YALE LAW JOURNAL

VOLUME XVI

1906-1907

PUBLISHED BY
THE YALE LAW JOURNAL COMPANY
NEW HAVEN, CONN.

different contract, and so the contract actually made by an acceptance, after the time fixed in the writing, is a contract not in writing, and so void under the statute." *Atlee v. Bartholomew*, 69 Wis. 43, 50. Numerous cases can be cited which take the opposite ground. See cases cited in 20 *Cyc.*, page 268, note 74; and 23 *Cent. Dig.*, tit. "*Frauds, Statute of*," Section 264.

In this apparently irreconcilable conflict of decisions, there is one rule to be deduced which will materially aid in harmonizing many of them, and that is:—When the written agreement as altered by the parol modification is declared upon, the action will not be sustained as this would be going in the teeth of the statute, but where the original agreement, and that alone, is the foundation of the action, then the substituted or altered term may be relied upon by way of accord and satisfaction, as performance or readiness to perform under the terms of the parol variation is equivalent to performance or readiness to perform under the contract as written; and it is held that proof of such will not constitute a variance from the declaration. *Stearn v. Hall*, 9 Cush. 31; *Whittier v. Dana*, 10 Allen 336; *Browne on Statute of Frauds* (2 Ed.) Section 423, 425, and cases there cited. *Cummings v. Arnold*, 3 Met. 486, holds that in defense to an action on a written contract, the defendant may show that he has performed it according to an oral agreement for a substituted performance, or, being ready to do so, was prevented by an act of the plaintiff. So by this method effect is given to an oral change in the manner or time of performance without contravening the terms of the Statute of Frauds.

The question is often involved in contracts for the sale of goods which come within the purview of the statute and a verbal alteration is made as to the time of performance, etc. In such cases, the courts show much reluctance, and justly so, in allowing the statute to be interposed as a defense and thereby constituting themselves innocent means in the perpetration of a fraud. Endeavor is constantly shown to obviate the rigidity of this rule of law and not to extend its scope but rather to nullify its effect. Reasons of expediency and justice, in its widest and primary sense, demand such a course; otherwise that which was intended for the prevention of wrong might become an engine for its accomplishment.

In many cases the equitable doctrine of estoppel may be invoked. Thus it is stated by the Illinois court in the case under consideration: "In equity, a party is not permitted to deceive and defraud another by agreeing to such an extension, and then disregard it, and thus gain an unjust and inequitable advantage," citing *Thayer v. Meeker*, 86 Ill. 470, 473.

The principal decision is not only in accord with a large line of cases, but is also commendable on other grounds.

EXTRADITION. HABEAS CORPUS.

The scope and limitations of the federal laws relating to interstate extradition are quite clearly expounded in *Pettibone v. Nichols*, 203 U. S. 192, decided Dec. 3, 1906. Pettibone was arrested in Colorado in accord with a requisition from the governor of Idaho,

taken to Idaho by its authorized agent and there held in custody in the state prison on a charge of murder committed in Idaho. Pettibone made application for a writ of *habeas corpus*. In this appeal the facts sufficiently alleged in the application were treated as true in their legal bearing on whether the detention was in violation of the Constitution or laws of the United States. In this application Pettibone alleged that he had not been in the state of Idaho for more than ten years prior to the act complained of, and that the governor of Idaho knew that he had not been in the state at the time of the commission of the crime nor at any time near that day. He further alleged that there was a conspiracy between the governor of Idaho and his legal advisors and the governor of Colorado to prevent the accused from asserting his constitutional right under the Constitution (Cl. 2, Sec. 2, Art. 4) and the act pursuant thereof. (Sec. 5278 Rev. Stat.) The execution of the conspiracy was set out and was in substance, that by arrangement he was secretly arrested late Saturday night, and that early Sunday morning he was hurried out of the state of Colorado, on a special train making fast time, by the officers of the state and "certain armed guards being part of the militia of the state of Colorado." He was given no chance to communicate with friends or counsel although he requested opportunity to so communicate. In Idaho he was held charged with the murder of one Steunenberg by throwing an explosive bomb at and against his person. At the earliest opportunity application was made for the writ of *habeas corpus*. The Supreme Court of Idaho, the United States Circuit Court for the District of Idaho, and the United States Supreme Court, McKenna J., dissenting, refused to discharge the accused. Mr. Justice Harlan delivered the opinion of the U. S. Supreme Court. In considering the arrest in Colorado he says, "we do not perceive that anything done there, however hastily and inconsiderately done, can be adjudged to be in violation of the Constitution or laws of the United States." As this man was held for trial under an indictment in one of the courts of Idaho for the crime of murder, charged to have been committed in that state against its laws, his custody was by due process of law. The courts uniformly held that, "his imprisonment was not illegal unless his extradition makes it so, and as an illegal extradition is no greater violation of his rights of person than his forcible abduction, if forcible abduction from another state and conveyance within the jurisdiction of the court holding him is no objection to his detention and trial for the offense charged, as held in *Ker v. Illinois*, 119 U. S. 437, and in *Mahon v. Justice*, 127 U. S. 712, no more is the objection allowed if the abduction has been accomplished under the forms of law." *In re Moore*, 75 Fed. Rep. 821.

The discretionary power of a governor in preparing requisition papers and in granting warrants for arrest upon such papers is generally recognized. The governor's action establishes a *prima facie* case or presumption that all essential prerequisites have been observed. If uncontroverted in such a proceeding as *habeas corpus* such a presumption becomes conclusive evidence of the right to extradite the person charged. *People ex rel. Hamilton v. Police*

Com. of City of New York, 91 N. Y. Sup. 760; *Cook v. Hart,* 146 U. S. 183; *ex parte Reggel,* 114 U. S. 642. By the method of arrest and deportation from Colorado the accused was deprived of all opportunity to invoke judicial aid. Had he succeeded in obtaining a writ of *habeas corpus* in Colorado there is no doubt but that he could have successfully interposed that he was not a fugitive from justice under the terms of the federal statute and Constitution. *Ex parte Smith,* 3 McLean 132. Mr. Justice McKenna in his dissenting opinion says, "The foundation of extradition between states is that the accused should be a fugitive from justice from the demanding state, and he may challenge the fact by *habeas corpus* immediately upon his arrest. If he refute the fact he cannot be removed. *Hyatt v. Cockran,* 198 U. S. 691. And the right to resist removal is not a right of asylum. To call it so in the state where the accused is, is misleading. It is the right to be free from molestation. It is the right of personal liberty in its most complete sense." As Mr. Justice Harlan suggests, Congress might provide for the compulsory return to the state of parties wrongfully abducted from its territory on application of the parties or of the state. But Congress has not seen fit to add to nor change the existing law.

The zeal which prompts the bringing of criminals to justice is commendable. But in the exercise of such zeal the safety of the public demands that no means shall be used which are against the intent of federal law. In the present case a man's right to personal security as guaranteed by the federal law is infringed by a legal abduction. This seems an anomoly. It would technically be a legal crime if there could be such a thing. The inadequacy of the law to prevent such abduction is a menace to the personal security and liberty of all citizens of the United States. In our treaty with Great Britain provision is made assuring every person for whom requisition is made, a hearing before the court issuing the warrant of arrest. Thus opportunity to claim any just defense is given. *Ashburton Treaty* (1842). Considering the great extent of our country such a safeguard would be equally warranted, and would be but a reasonable protection to citizens of any state against being surprised and subjected to deportation, possibly from coast to coast or even to the Philippines.

ON THE RIGHT OF A "WALKING DELEGATE" OR "BUSINESS AGENT" TO ORDER MEN OUT ON STRIKE.

For many years the courts have been endeavoring to find some solid ground on which to decide the respective rights of employer and employee during labor troubles. Adding to this the problem of the rights of interested third parties, sympathizers, would-be patrons and last of all the duties of the belligerents to the general public a situation then arises which requires the utmost care and study in attempting to conserve the rights of all and wrong none.

In the case of *Booth v. Burgess,* 65 Atl. 226, Vice-Chancellor Stevenson of the New Jersey Court of Chancery has contributed a remarkably well-written and clear opinion. In this case a boycott