government to punish crimes against the laws of the States; neither is one State authorized to execute warrants of arrest within the jurisdiction of another. By a principle of law common to all the States, and expressly recognised by the constitution of the United States, a person charged with the commission of a crime can only be tried in the State and district where the crime is committed.

The only protection afforded to society throughout the United States against the operations of the lawless, is to be found, therefore, in the power of each State to arrest and bring to trial offenders remaining within its jurisdiction, and to demand from the Governors of the several States the arrest and delivery up of all who may be fugitives from its justice.

The equality of privileges and immunities secured by the constitution to the citizens of each State, in the several States; the identity of the language, habits, pursuits, and feelings, of the people throughout the Union; and the similarity of the form of government, and the public institutions of the several States, enable offenders against the laws to pass from one State into another without sacrifice or difficulty. Unless, therefore, the Governors of the several States deliver up, upon demand, all within their jurisdiction who are charged with the commission of crimes in other States, with the same certainty that criminals are arrested by the officers of justice within the jurisdiction where their offences are committed, the people of this country have no sufficient security for the protection of their rights against the facility with which offenders can escape from the jurisdiction where alone they can be tried, and our form of government will have failed in providing for the performance of one of its most important functions—the certain punishment of crimes.

The conduct of yourself and predecessor, in preventing Philbrook and Kelleran from being brought before the courts of Georgia, where alone they can be tried, has certainly not been in conformity with these views of the constitution.

You maintain, however, that "fleeing from justice," in the recited clause of the constitution, is a direct, explicit, and preliminary point, to be satisfactorily established before the accused can be demanded as a matter of

right. And you justify your refusal to deliver up Philbrook and Kelleran upon the allegation that this condition had not been complied with by the authorities of Georgia.

To give to the words "flee from justice" your interpretation, would, most obviously, tend to thwart the purposes of the constitution, by increasing, if it would not render it impossible to make demands. But, without this general reasoning, the point made by these words was established, by the express allegation in the demand made of your predecessor and yourself by Executive of this State, that Philbrook and Kelleran were fugitives from the justice of Georgia; by the charge against Philbrook and Kelleran of the commission of larceny in Georgia, proven by a duly authenticated copy of an affidavit, and a true bill of indictment found; and by the acknowledgment of your predecessor, at the time when the demand was first made, and afterwards, by yourself, when it was renewed, that these persons were at the time in the State of Maine.

According to the act of Congress passed February 12, 1793, whenever the executive authority of a State demands the arrest and delivery up of a person as a fugitive from its justice, and produces to the Governor of whom the demand is made the authenticated copy of an affidavit, or true bill of indictment found, charging the person so demanded with the commission of a crime within the State demanding him, and he is found within the jurisdiction of the State of which he is demanded, the law presumes, without further proof, that he has fled from justice.

But, if these facts and legal presumptions had not sufficiently established the proper application of the words of the constitution "flee from justice" to the case of Philbrook and Kelleran, the positive proof furnished by the affidavit upon which the demand was first made did so, beyond a doubt. That affidavit, after setting forth the crime charged upon Philbrook and Kelleran, states, "that, since the commission of said felony, the said Daniel Philbrook and Edward Kelleran have fled from this State, and are, it is believed, within the limits of the State of Maine."

The arrest of fugitives from justice can never be asked of a Governor as a matter of favor, to be granted according to his discretion, as your excellency seems to suppose. The demand must be made as a matter of right; and, if accompanied by the proofs required by the law of the United States, the duty is imperative. The executive authority of a State has no right to arrest and deliver up a citizen, upon demand, unless made in the form which would compel the arrest. The constitution allows no option: it gives no room for the exercise of the will or caprice of the Governor, or his yielding to public opinion or feelings around him. The rule of conduct in making demands and arresting fugitives from justice, to be just, must be applicable to all the States, at all times, and to all crimes.

The difficulties which the authorities of this State have met with in bringing to trial Philbrook and Kelleran have proceeded from the nature of the particular crime with which they are charged, and not the want of sufficient proof that they were fugitives from justice, or the failure on the part of the authorities of Georgia to perform the requirements of the constitution and laws of the United States in demanding them.

If these persons had committed a secret murder, robbery, or forgery, in the transaction of their business in Savannah; or stolen bales of cotton, instead of a negro slave; no one can doubt but that they would have been delivered up, without the repeated demands, upon the various proofs upon which their arrest has been refused.

If Philbrook and Kelleran had been charged with any other crime than stealing a negro, is it possible that the Governor of Maine would have constituted himself into a judicial tribunal to receive the voluntary statements of the accused? have inferred their innocence from the very facts which usually accompany guilt in such cases, (their being mariners coming from a non-slaveholding State, into the seaports of Georgia, in the usual course of their business, and, when returning home, carrying away slaves—this being the mode in which citizens of the seaboard of this State are most frequently deprived of their property?) have determined, in consequence, that the accused were not fugitives from justice? and have refused to deliver them up to the authorities of Georgia, where alone their guilt or innocence could be legally inquired into?

The opinion that the demand of Philbrook and Kelleran has been refused, not because the case did not conform to the requirements of the constitution and laws of the United States, but because these persons were charged with stealing a slave, is confirmed by the act of the Legislature of Maine, to which your excellency has referred as sanctioning your course.

The right of the States to demand from each other the delivery up of fugitives from their justice, is derived from the mutual agreement entered into in their sovereign capacity by all the States who are parties to the constitution, and is secured by making it obligatory upon the executive authorities of each State to comply with such demands. The manner in which this is to be performed has been prescribed by a law of the United States.

The legislative department of a State cannot, therefore, limit, restrain, or control the executive department in the exercise of this power, which is not derived from the State, but is imposed as a duty by the constitution; nor pass any law whatever upon the subject, except to aid or compel the Governor to execute what the constitution and laws of the United States enjoin upon him.

And yet, the Legislature of Maine, on the 20th March last, after your predecessor had refused to deliver up Philbrook and Kelleran, and the Legislature of Georgia had directed the demand to be renewed, passed a law, giving authority to the Governor to satisfy himself, by an investigation into the grounds of a demand, and whether it was right to be complied with, before he should arrest fugitives from the justice of the other States.

The authorities of Maine cannot but be aware that, if public sentiment in Maine requires the Governor to protect persons from punishment who take from citizens of Georgia their slave property, the authorities of Georgia must necessarily protect the rights of its citizens from the danger to which their slave property will be thus exposed from the mariners coming from Maine into her ports. I shall not attempt to trace out the consequence to which such a state of things must lead. Those who know how to estimate the blessings derived from the Union need no such commentary; and those who think it doing God service to plunder us of our slave property will not regard it.

The Legislature of this State has directed me to request you to transmit to the Legislature of Maine, at its next session, the enclosed copy of resolutions, adopted at its last session.

Your excellency is requested to communicate to this department whatever proceedings may be had by the Legislature of Maine upon these resolutions.

Very respectfully, yours, &c.,

GEORGE R. GILMER.

His Excellency EDWARD KENT.

