THE LAW OF NECESSITY AS APPLIED IN THE BISBEE DEPORTATION CASE

The most noted Arizona trial is *State v. Wootton,*[1] more commonly remembered as the *Bisbee Deportation* case. Its popular fame rests on its sensational facts, its legal interest upon its application of the seldom-invoked law of necessity.

Since the judgment for the defendant could not be appealed, the law of the case has been generally unavailable. As matter of interest, therefore, the *Arizona Law Review* presents it here, from the ruling of the trial judge[2] on the defendant's offer of proof.

A brief summary of the facts may be helpful, as an introduction.[3]

On April 26, 1917, hard on the heels of our declaration of war against Germany, a strike of copper miners in the Warren District of Cochise County, Arizona, was ordered by the Industrial Workers of the World—the I.W.W.. On July 12th an armed posse, organized by the sheriff and numbering more than 1000, rounded up some 1100 to 1200 of the strikers and their associates, including practically every member of the I.W.W. in the district, put them aboard a special freight train, and transported them under guard to Hermanas, near Columbus, New Mexico, where they were left to be cared for by federal troops. Eventually, about 200 of the possemen were charged with kidnaping, and one of them, H. E. Wootton, was selected to be brought to trial.

At the close of the state's case in chief, the defendant offered to prove that the I.W.W. had been organized about 1908 as an anarchistic conspiracy to overthrow the government and the capitalistic system by force; that these strikes in the Warren District and elsewhere were designed to obstruct the successful prosecution of the war; that at the time of the alleged kidnaping the conspirators were present in the Warren District in great numbers, to destroy the lives and property

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[1] Crim. No. 2685, Cochise County, Arizona, September 13, 1919.

[2] Samuel L. Pattee, born Chicopee Falls, Mass., 1869; admitted to bar, 1891 Minn., 1899, Ariz.; District Attorney of Yavapai County, 1901-1902; Code Commissioner for the Revised Statutes of Arizona, 1913; Assistant United States Attorney, 1915-16; Judge of the Superior Court, Pima County, 1916-1922; Lecturer in Law, University of Arizona College of Law, 1926-1929.

[3] For fuller accounts see: *The Trial of Harry E. Wootton for Kidnaping, Tombstone, Arizona, 1920,* 17 AMERICAN STATE TRIALS 1; U. S. Department of Labor, *Report on the Bisbee Deportations,* 1918; *The Law of Necessity as Applied in State of Arizona vs. H. E. Wootton,* Tucson: Bureau of Information (undated).

of its inhabitants; that they had assaulted and threatened its citizens and had accumulated quantities of dynamite, firearms, and ammunition to be used for their purposes; that the day before the deportation a leader of the conspirators had told the sheriff that he would no longer be responsible for the acts of his men; that the sheriff and possemen reasonably believed that the conspirators intended to commit many felonies in the district, including riot, treason, assault, murder, and the destruction of property, and that protection by the state and federal troops had been sought without avail; that the jails of the county were inadequate to confine the conspirators, and that as prudent men the defendant and his associates had reasonably believed that the deportation was imminently necessary for the preservation of life and property in the district.

The defendant contended that proof of these facts should be admitted, to show that he had acted in self-defense and under the law of necessity. The court ruled that self-defense could not be asserted under the tendered proof,[4] but expressed itself on the law of necessity.[5]

The other rule invoked by the defendant is what is termed the law of necessity, and it has been said that the law of necessity is that law that justifies by virtue of necessity the invasion of another's right. Much that has been said in argument has had reference to both self-defense and the so-called law of necessity. The argument of counsel for both parties respecting both these propositions has to a great extent overlapped. But the two are entirely distinct. The one is defensive; the other necessarily offensive. The distinction has thus been stated by a distinguished writer:

> The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right. It is therefore essential to self-defense that it should be a defense against a present unlawful attack, while necessity may be maintained through destroying conditions that are lawful.

And again:

> Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil. Wharton, Criminal Law, Sections 126, 128.

As stated by the Supreme Court of New Jersey in a case involving the destruction of buildings to prevent the spread of fire:

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[4] Relying on the Penal Code of Arizona, 1913, §§ 180 and 181.

[5] All of the following material is in the words of the Court, except where indicated by brackets.

> But the right to destroy property to prevent the spread of a conflagration rests upon other and very different grounds. It appertains to individuals, not to the state. It has no necessary connection with or dependence upon the sovereign power. It is a natural right existing independently of civil government. It is both anterior and superior to the rights derived from the social compact. It springs not from any right of property claimed or exercised by the agent of destruction in the property destroyed; but from the law of necessity. The principle as it is usually found stated in the books is, that "if a house in a street be on fire, the adjoining houses may be pulled down to save the city." But this is obviously intended as an example of the principle, rather than as a precise definition of its limits. The principle applies as well to personalty as to real estate; to goods as to houses; to life as to property — in solitude as in a crowded city; in a state of nature as in civil society. *Amer. Print Works vs. Lawrence,* 21 N.J.L. 248-257.

The application of this doctrine has frequently been considered in cases similar to that just cited involving the right to destroy property to prevent the spread of conflagration, and in such cases the rule seems to be settled that whenever it is necessary or reasonably appears to be necessary that property be destroyed to prevent the spread of fire the right of destruction arising from necessity exempts those committing the destruction from the liabilities that would ordinarily obtain in the case of the invasion of one's property rights by another. (*Hale vs. Lawrence,* 21 N.J.L. 714; *American Print Works vs. Lawrence,* 23 N.J.L. 590; *Keller vs. City of Corpus Christi,* 50 Tex. 614; *Conwell vs. Emrie,* 2 Ind. 265; *Field vs. City of Des Moines,* 39 Ia. 575; *Mayer, etc. vs. Lord,* 17 Wend. 285; *Mayor, etc. vs. Lord,* 18 Wend. 126.) The same rule has been applied where seamen, in order to avoid the perils of the sea on account of the unseaworthiness of the vessel, or to relieve themselves of conditions of intolerable hardship, were guilty of conduct which otherwise would have constituted mutiny, punishable by laws relating to that offense. (*U.S. vs. Ashton,* Fed. Cas. 14470; *U.S. vs. Bordon,* Fed. Cas. 14625.) And the same principle with relation to the seizure of private property by military officers. (*Mitchell vs. Harmony,* 13 How. 115.) And likewise as to the destruction of property to avoid the spread of disease, (*Seavey vs. Preble,* 64 Me. 120) in which it was said:

> To accomplish this object persons may be seized and restrained of their liberty or ordered to leave the state; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights

of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration.

Salus populi suprema lex—the safety of the people is the supreme law—is the governing principle in such cases.

Where the public health and human life are concerned, the law requires the highest degree of care. It will not allow of experiments to see if a lesser degree of care will not answer. The keeper of a furious dog or a mad bull is not allowed to let them go at large to see whether they will bite or gore the neighbor's children. Nor is the dealer of nitroglycerine allowed in the presence of his customers to see how hard a kick a can of it will bear without exploding. Nor is the dealer in gunpowder allowed to see how near his magazine may be located to a blacksmith's forge without being blown up. * * * The law will not tolerate such experiments. It demands the exercise of all possible care. In all cases of doubt the safest course should be pursued, remembering that it is infinitely better to do too much than run the risk of doing too little.

As further illustrating the rule, see *Chesapeake & Ohio Ry. Co. vs. State,* 84 S.W. 586.

The law of necessity as laid down by these authorities is based purely upon the natural rights of the individual. It can neither be granted nor taken away by statute. It cannot be vested in any public officer nor the exercise of the right made a part of his official duties. And statutes purporting to grant public officers such right are construed to only prescribe regulations under which such right may be exercised. In speaking of such a case it was said by the Court of Appeals of New York:

The legislature does not in these cases authorize the destruction of property. It simply regulates that inherent inalienable right which exists in every individual to protect his life and his property from immediate destruction. This is a right which individuals do not surrender when they enter into the social state, and which cannot be taken from them. The acts of the legislature in such cases do not confer any right of destruction which would not exist independent of it, but they aim to introduce some method into the exercise of the right. *Wynhamer vs. People,* 13 N.Y. 441.

So also the quaint illustration in Wharton's notes that:

A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing and whose clothes have been stolen may snatch up clothing he may find on a clothesline so as not to be obliged to enter into a village naked. 1 Wharton Criminal Law, 11th Ed. 169.

And the more serious statement that:

If the safety of a city require that a house should be destroyed

> by gunpowder, and supposing there be no time to rescue all the inmates of the house, the killing of one of such inmates under the circumstances would be excusable. Idem. 815.

Without attempting to follow the elaborate arguments of counsel and the numerous authorities to which they have referred, it seems clear that there exists what is known as the rule of necessity applicable in some cases under circumstances of unavoidable peril, and when properly invoked, furnishing an excuse to one committing acts which would otherwise constitute a criminal offense. This rule is ordinarily invoked in cases involving the destruction of property, but in extreme cases may extend to the deprivation of life or liberty. Of course, there is a higher degree of sanctity in liberty or life than in any mere property right. The destruction of property is of vastly less moment than the deprivation of liberty or the taking of life, but the difference is not in kind but merely in degree, and to warrant the deprivation of liberty or life only requires a higher degree of peril than would warrant the destruction of property. As was said in *Hale vs. Lawrence,* 21 N.J.L. 714:

> It (referring to the law of necessity) is a natural right, not appertaining to sovereignty but to individuals considered as individuals. It is a natural right of which government cannot deprive the citizen and founded upon necessity and not expediency. It may be exercised by a single individual for his own personal safety or security, or for the preservation of his own property, or by a community of individuals in defense of their common safety or in the protection of their common rights. It is essentially a private and not a public or official right. It is a right not susceptible of any very precise definition, for the mode and manner and the extent of its exercise must depend on the nature and degree of the necessity that calls it into action, and this cannot be determined until the necessity is made to appear.

No doubt one seeking to justify what would otherwise be an unlawful act on the plea of necessity has the burden of showing that such necessity existed, and he must show that the anticipated peril sought to be averted was not disproportionate to the wrong, and to justify the deprivation of liberty he must show that the peril which called for such action was of a higher and more serious character than one which might justify the destruction of property or the invasion of property rights. "He who relies on the warrant of necessity or goes beyond the boundaries which ordinarily separate right from wrong takes the risk upon himself of proving that the circumstances were such as to justify his conduct." (*Hare's American Constitutional Law,* Vol. 2, 912.) And only where the threatened peril is immediate and overwhelming, or so appears to a reasonable man under all the

circumstances, and can only be averted by violence of the character involved in this case, can the law of necessity be invoked to justify the use of such violence.

Much reliance is placed by counsel for the state upon *Ex parte Milligan,* 4 Wallace 2, and as that case was much commented upon by counsel for both sides, an examination of it becomes important in order to determine what actually was decided and to what extent it bears upon the propositions under consideration in this case. [The court then demonstrates that *Milligan* does not involve the law of necessity.]

Many of the decisions cited by counsel for the defendant are cases based upon situations growing out of declarations of martial law by state executives, or a modified form of martial law in particular portions of a state. Many of them justify such declaration and the proceedings of military officers in detaining persons whose being at large might be inimical to the public welfare. One or two sustain the right under certain conditions to establish a military tribunal with authority to try and sentence those found guilty of public offense. Most of them, however, justify nothing more than temporary detention, applying in full the rule laid down in *Ex parte Milligan* with respect to the power to create a military tribunal and the power of such a tribunal to pass upon the guilt or innocence of one charged with a public offense. (*Ex parte McDonald,* 143 Pac. 947.) But these cases, while perhaps enlightening, do not seem to affect any question involved in this case. Martial law had not been declared in the Warren District, nor, under the claim set up by the defendant, were he and those associated with him acting as military officers. Whatever power the Sheriff might have when properly acting as an officer of the law, the character of the claim made by the defendant in this case is such to preclude any idea of justification or excuse on that ground. If, as contended and as held by the authorities before cited, the rule is confined to the narrow limit of protecting a person or a community against imminent peril, by an invasion of the rights of others demanded by a great and overruling necessity, such right is a natural one merely and is wholly apart from any constitutional or statutory authority vested in military or peace officers.

It is urged with great earnestness by counsel for the state that an officer of the law arresting a person accused or suspected of crime, with or without warrant, must take the person arrested before a magistrate or proper tribunal, and failing to do so his conduct becomes wrongful and subjects the officer to both criminal and civil liability. The authorities cited abundantly sustain that position. One arresting an offender without a warrant must take him before a proper court

or magistrate, and in the event of his failure to do so is liable to a civil action brought by the person arrested or to a criminal prosecution. (*Brock vs. Stimson,* 148 Mass. 20; *Phillips vs. Fadden,* 125 Mass. 198; *People vs. Fick,* 26 Pac. 759; *State v. Parker,* 75 N. Car. 189; *Johnson vs. Americus,* 46 Ga. 85.) Nor can there be any doubt as to the correctness of the proposition urged by the state that one arresting under process valid upon its face must strictly pursue the command of the process, and that a failure to do so or a going beyond the authority given by the process renders the act of the arresting officer illegal *ab initio.* (*People vs. Fick,* supra.)

One arresting lawfully without a warrant must promptly take the person arrested before a magistrate and cause a proper warrant to be issued, else his action, though originally legal, will become void from the beginning. (*Pastor vs. Regan,* 30 N.Y.Sup. 657.) So also an arrest may not be made upon information communicated by telegraph from officers of another state without some more reliable information warranting the belief that a crime has been committed. (*Malcomson vs. Scott,* 23 N.W. 166; *Cunningham vs. Baker,* 16 So. 68.) The statutes of this state prescribe the duties of officers making arrests substantially in conformity with the rules laid down in the authorities above cited. Thus, under Section 843, Penal Code, relating to arrests upon a warrant properly issued, it is provided that if the offense charged be a felony the officer making the arrest must take the defendant before the magistrate who issued the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the county. And under Section 844, if the offense be a misdemeanor, the officer must bring the accused before a magistrate of the county where the arrest is made. And by Section 850 it is provided that an officer who executes the warrant shall take the defendant before the nearest or most accessible magistrate in the county in which the offense is triable, in cases where the warrant is issued by a magistrate of a county other than that in which the offense was committed. Section 852 provides that an arrest may be made by a peace officer or a private person, and Sections 854 and 855 provide:

> A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
> (1) For a public offense committed or attempted in his presence.
> (2) When a person arrested has committed a felony, although not in his presence.
> (3) When a felony has been committed in fact, and he has reasonable cause for believing the person arrested to have committed it.
> (4) On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

(5) At night, when there is a reasonable cause to believe that he has committed a felony.

A private person may arrest another:
(1) For a public offense committed or attempted in his presence.
(2) When the person arrested has committed a felony, although not in his presence.
(3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it..

Section 867 of the Penal Code provides:

'When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person must be laid before such magistrate.'

No doubt can be entertained, therefore, that the plain duty of an officer or a private person making an arrest is to promptly, or, in the language of the statute, without unnecessary delay, take the person arrested before a magistrate that further proceedings may be had against him in accordance with law. Nor can there be any doubt that for a failure to perform that duty the arresting officer or person is liable both civilly and criminally. Nor can there be any doubt that the forcible taking of the person arrested outside the limits of the state is a gross and inexcusable violation of the duty of the officer or person making the arrest, and he cannot be heard to justify such act by claiming that he acted as an officer or by command of an officer in making the arrest. The evidence so far introduced only identifies the defendant, Wootton, and a few other persons of the large number who associated in the taking of Brown and others to New Mexico. But in the facts offered to be proved by the defendant it is asserted that Wheeler, then Sheriff of Cochise County, was in command of the body of men who carried out the deportation. No claim is made that there was any taking of Brown or any of the persons deported before a magistrate. On the contrary, the evidence already given on behalf of the state and that proposed to be given on behlaf of the defendant conclusively shows that so far from being taken before any court, a complaint filed and a warrant procured, or any other proceedings taken, the parties seized were promptly carried out of the state to a point where no proceedings could be had against them, and there left. The result is that Wheeler could not legally justify his conduct on the theory that he was a peace officer acting in the performance of his duty. Nor can the defendant justify on the ground that he was a deputy of Wheeler or a member of a *posse comitatus*

summoned by Wheeler to assist him in the performance of an official duty. In the argument of counsel for the defendant the responsibility of a member of the *posse comitatus* was barely touched upon, and the question was not really presented. But counsel for the state in his argument cited persuasive authority to the effect that a member of a posse cannot justify his action unless the officer summoning the posse was in turn justified. The rule stated by such authorities is that an officer has no right to command another to perform an unlawful act, and one summoned by an officer to assist him acts at his peril, and regardless of his individual good faith his conduct cannot be justified if the action of the officer summoning him was in turn illegal. (*Mitchell vs. State,* 12 Ark. 60). Neither Wheeler nor any of those associated with him in the so-called deportation can justify by virtue of official action. But this is the extent and limit of the rules stated in the authorities cited by counsel for the state on that subject. It does not in the least affect the application of the rule of necessity of that rule be applicable. The right to act because of necessity is, as shown by the authorities before cited, a natural right vested only in persons as individuals and cannot be vested in any public officer, though its exercise may be subjected to statutory regulations. Neither Wheeler nor his deputies nor those acting at his command could as officers or aides to an officer act under the law of necessity. If they so acted they must necessarily have acted as individuals and as members of the community, and in so doing they could not avail themselves of any rights that the law gives to an officer nor be subject to liabilities for the violation of the duties of officers. Their acts were entirely beyond and outside, and must so have been, of any official duty, and their right to claim to be excused on the ground of necessity depends upon the existenece of a situation which would warrant individuals in acting under that rule.

It remains to apply these general rules of law to the facts sought to be proven by the defendant. [The court here discusses defenses other than the law of necessity.]

As to the rule of necessity: It has been shown by the authorities before cited that there *is* such a rule and in a case justifying its application the party acting by reason of necessity is excused from the consequences of what would otherwise be a criminal act. The cases are and must be rare and conditions exceptional in which such a rule may be invoked. No case exactly like the present has been found in which it was invoked. Nevertheless, the rule remains, though, as stated by the authorities, it is difficult to define its extent or the cases in which it may be applied. Each must necessarily stand upon its own facts, and as no two cases are exactly alike, necessarily as each arises

the application must be made according to the nature of the situation presented. The unusual character of the defense and the infrequency with which it is claimed naturally requires caution to see that a case is presented justifying the accused in invoking the rule. Naturally the first impression the mind entertains is that such a defense is rather a desperate attempt to escape the consequences of criminal conduct than a *bona fide* excuse for such conduct. But if the defense be asserted and evidence presented which comes within the rule as laid down by the authorities, it must be passed upon as any other defense, and it may be said in passing that in this case, though it may have aroused great public interest, no different rule obtains than in a case of less importance. It stands exactly in the same position and should be considered in the same manner as a case where one obscure citizen is charged with kidnaping another equally obscure, and in which no public interest has been manifested and no animosities engendered. Ordinarily the question here involved is one of fact to be determined by the jury. As was said in *Hale vs. Lawrence,* 21 N.J.L. 714:

> This justification, therefore, under a plea of necessity is always a question of fact to be tried by a jury and settled by their verdict, unless the sovereign authority shall have constitutionally provided some other mode.

This, of course, must be taken to mean that where there is evidence tending to establish such justification, its weight and sufficiency are for the jury, and the Court may pass upon it as a matter of law only where evidence is wholly wanting and may exclude proof of a given state of facts only when that state of facts could not in any event warrant the interposition of this plea. A case much discussed as involving both the right to assert this defense and the manner in which it should be determined is *Commonwealth vs. Blodgett,* 12 Metcalf, 56. This case grew out of a controversy that arose in Rhode Island, sometimes referred to as Dorr's Rebellion, in which one Thomas W. Dorr was the head of an insurrection "to overthrow by force of arms the government and the constitution of that state, and to impose and substitute another government and constitution in its stead." The prosecution was against certain persons who had acted as members of the military forces of the regular government of the State of Rhode Island under command of a military officer of that state. The charge was that of kidnapping based upon the statute of Massachusetts, differing in language from ours but of the same general nature. It appeared that the followers of Dorr, including the persons alleged to have been kidnapped, had been dispersed and scattered into the adjacent states of Connecticut and Massachusetts. Four of such persons with whose kidnapping the accused were charged had taken refuge in Massachusetts and at the time of the

alleged kidnapping were at a house within the State of Massachusetts wholly unarmed and at the time conducting themselves in a peaceful manner. The accused came to the house where the person referred to were stopping, seized them in the middle of the night, carried them to the State of Rhode Island and turned them over to the military authorities. Among other defenses asserted was the plea of necessity in that it was necessary to the safety of the citizens of Rhode Island and their property, and the State of Rhode Island itself, that these insurrectionists should be seized and their potential activities prevented. In support of this defense evidence was given respecting the conditions existing at the time of the seizure of the persons referred to, and of the history of the rebellion in Rhode Island, which gave rise to their capture. The trial court instructed the jury that 'if there existed a necessity for the defense or protection of the lives and property of the citizens of Rhode Island, or for the defense of the State of Rhode Island, that the defendants should do the act complained of in the indictment, or if there was probable cause at the time to suppose the existence of such necessity, and the jury found such necessity or probable cause of necessity, then they were to acquit the defendants.' And again the trial court also gave an instruction that 'such capture by the troops of Rhode Island under the orders of Rhode Island was unlawful unless necessary in defense of lives and property of the citizens of Rhode Island, or in defense of the state at the time; of which necessity or probable cause of necessity, or that there was probable cause at the time to suppose the existence of such a necessity, the jury and not the State of Rhode Island was the proper judge.' The case was one of great public interest, and the matter out of which it grew is a historical incident of importance. All the questions raised in the case were discussed at great length in an opinion delivered by Chief Justice Shaw. Counsel vie with each other in their tributes to the learning and ability of that great jurist, and undoubtedly his utterances are entitled to the greatest weight as authority. The propriety of the instructions above quoted was considered by the court and their correctness upheld, and the court summed up its conclusions with respect to them by saying that, 'on the whole, the court are of opinion that the instructions were correct and carefully considered,' and the exceptions were accordingly overruled. The similarity in many respects of the situation presented in that case with that involved in this and the great weight to be given to the statements of the court which rendered the opinion, and especially to the eminent jurist in whose language it was couched, caused the Court to invite consideration of it by counsel for both parties. The state has attempted to draw a distinction between that case and this in that in this case the parties claimed to have been kidnapped were taken out of the state to a place

where for any infractions of law that may have been committed they could not be proceeded against, and in that case the parties were taken to Rhode Island where suitable proceedings might be had against them for their participation in an insurrection against the lawful authority of the state. The soundness of this attempted distinction is not perceived. The crime of kidnapping as defined by our statutes requires neither malicious purpose nor criminal intent beyond the intent to commit the act which is made unlawful. The purpose of the act is not material, and no unlawful purpose need be alleged or proven. If the act itself is unlawful it constitutes the crime regardless of the purpose or intent of the perpetrator. The crime is as completely established by proof of an unlawful carrying of another person from one state to another for the purpose of prosecution as for any other purpose however unlawful. (24 Cyc. 798; *State vs. Backarow,* 38 La. Ann., 316; *People vs. Fick,* 26 Pac. 760; *John vs. State,* 44 Pac. 51.) If one is taken forcibly and without proper legal proceedings from one state to another for the purpose of being prosecuted in the latter state for a crime committed there, those taking him are guilty of kidnapping. The one kidnapped may be prosecuted after his removal to the state in which the crime is claimed to have been committed, and he may not complain of the manner in which he was brought into the state, because he does not in his own person represent the sovereignty of either state, and only the state can complain. (*Ex parte Moyer,* 85 Pac. 897.) But the state from which he was taken may prosecute those doing the taking, and it is no defense to a charge of kidnapping that the purpose was to bring the person kidnapped before a proper court for prosecution. This is abundantly shown by *Mahon vs. Justice,* 127 U.S. 700, and the numerous cases cited in the opinion. Had the persons claimed to have been kidnapped in this case fled into New Mexico and had the accused gone to that state and forcibly brought them back into this State, the crime of kidnapping (unless some excuse or justification other than the purpose of prosecuting had been shown) would have been as complete as would a forcible taking in the opposite direction. Indeed, such is the provision of the very statute under which this prosecution is brought. Section 185, Penal Code of Arizona, provides that:

> Every person who forcibly steals, takes or arrests any person in this state, and carries him into another country, state or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state * * * and every person who, being out of this state, abducts, or takes by force or fraud any person contrary to the laws of the place where such act is committed, and brings, sends, or conveys such person within

the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

The crime involed in this case may therefore consist either in forcibly taking a person out of the state into another state, or from another state into this, and no distinction is made between the two acts that constitute the particular offense. If it were lawful to forcibly seize a person suspected or accused of crime and bring him from another state into the state where the crime is alleged to have been committed, and such purpose would relieve those committing the seizure from criminal responsibility, the distinction urged by the state would be well taken. But where the offense is precisely the same and the object of the seizure in no way relieves the act from criminality, it can make no difference and can in no way militate against the force of the authority cited. *Commonwealth vs. Blodgett* is therefore a direct authority in support of the view that the question of necessity is one for the jury.

It was urged with great earnestness by one of the counsel for the state that, conceding for the sake of the argument, the right to arrest the persons claimed to have been kidnapped and to place them under restraint or in confinement, as a matter of law there could be no necessity for removing them outside the state. It is difficult to differentiate between different parts of the transaction. Indeed, under the circumstances shown by the evidence introduced on behalf of the state and that proposed to be introduced by the defendant, the whole transaction may be regarded as one act. As was said in one of the cases cited by the state, "in this case the arrest of the woman and her conveyance into Placer County and there placing her in the house of China Molly, constitute one continuous act, and for the purpose of determining the intention of the defendant when he made the arrest or at any other time when he had the woman in custody, it is proper to look at the entire transaction as one act, from its beginning to its consummation." (*People vs. Fick, supra.*) The offer of proof made by the defendant asserts that the circumstances gave rise to the necessity to not only remove the parties deported to the ball park, but to remove them such a distance as would avoid the threatened danger. The somewhat fanciful suggestion of counsel for the state that the persons captured might have been required to construct for themselves a place of confinement within the limits of this county is not entitled to serious consideration. No authority exists in law to require any such action on the part of a person arrested. Undoubtedly the rule of necessity is one that can arise only on rare occasions and should be confined within the strictest limits. Even though a necessity existed warranting such measures as were taken in this case, if at any time the accused went beyond the limits of necessity, or of what reasonably

appeared to be necessary, the necessity then ceased to exist, and thereafter criminal responsibility would attach to any further acts committed, but this upon the matters stated in the offer of proof is a question for the jury.

The state, in taking the position it does, necessarily assumes for the sake of the argument the truth of the statements made in the offer of proof, and necessarily concedes for the same purpose that the proof will measure up to the offer. [The court then summarizes the offer of proof, substantially as has been done above.]

Laying aside for the moment the offer of proof with respect to a conspiracy existing long prior to the acts complained of, the offer of proof as to conditions existing in the Warren District at the time of the so-called deportation, the purpose and intent of the persons deported, the contemplated destruction of lives and property within that district, the preparations to carry out that intent and the acts and conduct as well as the statements of the persons deported, present a situation where it cannot be said as a matter of law that the rule of necessity cannot be applicable, but rather leaves the question of the existence of such necessity to be determined by the jury as a question of fact under proper instructions. If such were the conditions and the citizens of Bisbee had called in vain upon state and federal authorities for protection against a threatened calamity such as is set forth in the offer of proof, it cannot be said as a matter of law that they must sit supinely by and await the destructiton of their lives and property without having the right to take steps to protect themselves.

It ought not to be necessary to state that the Court has nothing to do with questions of fact except to see that they are properly submitted to the jury, and can neither pass upon nor express any opinion upon the question whether the conditions claimed to have existed in the Warren District in fact existed. Many statements were made by counsel in argument in the way of controverting or denying the existence of the situation claimed, and while such arguments may have been well enough in order that the position of counsel might not be misapprehended and that it might not be thought that they conceded the actual truth of the matters claimed, it is obvious for the purpose of passing upon the questions presented both the state and the Court must act upon the assumption that the facts stated in the offer of proof will be shown, and that the proof when presented will fully measure up to the offer. Nor ought it to be necessary to again state that when a defendant in a criminal case offers to produce evidence in support of a claimed defense, such evidence can only be summarily excluded and the defense entirely rejected when it clearly appears as

a matter of law that the evidence if received could not tend to prove any legal defense. The Court does not attempt to say what were or were not the facts surrounding the act complained of, nor what conditions existed at the time. It only holds that upon the facts set forth in the offer of proof the question is one of fact for the jury and not one of law for the Court.

So far the offer of proof made by the defendant has been taken as a whole and the questions presented at such length have been considered with reference to that offer taken in its entirety. But many matters set forth therein may be subject to well-founded objection. The question of necessity may be governed by the conditions and the situation as they existed at the time of the commission of the act and immediately prior thereto at the place or in the vicinity of the commission of the act, and evidence as to matters preceding may not be admissible. In cases like many of those cited where the claim of necessity existed with respect to the destruction of, or injury to property, it is obvious that the necessity depended upon the situation as it existed at the time of the destruction. One claiming the right to destroy buildings to prevent the spread of a conflagration must necessarily have that right determined by the condition existing or appearing to a reasonable man to exist at the time of the destruction; that a conspiracy had been formed to start the fire would be wholly immaterial. So in this case it may be that the claimed conspiracy antedating the conditions, whatever they may have been, in the Warren District at and prior to the so-called deportation, may be entirely outside the evidence legitimately admissible. It does not appear clearly that the persons charged with the kidnapping had any knowledge of such conspiracy or acted upon any information as to its existence.. It was said in one of the cases cited that after-acquired knowledge cannot justify an illegal arrest, and so after-acquired knowledge may not be admissible upon the question of necessity. It may be that the right to act under the stress of necessity must be determined by the conditions existing at the time of the commission of the act done under such a claim of right, and that the proof bearing upon the necessity must be limited to that extent. The question was not discussed by counsel and is too serious to be passed upon without such discussion. It would seem, however, that the proof should first show what those conditions were before any evidence of an antecedent conspiracy to bring about those conditions could be shown, and after the submission of evidence respecting existing conditions the Court would then be in a position to determine whether the other evidence is admissible. The attention of counsel is called to the case of *People vs. Schmidt*, 165 Pac. 555.

The questions discussed have been presented before the opening statement of counsel for the defendant and bore as well upon his right to make such statement as to the admissibility of the evidence proposed to be introduced. The character as well as the extent of an opening statement of a case to the jury is left much to the discretion of the trial court, and while the right to make such statement is a matter of right, the Court may place such limitations upon that right as in its discretion are deemed proper. (*U. S. Fidelity & Guaranty Co. vs. Postker*, 102 N.E. 372.) To avoid possible prejudice and a statement of matters which after argument might be held inadmissible, counsel for the defendant will not be permitted to make any statement with reference to the alleged conspiracy existing outside the Warren District, but will confine himself to a statement of what he proposes to show with respect to conditions in that district at and prior to the time of the so-called deportation, and the acts and conduct of the parties accused and those claimed to have been deported. No prejudice can result should the evidence of a conspiracy be held admissible, because the jury will undoubtedly be able to appreciate its scope and purpose, and if admitted it will be a subject of discussion by counsel in the closing argument and of the Court in its instructions. But the Court is in grave doubt as to the admissibility of such evidence and will require, therefore, the exclusion of all reference to it until its admissibility can be properly determined.

Much has been said respecting the effect of a mere statement of the matters sought to be shown by the defendant and the prejudice likely to arise in the minds of the jurors from such statement, and the assertion that the mere mention of the name of a certain organization will give rise to such feeling on the part of the jurors that a fair consideration of the evidence cannot be obtained. But the Court cannot believe that substantial citizens of Cochise County of the character of those empanelled as jurors in this care are so lacking in intelligence or so wanting in appreciation of their duties as to be influenced by any such matter, or that the fear that a verdict will be based on prejudice instead of proof has any substantial basis.

The foregoing are the views of the Court as to the rules of law and their application to this case, formed after careful examination of the authorities cited and full consideration of the arguments presented, and these views will govern the further proceedings in the trial of this case."

[At the conclusion of the trial the case was submitted to the jury, which deliberated but 15 minutes and reached a verdict of "Not guilty" on the first ballot.]