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OF

J. PROCTOR KNOTT,

In re VARNEY HATFIELD *et al.*,

ON

HABEAS CORPUS

BEFORE THE

UNITED STATES DISTRICT COURT

OF KENTUCKY.

FEBRUARY 28, 1888.

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ARGUMENT.

MAY IT PLEASE THE COURT: We are admonished by Holy Writ that man that is born of woman is of few days and full of trouble; he cometh forth as a flower and is cut down; he fleeth also as a shadow, and continueth not.

—"To-day he puts forth
"The tender leaves of hope; to-morrow blossoms,
"And bears his blushing honors thick upon him:
"The third came a frost, a killing frost;
"And when he thinks, good, easy man, full surely
"His greatness is ripening,"

he falls, like autumn leaves, to enrich our mother earth. I have not the time, therefore, even if I had the inclination, to follow the learned counsel who opened the case for the prisoners, in his excursions beyond the legitimate domain of the present inquiry, either to discuss questions which the Court has already expressed its determination not to consider; or to argue a supposititious case of murder upon an imaginary state of facts; or to insist that the Court should not assume authority to twist the well-settled principles of law awry, in order to promote the development of the marvelous mineral resources which lie on either side of the line between this State and West Virginia.

On the contrary, it is my purpose, in the remarks I shall have the honor to submit in relation to the matter at bar, to be as brief as I can, consistently, with the importance of the principles involved; and I trust in dealing with those principles I shall be controlled entirely by that decent respect and perfect candor that should always characterize the conduct of counsel towards courts of justice of whatever dignity or degree.

If, however, I should advert to propositions which may have been already discussed, or seem at any time to dwell at undue length upon principles with which your Honor is thoroughly familiar, it will be through no lack of confidence in your Honor's legal intelligence, nor from any disposition to abuse the courtesy or trifle with the patience of the Court, but merely to preserve, as well as I can, the sequence of my argument.

There is, as your Honor is aware, a vast variety of cases in which relief under the writ of habeas corpus can only be sought in the authorized tribunals of the State Government; while there are others in which it can be afforded by the courts of the United States alone; and yet a third class, in which either may act without encroaching upon the authority of the other. But to undertake in this discussion to draw the line which limits the jurisdiction of the two Governments in such cases generally, or to explore the territory in which their organized agencies may act concurrently, would not only be an idle display of legal reading, but an unnecessary waste of time.

The Federal Constitution provides that the judicial power of the United States shall extend to all cases in law or equity arising under that Constitution, or the laws and treaties made by their authority; and Congress has by law conferred upon this Court the power to issue writs of habeas corpus in all cases falling within the purview of that provision, which may occur within the territorial limits of its jurisdiction. It is enough, therefore, for the purposes of this contention, to say that, unless the facts presented in the case under consideration bring it within that category, the Court has no power to grant the relief sought.

WHAT THEN ARE THE FACTS?

It appears from the jailer's return, and it is not controverted, that each of the prisoners at the bar was indicted at the September term, 1882, of the Circuit Court for Pike county, Kentucky, in three cases, for the crime of willful and deliberate murder, alleged to have been committed by them in that county; that bench warrants for their apprehension to answer these indictments were issued and placed in the hands of the Sheriff, who, by virtue thereof, arrested them in that county and delivered them, together with copies of the warrants under which they were arrested, to the jailer; that the jailer, as was his duty, received and confined them in the jail of the county where they were held by him in custody in obedience to the mandates of those warrants, where they were found when your Honor's writ was served upon him.

THE CAPTURE IN WEST VIRGINIA.

It is alleged, however, and the fact is not disputed, that they were violently seized, without legal process, in the State of West Virginia, where they were domiciled, and brought by force, and against their will, into the State of Kentucky, and that the Governor of West Virginia has demanded that the Governor of Kentucky shall release

them from their imprisonment in the jail of Pike county, and give them safe conduct back into the State in which they were captured; and that the Governor of Kentucky has declined to accede to that demand; and in view of these facts it is claimed that their subsequent detention by the jailer of Pike county, in pursuance of regular process in the name of the Commonwealth, to answer to the indictments against them for the crime of murder alleged to have been committed by them in that county, was in violation of the Constitution and laws of the United States, and that your Honor should consequently discharge them without delay. It is for us to see, therefore, whether there is any valid reason by which a proposition so startling and extraordinary can be sustained.

THE QUESTION STATED.

Neither the guilt nor innocence of the prisoners, nor the atrocity of the crimes with which they are charged, nor their nationality or citizenship is at all pertinent to this inquiry. Conceding that their capture in West Virginia and deportation into Kentucky were without warrant, by force, against their will, and totally without legal or moral justification, after all the naked question is: What provision of the Federal Constitution, or what law made by authority of the United States has been violated, or will be violated, by their detention in the jail of Pike county, under the authority and in obedience to the Commonwealth of Kentucky, to answer indictments for crimes alleged to have been committed against her laws.

ARGUMENT OF THE PRISONERS STATED.

What reasonable answer can be made to this question, other than that no such provision can be found at all, I confess my utter inability to conceive, notwithstanding I listened with the most profound interest and attention to the very earnest remarks of the learned counsel (MR. ST. CLAIR) who opened this discussion. He argued, however, if I understood him correctly, that the only right which a State has to *claim* the arrest of a fugitive from its justice, who may be found in the territory of another, is under the third clause of the second section of the fourth article of the Constitution of the United States, and that such *claim* can only be asserted in the manner therein prescribed; that they were citizens and residents of the State of West Virginia; that the State of Kentucky has obtained custody of them through a different method, namely: by having them seized under a regular writ and

confined in her jail after they had been brought within her jurisdiction by parties acting without her authority; and that, therefore, their detention under its writ is in violation of the provision of the Constitution to which I have just referred, and of the law enacted by Congress to carry the same into effect.

If this is not a fair statement of the argument for the prisoners on this point, there can be no argument about it. But admitting every syllable of the premises stated to be true, they utterly fail to warrant the conclusion claimed on the other side.

In the first place it must be borne in mind, that there is a material difference between the action of a State and the act of any number of individuals, even though they may be its own citizens. A State can act only through its legally authorized agencies, whose power and duties are prescribed by law, and if any of the agencies thus constituted transcend the limits of its prescribed authority, his act becomes his own wrong, and upon no principle of reason or law can be imputed to the State as an entity. The whole argument may be answered, therefore, by a simple statement of the fact, that however flagitious the seizure of these parties in the State of Virginia may have been, it was neither advised, authorized nor commanded by the State of Kentucky, but was effected by a party of unauthorized persons, each acting under his own individual will; and that the State of Kentucky did not pretend to act in the matter at all until after the prisoners had been brought within her own jurisdiction, where they were seized and detained by her officers, in pursuance of her own laws.

Nor can it make a particle of difference, sir, where their citizenship may have been. It is true, as stated by Mr. St. Clair, that under the Constitution of the United States, the citizens of each State are entitled to all the privileges and immunities of the citizens of the several States. Nobody ever denied that. But certainly it can not be claimed that a citizen of one State is entitled to any greater immunity in another State than that State guarantees to its own citizens, for it is a well-settled principle, universally recognized under the law of nations, that every person whether citizen, denizen or alien who violates the laws of any State is amenable to punishment under those laws. It is immaterial therefore whether these prisoners were citizens of Kentucky, or of West Virginia, or were the subjects of a foreign government; once within reach of criminal process in this State, no matter how, whether through the regular process of extradition, or by the act of

unauthorized individuals, it had a right to seize and hold them to answer for crimes committed against its laws.

My learned friend, however, asserted more than once in his argument that there is no analogy between principles of international law regulating the rendition of fugitives between independent nations, and those which govern interstate extradition under the Constitution and laws of the United States. On the contrary, with all deference to his superior learning, I think I shall be able to show that they are identically the same.

RULES UNDER THE LAW OF NATIONS.

Let us, therefore, look into the question a little further. It is true, as your Honor well knows, that as between independent sovereignties, in the absence of any conventional regulation by treaty or otherwise, neither can demand of the other *as a matter of right* the rendition of a fugitive from its justice, however atrocious his crime may be. His extradition may be requested as a matter of *comity*, but not *claimed* as a legal right on the part of the sovereignty asking it; and the question of his surrender under such circumstances rests entirely in the discretion of the sovereign of whom the request is made; and not in any supposed right of sanctuary vested in the fugitive himself. Where there are treaty stipulations, however, between two independent sovereignties regulating the rendition of fugitives from one to the other, there is, in every case within the purview of the treaty, an absolute right to demand on the one hand, and a correlative duty on the other to surrender the fugitive demanded. And where that right is sought to be enforced, it must, of course, be done in the method, and according to the terms of the treaty, otherwise the party upon whom the demand is made is under no obligations, either legal or moral, to comply with it.

It must not be forgotten, nevertheless, that the existence of a treaty of extradition between two sovereigns, in nowise diminishes the right of either to surrender a fugitive to the other in any other manner than that provided in the treaty. It may seize him, and deliver him to his pursuers, or permit them to take him back to the jurisdiction against whose laws he has offended, with or without the formality of extradition as provided in the treaty, at its own discretion, and it will not lie in the mouth of the fugitive to complain that his right of asylum has been violated.

RIGHT OF ASYLUM.

The truth is, he can have no such right. It is impossible in the very nature of things. If he has, there can be no such thing

as the right of extradition without the fugitive's consent, under any circumstances whatever. The two rights can not be reconciled by any known rule of logic, or upon any principle of common reason. If one exists, the other can not. But, sir, the responsibility of the criminal to the sovereignty whose laws he has feloniously violated, attaches to his person and follows him wherever he may go, regardless of his citizenship or nationality, and whensoever and howsoever the offended sovereignty may get him in custody, without itself being in the wrong, it has a right to hold him for trial. It clings to him anywhere. He can only be freed from its presence by death, or the expiation or pardon of his crime. If he should take the wings of the morning and fly to the uttermost part of the earth, it will be there like a threatening Nemesis to confront him. If he should say, "Lo! the darkness shall cover me," he will find it still with him, in the darkness as in the light; and if he should descend into hell, the consciousness of that responsibility, uncanceled in life, will be with him to add sharper tortures to his deep damnation.

It should be remembered also that while the most punctillious observance of good faith and national honor should be exercised in all cases of extradition under a treaty, it is universally held that the treaty itself—unless it contain some special provision to that effect—will not be considered as violated, if the citizens or subjects of one of the contracting parties, acting without its authority and without regard to the method therein prescribed, should kidnap and carry away a fugitive from its justice found within the dominions of the other. In such a case the only remedy would be by a proceeding against those guilty of the trespass, by the Government against whose laws they offended, and not against the Government holding the party seized to answer for having violated its criminal laws. All that either reason, honor, justice or law could require under such circumstances would be the rendition of the kidnappers to the Government whose laws they had violated, for trial and punishment under those laws. If this were not so; if governments were to be held responsible for all the lawless acts of their citizens, or subjects, committed without their authority, within the dominions of another, it is easy to see that it would be impossible that there could ever be a day's peace between any two civilized nations upon the earth, upon any other terms than absolute non-intercourse; as reckless, lawless, "landless resolutes" from almost every country on the globe are constantly committing crimes within the dominions and against the laws of other governments.

Such would be precisely the rules by which the conduct of the States of this Union toward each other would be regulated if they were independent nations. But when they adopted the Constitution of the United States they surrendered the sovereign powers of levying war, concluding peace and making treaties, either with foreign nations or between each other; and, so far as the subject of extradition among themselves was concerned, accepted the provision contained in the second section of the fourth article of the Constitution, as follows:

"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 provision conferred upon each State the right to demand, through its executive authority, a fugitive from its justice, when found in another, and imposed the correlative duty upon the executive authority upon whom the demand should be made to surrender him up, precisely as in case of an extradition treaty between two independent nations; and in order to prescribe a uniform method in which this right should be asserted, on the one hand, and the corresponding duty performed on the other, Congress passed the act of February 12, 1793, which, as your Honor is aware, remains the law to this day, providing that the demand should be accompanied by a copy of an indictment found, or an affidavit made before some magistrate, charging the person demanded with having committed treason, felony or other crime, and certified to be authentic by the executive authority making the demand; and on the other hand requiring the executive authority of whom a demand is thus made to cause the fugitive to be arrested and delivered up as therein provided.

Now, your Honor will observe that this provision of the Constitution, and the statute enacted to give it effect, refer exclusively to the rights and duties of the several States as such, acting respectively through their chief executive authorities; and neither has the remotest reference, directly or by implication, to the right of a State to hold a person charged with crime against its laws who may be brought within its jurisdiction by other means. They do, however, afford a State from whose borders a person may be kidnaped, the amplest and the easiest means for vindicating its sovereignty, by demanding the offend-

er and having him delivered up to be punished for a violation of its laws.

Of course, when a State formally asserts its right to reclaim a fugitive from its justice under this provision of the Constitution, it must do so precisely in the manner prescribed by law, or the proceedings will be void. As if a judge of a court should make the demand, instead of the Chief Executive authority, or the demand should be made by a Governor without producing a copy of an indictment found, or affidavit made, charging the person demanded with the commission of treason, felony or other crime, or should fail to certify the copy produced to be authentic; a failure to comply with the law in any of these particulars would render the whole proceeding nugatory if its validity should be tested on habeas corpus, either in the State where the arrest was made, or in any other through which the fugitive might be carried en route to the State having jurisdiction of his crime. And that for the obvious reason, that a warrant issued by a Governor under such circumstances would be void for want of legal authority in him to act. But once in the jurisdiction of the State against whose laws he has offended, no more illegality or irregularity in the manner in which he was brought there can be held as an available excuse against his being held for trial.

This is precisely the doctrine held in the case of Joe Smith, the Mormon prophet, in 3 McLane, cited by the learned counsel, as well as by the Supreme Court in the Ker case, to which I will presently refer. As your Honor well remembers, no doubt, the points and the only points determined in the Smith case were, that as the case arose under the Constitution and laws of the United States, the District Court of the United States for the district of Illinois had jurisdiction to issue the writ of habeas corpus, notwithstanding the officers concerned in the attempted extradition of Smith in pursuance of those laws were State officers; and that, inasmuch as the affidavit which accompanied the requisition issued by the Governor of Missouri showed upon its face that no crime had been committed by the accused in that State, the warrant issued thereon by the Governor of Illinois was without authority and consequently void. And so in Ker's case, as we shall presently see. The Supreme Court held that, while an irregularity in the extradition proceedings between the Governors of California and Illinois might have been available on habeas corpus to test their validity in California, or in any State through which he was

carried to Illinois, it would afford no ground for his discharge from custody without trial when once within the jurisdiction of the court having cognizance of the charge alleged against him, as is the case here.

Thus far, sir, I think I have asserted no principle which is not abundantly supported by both reason and the authorities to which I will presently invite your Honor's attention; and if I have succeeded in making myself understood up to this point, the Court will not only be able to appreciate more fully the perfect harmony which pervades the unbroken line of judicial opinion upon this subject, but will have no difficulty in seeing that the premises I have laid down lead inevitably to the establishment of the doctrine asserted over and over again in the cases to which I am about to refer, and which goes to the very pith and marrow of the pending proceeding, namely: That no matter by what method private persons, acting without authority from the State, may bring within its jurisdiction the body of a fugitive charged with a violation of its laws, it has a *right* to hold him to answer for his crime.

It is true that a person brought by fraud or force within a certain jurisdiction in order that process may be served upon him in a civil action is not bound thereby, because no man can take advantage of his own wrong, and it was quite unnecessary for my learned friend (authorities) in 12 Pickering, to establish a principle which, I suppose, no one at this day would think of denying; but a State is never responsible for, nor bound by, the acts of unauthorized individuals, and such acts, whether right or wrong in themselves, can not be imputed to it, nor take away its sovereign authority to try and punish a violator of its laws, when once within its custody.

SMITH'S CASE.

In proof of the soundness of these principles, I will now call your Honor's attention to a number of carefully considered cases, which have been so frequently cited with approval by courts of the highest intelligence that they may be taken as authoritative, and as I prefer to take them chronologically I will begin with Smith's case, decided by the Supreme Court of South Carolina in 1829, and reported in 1 Bailey, S. C., 283. Smith had been pardoned on condition that he should leave the State and not return. He broke the condition, however, and was arrested in North Carolina without warrant and forcibly taken back to South Carolina for re-imprisonment under his original

sentence. He sued out a writ of habeas corpus for his release, which being refused, he appealed to the Supreme Court, which affirmed the judgment. The Court said, through Judge Johnson:

"The third and only remaining question is whether the prisoner is entitled to be discharged in consequence of having been illegally arrested in North Carolina, and brought into this State. The pursuit of the prisoner into North Carolina and his arrest there was certainly a violation of the sovereignty of that State, and was an act which can not be commended. But that was not the act of the State, but of a few of its citizens, for which the Constitution of the United States has provided a reparation. It gives the Governor of that State the right to demand them of the Governor of this, and imposes on the latter the obligation to surrender them; but until it is refused there can be no cause of complaint. And supposing it otherwise, and that the outrage furnishes just cause of complaint, and that North Carolina had declared war against us, how can the Court know that the restoration of the prisoner would appease her? Or if it did by what process would the Court send him there? * * * The case then is this: A felon convict flies into North Carolina to avoid the execution of his sentence, and is pursued and brought back, and although the manner of doing it was illegal, the thing in itself was *right*, and exactly what North Carolina was bound to do if it had been properly required."

BREWSTER'S CASE.

In the case of the State vs. Brewster, determined by the Supreme Court of Vermont in 1835 (7 Vt., 118), Judge Phelps for the Court said:

"It is a well-established principle of international law that a foreigner is bound to regard the criminal laws of the country in which he may sojourn, and for any offense there committed he is amenable to those laws. In this case the offense, if committed at all, was committed within our jurisdiction and is punishable by our laws. The respondent, though a foreigner, is, if guilty, equally subject to our jurisdiction with our citizens. His escape into Canada did not purge the offense nor oust our jurisdiction; being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice. It becomes then immaterial whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there was anything improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consisted in the violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in that aspect the subject is not within the constitutional powers of this Court. Whether the authorities of Canada would have surrendered the prisoner or not upon due application is a question of national comity resting in discretion. Their power to do so will not be questioned. If they have

the power to surrender him, they may permit him to be taken. If they waive the invasion of their sovereignty, it is not for the respondent to object, inasmuch as he is, for this offense, by the law of nations amenable to our laws."

DOW'S CASE.

The next case in chronological order is that of Dow, determined in the Supreme Court of Pennsylvania in 1851. It appears that Dow had been seized in Michigan on a charge of forgery and taken into Pennsylvania without a warrant and regardless of the method prescribed by the Constitution and laws of the United States for the extradition of fugitives from justice, notwithstanding there had been a requisition for his rendition upon the Governor of Michigan, who had issued his warrant for that purpose. In Pennsylvania he set up the illegality of his arrest and deportation from Michigan as grounds for his release under a writ of habeas corpus. It will be observed that the only point relied upon in Dow's case for his release was precisely the one made in this case, namely: That the Constitution and laws of the United States having provided a method of extradition between the States, that method *ex vi termini* excluded all other methods, and the extradition of Dow not having been in strict conformity to that method, his imprisonment was *ipso facto* illegal, and Dow entitled to be discharged.

The opinion was delivered by Chief-Justice Gibson, and I desire to say, sir, that no man ever has lived or ever will live with a higher admiration of the genius and learning, or with a profounder respect for the private virtue which adorned the character of that illustrious jurist than I have myself. I must, nevertheless, be permitted to say, that while his opinion in this case is, in all other respects, as bright and faultless as a gem of the rarest water, it opens with the most remarkable *dictum* ever uttered by an enlightened Court, or among civilized men. It is embraced in this one sentence: "Had the prisoner's release been demanded by the Executive of Michigan we would have been bound to set him at large!" And this *dictum*, totally uncalled for by the case in which it was uttered, and therefore dead—dead, sir, as the mummy of Rameses II., is made the sheet anchor of the prisoners' hopes in the proceeding at bar. No reason is given for this most extraordinary utterance, and no authority cited in support of it. I ask counsel, therefore, to explore the entire range of civilized jurisprudence and point out if they can a solitary rational principle upon which a court could be justified in liberating a prisoner held at its bar to answer for a crime clearly within its jurisdiction at the mere behest of a foreign power.

Go to yonder library, ransack the vast and varied treasurers of legal wisdom garnered there, and show to this Court, if you can, a single principle of enlightened comity, or a solitary rule of law, State, national or international which authorized the Governor of West Virginia to make such a demand upon the Governor of Kentucky, or empowered the Governor of Kentucky to comply with it when made, except by pardoning the persons demanded. What is the Governor of West Virginia? Is he *parens patrie?* Is he an autocrat embodying in his sacred person the entire sovereignty of his State, or is he the Governor of a free Commonwealth, which has limited his powers, and prescribed his duties by law? If the latter, will gentlemen please point out some provision in their own constitution or statutes, with which they are doubtless familiar, which either authorized or required him to make such an extraordinary demand upon the Governor of Kentucky? And if they find that the Legislature of their State has given him such authority, or imposed upon him such a duty, will they go farther, and show some legal principle which requires this or any other Court to release these prisoners because the Governor of Kentucky may have declined to accede to such a demand?

Do counsel find the right of the Governor of West Virginia to make the demand, and the duty of the Governor of Kentucky to obey it under the treaty-making powers inherent in independent sovereignties? These States have no treaty-making powers without the consent of Congress, and whatever West Virginia may have done I am sure that Kentucky has never asked, nor dreamed of asking, that consent to a proceeding so anomalous and unheard of.

It is true, as Chief-Justice Gibson says in this opinion, a State is bound to fight the battle of its citizen when he hath his quarrel just, but it must fight that battle according to the rules and with the peaceful weapons of the law; and if the Governor of Virginia desired to vindicate the sovereignty of his State, the legal and proper method to be pursued was not to insult the sovereignty of another State by demanding the surrender of criminals legally held for trial in the courts of that State to answer for violations of its laws, but by demanding the rendition of the person who had violated the laws of his own State, for trial in its own courts. Thus far, and thus far only, could he find any authority under the Constitution and laws of the United States, or any justification under any enlightened principle of international comity.

But fortunately, sir, as was well remarked by the learned judge in the case of the Mormon prophet, we live under a government of law; a government in which the powers and duties of the Chief Executive are as distinctly limited and as clearly defined as those of the humblest official; a government of co-ordinate departments, neither of which has any authority to invade the province or to assume any of the functions of another. Suppose, then, that the Governor of Kentucky had been as ignorant of his duties as the Governor of West Virginia seems to have been of his rights in this matter; suppose that the Governor of Kentucky had ordered the jailer of Pike county to liberate these prisoners and conduct them safely back to the West Virginia line, and that the jailer had refused to obey that order, how, or under what law, could the Governor have enforced that order otherwise than by pardon? Will it be said that he could send the militia there and take them out by force? The militia, when sent there, could only act in aid of civil process, and that, too, under the command of the very judge before whom the prisoners are to be tried, if he should be in the county. That judge could, and would most likely, say to the commanding officer: The Governor has no authority to invade the judicial department in which these prisoners are held in pursuance of the laws he has sworn to see faithfully executed; and as you are under my command for the purpose of enforcing legal process, you will assist me in holding, and not in unlawfully releasing, them.

But, should the soldiery liberate them with a strong hand and against the orders of the judge, what then? They would simply be guilty of a forcible rescue, in which the Governor would be *particeps criminis*, for which they would be liable to indictment and punishment, and the Governor to impeachment. But suppose the jailer should think the Governor of Kentucky has as much power as the Governor of West Virginia seems to think he has himself, and should release the prisoners in obedience to the order without consulting the judicial branch of the government about it at all, what then? He would be guilty of suffering an escape for which he could be punished, and the Governor's order would be no defense in his hands whatever. Away, then, with a *dictum* so utterly absurd, and totally at variance with the plainest principles of both reason and law. I have dwelt upon it to this length because it is the only little inch of ground upon which counsel for the prisoners can hope to stand for a single moment.

But to return now to the case of Dow. Chief-Justice Gibson for the Court said:

"As regards all but Federal stipulations the States of the Union are independent sovereignties; and the only *right* which one of them has to *claim* the arrest of a fugitive from its justice in the territory of another is conventional. It is created by treaty stipulation in the Federal Constitution; and it can be exercised only in the way therein pointed out."

This is precisely what I stated a while ago. The right of a State to demand the rendition of a fugitive, and the duty of a State upon which such demand is made to deliver him up, grow out of the provision in the Constitution to which I have more than once referred already; and when a State, as such, acting through its legally authorized agency, makes such a demand, it must be done in pursuance of the method prescribed by law and no other.

But is it intimated in this opinion that a State can obtain legal custody of a fugitive from its justice in no other method, or that the detention of a prisoner under authority of a State having jurisdiction of his crime would be in violation of the Constitution or any law of the United States, if he should be arrested by an unauthorized person and brought within its jurisdiction in any other manner than that prescribed by law for the regular extradition of fugitives between the States? Very far from it, indeed. On the contrary, the Court will find that in many cases the Chief-Justice seems inclined to regard kidnaping as rather a convenient and praiseworthy mode of extradition. He says:

"A sovereign State is doubtless bound to fight the battle of its citizen when he hath his quarrel just, but it is not bound to maintain him against demands of foreign justice from which he has fled. It may or may not interpose its shield at discretion; but that discretion will not be directed by any claim he may be supposed to have on it"—

Not by any supposed right of asylum in the fugitive himself—

"But by consideration of the consequences to the public weal. The Federal Constitution takes away this discretion in cases of executive *demand*, and makes that a matter of *duty*, which else had been a matter of grace. The constitutional provision was not devised for the benefit of the fugitive. It was intended to obviate the principle that one government may not execute the criminal laws of another."

The evident meaning of this opinion thus far is, that when a State resorts to the regular method to procure the extradition of a fugitive from justice, the Executive upon whom the demand is made is bound, as a matter of duty, to surrender him, but that the extradition of the

fugitive in other modes is no violation of the Constitution or laws of the United States, and the fugitive can not avail himself of such irregularity before the courts. This is made more distinct by what follows:

"The practice has been to arrest on hot pursuit a fugitive from justice wherever found, and were not violations of territory consequent on it tolerated by common consent few fugitives from justice would be brought back. In its practical results the constitutional provision would be nearly inoperative. The tardy publicity of laying the ground for the demand by indictment, or affidavit, or transmitting the documents to the proper executive, and procuring a warrant for the arrest from him, necessarily warns the fugitive of his danger and leads to another flight. * * * The consequence of the inefficiency of the constitutional provision has been that extra-territorial arrests have been winked at in every State, but an arrest at sufferance would be useless if its illegality could be set up by the culprit. He has been allowed to do so; let the question be answered by the cases quoted. The prisoner in Brewster's case insisted that he had been kidnaped abroad, but he was held to answer. That case has not been overruled or before doubted. And the English courts hold the same doctrine. It was enforced in Susannah Scott's case; and in Mack's as well as in Krans' case the broad principle was established that want of authority for the prisoner's arrest can not protect him from prosecution; and Viremaitre's case shows the decisions of the American and English courts to be founded upon a principle of universal law. A judge at the place of arrest could not be bound to discharge a prisoner proved to have fled from a well-founded accusation of murder."

I will read this last sentence over again. "A judge at the place of arrest could not be bound to discharge a prisoner proved to have fled from a well-founded accusation of murder." I know not how it might be in West Virginia; but if these parties had been indicted in that State for murder, and had been arrested in this—even by private persons acting without a lawful warrant—for the purpose of being taken back to the jurisdiction whose laws they had violated, there to be tried for the crimes alleged against them, a State Court of Kentucky, upon being satisfied of these facts would not discharge them on account of any irregularity in the manner of their arrest, but would hold them in custody until the Governor of West Virginia could send his requisition and get them, and Chief-Justice Gibson seems to have been of the opinion that such would be the duty of a court in a foreign country under similar circumstances.

But, sir, this is not a foreign court. The government under which your Honor holds your commission is within its sphere the government of Kentucky, and the laws by which your Honor must be con-

trolled in your adjudication of this as well as all other matters within your jurisdiction are as much the law of Kentucky as any act to be found in its own Statute books. The two governments are but complemental parts of a single system, intended for the protection of the people of the State through the prompt enforcement of their laws. I take it, therefore, that your Honor would under no circumstances disturb the harmony which should always exist between these two governmental agencies, by ousting a State Court of its lawful jurisdiction of a question like the one at bar, when that jurisdiction has once fully obtained, but will, on the contrary, uphold and maintain the State Court in its exercise.

SCOTT'S CASE.

But to return. The case of Susannah Scott, referred to by Judge Gibson in this opinion, is rather interesting in some particulars, and is not only directly in point here, but has universally been cited as authority for the principle I am contending for wherever the question has been raised.

It seems, from the report of the case, found in 9 B. and C., 446, that the prisoner had been indicted in an English court for perjury, and a warrant for her arrest was issued and placed in the hands of a police officer, by whom she was arrested in Belgium, where she appealed to the English Ambassador for relief from her detention, who refused to interfere, and she was carried by the officer back to England, where application was made to Lord Tenterden for a writ of habeas corpus for her release, on the ground of the illegality of her arrest in a foreign jurisdiction. The motion was argued for the prisoner by Mr. Chitty and resisted on the part of the Crown by Lord Brougham and Mr. Sergeant Platt, but the writ was refused, upon the principle, as stated by Lord Tenterden, that where a party charged with a crime of any kind is brought before a court of competent jurisdiction in the country where the crime was committed, it is the duty of the Court to see that such party shall be held amenable to justice, no matter under what circumstances such party may have been brought within its jurisdiction, and that if the arrest was in violation of the laws of a foreign country, that country must vindicate its own laws by proceeding against the person who violated them.

The Court will observe that this case is strongly in point against the prisoners here, because the arrest was not only made in a foreign country, but by an officer of the Government by whom the fugitive

was subsequently held, with the writ of that Government in his hand, and not by a private person with no color of authority from the Government, as was the fact in the case at bar.

ROWE'S CASE.

The same is true in Rowe's case found in IV Parker's Criminal Reports, 253. In that case it seems, a warrant had been issued by the Police Justice of Buffalo, N. Y., and placed in the hands of a Deputy Sheriff of Erie county, for the arrest of Rowe upon a charge of grand larceny. This was in 1858, when there was, as there still is, an extradition treaty between the United States and Great Britain covering that crime. The Deputy Sheriff went to Canada where Rowe had taken refuge, and made an arrangement with a party there to seize Rowe and bring him into the State of New York. That party seized the prisoner in Canada, and forced him against his will across the Suspension bridge, the Deputy Sheriff accompanying him, and at this end of the bridge the Deputy Sheriff arrested him under the warrant. On motion to quash on account of this kidnaping, Judge Clinton said:

"As to the arrest, it was undoubtedly the fruit of an agreement in violation of the prisoner's right of personal liberty on Canadian soil. For that he has, we presume, a remedy in the Canadian courts, and, perhaps, in our own. Whether the dignity of Great Britain has been insulted by the act of its subject in hurrying the prisoner across the Suspension bridge from a point in Her Majesty's domains, we are not called on to inquire. The question is an international one, and can not arise unless Her Majesty's Government shall see fit to lay the matter before our Government. If the Canadian law has been violated, one of the offenders, and, perhaps, the only offender, against that law is within its reach. No offense against the laws of this State, nor of the United States, was, so far as we can discover, perpetrated by the arrest. We can see no analogy between this case and cases of arrest in civil actions procured by the trick, or fraud of the plaintiff. When the defendant is so induced by the plaintiff to come within the jurisdiction, the Court may discharge him without bail. Here is no wrong chargeable to the people. On the other hand, the indictment is, on such a motion as this, conclusive evidence of the prisoner's guilt, and the Court would be guilty of a gross injury to the people if it should discharge him untried."

This case is quoted and approved by Judge Wright in delivering the opinion of the Supreme Court of Iowa, in

THE CASE OF ROSS AND MANN,

XXI Iowa, 46. The Court said:

"The claim is that this arrest was in violation of law; that the prisoners were brought within the jurisdiction of this State by fraud

and violence, and without the semblance of authority or right; and that comity to the rights of a sister State, a just appreciation of the rights of the citizen, and a due regard to the integrity of the law and its administration demand that courts should, under such circumstances, refuse their aid, and that there can be no rightful exercise of jurisdiction over those thus arrested."

After having stated the question in this strong language, and discussed some technical objections to the plea, the opinion proceeds:

"But secondly, if properly presented, we are not ready to admit its force. The liability of parties arresting them, without legal warrant, for false imprisonment, or otherwise, and their violation of the Criminal Statutes of Missouri may be ever so clear, and yet the prisoners not be entitled to their discharge. The offense being committed in Iowa, it was punishable here. There is no fair analogy between civil and criminal cases in this respect. In the one (civil), the party invoking the aid of the Court is guilty of fraud or violence in bringing the defendant or his property within the jurisdiction of the Court. In the other (criminal), the people of the State are guilty of no wrong. The officers of the law take the requisite process, find the prisoners charged within the jurisdiction, and this, too, without force, wrong or fraud or violence on the part of any agent of this State or officers thereof. And it can make no difference whether the illegal arrest was made in another State or another government. The violation of the other sovereignty, so far as entitled to weight, would be the same in principle in one case as in the other. That our laws have been violated is sufficiently shown by the indictment. For this the State had a right to detain them as prisoners, and it is of no importance how or where their capture was effected. In the language of Clinton J., in The People vs. Rowe, the indictment on such a motive is conclusive evidence of the prisoners guilt, and the Court would be guilty of a gross injury to the rights of the people if it should discharge him untried."

THE COURT: "As this is the usual adjourning hour for dinner, if it would not inconvenience counsel to suspend his argument at this point, the Court will take a recess till half past two o'clock, and in the meantime the Court would direct the attention of counsel to the question: Whether the forcible capture of these parties in West Virginia, and their being brought into Kentucky against their will, being a trespass, the subsequent service of process upon them in Kentucky, and their detention in jail is or is not a continuance of that trespass, which would amount to a want of 'due process of law' in the sense of the Fourteenth Amendment to the Constitution?"

The Court then took a recess.

2:30 P. M.

EX-GOV. KNOTT.—IF THE COURT PLEASE: If it would suit your Honor's convenience equally well, I would prefer to resume the thread of my argument at the point at which it was broken by the recess, and defer answering your Honor's question to a point further on, where I

think my answer may possibly appear in a somewhat clearer light than if made at this time.

The identical principle I was discussing when the Court adjourned for dinner as well as the authority of the Federal courts under such circumstances was brought directly under judicial cognizance *in re. Noyes*, in the District Court of the United States for the District of New Jersey in 1878 (18 Albany L. J.). In that case, Noyes, who was held for trial in a State Court for a crime against the State laws, sued out a writ of habeas corpus before the District Court of the United States, upon the alleged ground that he had been wrongfully brought within the jurisdiction of the State of New Jersey by an illegal extradition from another State, and was held in custody in violation of the Constitution and laws of the United States.

In delivering the opinion of the Court, Judge Nixon said:

"Here a court of competent jurisdiction has custody of a person who is charged with the commission of certain offenses against the laws of the State. The answer to the charge is that some other person has done a wrong to the prisoner by violating the laws of another State in arresting him without proper authority. In a criminal case this can hardly be reckoned a pertinent response. A person arraigned for the commission of a felony can not plead in bar that he ought to be excused from answering the charge because other parties trespassed upon his personal rights. It is confounding matters which are essentially separate and distinct. It is a claim on the part of the accused that his criminal violations of the law are to be condoned by his personal injuries. It is asking the Court to suspend its responsible duties, to-wit: The trial of alleged offenders against the penal code of the State while the persons charged with the crime are instituting preliminary inquiries into the methods adopted to bring them within its jurisdiction. Such a course, for obvious reasons, is allowable in a civil proceeding between parties litigant, but for like obvious reasons can not be used and never has been allowed in criminal proceedings where the object of the prosecution is to punish an offender against the public. * * * All the authorities of Great Britain and the United States, when carefully distinguished and interpreted by their circumstances, support this view of the law."

And, after an elaborate review of the authorities, he concludes:

"It is the conclusion of the Court, upon principle and authority, that the State Court has a right to hold the prisoner for trial for the offense charged against him, without reference to the circumstances under which his arrest was made in a foreign jurisdiction. It necessarily follows that there is no authority here to discharge him on habeas corpus. Neither the Constitution of the United States, nor Section 753 of the Revised Statutes, makes provision for the writ in such a case, and the prisoner must be remanded."

But, sir, this whole subject has recently undergone a most thorough and exhaustive judicial examination, in the case of Ker vs. The People, in which every authority I have adduced has been approved, and every principle I have asserted has been solemnly affirmed, not only by the Supreme Court of Illinois, but on final review by the Supreme Court of the United States, and in which I think your Honor's question will be found to be fully and distinctly answered.

I know that the Court is thoroughly familiar with the case, but I ask permission, nevertheless, to read such portions of the opinions delivered by the two courts as will illustrate the present argument.

As the Court is no doubt aware, Ker had fled from the State of Illinois, where he was charged with the crimes of larceny and embezzlement, and sought refuge in Peru; proceedings for his extradition had been taken, in pursuance of the treaty between that country and this, and the papers for that purpose placed in the hands of one Julian, who failed to present them to the Peruvian Government, but kidnaped Ker and brought him by force to California, where he was taken into custody by another party under a requisition issued by the Governor of Illinois upon the Governor of California, and taken to the former State, and there delivered to the proper local authorities. On the trial Ker pleaded these facts in abatement, but the plea was held bad on demurrer and the case was taken to the Supreme Court of Illinois on writ of error, where the judgment of the lower court was affirmed, and thence on writ of error to the Supreme Court of the United States where it was also affirmed, the opinions of the two courts being reported respectively in 110 Illinois, p. 627, and 119 United States, p. 437.

Mr. Justice Scott says, in delivering the opinion of the Supreme Court of Illinois in this case:

"But waiving every objection to the plea that may seem to be technical, and considering it on the broadest grounds taken in its support, it is thought the demurrer was properly sustained. Three propositions are stated, which, if they can be maintained, it is insisted lead to the conclusion that the Criminal Court of Cook county never obtained jurisdiction of the defendant to try him for larceny or any other crime: First, that the United States, by its treaty with Peru, provided 'due process of law' for getting jurisdiction of persons domiciled in that country, charged with having committed certain crimes, among which is larceny, of which defendant was charged in one count of the indictment against him. Second, that such 'due process of law' must be obeyed in all its terms express and implied; and Third, that such due proofs of law for the purpose of getting jurisdiction in such cases by

necessary implication excludes any other mode of getting jurisdiction. As has been seen, the defendant was not in fact brought within the jurisdiction of the United States under its treaty with Peru; but the argument assumes that if defendant was brought back to the United States otherwise than under the treaty between the United States and Peru, his capture and detention would be unlawful, as being in violation of a right of asylum he is supposed to have had under the treaty at the place he was domiciled when captured. No principle is suggested on which this proposition can be maintained as broadly as stated, nor in any case, English or American, cited where the decision was rendered on analogous facts with the case being considered that holds the doctrine contended for. Undoubtedly at common law the rule is, that the Court trying a party for a crime committed within its jurisdiction will not investigate the manner of his capture in case he fled to a country and had been brought back to his jurisdiction, although his capture had been plainly without authority of law. It is sufficient if the accused is in court to answer the indictment against him. It is thought, and with good reason, any other rule would work great embarrassment in the administration of criminal law."

Upon the same point the Supreme Court of the United States, in the vigorous and pointed language of that stalwart legal reasoner, Mr. Justice Miller, says:

"The main point insisted on by counsel for plaintiff in error in this Court is that by virtue of the treaty of extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois; a positive right in him that he only be forcibly removed from Peru to the State of Illinois, in accordance with the provisions of the treaty, and that this right is one which he can assert in the courts of the United States in all cases whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnaping. * * There is no language in this treaty, or any other treaty made by this country on the subject of extradition, of which we are aware, which says, in terms, that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the Government of Peru could not have ordered Ker out of the country on his arrival or at any period of his residence there. If this could be done, what becomes of his right of asylum? Nor can it be doubted that the Government of Peru could, of its own accord, without any demand from the United States, have surrendered Ker to the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that either by express terms or by implication, there is given to a fugitive from justice in one of these countries any *right* to remain and reside in the other; and if the right of asylum means anything it means this. The right of the Government of Peru to voluntarily give a party in Ker's condition an asylum in

that country is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the Government of the country of the asylum shall deliver him up to the country where the crime was committed; and to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the Government of the country of asylum to protect the criminal from removal therefrom. The plea shows that although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket, and were never brought to light in Peru; that no steps were taken under them, and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act or profess to act under the treaty. In fact, that treaty was not called into operation, was not relied on, was not made the pretext of arrest, and the facts show that it was a clear case of kidnaping within the dominions of Peru, without any pretense of authority under the treaty, or from the Government of the United States."

Now, sir, recurring to the parallel I endeavored to draw between treaties of extradition, and the provision of the Constitution and laws of the United States regulating rendition of fugitives among the States, let us apply the principles affirmed by the Supreme Court of the United State, as well as the Supreme Court of Illinois, in this case to the case under consideration.

It is evident that both of these distinguished tribunals, as well as the others from whose opinions I have quoted, regard the so-called "right of asylum" as an absurdity on its face, that a fugitive criminal does not, and can not in the very nature of things, have any such *right* at all, and that what is miscalled "the right of asylum" is simply the right which a government, in the absence of any treaty stipulation limiting it, has to permit the fugitive to remain within its territory until it shall see proper to expel him, surrender him up, or allow him to be taken away. But according to the doctrine laid down in this case, even that right of permission which an independent nation has, in the absence of any treaty to the contrary, is limited, or taken away entirely by a treaty of extradition, as may be therein stipulated. If this is so, where can there be any right of asylum in a fugitive criminal, who has fled from the justice of one State of this Union into another, or what possible right can the State into which he may flee have to harbor him, when the Constitution and laws of the United States, which are the supreme law of both, expressly gives the right

to the one to demand him, and makes it the duty of the other to give him up?

But, again, if the forcible and unauthorized kidnaping of a fugitive criminal in one country and his transportation against his will into another with which it has an extradition treaty is no violation of that treaty, how can it be claimed that a similar transaction between the States of the Union is a violation of the Constitution or laws of the United States?

The Court goes further and says:

"The question of how far this forcible seizure in another country, and transfer by violence, force or fraud to this country could be made available to resist trial in a State Court, for the offense now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution or laws or treaties of the United States guarantee him any protection."

But a treaty, made under the authority of the United States, is expressly declared by the Constitution to be a part of the supreme law of the land, and certainly the Constitution and laws of Congress guarantee to him the same protection it does to the prisoners at bar, under similar circumstances, and certainly the circumstances are precisely similar. He was seized by force and taken, against his will, back to the jurisdiction from which he had fled, and so were they. How can this Court interpose for their relief, when the Supreme Court of the United States could not for his?

But the Court goes still further and says:

"There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the Court which has the right to try him for such an offense, and presents no valid objection to his trial in such Court"—and then cites the very cases to which I have already called your Honor's attention.

But this is not all. The Court proceeds to say:

"However that may be, the decision of that question is as much within the province of the State Court as a question of common law, or the law of nations of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision."

And this, it seems to me, ought to be conclusive of this whole controversy. If the Supreme Court of the United States had no right to review the decision of the courts of Illinois upon the question of its jurisdiction in Ker's case, how can this Court oust the courts of Kentucky of jurisdiction to determine the same question in this?

But if a State is vested by the Constitution and laws of the United States with the right to demand the rendition of a fugitive from its justice, and it is made the duty of the State upon which the demand is made to deliver him up, it must necessarily be because it has a *right* to the jurisdiction of his person in order that he may be tried and punished for his crime, if convicted, according to law, and if a State has a right to such jurisdiction and has once obtained it without wrong in itself, upon what principle of correct ethics, or under what provision of the Constitution or laws of the United States can that right be taken away from it? Again, if it is true, as is held by all the authorities I have quoted, that a fugitive criminal can acquire no right superior to, or in contravention of, the right of jurisdiction in the State from which he fled, by the mere fact of his residence in a foreign country, what wrong has been done him to be redressed by this Court in this summary proceeding? If, as Chief-Justice Gibson said in the Dow case, the provisions in our Constitution and laws in relation to extradition were not devised for the benefit of the fugitive, what right have these prisoners to complain that those provisions have not been resorted and conformed to in their arrest? What possible difference can it make to one legally liable to arrest, how, or by whom, or where such arrest may be made?

The Supreme Court concludes its opinion by asserting the principle that as the only violation of the sovereignty of Peru in the forcible kidnaping of Ker was by the person who kidnaped him, the remedy of the government of that country for the wrong done lies in the enforcement of its own laws and in its own courts against the kidnaper, who might be extradited under the treaty for that purpose, and so in this case the offended sovereignty of West Virginia may be amply appeased by the punishment under her own criminal code of those who were guilty of the wrong, which may readily be accomplished under our simple and convenient method of interstate extradition.

There is but one other provision in the Constitution, that I know of, which furnishes any shadow of claim that this Court has jurisdiction in the present proceeding, and that is the second sentence in the first clause of the Fourteenth Amendment, which provides that

"No State shall deprive any person of life, liberty or property without due process of law," and at this point I will endeavor, if the Court please, to answer the question suggested by your Honor before the recess.

I need not enter here upon a labored discussion of any of the multitude of definitions which courts and text-writers have attempted to give to the well-worn and time-honored expression, "due process of law." I fully appreciate the difficulty experienced by the Supreme Court in the case of Davidson against New Orleans (96 U. S., 97) of formulating any definition of the constitutional meaning and value of the phrase which would be at once so perspicuous and comprehensive as to embrace all classes of cases, and quite agree with that exalted tribunal in the wisdom of ascertaining its true intent and application according to well-ascertained principles, and as sound legal logic may require, in each case as it may be presented for decision. And it is quite sufficient in this case to say that if the principles I have already stated are correct, there is no room for the question here; for if it be true that a State Court having jurisdiction of a crime may lawfully hold the alleged perpetrator of that crime to answer, without any regard to any irregularity that may have been committed in bringing his person within its jurisdiction, it follows as an inevitable conclusion that his detention is under "due process of law." Under the common law, as well as under our Statutes, there are many cases, as your Honor well knows, in which anybody, officer or private person, may arrest an offender not only without a writ, or without any previous complaint or accusation by affidavit, information or indictment; and, out of the thousands of such cases which have occurred in this country and in England, not one can be found in which even a doubt was suggested that the detention of the prisoner was "by due process of law" when the facts justified it.

But, to be somewhat more specific. It will be observed that the exact language of the provision is, that "No *State* shall deprive any person of life, liberty or property without due process of law," and I need not refer to the several decisions of the Supreme Court in which it is held that this clause refers exclusively to acts done by the State or under its authority, and not to the acts of unauthorized individuals. At what point of time, then, and in what manner did the State act in this transaction? It was not when these parties were forcibly seized by Frank Phillips and others in the State of West Virginia. The State could not have given them authority to make the seizure as it was done, and it is not pretended that the State ever attempted to confer any such authority upon them. It is true that, in the preceding September, Frank Phillips had been appointed as agent for the State by

the Governor, and that his agency had not been formally revoked; but agent for what purpose? To go into the State of West Virginia and capture and carry away its citizens with a strong hand and without warrant? By no means. His agency extended to one single object and no more; and that was, to receive such of the persons named in the Governor's requisition as might be arrested and delivered to him in pursuance of a warrant to be issued by the Governor of West Virginia, bring them to Kentucky, and deliver them to the proper authorities. Beyond that he could not go by virtue of his agency. When he went a hair's breadth outside of the expressed terms of his agency he was acting without authority from Kentucky, and his act, whether right or wrong, was his own, and in no sense the act of the State. Suppose he did say to Varney, when he arrested him, that he was State agent, and had authority from the Governor of West Virginia, can the State of Kentucky, upon any principle of law or common sense, be held any more responsible for his false statement than for his wrongful act? One was as much without authority as the other. The State did not act until its process was served upon the prisoners by its duly authorized officers within its own territory.

Nor is it material whether that process was served upon them the moment their feet touched the west bank of Tug Fork, or whether it was done days afterwards and miles in the interior. Whatever the nature of their previous holding might have been, whether an unjustifiable trespass, or a lawful arrest for the crime of murder, under the common law or the statutes of the State, it can not be denied that when Kentucky did act she acted through due process, which has been exhibited to the Court here, executed by her own regularly constituted authorities, within the territorial jurisdiction of the Court having cognizance of the crimes alleged against the prisoners. At that moment the act of the captors terminated, and the rightful authority of the Commonwealth was asserted in regular form.

Fortunately, however, so far as the case at bar is concerned, the question is answered fully and authoritatively by the Supreme Court in the case of Ker. The point was brought directly under official cognizance in that case, and this is the answer the Court made in the cogent and perspicuous language of Mr. Justice Miller:

"It is contended in several places in the brief that the proceedings in the arrest in Peru and the extradition and delivery to the authorities of Cook county were not due process of law, and we suppose, although it is not so alleged, that this reference is to that clause of

Article XIV. of the amendments to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law. The due process of law here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State Court, has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which, prisoner could invoke in some manner the provisions of this clause of the Constitution, but for mere irregularities in the manner in which he may be brought into the custody of the law we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense by persons without any warrant or without any previous complaint and brought before the proper officer, and this may be in some sense said to be without due process of law. But it would hardly be claimed that after the case had been investigated, and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested without due process of law. So here when found within the jurisdiction of the State of Illinois, and liable to answer for a crime against the laws of that State, unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into Court, it is not easy to see how he can say he is there without due process of law, within the meaning of the Constitutional provision. So also the objection that the proceedings of the authorities of the State of Illinois and the State of California were not in accordance with the act of Congress on that subject, and especially that at the time the papers and warrants were issued from the Governors of California and Illinois the defendant was not within the State of California, and was not then a fugitive from justice. * * * It is sufficient to say in regard to that part of this case, that when the Governor of one State voluntarily surrenders a fugitive from the justice of another State to answer for his alleged offenses, it is hardly a subject of proper inquiry on the trial of the case, to examine into the details of the proceedings by which the demand was made by the one State and the manner in which it was responded to by the other. The case does not stand when the party is in Court and required to plead to an indictment as it would have stood upon a writ of habeas corpus in California, or in any State through which he was carried in the progress of his extradition to test the authority by which he was held; and we can see in the mere fact that the papers under which he was taken into custody in California were prepared and ready for him on his arrival from Peru, no sufficient reason for an abatement of the indictment against him in Cook county, or why he should be discharged from custody without trial."

Now, sir, draw the parallel between this case and Ker's. Julian had authority from the United States to procure Ker's extradition from Peru. Frank Phillips had authority from Kentucky to receive these prisoners when arrested under the warrant of the Governor of

West Virginia and bring them to Kentucky. Julian disregarded the authority he had in his pocket and kidnaped Ker at Callao. Phillips, without regard to the extradition papers which had been issued by the Governor of Kentucky, forcibly seized these parties in West Virginia. Julian kept Ker a close prisoner, between decks, perhaps, during the voyage to Honolulu, and thence to San Francisco. So these parties were held close prisoners by their captors until they were taken into custody by the sheriff of Pike county under the authority of a regular warrant. When Ker's foot touched the wharf of San Francisco the warrant of the Governor of California was served upon him and he was in the grasp of the law, and by due process of law he was held until tried and convicted of his crime. If there was "due process of law" in that case there has been the same due process of law in this.

I forbear further comment, sir. If this authoritative utterance of the highest tribunal known to the Constitution of our country, upon a solemn adjudication of the precise point in issue, does not settle it conclusively against the claim of the prisoners here, it can be done by no argument of mine.

RANSCHER'S CASE.

If the logic of the cases from which I have quoted is sound, it follows that the principle settled in Ranscher's case (119 United States, 470), to which my attention has been called, can find no possible application here. The decision in that case turned upon a question of good faith on the part of the United States towards the Government of Great Britain, in pursuance of the extradition treaty between them, under which he had been brought to this country, and the proper construction of Section 5275 of the Revised Statutes of the United States, which it was claimed guaranteed to him the right, if acquitted of the crime for which he was extradited, to a reasonable time thereafter in which to depart out of the United States before he should be liable to arrest or detention for any other offense. But that question is in nowise even remotely connected with this case.

The Ranscher case and the Ker case were considered by the Supreme Court together, and the distinction between them so distinctly pointed out, in the opinion of the Ker case, that I may well be contented to let Mr. Justice Miller, who delivered the opinions in both cases, answer the points here in his own language. He says:

"In the case of the United States against Ranscher, just decided, and considered with this the effect of extradition proceedings under a

treaty was fully considered, and it was then held that when a party was duly surrendered by proper proceedings under the treaty with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of treaty gave him. One of the rights with which he was then clothed, both in regard to himself and good faith to the country which sent him here, was that he should be tried for no other offense than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the treaty of 1870-74 with Peru, it seems probable from the statement of the case in the record that he might have successfully pleaded that he was extradited for larceny and convicted by the verdict of the jury of embezzlement. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty."

I have now done, and in discharging my duty to my State and to this Court, I have not intentionally stated a single principle or urged a solitary proposition which I would not solemnly affirm if I occupied the position your Honor has for years so signally adorned. But I can not resume my seat in justice to myself without thanking the Court for the courtesy and patience with which it has heard the argument I have felt it incumbent upon me to submit.