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HISTORY OF JOSEPH SMITH.

JANUARY, 1843.

Jan —Thursday, 5.—At 9 a.m. repaired to the court room, which was crowded with spectators anxious "to behold the Prophet," and hear the decision of Judge Pope, who soon took his seat, accompanied by half-a-cozen ladies, and gave the following

OPINION:

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. The able arguments of the counsel for the respective parties have been of great assistance in the examination of the important question arising in this cause.

When the patriots and wise men who framed our Constitution were in anxious deliberation to form a perfect union among the States of the confederacy, two great sources of discord presented themselves to their consideration, the commerce between the States and fugitives from justice and labor.

The border collisions in other countries have been seen to be a fruitful source of war and bloodshed, and most wisely did the constitution confer upon the national government the regulation of those matters because of its exemption from the excited passions awakened by conflicts between neighboring States, and its ability alone to adopt a uniform rule and establish uniform laws among all the States in those cases.

This case presents the important question arising under the Constitution and laws of the United States, whether a citizen of the State of Illinois can be transported from his own State to the State of Missouri, to be there tried for a crime, which if he ever committed, was committed in the State of Illinois; whether he can be transported to Missouri, as a fugitive from justice when he has never fled from that State.

Joseph Smith is before the court on habeas corpus directed to the sheriff of Sangamon count., State of Illinois. The return shows that he is in custody under a warrant from the executive of Illinois, professedly issued in pursuance of the Constitution and laws of the United States, and of the State of Illinois, ordering said Smith to be delivered to the agent of the executive of Missouri, who had demanded him as a fugitive from justice under the 2nd section, 4th article of the Constitution of the United States and the act of Congress passed to carry into effect that article.

The article is in these words, viz: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the exective authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

The act of Congress made to carry into effect this article directs that the demand be made on the executive of the State where the offender is found, and prescribes the proof to support the demand, viz.: indictment or affidavit.

The court deemed it respectful to inform the governor and attorney-general of the State of Illinois of the action upon the habeas corpus. On the day appointed for the hearing, the attorney general for the State of Illinois appeared and denied the jurisdiction of the court to grant the habeas corpus. 1st, Because the warrant was not issued under color or by authority of the United States, but by the State of Illinois. 2nd, Because no habeas corpus can issue in this case from either the federal or State courts to inquire into facts behind the writ.

In support of the first point, a law of Illinois was read declaring that whenever the executive of any other State shall demand of the executive of this State any person as a fugitive from justice, and shall have complied with the requisition of the act of Congress in that case made and provided, it shall be the duty of the executive of this State to issue his warrant to apprehend the said fugitive, &c. It would seem that this act does not purport to confer any additional power upon the executive of this State independent of the power conferred by the Constitution and laws of the United States, but to make it the duty of the executive to obey and carry into effect the act of Congress.

The warrant on its face purports to be issued in pursuance of the Constitution and laws of the United States, as well as of the State of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States. It must be proved that the United States could not confer the power on the executive of Illinois. Because if Congress could and did confer it, no act of Illinois could take it away, for the reason that the Constitution and laws of the United States passed in pursuance of it, and treaties, are the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. This is enough to dispose of that point.

If the legislature of Illinois, as is probable, intended to make it the *duty* of the governor to exercise the power granted by Congress and no more, the executive would be acting by authority of the United States. It may be that the legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more, the law is unconstitutional and void, 16 Peters, 617 Prigg vs. Pennsylvania.

In supporting the second point the attorney general seemed to urge that there was greater sanctity in a warrant issued by the governor than by an inferior officer. The court cannot assent to this distinction.

This is a government of laws, which prescribes a rule of action as obligatory upon the governer as upon the most obscure officer. The character and purposes of the *habeas corpus* are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English history must know that it was extorted from an arbitrary monarch and that it was hailed as a second magna charter, and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles the Second. It was indeed a magnificent achievement over arbitrary power. Magna charta established the principles of liberty, the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of State as readily as from those committed by subordinate officers. The warrant of the king and his secretary of state could claim no more exemption from that searching inquiry, "The cause of his caption and detention," than a warrant granted by a justice of the peace. It is contended that the United States is a government of granted powers and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the second section of the third article of the Constitution of the United States. "The judicial power shall extend to all cases in law or equity arising under this constitution, the laws of the United States, and treaties made, and which shall be made under their authority."

The matter under consideration presents a *case* arising under the 2nd section, 4th article of the Constitution of the United States, and the act of Congress of February 12th, 1793, to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States) power to issue the writ of habeas corpus, when a person is confined, "under color of, or by the authority of the United States;" Smith is in custody under color of and by authority of the 2nd section, 4th article of the Constitution of the United States. As to the instrument employed or authorized to carry into effect that article of the Constitution (as he derives from it the authority to issue the warrant) he must be regarded as acting by the authority of the United States. The power is not official in the governor, but personal. It might have been granted to any one else by name, but considerations of convenience and policy recommended the selection of the executive, who never dies. The citizens of the States are citizens of the United States; hence the United States are as much bound to afford them protection in their sphere as the States are in theirs.

This court has jurisdiction; whether the State courts have jurisdiction or not, this court is not called upon to decide. The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the governor of Illinois, under the 2nd section of the 4th article of the Constitution of the United States, relative to fugitives from justice and the act of Congress passed to carry it into effect. The article of the Constitution does not designate the person upon whom the demand for the fugitive shall be made, nor does it prescribe the proof upon which he shall act. But Congress has done so. The proof is "An indictment or affidavit," to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit. The material part of the latter is in these words, viz.:

"Lilburn W. Boggs, who being duly sworn, doth depose and say, that on the night of the 6th day of May, 1842, while sitting in his dwelling in the town of Independence, in the county of Jackson, he was shot with intent to kill, and that his life was despaired of for several days, and that he believes, and has good reason to believe from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessory before the fact of the intended murder, and that the said Joseph Smith is a citizen or resident of the State of Illinois."

This affidavit is certified by the governor of Missouri to be authentic. The affidavit being thus verified furnished the only evidence upon which the governor of Illinois could act. Smith presented affidavits proving that he was not in Missouri at the date of the shooting of Boggs.

This testimony was objected to by the attorney general of Illinois, on the ground that the court could not look behind the return. The court deems it unnecessary to decide that point, inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit.

To authorise the arrest in this case the affidavit should have stated distinctly:—1st, That Smith had committed a crime; 2nd, That he committed it in Missouri.

It must appear that he fled from Missouri to authorise the governor of Missouri to demand him, as none other than the governor of the State from which he *fled* can make the demand. He could not have fled from justice unless he committed a crime, which does not appear. It must appear that the crime was committed in Missouri to warrant the governor of Illinois in ordering him to be sent to Missouri for trial.

The 2nd section, 4th article, declares he "shall be removed to the State having jurisdiction of the crime." As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that State, unless it can be maintained that the State of Missouri can entertain jurisdiction of crimes committed in other States. The affirmative of this proposition was taken in the argument with a zeal *indicating sincerity*. But no adjudged case or dictum was adduced in support of it. The court conceives that none can be; let it be tested by principle.

Man in a state of nature is a sovereign, with all the prerogatives of king, lords and commons. He may declare war and make peace, and as nations often do who "feel power and forget right," may oppress, rob and subjugate his weaker and unoffending neighbors. He unites in his person the legislative, judicial and executive power. "Can do no wrong" because there is none to hold him to account. But when he unites himself with a community, he lays down all the prerogatives of sovereign (except self defence) and becomes a subject. He owes obedience to its laws and the judgments of its tribunals, which he is supposed to have participated in establishing either directly or indirectly. He surrenders also the right of self redress.

In consideration of all which he is entitled to the ægis of that community to defend him from wrongs. He takes upon himself no allegiance to any other community, so owes it no obedience, and therefore cannot disobey it. None other than his own sovereign can prescribe a rule of action to him. Each sovereign regulates the conduct of its subjects, and they may be punished upon the assumption that they know the rule and have consented to be governed by it; it would be a gross violation of the social compact if the State were to deliver up one of its citizens to be tried and punished by a foreign State to which he owes no allegiance, and whose laws were never binding on him. No State can or will do it.

In the absence of the constitutional provision the State of Missouri would stand on this subject in the same relation to the State of Illinois that Spain does to England. In this particular the States are independent of each other; a criminal fugitive from one State to another could not be claimed as of right to be given up.

It is most true, as mentioned by writers on the laws of nations, that every State *is* responsible to its neighbors for the conduct of *its* citizens, so far as their conduct violates the principles of good neighborhood: so it is among private individuals. But for this, the inviolability of territory or private dwelling could not be maintained. This obligation creates the right, and makes it the duty of the State to impose such restraints upon the citizen as the occasion demands.

It was in the performance of this duty that the United States passed laws to restrain citizens of the United States from setting on foot and fitting out military expeditions against their neighbors. While the violators of this law kept themselves within the United States, their conduct was cognizable in the courts of the United States and not of the offended State, even if the means provided had assisted in the invasion of the foreign State. A demand by the injured State upon the United States for the offenders whose operations were in their own country, would be answered, that the United States laws alone could act upon them, and that as a good neighbor it would punish them.

It is the duty of the State of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise any person to commit a crime in her sister state; any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there, and a plea that he was a citizen of another state would not avail him. If he escape he may be surrendered to Missouri for trial. But when the offence is perpetrated in Illinois, the only right of Missouri, is to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect, for the neglect of it, nations go to war and violate territory.

The court must hold that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessary before the fact, in the State of Missouri, nor that he committed a crime in Missouri; therefore he did not commit the crime in Missouri, did not flee from Missouri to avoid punishment.

Again, the affidavit charges the shooting on the 6th of May, in the county of Jackson, and State of Missouri, "that he believes, and has good reason to believe, from evidence and information now (then) in his possession, that Joseph Smith was accessary before the fact, and is a resident or citizen of Illinois."

There are several objections to this. Mr. Boggs having the "evidence and information in his possession," should have incorporated it in the affidavit to enable the court to judge of their sufficiency to support his "belief."

Again, he swears to a legal conclusion when he says that Smith was *accessary before the fact*. What acts constitute a man an accessary in a question of law are not always of easy solution. Mr. Boggs' opinion then is not authority. He should have given the facts. He should have shown that they were committed in Missouri, to enable the court to test them by the laws of Missouri, to see if they amounted to a crime.

Again, the affidavit is fatally defective in this, that Boggs swears to his *belief*. The language in the Constitution is "charged with felony, or other crime." Is the Constitution satisfied with a *charge* upon suspicion?

It is to be regretted that no American adjudged case has been cited to guide the court in expounding this article. Language is ever interpreted by the subject matter. If the object were to arrest a man near home, and there were fears of escape if the movement to detain him for examination were known, the word *charged* might warrant the issuing of a capias on *suspicion*. Rudyard (reported in Skinner 676) was committed to Newgate for refusing to give bail for his good behavior, and was brought before common pleas on habeas corpus. The return was that he had been complained of for exciting the subjects to disobedience of the laws against *seditious conventicles*, and upon examination they found *cause* to suspect him. Vauhan, chief justice, "Tyrell and Archer against Wild, held the return insufficient, 1st, because it did not appear but that he might abet frequenters of conventicles in the way the law allows. 2nd. To say that he was complained of or was examined, is no proof of his guilt. And then to say that he had cause to suspect him is too cautious; for who can tell what they count a cause of *suspicion*, and how can that ever be tried? At this rate they would have arbitrary power upon their own allegation, to commit whom they pleased."

From this case it appears that suspicion does not warrant a commitment, and that all legal intendments are to avail the prisoner. That the return is to be most strictly construed in favor of liberty. If suspicion in the foregoing case did not warrant a commitment in London by its officers, of a citizen of London, might not the objection be urged with greater force against the commitment of a citizen of our state to be transmitted to another on *suspicion?*

No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the Constitution of the United States. It is proposed to deprive a freeman of his liberty; to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him; separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appaling enough to challenge the strictest analysis.

The framers of the Constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that citizens of different states, might resort to the federal courts in civil causes. How much more important that the criminal have confidence in his judge and jury. Therefore before the capias is issued, the officers should see that the case is made out to warrant it.

Again, Boggs was shot on the 6th of May.—The affidavit was made on the 25th of July following. Here was time for enquiry, which would confirm into certainty, or dissipate his suspicions. He had time to collect facts to be had before a grand jury or be incorporated in his affidavit.

The court is bound to assume that this would have been the course of Mr. Boggs; but that his suspicions were light and unsatisfactory. The affidavit is insufficient, 1st, because it is not positive; 2nd, because it charges no crime; 3rd, it charges no crime committed in the State of Missouri. Therefore he did not flee from the justice of the State of Missouri, nor has he taken refuge in the State of Illinois.