SUPPLEMENT B.

Papers relating to the treaty of extradition, signed June 25, 1886, by the plenipotentiaries of the United States and Great Britain.

LIST OF PAPERS.

1. Mr. Phelps to Mr. Bayard. No. 143. November 23, 1885.
2. Mr. Phelps to Mr. Bayard. No. 307. June 26, 1886.

No. 1.

Mr. Phelps to Mr. Bayard.

No. 143.] LEGATION OF THE UNITED STATES,
London, November 23, 1885. (Received December 7.)

SIR: Referring to your dispatch No. 73, of August 4, 1885, touching the proposed extradition treaty between the United States and Great Britain, I have the honor to say that I have recently had an interview with Lord Salisbury for the purpose of renewing the negotiations on the subject; and I have in the mean time been engaged in a careful examination of the draught of the treaty transmitted to me from the Secretary of State with the dispatch No. 73, and of the instructions that accompanied it.

There appear to me to be objections to some of the provisions proposed in this draught, as well as to some of those that seem to have been agreed on in the negotiations that took place under the administrations of former Secretaries of State; and I feel it my duty respectfully to suggest these objections for the consideration of the Department before taking definite ground with the British foreign office in respect to the provisions to which they apply.

I. Article II of the draught referred to enumerates the crimes for which extradition is to be granted. Among them is included No. 6, "Obtaining by false pretenses money or goods of the value of $50, or £10, and upwards."

I would suggest that this offense be omitted from the article.

(1) It is not, so far as I am aware, included in any of the numerous extradition treaties existing between the United States and other nations. I can perceive no special reason for its insertion in a treaty with Great Britain.

(2) It is a crime that is very difficult of the exact definition that ought to apply to all extradition crimes. It receives different definitions in different jurisdictions, and is likely to give rise to vexatious and doubtful questions on the point whether the facts relied on are really criminal or only fraudulent.

It is created by statutes that vary widely in different States. The British extradition act of 33 and 34 Victoria, which applies to all exist-

ing extradition treaties of that country, provides that this crime, among others, "is to be construed according to the law existing in England, or in a British possession," as the case may be, "at the date of the alleged crime, whether by common law or by statute made before or after the passing of this act." In respect to an offense of which the character may differ so materially under the provisions of different statutes it would not be satisfactory to the United States Government, nor would it be just that extradition should take place in cases made criminal by English law and not in those made criminal by American law. Yet, if resort is had to American law to define a crime that depends altogether upon statute provisions for its existence, to the statutes of what State among the thirty-eight is it to be made? There is no United States statute on the subject. If it be said that upon an application by the United States for extradition the law of the State in which the offense was committed shall govern, which law is to govern where the application is made by Great Britain? If such a case is to be determined by the law of the State in which the arrest is made and the hearing is had, then a man may be liable to extradition if arrested in one State but not if arrested in another.

(3) This offense, though sometimes punished as felony by statute, is usually not above the grade of a misdemeanor. Aggravated cases may of course occur, but the general average of cases does not amount to felony. It seems to me that any crime less than felony is below the dignity of an extradition treaty or of international proceedings.

(4) The claim of extradition for this offense is one very likely to be abused to answer private purposes.

The charge is frequently resorted to by creditors as a means of obtaining payment from insolvents for goods sold on credit. Of course the credit is granted under the belief that the debtor is solvent; but little straining of the facts is necessary in many cases to establish a plausible claim that such belief was induced by the fraudulent representations or practices of the buyer. Most courts of justice are familiar with cases of this description.

It is certainly most undesirable that an extradition treaty should offer opportunity for such enterprises.

II. The same observations apply with increased force to so much of clause 21 in Article II as includes the offense of "receiving any chattel, money, valuable security, or other property of the value of $50, or £10, and upwards, knowing the same to have been obtained from the owner by * * * false pretenses."

I am not aware that any such offense is known in criminal law. It may, perhaps, be created in some States by statute, but I think it is not known in most States. It could, in no event, be more than a misdemeanor. The difficulty of defining the crime of obtaining by false pretenses, and the liability to abuse of the charge, is much increased when it is thus attempted to be carried to the second degree.

Of course the latter offense should be omitted from the treaty if the former is; and I think it should be omitted even if the former is included.

It is also to be remarked in respect of both these offenses that they are of the same class, and stand upon very analogous ground with that of "fraudulent bankruptcy," which the British Government have proposed to include in the treaty, and which the State Department has instructed me (in my judgment most wisely) to object to. I think the objections to the inclusion of that offense are much weakened when these are introduced, and much strengthened by their exclusion, because

all I have said in respect of these crimes is equally applicable to that of fraudulent bankruptcy.

III. Article II also includes in the list of extradition crimes the offenses: No. 10, "abduction;" No. 12, "kidnapping."

I suggest the omission of these offenses. The objections to their insertion are similar to those already stated in respect to the offenses previously considered.

(1) What is legally understood by "kidnapping" or "abduction" it is very difficult to state. These terms have no recognized common-law definition, and vary very widely under different statutes in respect to the facts on which they depend. In the criminal law of some States they are probably unknown.

(2) Unless in extreme cases they must be classed, when the offense is made out, as misdemeanors only.

(3) They are charges commonly made in the progress of private controversies among litigants. The term "kidnapping" is most frequently applied to arrests that are claimed to be illegal. That of "abduction" is often used as substantially equivalent to seduction, and quite as often refers to the efforts of parties in divorce suits to obtain from each other possession of children in contempt of judicial orders.

(4) The United States has no other treaty of extradition in which either of these crimes is included, except that in the treaties with Mexico and Peru "kidnapping" is made an extradition offense, defined in their language as "the taking and carrying away of a person" [or "a free person"] "by force or deception," a definition that would embrace almost any case of actionable false imprisonment.

(5) Finally, it is to be observed that the crime of "child-stealing," that would include many of the most aggravated cases of "abduction" and "kidnapping," is also included in the treaty.

IV. Article II concludes with these words: "The extradition is also to take place for participation in any of the aforesaid crimes, provided such participation be punishable by the laws of both contracting parties."

(1) The term "participation" seems to me to be obscure. It is not a legal term as describing a criminal offense. In case of misdemeanors, if such are to be included, no participation is criminal short of the commission of the offense itself.

In cases of felony there may be accessories as well as principal. If the participation in the crime without being a principal amounts to being accessory, it should be so described; if it does not, it is not criminal.

(2) The phrase "laws of both contracting parties" seems also obscure.

The contracting party on the American side is described in the treaty as being the United States of America. The United States statutes create but few of the offenses included in the treaty. The laws of the thirty-eight States differ widely from each other as to some of these offenses. What law is intended? And if the law of any State in aid of which extradition is demanded is intended, what law controls when the extradition is demanded by Great Britain?

I think it may be safely assumed that by the laws of Great Britain and of all the States the being accessory to a felony is punishable. And that neither government would seek to excuse itself from the extradition of an accessory upon the ground that under its laws the being accessory to a felony is not a crime; and I presume that only crimes of the grade of felony are intended to be included in the treaty.

Would not the purpose of this clause be better answered by adding to the list of crimes the following: "23. The being accessory to any of the crimes" [or any of the "felonies"] "specified in this article."

V. Article III concludes with this clause:

> Neither Government shall be required to grant extradition for an offense of which, as it is stated or described in the demand for extradition, it has jurisdiction.

This clause is not contained in the British draught, but it is proposed by the United States. A previous clause of the same article provides that if the person claimed for extradition "have already been tried and acquitted or convicted, or be still held for trial in the United States or in Great Britain respectively, for the same crime for which his extradition has been demanded, his extradition shall not take place."

The question then arises, whether if the country from which the person is claimed has not tried him and does not propose to try him for the crime, the mere fact that it has jurisdiction to try him should exempt him from extradition? I think it should not.

There are many cases in which, while the legal jurisdiction to try may be in both countries, the proof necessary to convict is only in one. Rarely can such proof be found in both. There is no means of compelling the attendance of witnesses from a foreign country, nor can their testimony, taken abroad, be used in a criminal case. In all such instances there must necessarily be a failure of justice if there can be no extradition. Nor is it infrequent that local or political sympathy prevents any attempt at a prosecution in one jurisdiction for a crime that in the other would be promptly punished.

It would seem to be but just that a country in which a criminal from another country takes refuge, where both have jurisdiction to try him, should either try or surrender him, if the offense is within the treaty and his extradition is demanded.

If in such case he be not actually held for trial where the claim for extradition is made, a prosecution could still be instituted instead of granting the extradition, if the authorities should find such course advisable.

VI. Article VII provides as follows:

> A fugitive criminal surrendered by or to either of the contracting parties for trial for the offense named in the extradition warrant, may be tried for any other of the crimes or offenses committed prior to his extradition enumerated in Article II.
>
> Provided, etc.

I earnestly advise that Article VII be stricken out.

No nation ever agreed to an extradition treaty under which a criminal should be surrendered upon the mere demand of another nation, unaccompanied by *prima facie* evidence of guilt, and without examination of the case by the judicial authorities of the nation on which the demand is made. A proposition for such a treaty would be universally scouted. Yet that is precisely the result of the provision in this article, in respect to any case to which it applies.

The proposed treaty contains in its Article II a long list of crimes for which extradition may be granted, varying widely in magnitude, and having no relation to each other.

A proper case for extradition may be made in respect to any one of these crimes, perhaps a minor one, and after due examination before the court or upon *habeas corpus* as to the probable foundation for the charge, the alleged criminal is surrendered. Instead of bringing him to trial on the charge for which he is extradited, he is indicted and tried for an altogether different offense, concerning which no evidence

has been offered to the nation which surrendered him, and no examination before its courts has taken place. The man may thus be brought to trial for a crime for which his extradition could never have been obtained if it had been demanded.

Another consideration adds greatly to the force of this suggestion. Articles V and VI contain very stringent provisions that no extradition shall take place for any political offense, and no trial for such an offense where extradition has been had for another offense. These provisions necessarily assume that some of the crimes included in the treaty and for which extradition may be claimed under it may turn out to be political offenses. Whether they are so or not in any given case is a point on which a wide difference of opinion and a heated state of feeling may, not improbably, occur. It is easy to see that such cases are not unlikely to arise hereafter between Great Britain and the United States. If in such an instance extradition of a man should be obtained for one crime and he should then be proceeded against for another, claimed in the country from which he was surrendered to be political, and not admitted to be such in that by which he is demanded, very disagreeable complications might arise.

Article V of the treaty expressly provides that whenever a question arises whether an alleged offense is political or not, "the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time *shall be final.*" But the provisions of Article VII transfer the decision of this question from the government surrendering the fugitive to the government to whom he is surrendered in all cases to which this article applies—that is, whenever the extradition is for one offense, and the trial is sought to be had for another.

The further proviso in the article that time shall be afforded for "remonstrance" in such case by the government which has surrendered the fugitive does not appear to me to meet the difficulty. Such a government has the right, and ought to reserve it, to decide the question for itself before making the surrender—not to make the surrender, and remonstrate against the consequences. In the heat and pressure engendered by the particular case, and especially under an inflamed state of public feeling, may not be found the favorable occasion for the consideration of remonstrances, or the harmonizing of conflicting views. What may easily be agreed on in a treaty, in the abstract, might be found very difficult to adjust in the concrete case.

On the other hand, I can see no reason for the inclusion of this provision. It is certainly but just and fair to require the government which asks the extradition of a fugitive to specify the offenses and all the offenses for which it is proposed to try him. Good faith and fair dealing would seem to demand it. That is the sure way to avoid dispute. The case must be rare indeed, if any, in which this can not be done.

No other treaty of the United States, so far as I know, contains such a provision. The English extradition act (33 and 34 Vict.) is directly to the contrary.

I do think this article would endanger the ratification of the treaty in the Senate as well as the legislation in Congress and in Parliament necessary to carry it into effect.

If Article VII should be retained in the treaty, I respectfully suggest the omission from it of these words now contained in the draught:

In order that the government that shall have made the surrender may be assured that the provisions of the treaty are not about to be violated, or that it may remonstrate against the person so surrendered being held for such further trial, if, in its opinion they are about to be violated.

It seems to me hardly to consist with the dignity of either government to anticipate in the terms of the treaty that a violation of it may be looked for or needs to be provided against. Should it not be assumed that whatever the treaty stipulated will be carried out in good faith?

The sixty days' notice of the intention to try the fugitive for a different offense from that for which he was extradited being provided for, which affords the opportunity for remonstrance upon any grounds deemed material, it would seem unnecessary to suggest the reasons that may induce the remonstrance, or to state in terms why the opportunity is given.

VII. Article VIII contains the following clause:

> An indictment against the accused found by a court having jurisdiction will afford a *prima facie* case to sustain the demand for extradition, subject to rebuttal by proof of *alibi*, or of the non-identity of the defendant, or want of jurisdiction.

I would suggest upon this article either: (1) That the whole of the sentence be omitted; or (2) that the conclusion of it, commencing with the words "subject to rebuttal," etc., be stricken out.

If the whole clause above quoted be omitted, it will leave the law on the subject of the evidence necessary to sustain a claim for extradition where it now is, and as it has been administered by the courts on both sides ever since an extradition treaty has existed between the countries.

I am not aware that any difficulty on this point has ever arisen. Such would still remain the law, even if this clause is inserted, in cases where the claim for extradition is made before the finding of an indictment. But if it be desired to make the finding of an indictment in a competent court a sufficient ground for extradition without the production of any further evidence in support of the charge, I think it should be so provided without the added provision for a rebuttal by proof adduced for the defense.

If this clause is retained, the court will be compelled to hear evidence from the respondent to sustain the defense of *alibi* or non-identity. If obliged to hear such evidence, it necessarily follows and is implied that the decision must be according to the weight of the evidence. And that if the defense is made out upon the evidence before the court, the respondent must be discharged.

The result is that, as the indictment which constitutes the case on which the claim for extradition is made is found by a grand jury in one country upon the *ex parte* testimony for the prosecution, the determination of the question whether that claim shall be allowed will be had in the courts of the other country on the *ex parte* testimony for the defense.

If to avoid this consequence evidence in support of the indictment must be furnished, then nothing would appear to be gained by making the indictment *prima facie* sufficient.

I think there is a very serious objection to imposing upon the courts by an arbitrary rule the necessity of hearing evidence from the respondent in support of such defenses as *alibi* and non-identity. They are peculiarly questions that can not be fairly tried in a foreign country where prosecuting counsel can not attend, evidence by witnesses can not be produced, testimony for the defense can not be rebutted, nor even cross-examination adequately conducted. A trial has just terminated here in which the evidence for the prisoner to support these defenses of *alibi* and non-identity was such as, if it had been heard *ex parte*, must inevitably have resulted in his discharge. Yet he was convicted on the trial by the establishment of his guilt beyond all question.

The present law on the subject leaves the whole matter to the sound discretion of the courts. Evidence for the defense is not necessarily excluded nor necessarily received. The judge is left at liberty to determine on the whole case how far he will or will not enter upon the trial of such questions.

I can see no reason why an indictment on which a respondent would be compelled to go to trial in the country where the offense occurred should not be sufficient ground for a claim for extradition. Faith and credit enough for this should surely be accorded by each country to the judicial proceedings of the other. But if this is not agreed to, then I should think it better to leave all cases on the same footing and to require in all the measure of proof so well stated in the already existing treaty on this subject between the two Governments—

> such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his apprehension and commitment for trial if the crime or offense had there been committed—

leaving it to the courts to administer on this point the common law that has grown up by more than forty years' experience, without hampering them by further enactments or compelling them, on the question whether a respondent shall be held for trial, to pass *ex parte* upon issues which only such a trial could properly determine.

The clause which allows proof to be offered of "want of jurisdiction" in the court in which the indictment is found is probably the result of an oversight. The article previously requires that the indictment on which the claim for extradition is based must be "found by a court having jurisdiction." Such jurisdiction must therefore affirmatively appear.

I trust these observations—unavoidably lengthy, yet still much too brief to exhaust what might be said in support of them—will not be deemed out of place or in any respect captious. They are the result of much and anxious consideration of the subject. I beg to commend them to your consideration, more especially as I am aware that this unfinished treaty of which the original draught was prepared by the British Government was inherited by the present from a past administration, and that time has been too short and engagements too pressing to admit of much examination of it since you took charge of the Department of State.

I need not add that whatever your conclusion may be, whether in accordance with my own views or not, my best exertions will be addressed to the effort to carry it into effect.

The foregoing suggestions are offered as applicable to the continued negotiation of a treaty substantially in conformity to the draught I have had the honor to receive.

I ask leave now to bring to your attention a proposal of a different character as an intermediate and provisional measure.

A pressing necessity is undoubtedly felt by both Governments for an immediate extension of existing extradition arrangements so as to include certain offenses that are becoming frequent and that are much encouraged by the present facilities for escape. If these offenses were within the provisions of the treaty of 1842, now in force, probably no further treaty on the subject would be thought necessary.

It appears to me clear that the proposed draught now under consideration can not by any exertion be matured, agreed to, and ratified without very considerable further delay. Its consideration is constantly interrupted and put aside in England by the many pressing and critical

matters that are recurring, and are likely to recur, so rapidly. The treaty, as drawn, is so elaborate in its provisions, really presenting a complete code of both law and procedure in the matter of extradition, that very numerous points of discussion are presented, all of which require to be carefully considered, and in respect of some of which a serious difference of opinion exists. The negotiation has already occupied nearly nine years, and the advances that have been made toward an agreement on the disputed points are as yet very small.

After the treaty shall have been executed, it must still be ratified by the Senate. I can not doubt that the criticisms already suggested, and perhaps many others, will occur to members of that body, and may probably give rise to discussion and to grave differences of judgment.

Should the treaty be ratified, legislation must still be obtained from both Congress and Parliament in order to carry it into effect. Reasons which need not be suggested make the present, as it seems to me, a singularly unpropitious time for attempting to deal with the subject in either of these bodies. Certain provisions of the treaty are almost sure to attract opposition in certain quarters. And the numerous points presented by so elaborate a system offer great opportunities for attack.

It is further to be observed that all this delay, past and prospective, arises upon topics that are altogether subordinate to the principal objects sought to be accomplished. So that while there has never been any dispute or hesitation between the two Governments in respect to these main and urgent points, the provision for them is indefinitely postponed, to the great detriment of public justice, by the discussion of minor questions that never would have arisen at all but for the opportunity afforded by the making of a new treaty.

Pressed by these considerations, I venture to suggest, as an intermediate and altogether unobjectionable remedy, that it be proposed to the British Government, by a short article supplementary to the treaty of 1842, to extend its extradition provisions so as to comprehend the more important and material offenses not already included in them. And I beg leave to submit herewith for your examination a draft of such supplemental agreement.

For this method of treaty stipulation there are abundant precedents.

I thought it not improper, in the interview with Lord Salisbury before mentioned, to ascertain informally whether such a proposal, if made by my Government, would be acceptable to Her Majesty's Government. The suggestion was very promptly accepted by his lordship, who quite concurred in the opinion that under the circumstances it is the most advisable course to adopt, pointing out at the same time that the execution of such an article need not prevent the continuance of the effort to mature a more elaborate treaty, which, when ratified, would by its terms annul and supersede both the extradition clauses of the present treaty and the proposed supplement.

I have every confidence, therefore, that, if you should think proper to authorize it, I can procure the immediate adoption of such a supplemental agreement.

There could not be, I think, any question of its prompt ratification by the Senate, as it does not change in any respect the existing law on the subject, and only adds to the number of extraditable offenses already provided for two or three which, it is universally admitted, should be included without delay.

No legislation whatever on the part of Congress would be necessary to carry this arrangement into effect, the existing laws being ample for

that purpose, as will be seen by reference to the act of Congress (Revised Statutes, Title LXVI).

And almost no legislation would be required from Parliament, an act of a few lines adding to the schedule of extradition offenses now contained in the acts of 33 and 34 Victoria being all that would be needed.

The result would be that the public interest has immediately the benefit of the most that is sought to be effected by a new treaty, without any prejudice to the effort to substitute, if thought desirable, one that might be more perfect in detail and subordinate provisions, when it can be deliberately and carefully perfected. But I may perhaps take the liberty to add, upon this point, that, so far as my own opinion is concerned, I should much prefer a treaty expressed in the concise and general, yet clear and explicit terms in which this subject is dealt with in the Webster-Ashburton treaty of 1842, than such a draft as that proposed by the British Government, and which has so long been under unavailing consideration.

The difference between the two is strikingly illustrated by actual experience.

Under the treaty of 1842, now forty-three years in force, no claim for extradition on either side, so far as I can learn, has failed of accomplishment in any proper case properly presented. No practical difficulty has been encountered by the courts of either country in carrying the provisions of the treaty into effect. And no difference has occurred between the two Governments arising out of any case of extradition, except on the single question as to the right to extradite a fugitive for one offense and to try him for another. In short, the treaty has completely and harmoniously answered its purpose. Surely this history does not disclose the necessity for any alteration of the existing law otherwise than to extend its provisions to certain offenses which since the adoption of that treaty have become frequent and flagrant.

With France, on the other hand, Great Britain has had during a part of the same period (from 1852 to 1866) an extradition treaty of a most elaborate character, very similar to the draft now proposed to us. But it remained a dead letter because the requisite legislation could not be obtained from Parliament, its numerous details raising so many questions and encountering so many objections that the bill introduced for that purpose had to be abandoned.

After fourteen years had elapsed, during which no surrender of a fugitive to France had been obtained, though many had been demanded, the treaty was terminated by notice from the French Government in accordance with its stipulations.

I am quite unable to perceive what is the advantage of encumbering a treaty of this character with rules of evidence, methods of procedure, and special conditions and limitations. If these are not enacted into the law of both countries, the treaty does not go into effect. If they are so enacted, then they need not be set forth in the treaty. If the treaty is in general terms, simply expressing the agreement, any statute regulating extradition on either side, not inconsistent with it, is sufficient to make the treaty operative, and can at any time be amended if found necessary. But if all these details are made a part of the treaty, then no legislation that does not exactly conform to it is available. Thus, as I have pointed out, the British extradition act, which has made the simple words of the American treaty completely effectual, has left the elaborate treaty with France incapable of any effect at all.

But even if it be assumed (as I think it can not safely be assumed) that acts of Congress and of Parliament can be obtained in precise conformity

with all the special provisions of the proposed draught, I must still believe that the form of the treaty now in force is much the more desirable. In a treaty, as in all other contracts, courts of justice will always find means to carry into effect clearly expressed intentions. But where an excess of caution adds to the expressed agreement special methods of procedure and attempts to anticipate the various emergencies that may arise, cases otherwise easy of solution are made to bristle with points for litigation.

Under the old treaty a system of legal administration has grown up that is now understood by courts, counsel, and magistrates. If not altogether perfect, it shares that defect with all other systems of law that have yet been devised. It has worked well enough for many years. Why should we change it? It seems to me that only necessity can justify the alteration of well-settled law. All judicial experience shows that the most promising theories of legal remedy are often the most unfortunate in practical results.

This point, however, as I have remarked, does not require present determination. The immediate question is not whether the treaty of 1842 shall ultimately be superseded by a new one, but whether pending the consideration of that subject, which is likely to be protracted, the provisions of that treaty shall be extended to cover the existing necessity. Such an extension would not embarrass the negotiation of a further treaty. And to that negotiation, if it be thought expedient, I shall contribute my best endeavors.

I have, etc.,

E. J. PHELPS.

[Inclosure in No. 143.]

Draught of a proposed convention supplemental to the treaty between the United States of America and Her Britannic Majesty, concluded on the 9th day of August, 1842.

[Title—Introduction in usual form.]

Whereas a treaty between the United States of America and Her Britannic Majesty was concluded on the 9th day of August, 1842, whereof the 10th article makes provision for the giving up of criminals, fugitives from justice, in certain cases:

And whereas it is now desired by the high contracting parties that the provisions of the said article be extended so as to embrace certain offenses not therein specified:

It is now hereby agreed and declared as follows:

ARTICLE I.

The provisions of the said tenth article in the said treaty shall be and are hereby extended so as to apply to and comprehend the following additional crimes not mentioned in the said article, amely: (1) Manslaughter. (2) Embezzlement, or larceny of the value of fifty dollars, or ten pounds and upwards. (3) Malicious destruction of, or the attempt to destroy, railways or trains, bridges, public edifices, or dwellings, where the act endangers human life. And that the provisions of the said article shall have the same effect in respect to the delivery up of persons charged with either of the said crimes as if the same had been originally named and specified in the said article.

ARTICLE II.

The terms of this convention shall not apply to either of the offences herein named, which shall have been committed previous to the date when this convention shall come into force.

ARTICLE III.

No fugitive criminal shall be surrendered under the provisions of the said treaty, or of this convention, if the offence in respect of which his surrender be demanded be one of a political character.

ARTICLE IV.

A fugitive criminal surrendered to either of the high contracting parties for trial under the provisions of the said treaty, or of this convention, shall not be tried for any other crime, committed before his extradition except those specified in the extradition warrant, unless an interval of sixty days shall have elapsed between his being set at liberty in respect to the charge upon which his surrender shall have been made and his arrest for any other crime.

ARTICLE V.

This convention shall come into force ten days after its publication in conformity with the forms prescribed by the laws of the high contracting parties. And it shall continue in force until one or the other of the parties shall signify its wish to terminate it, and no longer.

NOTES IN RESPECT TO THE FOREGOING DRAUGHT.

(1) Only four offences are provided for in addition to those already in the treaty. In a more elaborate treaty perhaps others may be usefully added—perhaps not; but the suggestion of one will probably bring from the other side the suggestion of others. The delay of the discussion reproduces all the mischief this convention is designed to avoid and affords ground for opposition, or at least delay, in the ratification of the treaty by the Senate.

It seems to me best to provide only for the main offences most necessary to be dealt with, and in respect to which no question or hesitation can arise.

(2) For the same reason, other provisions that might perhaps be useful are omitted, and also to obviate the necessity of additional legislation.

(3) Article II is usual in extradition treaties to avoid giving them an *ex post facto* operation.

(4) Article III might be well enough omitted. The rule therein stated is universally conceded and enforced and need not be stated in a treaty. The absence of it, however, might occasion opposition or cavil, and it does no harm to include it.

(5) Article IV might be well enough ommitted, which would leave the rule as it now stands under the treaty of 1842. But the British extradition act, under which all proceedings are had in this country for the surrender of fugitives, expressly provides that no surrender shall be made to any country where laws do not provide against the trial of a criminal for another offence than that for which he is extradited.

This provision may, if the question is raised, offer a serious obstacle to obtaining extradition, so long, at least, as the treaty of 1842 is in force. That treaty is silent on the subject, and the question for a magistrate in any particular case is, not what the treaty implies, but what authority he is invested with by the act of Parliament, which in this country is supreme. I understand also that this is the true rule of international law as between nations, unless it is otherwise expressly provided in the treaty.

On the whole, it seems wise to include Article IV as long as the treaty of 1842 remains in force, and, if a different rule is desired, to incorporate it hereafter in a more elaborate treaty.

The great object in this convention is to provide for the important and pressing cases without encountering any delay, discussion, or dispute, and without the necessity of additional legislation on either side.

(6) Article V is taken from the treaty of 1842 and makes the duration of the convention the same as of that treaty.

No. 2.

Mr. Phelps to Mr. Bayard.

No. 307.] LEGATION OF THE UNITED STATES,
London, June 26, 1886. (Received July 7.)

SIR: I have the honor to transmit herewith the convention signed by me on behalf of the United States, and by the Right Honorable the Earl of Rosebery, minister of foreign affairs, on behalf of Her Majesty's Government, extending the provisions of the tenth Article of the Treaty

of August 9, 1842, between the United States and Great Britain, relative to the extradtion of persons charged with crime.

I advised you by telegram of the 25th instant of the execution of this convention.

It conforms in all substantial particulars so nearly to the form heretofore prepared by me, and submitted to the Department of State for consideration, and of which your approval was expressed, that I have not deemed it necessary or desirable to incur the delay, at this late period in the session of Congress, of sending it to you for further examination before signing. And it has been impossible for me, under the existing condition of public business here and the long discussion upon minor details that has taken place, to bring the matter to an earlier conclusion, though I have made every exertion to that end.

The convention is so short, and its terms will, I hope, be found so perspicuous, that but little explanation seems to me requisite; though to overcome the scruples of some of the officers of Her Majesty's Government, I have consented to add two or three clauses, which, though quite unobjectionable, are, in my judgment, unnecessary. But as the convention as finally concluded is in all its material provisions in accordance with my own views as approved by you, I regarded those concessions as judicious.

I add a few suggestions on the various clauses:

(1) It will be observed that the provisions for extradition are extended to persons convicted of the crimes specified in the treaty, as well as to those charged before trial with the commission of them. This seems to me a very desirable addition. If those accused of crime should be surrendered in order to be tried and punished, much more should those actually convicted of the same crimes, but who have escaped punishment by flight, be sent back to undergo the sentence of the law.

(2) But four additional crimes are added by this convention to the seven specified in the treaty of 1842. It is not intended to be asserted that there may not be other offenses proper to be included in an extradition treaty. These are the principal and most flagrant ones. A large class of crimes, justly punishable by law, are, in my judgment, not only beneath the dignity of a treaty between nations, but having different definitions and degrees under different statutes, are likely, if embraced in such a treaty, to be fruitful of controversy in its practical application. The attempt to enlarge the list of crimes encounters such a variety of conflicting claims on the one side and the other as to render discussion almost endless and agreement extremely difficult. On my accession to office, I found pending between the two Governments a negotiation for a new extradition treaty, which had been going on for nine years without much approximation toward a result. The discussion had been principally in regard to minor offenses and details, a procedure unnecessary, in my judgment, to be included in a treaty, and likely to embarrass its operation. Meanwhile the constant escape of criminals in flagrant cases, in respect to which there could be no dispute, had become a scandal to both countries. I was very glad, therefore, to obtain your approval to the suggestion that these cases be at once provided for by a simple extension of the existing treaty, leaving for after-consideration the question whether a more elaborate one is desirable.

(3) The restriction of the provisions of the convention, so far as the additional offenses are concerned, to those which may be committed after the convention comes into force is one which is usual in treaties of this character, and whether important or not can not, I think, be objectionable.

(4) The provision that no surrender shall be made for a political offense is unnecessary, because such is already the established and universal rule, to which all extradition treaties are regarded as subject. But its insertion can do no harm, and the omission of it might excite comment.

(5) The clause precluding the trial of a surrendered fugitive for any offence committed prior to his surrender, except that established by the facts on which his surrender was granted, until he shall have had a reasonable opportunity for return has already received your assent. If anything needs to be said in its support, I refer to the elaborate discussion of the subject contained in my dispatch, No. 143, under date of November 23, 1885. I regard this clause not only as right in itself, and as in conformity with the true principles of international law on the subject, but as specially desirable to the United States.

It is further to be remarked that, without the insertion of it or statute enactment to the same effect, no extradition treaty whatever could be made with Great Britain, because the act of Parliament of 1870 directly prohibits the making of such a treaty with any nation unless provision is made by that nation against the trial of a surrendered person for a crime other than that on which his extradition was demanded. I do not think a repeal of this act could be obtained from the British Parliament. It certainly could not at the present time. If, therefore, we were to persist upon the unnecessary, and in my judgment untenable and undesirable, proposition that a man should be extradited for one offense in order to try him for another, we should be unable to establish with Great Britain any extradition arrangements at all.

And I add that, in my opinion, if the objection arising upon the act of Parliament should be seriously pressed in the courts of Great Britain upon a demand for extradition under our existing treaty as it stands, without this convention, and in the absence of any provision such as that contained in this clause, a very serious question would arise whether any such extradition could be granted.

(6) Article VII is in my estimation quite unnecessary, but altogether harmless. No extradition can ever take place, whatever the stipulations of a treaty may be, except under and in conformity to existing legislation for carrying it into effect in the country where the surrender is sought. Omission to provide such legislation, or any statute restrictions inconsistent with the provisions of the treaty, would amount simply to a refusal to carry out the treaty, or to a violation of its terms. This is not to be anticipated in a contract between sovereign powers. But should it unhappily take place the remedy is found in the provisions of this convention copied from the treaty of 1842, by which either party can terminate the treaty by simply giving notice to that effect.

This clause, therefore, only formulates in terms the rule of law that would equally and unavoidably apply, though it were not expressed in the convention.

It is expressly understood on both sides that the adoption of this convention shall not stand in the way of the negotiation of a more elaborate treaty upon the subject, which shall supersede both this convention and the tenth article of the treaty of 1842, if such treaty shall, upon further consideration, be deemed advisable. My own judgment is decidedly against any such attempt, for reasons heretofore clearly presented to you. I think that the treaty of 1842, supplemented by this convention, and by the system of judicial construction and procedure which has grown up under it in an administration of forty-four years, forms an extradition arrangement that is not likely to be improved by attempting to

recast it. But should your opinion be otherwise I shall address my best efforts to obtaining such other or further treaty stipulations as you may deem desirable.

I have, etc.,

E. J. PHELPS.

[Inclosure in No. 307.]

Extradition treaty between the United States and Great Britain.

Whereas by the 10th article of the treaty concluded between the United States of America and Her Britannic Majesty on the 9th day of August, 1842, provision is made for the extradition of persons charged with certain crimes;

And whereas it is now desired by the high contracting parties that the provisions of the said article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said article and in this convention;

The said high contracting parties have appointed as their plenipotentiaries to conclude a convention for this purpose, namely: The President of the United States of America, Edward John Phelps, envoy extraordinary and minister plenipotentiary of the United States to the Court of St. James, etc., etc.; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honorable Archibald Philip, Earl of Rosebery, Her Majesty's principal secretary of state for foreign affairs, etc., etc., who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I.

The provisions of the 10th article of said treaty shall be and are hereby extended so as to apply to and comprehend the following additional crimes not mentioned in the said article, namely: (1) Manslaughter; (2) burglary; (3) embezzlement or larceny of the value of 50 dollars, or £10, and upwards; (4) malicious injuries to property whereby the life of any person shall be endangered, if such injuries constitute a crime according to the laws of both the high contracting parties; and the provisions of the said article shall have the same effect with respect to the extradition of persons charged with any of the said crimes as if the same had been originally named and specified in the said article.

ARTICLE II.

The provisions of the 10th article of the said treaty and of this convention shall apply to persons convicted of the crimes therein respectively named and specified whose sentence therefor shall not have been executed.

In the case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with evidence proving that the prisoner is the person to whom such sentence refers.

ARTICLE III.

This convention shall not apply to any of the crimes herein named and specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date when the convention shall come into force.

ARTICLE IV.

No fugitive criminal shall be surrendered under the provisions of the said treaty, or of this convention, if the crime in respect of which his surrender is demanded be one of a political character, or if he prove to the competent authority that the requisition for his surrender has in fact been made with the view to try or punish him for a crime of a political character.

ARTICLE V.

A fugitive criminal surrendered to either of the high contracting parties under the provisions of the said treaty or of this convention shall not, until he has had an opportunity of returning to the state by which he has been surrendered, be detained or tried for any crime committed prior to his surrender other than the extradition crime proved by the facts on which his surrender was granted.

ARTICLE VI.

The extradition of fugitives under the provisions of the said treaty and of the present convention shall be carried out in the United States and in Her Majesty's dominions, respectively, subject to, and in conformity with, the laws regulating extradition for the time being in force in the surrendering state.

ARTICLE VII.

This convention shall be ratified, and the ratifications shall be exchanged at London as soon as possible. It shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the high contracting parties, and shall continue in force until one or the other of the high contracting parties shall signify its wish to terminate it, and no longer.

In witness whereof the undersigned have signed the same and have affixed thereto their seals.

Done at London the twenty-fifth day of June, 1886.

[SEAL.] EDWARD JOHN PHELPS.
[SEAL.] ROSEBERY.