Question Pran d to Court in the Tom Derpi in Ca ..

RIGHT OF HAB. S CORPUS IS UPHELD

Full Text of the upinions Delivered by Judges Relies, Troupe and Day in Deciling on the Application.

For the benefit of the laity as well as in the matter, The Bee here prints in full the opinions of the three judges who sat to hear the application of Thomas Dennison principle involved is one that comes near to every one, the question being that of whether a prisoner is deprived of his liberty by due process of law. The right of of the judges agreeing, and each presenting

When the court had assembled, Judge Day said: "The parties are in court in Dennison for a writ of habcus corpus and the court is ready to pass upon the question which was submitted to us and Judge Redick will announce the conclusions of the court on the motion."

Judge R. dick's Opinion

Judge Recick then gave out the opinion the law. of the court as lone ws;

"It will not be necessary to make any extended statement as to what the issues of this case are turner than to say that has committed a crime, or stands charged the prisoner is held in the custody of the with the commission of a crime in any respondent on a warrant issued by the other state and is a fugitive from justice governor of the state of Neoraska based of that state, because the provision is that upon an indicament sound in the state of in cases provided for by the constitution Iowa, charging the detendant with the and laws of the United States the governor crime of receiving and aiding in concealing shall issue his warrant when it is made to stolen property in the county of Harrison, appear that the defendant stands charged, filed before the governor that the defendant that the defendant was a fugitive from has fied from the state of lown and is a fugitive from the justice of the state of power to issue his warrant. That section

titioner, and providing that he should be and state of lows for trial.

The petition for a writ of habeas corpus was filed in this court after the arrest of the accused had been made, and while he was in the custody of the agent of the state of lows. He has been brought into gourt upon the writ issued upon that petition and is here.

"The petition alleges a large number of grounds tending to show that the petitioner held unlawfully on this warrant. A return was made by the agent having the custody of the prisoner to the effect that he held him under a warrant of the governor. That return has not been traversed, but the matter now submitted is as to the sufficiency of the petition to sustain the issuance of the writ. That question is raised by a motion on the part of the agent of the demanding state, or the respondent in this proceeding, to quash the writ of habeas corpus issued by this court on the ground that the facts stated in the application, which is the basis of the writ, did not warrant its issuance. We believe that this is a proper way, and the only way, to raise the question of the sumclency of the petition. But the argument proceeds on such a motion the same as ough a demurrer had been filed to the In other words, the motion admits all the facts alleged in the petitio and says that they do not constitute proper

authority for the issuance of the writ. What is to Be Determined.

Were we asked to pass upon the ques tion simply of the sufficiency of the tion in this case, this motion wou'd have overruled at once, because, among the allegations in this petition, is one that there was no competent evidence before the governor to authorize him to issue this warrant. But we have been requested, to hear, or the court has invited argument, upon the main and crucial question which the petitioner here seeks to present, and have heard arguments upon it, and we propose to pass upon that question regardas of the technical one of the sufficiency of the allegations of the petition.

"The point made is that, before the governor of a state is either authorized or required to issue his warrant of extradithe transportation of the accused to the other state, it must appear to the govclaimed that the question whether or not he is a fugitive is a question of fact, and that the determination of that question in the negative divests the governor of tive from justice.

any authority he may have to issue the Rights of warrant; or, rather, to state it more exactly, that the non-existence of that fact prevents the governor from taking any action whatever in the matter; that the fact that the accused is a fugitive from justice is a jurisdictional fact without the existence of which the governor is power less to issue his warrant.

Essence of Nebraska Statute.

Upon this question it is suggested first, by the motion, that the power of the governor of the state to order extradition of a prisoner is not found exclusively in the constitution and laws of the United States, but that the statutes of the state of Nebranks have provided for cases beyond those provided for by the constitution and of the United States. It may be taken to be a proposition beyond dispute, under the decisions of the federal courts. had of a prisoner from one state another unless he be a fugitive from fustice from the state to which it is sought remove him. But, as I say, it is bonended that section 364 of the statutes of Nebraska, and contained in chapter xxxiii chapter governing habeas corpus-it is proregardless of the question whether or not he is a fugitive from justice. It may be that the respondent in this case is precluded from raising this question on the ground that he does not claim to hold the prisoner for any other reason except that he committed a crime in the state of Iowa and is a fugitive from the justice of the state of Iowa: and the warrant of the governor proceeds upon no other theory, but recites that the petitioner, Tom Dennison, is charged with the crime of receiving and siding in concealing stolen property and is a fugitive from the justice of the state of lows. So I may that we are not clear that it is open to the respondent, the mover of this motion rather, to claim any right to hold the prisoner under any different theory, or under proposition than that he is a fugitive from justice. However, we will discuss the question briefly. And I might as well say here that, while I am an nouncing the conclusions of the court, the other members thereof do not consider theniselves bound, or rather are not to so considered bound by the arguments that may use or any statements I may make to the law of the case. We are agreed of cases cited and read bearing upon this jurisdiction of an officer to act depends the governor upon that question, and the grocedure of all our courts, where

WHAT IS DUE PROCESSOFLAW as to the conclusions of law in the case,

Provision of the Statute "Section 161 contains a proviso at the end of the section. The first part of the section provides that no person shall be removed from the state of Nebraska to any other state, a prisoner, for any crime committed within the state of Nebraska. It persons who are interested and take part as to the weight of the evidence before n any such removal; provided, however, that any person who has committed any to be tried for that crime, that he may be sent to that other state, and it is that make out a case of probable cause, and if proviso which it is claimed warrants the so, the court will not interfero with the the legal protession who are interested whether or not he is a fugitive from justifial,

an exception, 'except in cases specially for a writ of halous corpus. The great provided for, that is, no removal shall be 1855, approved November 4, and was sechabens corpus is uplied by the court, all tion 3 of that act and the exception which I have just read doubtless had reference his line of reasoning. The opinions are as to cases provided for by another law in existence at that time, and not now upon the statute books, providing that the governor of the state might enter into conthe matter of the application of Thomas tracts with the governors of other states for the care of prisoners sentenced by the courts of this state for crimes committed in this state, because at that time there was no adequate provision in this state for taking care of such prisoners; and the exception which I have just read doubtless right of the petitioner in habeas corpus to had reference to that special provision of

"Section 233, which is declaratory of the law of the United States, authorizes the guish them, or give the reasons which acgovernor to extradite an accused when he state or lows, and upon an affidavit ste. Under that section it must appear justice, otherwise the governor has no I have been unable to find prior to the "Upon that showing the governor issued a Revised Statutes of 1866. No doubt it was warrant authorizing the arrest of the pe- passed prior to that time, but it was not in the criminal code of 1868, so-called, or turned over to the authorities of the state the collation of the criminal laws in 1838, of lows, or to an agent appointed by the and doubtless was a subsequent enactment authorities of that state to receive him for to section 364. Belleving that to be true, transportation to the county of Harrison it probably was intended by this proviso to except or exclude from the prior pro visions of that section cases of extradition.

Duty of the Court.

"The laws of the United States upon that subject have existed since 1793 and the constitution ever since it was adopted. No provision in this state with reference extradition appears prior to this section 364. As I say, it antedates section 353, and considered as separate enactments prior to the adoption of the state constitution of 1867, the first constitution, or the constitu tion of 1875, the latter law would probably control the former. But we are not called upon to determine those questions. These two laws were incorporated into the revision of 1886, and also that of 1873, and have been continued in the statute books from that time down to the present, and they are two provisions apparently referring to the same subject. In that case it is the duty of the court to harmonize them if possible.

"Tridge section 364 when originally er acted, and until the enactment of section 383, there was no method provided by the state for the enforcement of that act-no power granted by the state to the governor to issue his warrant in such cases. The power was given and the duty imposed, however, by the United States statute. It be that prior to the enactment of sec tion 333 the power of the governor under the proviso was greater than it would have been under the statutes of the United States, and we are not agreed upon the question whether it is competent for a state to enlarge the cases in which extradition may be had. I do not propose to discuss that but assuming that it was, the enactment of section 233 curtailed the power of the governor in those cases; it restricted his power to cases provided for by the constitution and laws of the United States. And while the existence of these two sections is something of an anomaly in a statute, by construing them together under the ordinary rules in the construction of statutes so that it may be possible that both may stand, we conclude that section 253 is the only one which grants power from the state to the executive to issue his warrant for extradition, and that the effect of that section is to tion, or his warrant of commitment calling restrict his power to such cases as are provided for by the constitution and laws of the United States. Therefore it folernor that the accused is a fugitive from lows that in order to hold the defendant in the justice of that other state, and it is this case, or, rather, the petitioner in this case, the defendant under the warrant, the respondent in the habeas corpus proceeding must show that he is a fugi-

Rights of the Petitioner.

case, and I will not discuss it at any the governor of a state, who is the execulength, but announce the conclusions of tive officer in this particular instance, anythe court thereon, which, I think, will be way, exercising no judicial powers, hears satisfactory to all parties concerned, so a matter ex parte, and the defendant has far as the discussion is concerned. The no right to appear and be heard and to point is this: The petitioner claims the call witnesses. right in this proceeding to introduce evi- cases do not apply to this case. dence upon the question of fact as to governor, having before him a duly certitry the came upon matters not fied, authenticated copy of the indictment record before the governor. found in Harrison county, Iowa, and an not authority upon the question of the affidavit to the effect that the prisoner or right of the party to be heard. I call atthe accused had actually fled from the tention right here to this class of cases state of lowa and was a fugitive from where the courts say in some cases that justice, and the governor having acted upon that evidence and Issued his warrant. both lower courts and the supreme court that it is not competent for the court in clusive upon the prisoner where he of the United States, that no extradition this proceeding to go behind the evidence mits his case upon the record, and an exbefore the governor. In other words, that in this proceeding this court is confined in its inquiry to the determination of jurisdiction. There is only one question whether or not there was any evidence be- a question practically of law there: fore the governor which would warrant him in the conclusion, or the finding, that or maxiv-at any rate contained in the the petitioner was a fugitive from justice. and having proceeded to that point and vided that a prisoner may be extradited found that there was some evidence before the governor upon that proposition then the court is powerless to go behind that evidence or to receive evidence contradicting that prima facie case made hefore the governor, and that the issuance of the warrant of the governor having determined the first fact, that there was evidence before him upon which the warrant was issued, is conclusive upon the courts, conclusive upon the right of the petitioner in this case, upon that question the hearing of an application for a writ of Or the other hand, it is claimed that the warrant of the governor is only prima facie evidence of the existence of

> Anthorities on the Puint, "The authorities seem to be pretty as one upon the question that the warrant is only prima facts evidence of the existence of that fact, but the respondent says that it is prima facie evidence without any further inquiry, and that the court examines the evidence taken before the governor and finds that there was some vidence upon the question of fact involved, then the court, having determined that fact the warrant of the governor becomes conand no further evidence can received. There have been a large number

First, where the prisoner has been con

mitted by a committing magistrate on a proliminary examination, or by a United brought into question. The jurisdiction of States commissioner on a preliminary examination, and he sues out a writ of habens curpus and claims that he is unlawfully restrained of his liberty, and the clusive. weight of authority unquestionably is that then provides certain penalties against any in those cases the court will not inquire the commissioner or before the examining magistrate, but on the writ will simply crime in any other state, where he ought inquire whether or not there was evidence before the magistrate sufficient to extraction, regardless of the question of writ, but will remand the prisoner for

"The second class of cases is those where This section 254 contains in the first part the prisoner was held upon the governor's warrant the same as here, but the cases were submitted upon the record; that is, had except in cases specially provided for there was no attempt made to introduce by statute. It first came upon the statute any further testimony by the party having books of this state by an act passed in the writ, but the question was submitted upon the record made before the governor, and in those cases the rule seems to be well established that if there was evidence evidence before the governor tending to establish the facts necessary to the exercise of his power to issue the warrant, the courts will not interfere with the exercise of that power, but will remand the pris-

Cases Directly in Point. "The third class of cases have particular eference to the question here as to the introduce further evidence upon the ques tion. It would subserve no useful purpose for me to take up these cases and distintuate the court in reaching the conclusion they have, but the distinction between the various classes of cases may be proper to call attention to. In the case of a com mitting magistrate the defendant is entitled to be present; he has a right to be present-he has an enforceable right to be present, and not only has he a right to be present, but he has a right to call witnesses, and the examining magistrate must receive the testimony of those witnesses and pass judgment on all the testestimony received. He is a judicial officer; he is exercising judicial powers when he passes upon that testimony; the defendant is in court; he has to be heard in court; he has a right to produce his witnesses, and it is consonant with good logic and sound common sense that where the defendant has had an opportunity to be heard upon the very question as to whether or not he shall be held for trial before the examining magistrate, that having been heard, or having had the opportunity or right to be heard, whether he takes advantage of it or not, that that question is closed so far as he is cerned, and he will be held to trial, Governor Not a Judge.

"Now, what is the difference between that case and the case that we are discussing? The governor of the state of Nebraska has no judicial powers. He may ometimes act in a quasi-judicial manner, but it is conceded on both sides, and we think it the law, that in the issuing of a warrant he is not exercising judicial powers. He is obeying the command of the estitution and laws of the United States o give up to a sister state a fugitive from justice. He has no discretion in the matter when it appears that a person is charged with a crime and that he is t fugitive from justice. It is said that the petitioner in this case was notified. It it to be a fact that the petitioner in this case was notified of the hearing before the is bound by the decision of the governor the same as he would have been by a pre liminary examination before an examining magistrate. But the cases are entirely different from a legal standpoint. The law distinguishes between what a man may do as a matter of grace, a matter of favor, or a matter of courtesy, and what a man under the constitution and laws of his state has a right to do and a right to insist that he has a right to do. The authorities are unanimous upon the proposition that prisoner has no legal right to go before the governor of a state and introduce evidence upon the question as to whether or not a warrant shall be issued. If the governor receives testimony, he receives it as a matter of grace or favor to the prisoner, and not as a matter of legal right to the

Rights of the Prisoner. "It results from these considerations that no duty rested upon the prisoner to apply to the governor for such favor in He may stand upon his legal the least. rights and present them to any court having jurisdiction and power to pass upon them. So, in my view, there is a wide distinction between the cases where there has been a preliminary examination before a judicial officer like a commissioner of the United States having power to examine preliminarily, or an examining mag-By disposing of that question, we come istrate of the gtate of Nebraska to the really important question in this county of Douglas, and the case where Therefore we think those

"The second class of cases, where it was whether or not he was a fugitive from on a governor's warrant, but the cases justice. The respondent denies his right were submitted upon the record, are not to do that, his position being that the authority in a case where it is sought to the warrant of the governor is conclusive upon the prisoner. Of course it is conamination of that record by the court shows that the governor acted within his the record show that the governor acted within his jurisdiction and was he authorized to issue the warrant? That is the only question in the case. And when you submit it in that way the warrant of the governor is conclusive when the court finds that he had jurisdiction to act. in this case it is practically conceded that the warrant of the governor is prima facie evidence only until that prima facie evidence is overthrown by competent proof. Power of the Court.

> "The third class of cases, it seems me and to the court, control here, The theory upon which a court of justice, on habeas corpus, will inquire into a question of fact before an inferior tribunal, board or officer, that is inferior in the sense of being subject to review by this court, that the existence or nonexistence of a fact inquired of determines the jurisdiction of the party to proceed and act, or of the officer to proceed at all. tion means only thir, in the briefest defini-It is the power and the right to hear and determine the question. the power is granted to an officer or to a court, or to a board in special cases, the mentioned in the act. Where the power is to be exercised in a certain manner, the measure of the power, and where the

proposition. They may be divided into upon the existence of some fact, that fact is always open to inquiry in another court where the finding or judgment or order sought to be enforced against him is a court, even to act judicially, has always been the subject of inquiry before its judgments are said to be binding and con-

Must Establish Facts.

"We consider it beyond question that the governor in this state has authority to issue his warrant to extradite a prisoner to a sister state for trial for crime only i a case authorised by the constitution and laws of the United States, and they provide only that he may be extradited when he is a fugitive from justice. So, before the governor may act and issue his warrant, it must be established that (he) the accused is charged with a crime, and the fact must be established that he is a fugitive from Justice. The decisions of the supreme court of the United States, and other federal courts, are at one upon the proposition that no man can be considered a fugitive from justice unless at or about the time of the commission of the crime he was in the state where the crime is alleged to have been committed, and it is before the governor, at least competent proposed to prove here by this testimony offered that the petitioner was not in the state of Iowa at or about the time this crime was committed. It is objected that this testimony tends to prove an alibi, and that that is a matter of defense for the prisoner to make in the state of Iowa, and not on which he can call upoh this court to decide. It is a question involving his innocence or guilt. There is no doubt but that this court has no authority to inquire into the guilt or innocence of the accused they have nothing to do with that propost tion in this proceeding, and they have nothing to do with any questions which are solely and only matters of defense to the prisoner upon the trial, and if the matter sought to be introduced in evidence goes no further than a mere alibi, then the authorities are to the effect that evidence merely amounting to an alibi have no application. That is the rule unquestionably if it were sought to introduce evidence, for instance, in this case that the petitione was not in Harrson county, Iowa, simply, or that he was in the city of Council Bluffs, or that he was in the city of Dubuque, Des Moines, or any other city within the state of Iowa, the question would be governed by those cases, that evi dence only tending to prove any alibi will not be received. It would be competent for the respondent in that case to prove an allbi, to prove that he was anywhere within fifty or 100 feet of the place where the crime was committed and not at the place where the crime was committed. If he could satisfy the jury that he was not there at the particular place, his alibi would be proved and perfect. He would not have to prove that he was out of the city, or even of the county, or in another building. So much evidence merely tending to prove an alibi would not be received. But the evidence here goes farther than that. The evidence here is offered, not for the purpose of proving an alibi, but for the purpose of proving the nonexistence of a jurisdictional fact, without which the governor could not act. It does not matter that the same evidence upon this jurisdictional fact might or would establish, if sufficient, an alibi. That does not

fact in question, it is immaterial that it may also establish an alibi. Questions Well Settled. "These questions, it seems to us, have been settled and determined by the circuit court of appeals of the District of Maryland in the matter of Bruce against Raydoes not appear in evidence, but conceding ner. In that case the accused was charged with having committed bigamy in the state of New Jersey. A requisition was obtained governor, and given an opportunity to go and presented to the governor of the state down there and protest, if he desired to, or of Maryland requiring that the prisoner be make such showing as he desired against delivered over to the authorities of New the issuance of this warrant, it is claimed Jersey for trial, and the governor issued that having had such opportunity that he his warrant. A writ of habeas corpus was trict, or the district court, and the matter was heard, and the petitioner proposed to introduce evidence upon the question of fact to show that he was not a fugitive from justice. The lower court refused to permit that evidence to be introduced. Now the facts were that he was a married man in New Jersey prior to 1897, and while his first wife was living, and in the year 1897. the prisoner contracted a second marriage The charge was that his former wife was living, and that his second marriage was bigamous, and that he was guilty of the crime of bigamy. No indictment was found until 1902, some five years after the contraction of the second marriage. Upon the hearing of the writ of habeas corpus the prisoner proposed to show that he was married at the time alleged in 1897; that he remained within the state of New Jersey for a period of three years after his marriage and did not conceal himself during that time, and that by the laws of the state of New Jersey no indictment could be found unless within two years after the date of the marriage. That is a defense of the statute of limitations. It is a perfect defense, it is true, to the prisoner, if the law did not permit an indictment to be found except within two years. It was a perfect defense for the prisoner to go into the state of New Jersey and set up the very facts upon which he relied for his writ of habens corpus of his residence in the state of New Jersey for three years and the fact that an indictment was not found within two years after that date while he was in New Jersey, and subject to their laws, and within the reach of their courts. It would

make any difference; if it establishes the

have been a perfect defense, as I say. Court Must Receive Evidence. "The lower court in this case refused to permit the accused person to present that The court of appeals, in a thorough discussion of the authorities, reversed the case, and said it was error for the lower court not to receive the evidence offered by the prisoner, not for the purpose of establishing the fact in Maryland that the crime had been barred by the statute of limitations in New Jersey, but to establish the fact that he was not fugitive from justice; that he had lived in the state of New Jersey during the entire period within which he could have been arrested, indicted and tried for the crime charged, and that therefore, having lived in the state of New Jersey for that time he was not a fugitive from justice and could not be extradited on the ground that was a fugitive. That is, they received the evidence upon that question of fact, and you will notice that the same facts identically upon which the court acted in the habens corpus proceeding would have constituted a perfect defense to the case had the prisoner been extradited and sent over for trial. So it does not matter that the same evidence proves an alibi. If it serves to prove another fact which is jurisdictional, it would be received as proof of that fact, no matter if it may at the same time prove an alibi.

Sufficiency of Indictment

"This case is criticised by counsel for the notion on the ground, as they claim, that does not appear that there was any evidence before the governor upon the question that the prisoner was a fugitive from The statement of the case contains this language: "The warrant of the governor of Maryland does not disclose whether he considered any evidence bear ing up the question: Was the prisoner, Thomas Bruce, a fugitive from justice, nor whether he considered the sufficiency of the indictment." When the case was power does not extend beyond the cases heard in the circuit court no testimony was received upon that question: the petitioner a fugitive from justice? manner of the exercise constitutes the is also claimed that the case does not show that there was any testimony before

Statement is not clear on the subject, but ever the it says: 'The papers accompanying the demand by said governor of New Jersey being certified as authentic by him.' It speaks of the indictment having been presented to the governor, and the papers accompanying the demand were certified as authentic by him. It is a fair inference that there was an affidavit probably before the governor upon the question of his being a fugitive from justice. It may not be necessary, however, to determine that fact absolutely.

Governor Finds No Facts

"What does the record say in that regard in this warrant? It is addressed to George M. Christian, respondent. 'Whereas, Albert B. Cummins, governor of the state of Iowa, has demanded of the governor of this state Thomas Dennison, charged with the crime of receiving and aiding in the concealing of stolen property as a fugitive from Justice of said state of Iowa, and complied with the requisites in that case made and provided.' Does the governor say there that he considered any evidence upon this case? He says he has compiled with the requisites. What requisites are they? They are mentioned in the statutes of the United States and of this state: First, demand is made by the governor; second, an indictment is presented to the governor duly authenticated: third, an affidavit of some person to the effect that he is a fugitive from justice. The governor does not find fact in this connection. He any not recite any fact that does found. He does not say that considered the evidence. All he says that he has complied with the requisites in that case made and provided. That is, he has filed an indictment, duly authenticated. and has filed an affidavit of somebody that the defendant is in the state of Nebraska and that he is a fugitive from justice. "So that it does not appear upon this hearing, beyond the return, that any other evidence was before the governor than the

a legal demand. As I say, the warrant does not recite that the governor con-sidered that evidence and determined the question whether or not Dennison was a complied with the requisites in that case made and provided.

Proposition is Preposterous.

"Now, can it be possible-can it be possible that a court of justice will say, as a matter of law, that an executive officer of a state, acting in an ex parte proceed ing, upon affidavit and indictment which is subject to criticism and comment on account of a number of things omitted from it, and does not say that he considered the evidence; who does not say in his warrant that he finds any fact to be true, as a justification for his action in a proceeding where the defendant is not entitled as a matter of right or as a matter of law, to be heard and produce his testimony to assist in the determination of the question of fact which is jurisdictional before the governor can act-I say, is it possible that a court of justice in this century, in the early part of it, is going to announce the rule that the finding of an executive officer in such cases is binding and conclusive upon a prisoner, and that on such a finding, or on such a warrant (in which the decision is only prima facie evidence at most, and that only until overcome by competent proof), is absolutely conclusive upon the right of this prisoner, or any other person, to walk the streets of his chosen place of residence, whatever his business may be, and whatever the character of the defendant may be, in such manner as he sees fit; and that he shall be taken away from such place and transported to some foreign country on such testimony as that, without the right to a judicial hearing upon the question of whether or not the officer has acted with authority? We say such a proceeding would be monstrous such a decision would be monstrous. It does not make any difoner is now sought to be taken is only thirty, forty or fifty miles away. The principle is the same as though he was indicted in Portland, Me., and requisition made upon the governor of California to transport him across the country, or even a foreign country, upon a prima facie show-

ing of that kind. Term is Relative. "The term prima facie ought not to be matter of dispute. It has a meaning in a court of law. It ought not to be necessary to cite authorities or to argue it, for the purpose of rendering a decision. What is meant by prima facie case? It means simply that until overthrown such will be considered to be the facts. It is prima facie until overthrown, and unless overturned by the offer of other competent proof of course it is conclusive. It is prima facie until competent evidence establishes another proposition, and it is conclusive if no such evidence is offered, and becomconclusive if no competent evidence is in-

troduced to overturn it. "So, on the whole case, this motion will be overruled and the respondent given an exception. The court announces as its conclusion that it will receive evidence upon the question of fact as to whether or not the petitioner in this case is a fugitive from justice, or was a fugitive from justice at the time the governor issued his warrant. The other members of the court may be inclined to express their views upon som questions."

Judge Troup's Remarks At the conclusion of Judge Redick's de livery, Judge Troup said:

"Inasmuch as I concur in the conclusion that have been announced by Judge Redick, it is probably of but very little consequence how I arrived at that conclusion, but I have been asked to express some personal visws in respect to the question before us, and I will do so as briefly as possible.

"I want to say that throughout this en

tire proceeding I have endeavored to have ever present before me the importance and gravity of the question that we are called upon to decide. Important and grave because it involves the personal liberty of a citizen of our state who, it is asked, shall be transported to another state, there to answer for the alleged commission of crime therein. I do not suppose that at at this day, and in this country at least there is anybody who will question the statement that there can be no matter of more importance, except life itself, which can come before a court or tribunal for arbitrament, than that which involves the personal liberty of a human being. And care not, and it matters not, who that individual is. Be he rich or poor, black or white, high or low, good or bad, so long as he is a human being, he is entitled to the benefits and protection which a just and fair administration of the laws of the land in which he lives, affords him. On the other hand, however, it seems to me that it is fair and right to say and believe, that in our country, composed as it is of a union of states, so closely linked together, that each individual state is scarcely less interested and concerned in the perfect obedience to the laws of every other state, and that a just punishmen follow an infraction thereof. is the particular state in which the infraction may have occurred. do I regard the transportation of a citizen from one state to another for the purpose of standing trial for an alleged offense committed in the latter with that same degree of horror which would seem to be felt by some from such a procedure. For he had not had due process of law, beit seems to me that it is very gratifying to know and believe that this well as all of the courts in our land, may truly and justly take judicial knowledge

may be, are the product of a of law because he had civilised ! and enlightened people, and that their only desire is that their laws shall faithfully but humanely administered, and that a just punishment shall follow an infraction thereof, but that no where, and under no circumstances, shall that punishment be of an exceptionally cruel or unusual nature. So that it seems to me that it is fair to presume that a citizen taken from one state to another for the purpose of being tried for an alleged offense committed therein, will be fairly and justly dealt with, and that under the laws and the courts of that state to which he is taken he will receive all or would be entitled to receive at the hands of the courts and under the laws gard the case of State against Clough so of the state of which he happened to be a resident.

Power of the Governor. "As I understand it, the sole power th governor of this state has to extradite one if its citizens is derived from the constitution and laws of the United States. say the sole power, because it is my unqualified opinion that anything that our state itself has enacted upon that subject gives no additional power whatever to the governor than that already conferred by the federal law. That law reposes or en trusts this power exclusively to the execu ive of the state. It might have lodged that power in other officials. It might have given it to the judges or to the courts of the states, but it has not seen fit to do so. It has lodged it exclusively in the hands of the executives of the several states and it prescribes how and when that power shall be exercised. That law provides substantially that when the executive authority of any state shall demand a person as a fugitive from justice from the executive authority of any other state to which that person has fied, and shall further produce to the executive a copy of an indictment found, or an affidavit made before a magformal evidence necessary to constitute istrate, charging such person with a crime, it shall be the duty of that executive of the state to which such person has fled to cause the arrest of that person and deliver him to the agent already appointed fugitive from justice. The only thing that by the demanding state for the purpose of he determined was that the applicant had having him transported to the state from which he has fied. The act itself does not prescribe further the character or amount of testimony, beyond that which I have mentioned, as to what should be before the governor before he shall act, but very early in the history of this law, both the courts of the states and the federal courts decided that there ought to be and must be some testimony of a competent character before

the executive in order to justify him in b

What the Governor May Do.

suing the executive warrant.

"Now, when the matters are presented to him as prescribed by the statute, the governor may demand such testimony as is satisfactory to him. He may demand more than the law requires. He should no and must not, demand less, but when he is satisfied he should issue the warrant and that warrant in itself, by all the au thorities of the land, is held to be prima facie evidence of what? Not prima facil evidence of the truth of the finding of the governor, but prima facie evidence the fact that the proceedings before the governor have been regular. and that the prerequisites the law have been substantially com plied with. But the governor may, in in stances, issue his warrant without having the proceedings before him regular, or without having complied with requisites of the law. And so may the party arrested come into the courts of the jurisdiction of his arrest and say that in this instance such has been done, 'I slaim the governor's warrant is unlawful I ask to come into a court of justice under the writ of habeas corpus and ask that this be inquired into, that the legality of my arrest be investigated.' That in this instance has been done. How far shall that investigation go? The investigation, in my judgment, must be made, and when that investigation proceeds it is to determine whether or not the proceedings before the governor have been regular, and the prerequisites of the law have been complied with; and in the event that it is foun that they have not been, then forthwit the warrant has failed and the prisoner must be discharged. If it is ever renewed it must be under the institution of new proceedings, and not under the warrant already unlawfully issued. The respondent cannot, in the case of a habeas corpus patch up the case and offer to introduce evidence to supply that which he should have given to the governor. He must stand or fall upon the case which he him self has made before the chief executive On the other hand, if it be determined upon this investigation that there was evidence before the governor; that the proceedings before him were regular; that the prerequisites of the law, as prescribed by the onstitution and laws of the United States, nave been complied with, then, in my judgment, the warrant is lawfully issued and the prisoner has been lawfully arrested and must be remanded to the arresting

Fair Construction of Law. "It seems to me that that is a just,

fair and correct construction and interpreation of all of the cases, either state or federal, up to and even including the Hyatt case, decided in 1902, by the court of appeals of New York and later affirmed by the supreme court of the United States, upon this question. If it were otherwise, what would be the procedure? The door would be open to inquire, not whether been regular, but whether or not independent of that he is a fugitive from justice. and thus have virtually determined for himself the defense of alibi which is the merits of the case. That involves in many instances, and probably in this, an examination of scores of witnesses; it involves the transportation of all the witnesses that are informed upon the question from the foreign state, a procedure, it seems to me, entirely without the design contemplation and purpose of the extradition proceedings. And it seems to me that such a course would be entirely subversive of the extradition proceedings as they have been exercised and acquiesced in by the people and the courts of this country for more than a hundred years.

Rights of the Individual. "I do not mean to overlook the fact that the question as raised here, whether or not the defendant, under such circumstances as these, has had due process of law. should want to be the last person, feeling as I do upon that question, by anything that I should do or say, to undervalue that right which every man has to appear and be heard in his own defense. But it seems to me that when a law has been prescribed for certain procedures, as has the extradition law, by the congress of the United States, applicable alike to all persons, and to which all persons are amerable, it seems to me that when the defendant in such a case has the right to make his application, and is permitted to come into a court of justice and inquire whether or not the law which apprehends him has been complied with, in all of its particulars, that he is not in a position to say that he has not had due process of law. It would seem to me to go further than that in a matter like this, would be much the same as would be an individual who was arrested here in our own community to say that cause he had not had the right to defend himself before he bad had his preliminary examination. In other words, that he had not had due process of law because he was of the fact that the laws of every state. not advised in advance that he was to be arrested; that he had not had due process

to defend himself against the arrest before he had been lo county jail. Decision of the Court. "This, we must recollect, is not the occasion of inquiring into the guilt or innocence of the defendant, but purely whether or not he shall be apprehended for the pur-

pose of having his preliminary examination, and all the difference in the case have cited and the case at bar is the difference of the place where the examination shall be held. And so thoroughly convinced was I of the soundness of my judgment in this matter, and the correct inter the consideration and rights that he could pretation of the authorities upon the question, that I was almost inclined to discorecently decided by the supreme court of New Hampshire, a very strong case opposing the view that I have expressed; as a case exceptional in its nature, and so far beyond that which the cases before it had gone that I thought it should not stand as authority against the many before it. when I am presented, as I am, by the case of Bruce against Rayner, a strong opinion by the Fourth circuit court of appeals, a court next to the highest tribunal in our land, I am bound, as I do, to yield my humble and insignificant judgment to the opinion of that eminent court. And it seems to me that no person who can read that opinion can come to a conclusion other than to say that the defendant in this case has a right, irrespective and independent of what the governor may have found, to inquire anew into the question of fact of whether or not he is a fugitive from justice. I regard that opinion as one that has virtually placed a construction or an interpretation upon all of the decisions upon this question that have gone before it, and it unquestionably decides and gives this court the authority for announcing the rule that a defendant under such circum stances as the case at bar has the right in a writ of habeas corpus to inquire into and determine whether or not in fact be is a fugitive from justice.

"Be that I conclude that my theory and my opinion have been wrong, that I have placed a wrong construction upon the opin ions, either state or federal, that have preceded this case, and that the opinion of the circuit court of appeals, only one door removed from the supreme court of the United States, places upon it the right construction, and I so hold and decide."

Judge Day's Position. Following the remarks made by Judge

Troup, Judge Day spoke as follows: "I did not intend to announce my personal views in respect to the case being considered by the court, but Judge Redick has announced that we were not all agreed upon the methods and reasons by which we arrived at the conclusions which we all agree upon. Since the two judges have announced their opinions and stated their reasons, I deem it in justice to myself and perhaps to the attorneys who are interested in the case, to state in a very brief manner the manner in which I have reached the conclusions which we all have agreed upon

"It was argued before us that the two sections of the statute of our own state with reference to this subject give the governor the power to issue an order of exradition upon evidence such as might seem proper to him; that the provision of the constitution of the United States that whenever a person is charged in any state with treason, folony or other crime, who shall flee from the justice and be found in another state, shall on demand of the executive of the state from which he fied be delivered or be removed to the state having jurisdiction of the crime, was a matter which affected the right of the state to the individual, and did not confer upon the individual himself any rights; that his rights must be determined the statutes of the state, but that the state under this constitutional provision sould not decline to deliver him up when the facts shown came clearly within this provision of the constitution of the United States, and which I have just quoted

Right of the Individual. Upon an examination of the authorities (I might say that we spent all day yesterday in examining them) the foundaon of practically all of the cases is based upon this identical provision of the constitution, and my construction of the pinions which have been determined is his: That this constitutional provision confers upon the individual the right which he has-the right to demand that it be clearly complied with in his favor before ne can be extradited from the state, and that if the governor, in the exercise of the power vested in him by this provision of the statute and the acts of congress should see fit to determine that he should be extradited, and the fact was not established that he was a fugitive from the justice of the state, that he could apply to the courts for the purpose of having that fact determined as to whether or not he had been, or whether the facts showed that he had come clearly within the provision of that article of the constitution.

"Another fact which I have laid a great deal of stress upon, and that is this: It is conceded that a hearing before the governor on these formal applications to him are purely ex parte matters. In other words, it is not necessary under the law that he give notice of a hearing before him, and the reason for the failure of notice is apparent to every one. If he should give notice to a person charged with an offense that a hearing was to be had bethese proceedings before the governor had fore him on an application for extradition as to whether or not such person should be extradited, before he was arrested, it is plain to all that the person who was sought to be apprehended, if he proper to be made only at the local upon to do so, could fice and conceal himself. so that the very purpose of the extradition might be defeated. So, I say, it is conceded that these applications are purely of an ex parte character. The governor may, if in his discretion he thinks it proper, serve notice upon the party, and permit him, if he sees fit to do so, to appear before him. But it is not a matter of right which the accused can demand neither is it compulsory upon the governor that the opportunity to appear before him be given, but in the exercise of his wise discretion he can give permission to the accused to be present and be heard. So that it becomes apparent that a man may be arrested and deprived of his liberty without any opportunity to present his cause.

Accused May Always Be Heard "There is another provision of the constitution which seems to have a very important bearing right here, and that is that no man shall be deprived of his life, liberty or property without due process of of law, and the courts are practically unanimous in the determination of what is meant by due process of law. It is a man's right to be heard in his own behalf. A person is arrested upon the warrant a governor without any opportunity or right to be heard. You have deprived him of his liberty without due process of law It seems to me that when we bear in mind these two provisions of the constitution of the United States, which in my judgment are passed for the protection of the individual, that you could not state the finding of a governor could not be reviewed by a court, and I have concurred in the conclusions which our brothers have both announced, that where a person has been apprehended, that he may raise the question of fact as to whether or not he be a fugitive from justice. The governor, in passing upon the question of whether

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