The Law of Necessity

AS APPLIED IN

STATE OF ARIZONA,
vs.
H. E. WOOTTON,

Bisbee I. W. W. Deportation Case

Statement of Case and Offer of Proof by Frank E. Curley of Tucson, Arizona

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Argument on the Law of Necessity by William H. Burges, of El Paso Texas

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Opinion of Judge Samuel L. Pattee

Instruction to Jury by Judge Pattee

Verdict

Statement of Jurors

PREFACE

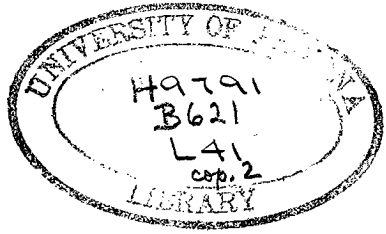
The case of STATE OF ARIZONA VS. H. E. WOOTTON (generally known as the "Bisbee Deportation case") was the result of prosecutions instituted by County Attorney Robert N. French of Cochise County, against several hundred citizens of the Warren District, charging them with the offense of "kidnapping," growing out of the deportation of about eleven hundred I. W. W.'s and sympathizers from the Warren District to Columbus, New Mexico, by the citizens of the Warren District on July 12, 1917.

On account of the disqualification of the judge of the Superior Court of Cochise County, Judge Samuel L. Pattee, judge of the Superior Court of Pima County, was, by agreement between counsel for the state and defense, called in and presided at the trial of the case.

At the close of the evidence introduced on behalf of the prosecution, the paramount issue in the case was presented to the Court by counsel for the defense in the form of an offer of proof, or statement of defense, by which the right of a community to defend itself when threatened with an overwhelming peril (known as the law of necessity), was put in issue. Objection was interposed by the County Attorney to the evidence offered and the matter was argued at length. Many days were devoted by the Court to a study of the authorities cited, after which an opinion in writing was delivered and filed by the Court.

Interest in the trial and outcome of this litigation throughout the country, as evidenced by innumerable inquiries and requests for information, has prompted the compilation of the interesting features bearing upon the law of necessity as applied in this case, which includes the state of defense and offer of proof as made by Frank E. Curley, of counsel for defense; argument on law of necessity as applicable to the facts of this case, as made by William H. Burges, of counsel for defense; opinion of Judge Samuel L. Pattee on admissibility of evidence offered; instructions to jury by Judge Pattee, and verdict of the jury.

After the close of the trial, members of the jury were interviewed by representatives of the press and each gave out a brief statement expressing his individual views of the case, which appeared in the newspapers at that time. These statements are deemed of interest in this connection and are included herein.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IN THE

SUPERIOR COURT

OF

Cochise County, State of Arizona

STATE OF ARIZONA,
Plaintiff.

vs.

H. E. WOOTTON,
Defendant.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths do find the Defendant not guilty.

J. O. CALHOUN,
Foreman.

STATEMENTS BY JURORS AFTER THE TRIAL

J. O. CALHOUN, OF DOUGLAS (Foreman of the Jury): "The verdict of the jury is a vindication of the deportation, if not in the legal sense, at least in the moral sense. No man could listen to the evidence adduced during the trial without feeling that the people of Bisbee were in imminent danger, and that, if their fears were ungrounded, yet they were apparently real and pressing. The essence of the law of necessity, as explained and laid down to the jury by Judge Pattee, is that it protects a man in his invasion of the rights of others when his fear for his own safety or welfare is great enough to force him to a drastic step, and this fear does not have to be a fear of really existent dangers but only of apparent danger when the appearance of that danger is so compelling as to be real to him who views it.

"That all the members of the jury must have had this thought when they made out their first and only ballot is shown, in my estima-

tion, by the quickness and unanimity of their decision. As the evidence showed beyond the shadow of doubt, the people of Bisbee, on the morning of July 12, 1917, believed they were in danger, and this belief of danger, outlined on the witness stand, was the background to the facts in the Wootton case—a background that could not be ignored.

"After such a trial under such a judge, and with the thought of the singleness of the decision of the jury, I believe it would be morally wrong for the county attorney's office to bring up another of the deportation cases for trial. Mr. French made a good fight—a fight that he may well be proud of—but the facts were against him, and, in the judgment of all the jurors, I believe, the facts in any other deportation case must be against him also.

"The members of the jury entertain the highest sentiments of esteem for Judge Pattee for his courtesy and his consideration for their comfort and welfare."

"On behalf of the jury I may say they felt the force of the conscientious rulings of the judge. When the people realize that he had nothing to guide him—that he was cutting a trail through an unexplored forest, they will feel their efforts to criticise him adversely must be unavailing, if criticism there be. I think the county was fortunate in having a man of his fair-mindedness and conscientious faithfulness preside as trial judge in the deportation cases. When the waves of partisan feeling run at high tide, and when the souls of men are brought face to face with matters as serious as those arising out of the trouble in Bisbee in 1917, then is the time of calm, deliberate, unbiased judgment to prevail. And when we realize, again, that a trial judge, presiding in such a case, is put in crucible fire —a position which he has not sought but which he could not avoid— it is more than unjust to be critical of his acts."

LEE HOLLAND, OF APACHE: "Behind the presentation of the evidence in the Wootton case, and regardless of the fact that F. W. Brown had elected to be deported, the members of the jury saw that the necessity for the deportation existed. This could not be ignored. The testimony of the witnesses, not only for the defense but also for the prosecution, showed conclusively that Bisbee had become a volcano, liable to burst into eruption without a minute's warning.

Not to consider this fact was as impossible as not to consider the fact that a trial was in progress. Every juryman had this thought. It ran through the whole time of the introduction of evidence, and the ominous quiet, as said by Sheriff Wheeler, had an echo in our minds as the testimony was unfolded.

"I cannot imagine that the district attorney's office will bring up another case. The decision in this one, taken without discussion, was too clear-cut and too positive for its meaning to be misunderstood. The cost of the first trial was undoubtedly excessive, and I believe that the people of Cochise County feel that another trial must simply be a repetition of the first.

"I desire also to say that the impartiality and fairness of Judge Pattee, his clear-cut decisions, and the fact that he never made a decision without stating in the plainest language his reasons for his conclusions, had a great effect upon myself and the other members of the jury. He not only was fair, but he was, in some instances, a most efficient assistant to the prosecution when, in the minds of the jurors, the state was getting beyond its depth."

ANDREW MORTENSON, OF DOUGLAS: "It was shown beyond the possibility of doubt that the people of Bisbee were menaced, and that they took the only step that they believed could furnish relief. As Mr. Burges said, when 1800 men, none of whom had been criminal before, none of whom had been criminal since, arose on the morning of July 12, 1917, to deport more than 1100 of their neighbors, there was a reason behind it, and that reason the jurors could not overlook, no matter what the particular issues were in the Wotton case. I have only the highest consideration for Judge Pattee, and believe that his fair-mindedness, his consideration and his logical mind have been the biggest assets in the deportation case."

JOHN JONES, SUNNYSIDE CATTLEMAN: "I went on the jury with only a slight knowledge of what happened over in Bisbee on July 12, 1917. After listening to the evidence presented in the Wootton case I feel that what happened there was fully justified under the law of necessity. I believe that any unbiased jury would have been convinced that the deportation was the only available means to avert bloodshed and the destruction of property in the Warren District."

VI

HENRY RICHARDS, POULTRY RAISER NEAR HEREFORD: "It is my opinion that the evidence showed conclusively that the threats of the strikers were not merely idle boasts and the deportation prevented destruction of property and loss of life in the district."

W. L. PATTERSON, BENSON FARMER: "Although I am not certain that the law of necessity applied to Fred W. Brown, I will say that after listening to the evidence of both sides I believe that as a whole the deportation was necessary. The evidence showed, in my opinion, that the citizens of Bisbee only beat the strikers to it by a few days."

AMOS GRETTON, DOUGLAS: "There could be no doubt in the mind of any reasonable man that the people of Bisbee were menaced and that they took the only way out of the danger as the necessities of the circumstances held out to them."

FRANK BROWN, OF WILLCOX: "I think the only regret we all had was that we could not settle all the cases with that one ballot. After hearing and considering the evidence from both sides I, for one, feel that Harry Wheeler and the citizens of the Warren District did what they thought was right and necessary."

B. K. RIGGS, ELDORADO CATTLEMAN: "After hearing all the evidence it does not appear to me that without troops the Sheriff and people of Bisbee could have taken any other action than the deportation without serious trouble. I think that we all wished that our one verdict could have spiked the prosecution of all the cases for it looks to me now like further prosecution will mean only the opening of an old sore."

JESSE AMALONG, ELDORADO CATTLEMAN: "We had each cast our vote without knowing how the other fellow was voting and it certainly was a relief when the votes were checked and we found that all twelve of us had reached the same decision after hearing all the evidence and arguments of both sides. It is too bad that the one case could not have settled the whole thing."

CLIFFORD WEESE, OF SERVOSS: "Although I have served on three juries I had never heard of the law of necessity before, but I was convinced, after hearing all of the Wootton case, that such a law applied to the situation at Bisbee. Even if there had been no question whether or not Brown had the chance to get out of the line

I think the result would have been the same, at least as far as I am concerned."

JESSE N. CURTIS, HAPPY CAMP CANYON: "I certainly was glad when we all agreed on the first ballot. When I went on the jury I knew nothing about the case, but at the end of the trial, after listening to every word said by both sides, I made up my mind that Wootton was not guilty. I don't think any amount of deliberation in the jury room, had we not all agreed, could have altered my decision."

STATEMENT OF CASE BY FRANK E. CURLEY OF COUNSEL FOR DEFENSE

We expect to prove that in or about the year 1908, a conspiracy was entered into in the United States at that time between William D. Haywood, a man by the name of Vincent St. John and a great many other, running probably into the thousands, but the names of whom are unknown to defendant, by which and by reason of which they conspired feloniously together to overthrow the government of the United States; that it was to defeat the government in the enforcement of its laws and to ultimately do away with it, and to ultimately end and do away witth the private ownership of property, and all by force. That it was not the purpose of said conspirators to acquire or deprive the owners of property of their said property by or through any legal or lawful methods or to change the form and structure of the government by or through any legal or lawful methods, but, upon the contrary, it was the purpose of said conspirators to so acquire and to deprive the then and now owners of all private property of their said property and to overthrow and destroy the then and present government and form of government of the United States of America, by force.

We expect to show that in the furtherance of the objects of that conspiracy, those then engaged in it, proceeded to apply the axe at the very roots of civilization in an effort to rob those who could not be reached by an insidious propaganda, of the benefits of a religion, rendering them less immune to the virus of anti-patriotism and anti-government. That since the creation of said conspiracy, the said conspirators and those who have since joined such conspiracy, and in furtherance of the objects thereof, have, at all times, continuously, down to the present day, consistently and persistently disseminated a propaganda of misrepresentation and falsehood by means of newspapers, circulars, pamphlets, speeches, correspondence and the like, and calculated to, and which did, in the minds of many, create dissatisfaction with and aversion toward all organized government as an institution and the government of the United States in particular and toward those who support the said government and believe in the private ownership of property and possess property in private ownership.

That some of the methods advocated and employed by said conspirators in the furtherance of the objects of said conspiracy in order to force, intimidate and coerce those into submission who could not be reached through other propaganda, consisted of the continual and persistent use and employment of unlawful, tortuous and forcible means and methods involving threats, assaults, injuries and intimidation and murders upon the persons and injury and destruction of the property of others.

We expect to show that from the time of the creation of said conspiracy down to the 12th day of July, 1917, the said conspirators had, throughout the United States and more particularly in the western states and in the furtherance of the objects of said conspiracy, destroyed private property with a value running into the millions of dollars, and had destroyed many lives.

We expect to show that said conspiracy, from the time of its creation, had grown until its membership and those engaged in the furtherance of the objects of such conspiracy, exceeded on the 12th day of July, 1917, two hundred thousand members.

That in furtherance of the objects of said conspiracy, the said conspirators had, prior to the said 12th day of July, 1917, inaugurated a series of industrial strikes throughout the United States, and especially in the lumber and copper mining districts of the United States, well knowing, as they did during said period well know and intend, that the necessary effect of their so doing would be, as it in fact was, to hinder and delay and in part to prevent the execution of the laws of the United States, and to obstruct and prevent the prosecution by the United States of its war against the Imperial German Government, through interference with the production and manufacture of required articles, namely: munitions, ships, fuel, subsistence supplies, clothing, shelter and equipment required and necessary for the military and naval forces of the United States in carrying on its said war. That one of the purposes of said conspirators in inaugurating and carrying on this series of strikes that I have mentioned, was to discourage and obstruct the prosecution by the United States of the war then existing between the United States and Germany, and to, and which did, prevent, hinder and delay the enforcement of the laws of the United States enacted to authorize

the President to increase temporarily the military establishment of the United States by diminishing the production of copper, lumber and food supplies, and thereby interfering with the production and manufacture of munitions, ships, supplies and equipment required and necessary for the military and naval forces of the United States, and unless and until the United Sttates should suspend or abandon the operation and enforcement of its laws providing for registration, selection and drafting of persons available for military service, and unless and until persons then in custody of the United States for violation of said registration, selection and draft laws be released.

In other words, we expect to show that the demands made upon the copper companies of the Warren District in June, 1917, and just prior to the calling of the strike in said district by the Industrial Workers of the World, commonly known as "I. W. W.," on or about the 26th day of June, 1917, were not made with the idea or purpose of securing increased wages or better working conditions, but that they were pure and unadulterated bunk concocted and put forward by a lot of disloyal, un-American anarchists, who were members of said conspiracy, as a screen behind which to hide their efforts and activities in bringing about the defeat of the United States in its war against Germany and the ultimate overthrow of the United States Government.

We expect to show that what, in July, 1917, and for many years prior thereto, was generally known throughout the State of Arizona and the Southwest generally, as the Warren District in this county, and during all of such period of time, was a copper mining district within which is, and at such times was, situated the City of Bisbee, the towns of Warren, Lowell and Don Luis, and the mines, mining claims and properties, mills and works of the Calumet & Arizona Mining Company, Copper Queen Consolidatted Mining Company, the Phelps Dodge Corporation, Shattuck-Arizona Copper Company, the Denn-Arizona Copper Company and many smaller companies. That the population of said Warren District on said July 12, 1917, was in excess of twenty-five thousand people; that the assessed value of the property for the purpose of taxation within that district for the year 1917 was in excess of one hundred million dollars. That substantially, the entire population of said Warren District was on

said July 12th, 1917, and in fact has always been, either connected with or dependent upon the copper industry of said district and upon the continued operation and production of the said industry for their support and maintenance; that during the year next preceding July 12, 1917, more than one hundred and seventy-five million pounds of copper or more than one-tenth of all the copper produced throughout the world during that period, had been produced from the said Warren District, and that a daily average of more than forty-five hundred men had been engaged in such production.

We expect to show that on or about June 26, 1917, one of these series of I. W. W. anti-conscription, anti-war and anti-government strikes was called by said conspirators in the Warren District and was being carried on by them on the 12th day of July, 1917, and at the time of the alleged kidnapping complained of in the information filed herein. As I stated before, we expect to show that the so-called Bisbee strike was not called for the purpose of securing better working conditions or higher wages, but was called for the sole purpose of embarrassing and defeating the United States Government in the prosecution of its war against Germany, and as one of its steps in the destruction of the private ownership of property, and that such purposes were admittted by those responsible for and in charge of such strike. We expect to show that the strike in Bisbee was but one of a well planned series of strikes called and then being carried on by said conspirators throughout the United States in an effort to accomplish such purpose.

We expect to show that in the furtherance of the objects of said conspiracy, the said conspirators were, upon the said 12th day of July, 1917, and at the time of the alleged kidnapping complained of in the information herein, gathering in the said Warren District in great numbers and had, just prior to said 12th day of July, 1917, gathered in said Warren District in great numbers, claimed by said conspirators to be in excess of three thousand, for the purpose of destroying the lives and property of persons within said Warren District, including defendant and defendant's wife and children.

We expect to show that in furtherance of the objects of said conspiracy, the said conspiratotrs had, just prior to said 12th day of July, 1917, assaulted and, from time to time, were continuing

to assault many persons in said Warren District other than said conspirators, and that, prior to said 12th day of July, 1917, had stored and hid out, within said Warren District, large quantities of dynamite and other high explosives for the purpose of destroying the lives and property of persons then within said Warren District other than said conspirators and had threatened to so destroy, and it was the then avowed purpose of said conspirators to so destroy the lives and property of such persons within said Warren District other than said conspirators, upon or immediately following said 12th day of July, 1917.

We expect to show that on the evening of July 11th, 1917, A. S. Embree, one of the said conspirators and one of the recognized leaders of all of said conspirators and a member of the executive committee in charge of the strike then being so carried on by said conspirators and a man high in the councils and activities of the I. W. W. organization, notified Captain Harry C. Wheeler, then the duly elected, qualified and acting sheriff of Cochise County, and then charged with the duty of protecting the lives and property of the people then within the said Warren District, that he, Embree, would no longer be responsible for the acts and conduct of his men, referring to the others of said conspirators, or words of like import.

We expect to show that said consiprators, just prior to said 12th day of July, 1917, stated that they had large quantities of firearms and ammunition hid out within the Warren District for the purpose of destroying the lives of persons other than said conspirators in said Warren District.

We expect to show that on the said 12th day of July, 1917, and at the time of the alleged kidnapping as in said information complained of, there was then a reasonable ground on the part of Sheriff Wheeler and those then acting with him, including defendant, to apprehend a design on the part of such conspirators to commit many felonies, namely, a riot as defined by the laws of Arizona, treason as defined by the laws of Arizona, a conspiracy to commit a felony as defined by the laws of Arizona, and a conspiracy to curtail and advocate the curtailment of production in this country of things and products necessary and essential to the prosecution of the war then engaged in between the United States and the Imperial German

Government, as defined by the laws of the United States, and to do great bodily harm and to destroy the lives and property ot persons then within said Warren District other than said conspirators, including defendant and his wife and children. That on said 12th day of July, 1917, there was imminent danger of such design being accomplished.

We expect to show that the threats and conditions heretofore referred to were, just prior to the 12th day of July, 1917, conveyed to Sheriff Wheeler and to those acting with him on the 12th day of July, 1917, including defendant, and at the time of the alleged kidnapping as set out in the information herein by persons in whom he and they had confidence and believed, and that such information was of a character that any reasonably prudent man or set of men was and were justified in believing and acting upon; that acting upon such knowledge and belief then had, Sheriff Wheeler did, just prior to the said 12th day of July, 1917, wire the then Governor of the State of Arizona that he anticipated great property loss and bloodshed and did request the Governor to use his influence to have United States troops sent into the Warren District to take charge of the situation and prevent bloodshed, the said Sheriff then knowing that there were no state troops then available or subject to the orders of the Governor; that the Sheriff also wired those in charge of and empowered with the direction of Federal troops on behalf of the United States Government a similar request, but that on the said 12th day of July, 1917, and at the time of the alleged kidnapping as complained of in the information herein, no troops had been sent into the said Warren District to protect the lives and property of persons then within said district from death and injury then imminent and being threatened by said conspirators.

We expect to show that the accomplishment of the objects and purposes of such conspiracy by said conspirators would not only have resulted in the loss of life and property in the Warren District, but would, as Sheriff Wheeler believed and those acting with him on the 12th day of July, 1917, including defendant, believed at the time of the alleged kidnapping as set out and complained of in the information herein, and as reasonably prudent persons were justified in believing, have resulted in the ultimate defeat of the United States

Government and its Allies in their war then being carried on against the Imperial German Government.

We expect to show that the jails in this county were inadequate within which to confine the said conspirators or any great number thereof, and that there were no jails within Cochise County where said conspirators could have been so confined; that it was at that time the avowed purpose and policy of said conspirators to allow themselves to be arrested in sufficient numbers to fill the jails and thereby render it impossible to further confine other of said conspirators, and thereby rendering the officers helpless in attempted arrests and in preventing the committing of crimes, and with such information in mind and in view of the threats and avowed policies of said conspirators and their character, Sheriff Wheeler and those acting with him, including defendant, on the said 12th day of July, 1917, and at the time of the alleged kidnapping as set out and complained of in the complaint herein, believed, and as prduent persons were justified in believing that any attempt upon their part to arrest the said conspirators and confine them at any point within Cochise County, would result in greater numbers of said conspirators coming to their aid and in releasing them and would result in the loss of many lives and the ultimate carrying out of the objects and purposes of said conspiracy as heretofore set out.

We expect to show that from the threats made and conditions then existing in the said Warren District and the acts of the said conspirators in acquiring the said dynamite and other high explosives and firearms and ammunition as heretofore detailed, and in view of the fact that great numbers of said conspirators were then and upon the said 12th day of July, 1917, continuing to gather and assemble in the said district in greater numbers for the purpose of the accomplishment of the objects of said conspiracy, the said Sheriff and those acting with him on the said 12th day of July, 1917, and at the time of the alleged kidnapping as set out and complained of in the information herein, including the defendant, believed, and as reasonably prudent men were justified in believing, that immediate action was necessary in order to save the lives and property of the persons within the Warren District from destruction at the hands of said conspirators, that it was necessary that said conspirators be

immediately removed from the said Warren District and delivered over to some organized authority sufficient in number and sufficiently equipped to not only detain the said conspirators and prevent their return into the said Warren District for the purpose of carrying out the objects of said conspiracy, but also to prevent other members of said conspiracy assembling in great numbers and releasing the said conspirators and enabling them to carry out the objects and purposes of said conspiracy. We expect to show that Sheriff Wheeler and those acting with him as before stated, then believed and were reasonably justified, as prudent men, in believing, that at the time of the alleged kidnapping as complained of and set out in the information herein, there was no other way in which the lives and property of the persons within the said Warren District could be saved from destruction at the hands of said conspirators, unless it would be by destroying the lives of said conspirators, which, in turn, must necessarily have resulted in the destruction of many lives within said Warren District, other than of said conspirators.

We expect to show that Fred W. Brown, the prosecuting witness herein, and being the same Fred W. Brown named in the information herein, on the 12th day of July, 1917, and at the time of the alleged kidnapping as set out and complained of in the information herein, and continuously for a long time prior thereto, was one of said conspirators, and during said period was actively engaged with the other of said conspirators in the furtherance of and in acts carrying out and in endeavoring to accomplish the acts and purposes of said conspiracy.

We expect to show that with all of the matters and things in view that I have heretofore set out, and acting on the belief as heretofore set out, Sheriff Wheeler did, just prior to the alleged kidnapping complained of and set out in the information herein, call to his aid a *posse comitatus* consisting of more than one thousand of the male citizens of Cochise County, and including defendant, and that he did then lay before the members of such *posse comitatus,* including defendant, all of the information and knowledge then had by him with reference to such conspiracy and which was as heretofore detailed, and did then order the members of said *posse comitatus,* including defendant, to aid him in the arrest of said conspirators,

and that the members of said *posse comitatus,* including defendant, in obedience to such command, and acting upon their said knowledge, information and belief as aforesaid, did aid the Sheriff in the arrest of such conspirators, including the said Fred W. Brown.

We expect to show that immediately following the said arrests and acting upon the information, belief and knowledge as heretofore detailed, the said conspirators were, under the direction of the said Sheriff, then removed from the said Warren District and thereafter delivered into custody of troops of the United States of America then stationed at Columbus, New Mexico, and not otherwise, and that said conspirators were received and thereafter detained by said troops of the United States at Columbus, New Mexico.

We expect to show further that said Fred W. Brown was not carried by defendant or anyone else on the said 12th day of July, 1917, or at any other time from the Warren District or from Cochise County into the State of New Mexico as complained of and set out in the information herein, involuntarily or against his will, but, on the contrary, we expect to show that the said Fred W. Brown did accompany his co-conspirators from Cochise County, Arizona, into the State of New Mexico on the said 12th day of July, 1917, and at the time of the alleged kidnapping set out and complained of in the information herein, freely and voluntarily and of his own free will.

ARGUMENT OF WILLIAM H. BURGES OF COUNSEL FOR DEFENSE

MAY IT PLEASE THE COURT:

It is not improper for me to say that at least in the judgment of counsel representing the defendant no more interesting or important case has ever called for the attention of the Court. Many months have been consumed in the preparation of this case for trial, no small portion of which time has been given to consideration of the law applicable to the case. We are of the opinion that the principles which should and must govern its determination are as old as our law and as enduring as human nature.

The defense is based upon two propositions, different and yet resembling each other as kinsmen—the right of self-defense and the law of necessity.

If it were only an ordinary case of self-defense, the kind of self-defense with which all courts and almost all citizens are familiar, in which one man defends himself from an attack made upon him by another by force of arms little that is new could be said to this Court. We think the fact that many were involved in the transaction out of which this prosecution arises and out of which grow the numerous prosecutions that are pending against those who acted in what, for want of a better and more descriptive name, may be called the Bisbee Deportations of July, 1917, does not change the principles which govern the case. The right of one man to defend himself or those whom he is charged with the legal or moral duty of protecting is undeniable. The right is in no way abridged because two are jointly or severally attacked and jointly and severally defend themselves, nor three, nor four, nor five, nor any number, nor can the point be found at which the right of self-defense ceases simply because of the number of those whose rights are involved and whose rights call for defense. Nor is the right of self-defense in any way impaired by reason of the fact that those whose rights are invaded or threatened act together in defense of their rights.

It is our contention that the right of self-defense is a perfectly valid defense in behalf of a community as well as an individual. In other words the right of a community to save itself from an over-

whelming, irreparable evil with which it is threatened, by the action or threatened action of man armed or unarmed, banded together against the peace and welfare of that community, in such numbers and under such conditions as to imperil the lives of the people in that community or the safety of their property, or of any great part of them is one form of self-defense, community self-defense, and is a right sound in law and in morals.

We are going to take, what we trust the Court will not think unnecessary time, in going back over the path that has led counsel for defense to the firm conviction that self-defense exists in any number as well as in one, and in a community, as such, as well as in any individual of that community. We shall read the authorities which establish the principle upon which our defense is firmly based.

Akin to the law of self-defense and yet differing from it, is the law of necessity, a law founded on reason and recognized by courts, a law almost incapable of definition, but, nevertheless an existing part of the law of this and every civilized country. One of the writers we shall call to the attention of the Court has stated that self-defense is the right of protecting one's self from the unlawful aggression of another, the right of protecting one's person or dependents or property from the unlawful invasion by another. The law of necessity is that law that justifies by virtue of necessity the invasion of another's right. Both exist and both have been applied many times. Both find their origin in the primal instinct of man to defend his life and what is his own, whether it be his family or his property; a law stronger than any other in the world; a law before which every thing else gives away when the occasion presents itself excepting the supreme necessity that comes to a man of sacrificing his own life for family or community or country.

In addition to this firm basis of fundamental instincts and impulses of the human heart upon which the law of self-defense is founded, the law of necessity is further buttressed by the maxim that the safety of the public is the supreme law, a maxim peculiarly applicable to the facts of this case as they will be manifested to Your Honor during the progress of the trial.

Believing that these two principles govern this case and that on these two principles must rest the ultimate decision of what is just

in this case, we are of the opinion that we have the right to show all of the facts, circumstances and conditions that existed in the Warren District on the 12th day of July, 1917, and immediately prior thereto, out of which grew this great transaction.

It is our contention that the action then taken by this defendant and his associates was brought about by conditions which imperiled the property of many, the lives of many and even more than all of that, imperiled the capacity of the United States, then at war, to meet the obligation which it owed itself, its citizens and the world at large in the great undertaking upon which it had embarked. It is our contention that had the effort of those conspirators referred to by Mr. Curley in his opening statement been successful, the production of the large amount of copper which the Warren District was capable of producing would have been impossible, and that not only would the people living within the Warren District have thereby been deprived of that to which they were entitled and which was necessary to the maintenance of the lives of that district, but that the government itself would have been denied a prime necessity of the government at that hour.

I do not have to argue, of course, that when a man is attacked by another with a loaded gun and defends himself by taking the life of the aggressor, that he has a perfect right to show what was the condition at the time, his own condition and that of his assailant, whether he was physically able to meet his adversary and win a victory from him and save his own life without resorting to the taking of the life of the other, or whether it was necessary to take the life of the other in order to save his own. We should not even have to prove in such a case that it was actually necessary but only that it reasonably appeared to him to be so. We would be permitted, without question, to show previous threats or declarations of the purpose of the men against whose violence the defendant was protecting himself, communicated or uncommunicated. We would be permitted to show the character of the man making the threats, whether he was a man who would be liable to take the life of another under these conditions or not, as showing the necessity for the defendant to defend himself, or the apparent necessity thereof and his reasonable belief from all the facts and circumstances that the aggressor contemplated

a murderous attack upon him. From this we have reached the conclusion that when a community, the law-abiding portion of the community, the peaceable portion of the community, the productive portion of the community, has been made the subject of threats of violence; when these threats have been communicated to it or to its representatives, the chosen officers of that community charged with the duties of enforcing its laws and protecting the property and lives of the people, or those who while wanting in official capacity, are nevertheless their chosen leaders, when these conditions exist and these threats have been made and these threats have been communicated to them, we have the right to show that the persons who made these threats were in sufficient number to carry out the threats that had been made, or that they were of the character to justify the belief that they meant to carry out these threats; that the making of these threats and the consummation of the purpose indicated by the threats were parts of a well defined scheme and plan then being carried out in different portions of the country having a common, determined end. We say that when these facts have been established when it is shown that on one side of the controversy there are a large number of people living in their homes with their families, people engaged in the peaceable pursuits of life ,in the peaceable production of something absolutely necessary to the very life of the country itself, and such persons are threatened by an organization of men sufficient in numbers to destroy the property and to take the lives against which their threats are directed; and to make impossible the production of that which was necessary to the lives of the threatened people and the preservation of their property and the very life and preservation of the government itself, we have the right to show that the persons making these threats have avowed their purpose to make impossible the production of that which the government needed; to make impossible or unsafe the continuance of the peaceable affairs of life and its employments and industries. We have the right to show that such conspirators were threatening the destruction of the property of these people, their homes and those things from which they drew the sources of support for themselves and their families, and the destruction of large numbers of the people themselves. We contend that we have the right to show these things insofar as they effect

the safety and well being of the community, just as surely as we should have the right to show them were an individual only the subject of such threats and actions.

It is our contention that if an individual in the protection of his life, or in saving himself from what is apparently an effort to take his life, that if such a person has the right to take the life of another, then he has an equal right to do a lesser thing, for instance, temporarily incapacitating the assailant from carrying out his purpose. If a man attack me with a threat of taking my life and he has the apparent capacity and purpose to execute his threat, or it is reasonably apparent to me that such is his purpose, I have the right to shoot him as he stands. Can it be denied that I have the lesser right of knocking him down and making it impossible for him to carry out his purpose? Can it be contended for one moment that if I have the right to take his life to keep him from taking mine, that I would not have the right to tie him so he could not do it? Or if I had the right in defense of myself to put him out of the world of living man, that I would not have the lesser right to put him out of the community that he lives in so that for the time being he could not do me that damage? If my life were in danger, but I could save it by temporarily imprisoning or deporting him, would I be justified in killing him instead; Certainly not. In that event it would be my duty to do him the lesser harm rather than the greater. If at the same time that my right was invaded, my life jeopardized, ten of my neighbors were similarly situated, would the right of any one be less because the lives of all were in danger? If, in the protection of my life I had the right to confine or to deport, or to kill my assailant, would my neghbors similarly situated have a less right than I, or I a less right than they; If it extends to ten, does it not extend to hundreds and thousands similarly situated? Can it be contended that, if as a matter of fact, A. S. Embree on the 12th day of July was undertaking to take the life of H. E. Wootton and was apparently capable of doing it and avowed his purpose to do it, and had committed an overt act in the execution of that purpose and Mr. Wootton had killed him to protect himself, that he would not have been fully justified under the law? Of course he would have been justified. To state the proposition as to that is to prove it.

If, however, Mr. Wootton could have saved himself by knocking Embree down and tying him, would he not have been justified in tying him? It would have been his duty to have used all means, short of taking life, and only to have taken life when every other means had failed. If Wootton could have saved his life by knocking Embree down and tying him and having him temporarily taken without the state, would it not have been as clearly his right as it was to kill him and would it not have been his duty to do this instead of killing him?

We respectfully submit that there can be no doubt that where the greater right exists it includes the lesser right.

Let me carry my illustration a step further. Let us suppose, for the sake of the illustration, that Mr. Wootton and eighteen hundred other men resident within the Warren District were conducting their affairs in a manner that did not meet the approval of Mr. Embree and his associates numbering between thirty-five hundred and four thousand men. Let us assume for the sake of the illustration that they were bound together for the purpose of bringing about destruction to the business of Mr. Wootton and those similarly situated and the destruction of the lives, if need be of Mr. Wootton and his family and his associates and their families or as many as might be necessary, in the judgment of the conspirators, to the accomplishment of their purpose.

Now, let's further assume that these conspirators had determined to consummate their purpose on the morning of the 12th of July, 1917, and had begun to carry out such purpose. Can there be any question in the mind of any court that Mr. Wootton and his associates under such conditions would have the right to act together, and would have the right, if need be, to take the lives of Mr. Embree and of his associates then engaged in the effort to carry out the unlawful purpose of their conspiracy? Can there be any question, that if Mr. Wootton were on trial for the part he took in preventing this invasion of his rights and of the rights of his associates, that he would have the right to prove that Mr. Embree and his associates had avowed their purpose to do the things against which Wootton and his associates defended themselves? Would we be less entitled to prove their threats and their purpose because the determination was

reached at regularly held meetings of the organization of which Mr. Embree and his associates belonged, by which committees were appointed for the purpose of carrying out their threats and where means were adopted, most reasonably adapted to the accomplishment of their unlawful purposes?

If Embree and his associates were members of a larger organization existing in various portions of the country and the struggle were then on in other communities; if the struggle in the Warren District had been initiated at the request of the members of the same organization at Seattle, Washington; Seattle in turn acting on the request of the members of the same organization in Butte, Montana, would we not be permitted to show this unity of purpose between the several branches of the organization as indicative of the character of the threats they were making, of the objects to be attained and of the purpose that actuated the conspirators in the effort against which Wootton and his associates were defending themselves. If the branches of this larger organization in different parts of the country had appealed to Embree and his associates saying: "Are you now willing to join us in a general effort to carry out the objects of our organization, the objects of our conspiracy," would we not have the right to show that fact? To show the terms of the conspiracy and the extent of it; to show how large was the organization; how widespread the unity of action and the purpose; how determined the conspirators were to accomplish that end, both as to the destruction of the people and the property in the Warren District, and to overthrow the entire system of ownership of property, as well as to accomplish the destruction of the government itself?

That is the charge we make, and that we are prepared to prove. If three men, Mr. Embree, Mr. Kimball and Mr. Tannehill agreed among themselves to go out at a certain time and destroy either the defendant in this case or any other man similarly situated because he was doing something that interfered with their purpose to overthrow this government, to bring about destruction of private property and to bring about the abolition of the system of private ownership of property, and to put the government of the affairs of the world in their hands, and the efforts of these men, or any of them were directed toward Mr. Wootton, or those whom he was charged with

the duty of protecting, or toward his property, would it be contended that he could not defend himself because all of them joined in the effort against him instead of only one. Would not the fact that he was attacked by a large and a powerful organization make all the clearer his right of self-defense? Would the right of his next door neighbor, similarly situated, subject to the same threats, subject to the same result on the part of the conspirators, be any less because two were involved as the object of the attack of the aggressor, or ten, or one hundred, or a thousand, or the community itself constituting the Warren District on that date? Wouldn't common sense and necessities of the case drive those attacked to a unity of action to protect themselves from that purpose and the accomplishment of that purpose by the aggressors?

Now, if the Court please, as has been made manifest to the Court by statement of Mr. Curley as to what we expect to prove, that was the purpose of this conspiracy, which for the sake of description we shall continue to refer to as I. W. W. We are prepared to show, we have the proof, we have the written, documentary proof of the character of the organization, of its avowed purposes, of the objects which were to be accomplished by what they describe as "The revolutionary movement." We have the documentary proof from their own minutes, the minutes of the Bisbee Local of the I. W. W. organization; of their unity of action and purpose with other branches of the Industrial Workers of the World at Butte, at Sand Point, Idaho, at Seattle, Washington, and other places, to bring about the strike at Bisbee at that time and for that purpose.

Let me suggest another illustration. Let us suppose that at the head of Tombsone canyon at the lower part of which is the Town of Bisbee and the homes of thousands of people, there was a large dam that was holding back the waters which were coming down that canyon; that the flood season was on and a committee of ten or one hundred were standing guard at that time, all realizing that it was going to be difficult to impound all the water that naturally comes down Tombstone canyon and to pass it out in safety through the ordinary conduits and subways out into valleys below to the end that no harm be done to the people and the property below the dam.

Now, let us suppose there is another canyon nearby Tombstone

canyon and from which waters could be emptied into Tombstone canyon above the dam. Let's assume that the Tombstone dam will hold the waters impounded above it; that the second canyon can carry off the waters naturally flowing in that canyon, but that if the water from the second canyon were turned into the Tombstone canyon it would inevitably break the dam and drown the people in the town below. Could there be any doubt that the representatives of these people who are there at the time, representatives of the people living in the town below, have the right to act together and for the common purpose of making that flood impossible? Let us, for the sake of our illustration, say that the people who are insisting on turning that water from the second canyon into that reservoir are doing it because if they did not do it their own canyon will be the scene of a devastating flood. Can there be any doubt in spite of this fact, that the men guarding the Tombstone dam would have the right to prevent the water being turned into their reservoir? Certainly they would have that right. Yet, under the law, if the people in the second canyon had the strength to turn the water off of them and into the Tombstone canyon and thereby save the lives of the people in the second canyon, they would have the lawful right to do so. The right of the people guarding the Tombstone dam to prevent the water from the second canyon being turned in upon them and thereby destroying the lives and property of the people under the Tombstone dam, is a perfect illustration of the right of community self-defense. The right of the people in the second canyon of diverting the water from their own canyon into the Tombstone canyon and thereby save the lives of the people of the second canyon, even though at the expense of the people in the Tombstone canyon, is a perfect illustration of the right under the law of necessity. Now, if the people guarding the Tombstone dam find it necessary in order to prevent the water from the second canyon being turned in upon them, to take the lives of those who were endeavoring to so turn the water and that the taking of such lives was necessary to protect the lives of the people in the Tombstone canyon below the dam, they would have the clear right to take such lives. If, however, instead of taking the lives of those endeavoring to turn the water into the Tombstone canyon they could prevent such action by taking

them, tying them and removing them for a period without the State of Arizona, would it not be their duty so to do instead of taking their lives? If having the right to take the lives of the men guarding the interest of those in the second canyon the men of the Tombstone canyon were justified in killing, can there be any question but what they would be justified in deporting them for the season from the state in order to protect the people under the Tombstone dam, whom they were charged with the duty of defending, and while making the situation safe for those whom they were charged with the duty of protecting at the same time save their opponents from the greater harm they could have lawfully inflicted upon them? We submit that where the right of self-defense exists and life may be taken under the right of self-defense, the right to do anything less than to kill also exists and if less will do, less must be done.

The illustration, I think, clearly puts before the Court our views as to the right of community self-defense and the right of the community under the rule of necessity. Every man under the Tombstone dam had the right to have that dam remain intact and the water carried off in natural channels to the end that there be no loss of life or property below, and in the protection of that right they would have the right to kill those who invaded that right. This is a clear case of community self-defense. If, on the other hand, the people in the second canyon could only save themselves, their families and their property by diverting the waters from their canyon into the Tombstone canyon, they would have the lawful right to do so, even though it was an invasion of the rights of the people in the Tombstone canyon, because it was the only means of saving themselves from an imminent, overwhelming, irreparable injury, and the means taken would not be out of proportion to the injury threatened. Had the men guarding the Tombstone dam taken the lives of those seeking to divert the water from the second canyon into the Tombstone canyon, it would have been justified under the law of self-defense. Had the men in the second canyon been compelled to take the lives of those guarding the Tombstone canyon in order to divert the water into it even though they did thereby destroy the lives and property of those below the Tombstone dam, they would have been justified in law under the rule of necessity.

We propose to show that a condition existed under which it was the honest conviction, I will say of this defendant for the purpose of this illustration, the honest conviction of this defendant, reasonably arrived at from credible evidence that was before him, that unless he took the part he did in the Bisbee deportation, he and those dependent on him, or his neighbors and friends would lose their lives or suffer irreparable injury to their persons and the loss of property. Have we the right to prove it? We say YES.

Let us say for the purpose of the argument, that Wootton did not know whether he or his family would be killed, but he did know from the avowed purpose of those deported, those creating the condition of peril then existing in the Warren District, that lives would be lost and property destroyed and his and those of his family might be among them. Let us assume that Wootton reasonably believed from credible evidence then before him of the avowed purpose of those in control of and responsible for the condition of danger and terror then existing in the Warren District to bring about or to accomplish their purpose, that they would bring death and ruin to a large number of people in the community indiscriminately. Can there be any question that he would have the right to act to protect himself and those dependent on him? We say, most certainly there can be no doubt about that. The right of community self-defense is one more difficult to invoke than the right of individual self-defense, that is to say: the conditions bringing that right into play less frequently exist. The right to act under the rule of necessity is very much less frequent than the right to act in self-defense. The existence of the right to invoke the rule of necessity is far more difficult to prove, but it is a question of proof, not of the existence of the right. Both rights exist.

A community at last is but the aggregate of the people that make it. The right of self-defense, the right to invoke the rule of necessity exist and must always exist. What is this rule of necessity as distinguished from the law of self-defense?

"Necessity knows no law"—a proverb as old as our law, almost as old as our language, but also a principle recognized by the authorities. As I have heretofore stated, under the law of necessity the rights of another may be invaded, and I respectfully submit that this

is true whether the invasion be by an individual or a community. The right to fight fire is an unquestionable right. Often there may be a question as to whether you must fight fire in your own yard or in your neighbor's yard, but no man whose property is in jeopardy ever doubts his right to fight fire. If your neighbor endeavors to destroy your house by burning it and such action would result or probably result in the death of your wife or child lying seriously ill in your home and all other means failing, you killed him in your yard, you would be clearly within your rights under the rule of self-defense and if, on the other hand, your neighbor had created a condition by which the salvation of your property and the lives of those dependent on you could only be accomplished by the destruction of his property, you would have the right to invade his premises for that purpose. That right in the latter instance would be a demonstrable right, indisputable under the law of necessity.

The courts have held, not once, but repeatedly, that that is a right that exists by virtue of the fact that it is necessary to protect the community and it takes legislative action permitting a recovery to be had against a municipality to enable a person whose property was so destroyed to recover compensation therefor, the act being necessary to prevent the spread of fire, necessary to protect the property of the community. This defense has been uniformly upheld by the courts when suits have been instituted to recover damages for the destruction of buildings in the path of a fire, destruction being necessary to save the property that lay behind it.

Fortunately in the transactions out of which this case has arisen the loss of life is not involved. There was one death on each side, but that has no connection whatever with this defendant. There is nothing to connect him with it. He was in a different part of the Warren District. One man was killed on either side and about the same time, possibly by each other. These killings have nothing to do with this controversy. We say that when we establish the facts set forth in the statement which Mr. Curley had made to Your Honor, Mr. Wootton stands justified under the law of self-defense, or under the law of necessity as the case may be. If the jury believes from all of the evidence that he was protecting himself against the invasion of his rights then he is justified under the law of self-defense. If

they believe that he and those with whom he acted were acting under the necessity, as they in the reasonable belief of necessity were acting, to protect themselves and those dependent upon them from overwhelming, imminent, impending peril and that the action they took was not out of proportion to the danger threatening, then he and they are justified under the law of necessity. We say that the right of self-defense existed in the people of the Warren District by virtue of the existence of the conditions set forth in Mr. Curley's statement. Such facts and circumstances clearly disclose the invasion of their rights and the purpose on the part of the deportees of bringing about irreparable injury to the defendant, Wootton, and his associates, and that from the nature of the entire transaction and the means necessary to be used by them against the conspirators, no overt act was necessary except those which were actually done. On the other hand should there be a question in the mind of the jury as to whether or not we had brought ourselves within the protection of the law of self-defense, nevertheless the defendant and his associates were justified under the rule of necessity in that the danger was threatening and was imminent; that the harm to be done was irreparable and that they were not called upon to sit by until the damage had been suffered and it was too late to protect themselves; that the means used were not out of proportion to the evil with which they were threatened. That they only deported, instead of destroying, is a matter for commendation rather than for punishment.

No argument is necessary to show that to entitle a person to the protection of the law of self-defense it is not necessary that the person defending his life should have actually been in danger of losing his life or suffering serious bodily harm. It is only necessary it should have reasonably appeared to be so.

If, under all the facts and circumstances as they reasonably appeared to the defendant at the time he invoked and acted upon his right of self-defense, he appeared to be in danger, he was justified in acting, even though as a matter of fact he was not at the time in actual danger. In other words the exercise of the right of self-defense does not depend upon the actual existence of danger and the actual doing of the overt act evidencing a purpose to injure the defendant, but the right rests upon the appearance to a reasonable mind so situated that

such danger existed and that such overt act had occurred. It may be that subsequent developments will disclose the fact that the assailant was only drawing upon the defendant an unloaded gun and that, therefore, the defendant was in no danger of death or other bodily harm, but he reasonably appeared to be in danger and therefore was justified in acting. A man does not have to wait to see whether his adversary is shooting at him with blank cartridges. When an assailant has avowed his purpose that when he meets the defendant he will kill him, or that on a certain date he is going to kill him and he comes at that time with a pistol, even though it is an empty one, in his hand, the defendant is not legally bound to wait to see whether that pistol is loaded or whether the assailant is going to shoot, if the defendant has any real interest in that controversy and a further interest in worldly affairs. It is his duty to get into action and get in quick. It has become a proverb in the West that the Lord is on the side of the fellow that gets in the first shot.

These rules applicable to self-defense are applicable also to the law of necessity. Upon the appearance of danger under all of the facts and circumstances of the case to a reasonable mind so situated, the defendant is entitled to act to prevent the invasion of his rights. This under the rule of self-defense. Upon the appearance to a reasonable mind under all the facts and circumstances surrounding him, of a danger imminent and irreparable, such person is justified in invading another's right, provided the act done in so invading the right of another is not out of just proportion to the peril sought to be avoided. It is not necessary to sit supinely by until the damage has been suffered. Such is the law under the rule of necessity.

We have the right to show, insofar as this defendant is concerned, what were his circumstances at that time; what was the condition of his mind; what was the condition of the community that he lived in; what the threats were that were being made by a large body of men organized for a definite purpose; what that purpose was and what was the character of the organization and of the men composing it. If the defendant had the right either under the law of self-defense or the law of necessity to protect himself by taking the life of his assailant or one who compassed his destruction, certainly he had the right to anything less than kill him. If one person had that right,

then all similarly situated had it. If any had it, then unity of action was justified even though those who acted with the defendant were not themselves actually involved in the danger threatening the defendant. If it were an effort to take the life of one man only, and if the defendant in this case were the only man in the entire Warren District that was in danger that day and his life was being sought by a large body of men, his neighbors and friends, all of his neighbors and friends, all law abiding, all the well disposed people in that community could and should have rallied to his assistance and averted the danger by the use of the necessary force.

At this point I think it may be well to bring to the attention of the Court a matter that is not without its weight in determining and correctly estimating the action of the defendant and his associates in the deportation. It will appear from the evidence that the united action of these people, who for the purpose of description we shall continue to call the deporters, on the 12th day of July, 1917, was under the leadership of the Sheriff of Cochise County, Captain Harry C. Wheeler. He led the movement. He called to his aid hundreds of duly appointed deputies and even a larger number of those who although they had not been appointed deputies at that time were capable of acting with him and who in fact during the deportation did act with him. The Sheriff of the county was charged with the duty of protecting the lives and the property of the people in the community and of seeing that peace was preserved and the laws faithfully executed. The evidence will show that Captain Wheeler believed, as those acting with him believed, that a disastrous riot was imminent. He and his associates believed, and reasonably believed, under all the facts and circumstances then within his and their knowledge, that a large number of people had gathered for the purpose of bringing about a condition under which the private ownership of property would cease and the government of the United States be left without an article of prime necessity in the great struggle in which it was then involved. The Sheriff knew that a large number of people, strangers to the community, had come in for the purpose of carrying out the avowed program of the organization of which they were members or with which they were in sympathy, that is of destroying or so greatly interfering with the industries of the community as

to make it impossible for those who owned the mines to operate them, at the same time making it impossible for the government to get the copper that it needed for the prosecution of the war. In the light of the facts known to him, honestly believing, as he had cause reasonably to believe, that such were the purposes of the organization and those who composed it and those who sympathized and acted with it, he formed a plan subsequently carried out by him with the assistance of this defendant and those acting with the Sheriff on the 12th day of July, 1917, of seizing all such persons so threatening the peace and security of the community, and the welfare of the government itself, and having them in his possession by virtue of that seizure and having no jails or other places of imprisonment wherein he might put them, to remove the persons so seized beyond the district and to a point at which no harm could be done by them to the district, its inhabitants or their property. The evidence will show that it was a part of the established tactics of the I. W. W. organization in their efforts to force their will upon the community, or to interfere with the government in the prosecution of the war, to have so many of their members and sympathizers arrested that the jails could not hold them; that they would, therefore, have to be turned loose on that account. Assuming now, for the sake of the argument, and the evidence will show it to be the fact, that the Sheriff of this county and his associates then knew that such a thing had been done in another American city, in a riot of exactly the same kind and under similar conditions, and there were no troops then in the service of the state, all having been taken over by the Federal Government for the prosecution of the war; and assuming as a matter of fact that an appeal for Federal troops had failed because there were no troops to send for that purpose, the army being either engaged in watching the southern border or in course of preparation for the expedition to France; assuming, as the evidence will show, that all appeals for military help had failed; that there was no place to imprison so large a body of men as must necessarily be seized; that there was no organization by which so large a body could be safely guarded and held; and assuming, as the evidence will show, that it was necessary to the peace and safety of the lives and the property of the people of the Warren District and the continued activities of the government,

that the large body of men creating the condition of terror, seized by the Sheriff should be held; assuming, as I have stated, these things,—and the evidence will substantiate the assumption—we assert that there was nothing to be done but for the people of the district, acting under the leadership of the Sheriff, or other chosen leader, and in this instance no better choice could have been made, to seize the men threatening their peace and deport them instead of killing or being killed in the impending riot. It would seem to us that from the statement of the conditions, of what was done, of the reasons for which it was done, there is a full justification for the action of July 12, 1917. The Sheriff as the leader of the citizens of the county took the men so seized to a place where they could be held in safety to themselves and to the community until order could be restored and the ordinary processes of government and of life be resumed in the community.

Under the statutes of Arizona defining kidnapping, there is no distinction between the removal of a man beyond the limits of the state and to another place within the state or even within the same county; therefore, there is no force in the suggestion that is made that they should have been turned over to the soldiers at Naco or at Douglas instead of at Columbus. Captain Wheeler, as leader of the citizens' movement and those with whom he acted, were justified in removing the men to Columbus, New Mexico, provided, under the law of necessity, as it has heretofore been defined, the Warren District was threatened with imminent and irreparable injury to life and property, when they appeared to be in danger of destruction, and when in the reasonable judgment of Captain Wheeler and his associates, honestly exercised, no other or better way presented itself of preserving the lives and property of the Warren District and restoring peace and order to that sorely tried community, such action under the circumstances stated would not only be justified by law, but in my judgment would be worthy of approbation. If as a matter of fact the riot were on, any means necessary—it does not matter what, provided it were not in excess of what was reasonably necessary to stop it—could have been resorted to. If, as a matter of fact, prior to reaching that desperate state the Sheriff and those acting with him wisely determined that it should not reach that state, but that they would make it impossible for those threatening riot to carry out their purpose; if instead

of waiting until the armed conflict came, when it would be necessary for the Sheriff and his deputies and those called to their assistance to shoot or be shot down, the Sheriff and those acting with him knew that such timely action would prevent bloodshed, then in that event it became their duty to act in time and prevent the loss of life. Under such circumstances it was the duty of the Sheriff, as such, to prevent the riot, to avert the loss of life and the destruction of property and if he acted as Sheriff under these circumstances he and he alone could be responsible, not the men who acted under him. Captain Wheeler's first duty as Sheriff was to preserve the peace, to maintain order, protect the lives and property of the people of the district and such was the duty of all that acted under him as deputies. If he acted not as Sheriff but as the chosen leader of the people, acting under the law of necessity to save themselves and their property from threatened destruction, it was as much his duty and the duty of all who acted with him to take the necessary steps to bring about peace in the community and to maintain it, to make life safe and property secure.

The first of all maxims of the law is: "Regard for the people's welfare, is the highest law."

At page 1 of *Broom's Legal Maxims* we find it stated:

> "This phrase is based upon the implied assent of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good."

On page 8 the author states his second maxim:

> "In the domain of *jus privatum* necessity imparts privilege."
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> "The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; and therefore if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself."

The same author tell us that a person so acting

> "Is the servant of the law, and the agent of an overruling necessity; and if the service of the law be a reasonable service, he is (in accordance with the above maxim) justly entitled to expect indemnity so long as he acts with diligence, caution, and pure

good faith; and, it should be remembered, he is not at liberty to accept or reject the office at his pleasure, but must serve if commanded by the Crown." *(Broom's Legal Maxims,* p. 11.*)*

There is, of course, a higher degree of sanctity to life than to property. It is all the more important that life be saved than that property be saved unnder similar conditions. As between life and property, life must be saved. But in law there is only a difference in degree, not a difference in right. A man in his own home has a right to save that home and his property from the unlawful aggression of another just as he has a right to save his life. In the same article of our constitution protection is guaranteed to life, liberty and property. This guaranty has come down to us from the same great document from which all such rights have sprung. It was so declared in the Great Charter. The rights existed before the charter, they were only recognized and declared by it. We shall all agree that under ordinary conditions a man should not go as far to save his property as his life, that in defense of property only he should stand more from the aggressor before appealing to his natural right, than when life is threatened; but, as stated before, this is only a question of degree and under the law he is justified in defending himself or his property even though such defense may result in death to another. In this case the rights are so intermingled that we shall not make any effort to distinguish one from the other. The right existed in this defendant, it existed in all of his neighbors and all persons so situated and the aggregate of their rights made the right of the community to protection under the law of self-defense or under the rule of necessity.

In *1 Wharton's Criminal Law,* 167, §126, Eleventh Edition, we find the law thus stated:

> *"Necessity a defense when life or other high interests are imperiled.* 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 disproportioned to the evil. Homicide through necessity—i. e., when the life of one person can be saved only by the sacrifice of another—will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The common law prescribes that a person whose life is dependent

on immediate relief may set up such necessity as a defense to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree."

In the light of this authority, how can there be any question about our right to show all the facts and circumstances surrounding the commission of the act, without which it would be impossible to determine whether or not his conduct was justified by necessity?

"*Distinction between necessity and self-defense.* 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 though destroying conditions that are lawful. In self-defense the attack must be upon interests which it is the duty of the party assailed to defend. But the right is not limited to attacks on his own person. Whatever the law places under his protection, that he may defend according to the law. Self-defense by an individual also differs from preventive punishment by a state in this, that the former hinders the crime, and is prospective, the latter punishes for the crime, and is retrospective. Since to constitute self-defense the attack must be unlawful, as a general rule, the right does not exist as against an officer armed with a legal warrant. Children, also, cannot exercise this right against their parents; nor pupils against their teachers; nor apprentices against their masters; provided the limits of the right of correction by the assailant be not overstepped. It follows that there can be no self-defense against self-defense. Self-defense is only permissible against an unlawful attack. If A, unlawfully attacked by B, resorts to violent means to repel the aggression, his repulse of B is lawful; but if B in pursuance of the struggle, deliberately and unnecessarily renews the attack on A, this is not self-defense since self-defense only obtains against an unlawful attack." (*1 Wharton's Cr. Law,* 11th Ed., p. 171.)

"*But not violent defense of honor.* An interesting question, which will be hereafter more fully discussed, arises as to the extension of the right of self-defense to injuries to honor. The cases which have heretofore been adjudicated in this relation have been mainly those in which persons whose character has been

assailed have assaulted or killed the assailant. On these facts it has been uniformly held, as an elementary principle, that no words, no matter how insulting, will excuse an assault. At the same time insults of all kinds, words as well as blows, are to be taken into consideration in determining how far hot blood can be considered to exist. It is easy also, to conceive of cases in which a party insulted is entitled to remove the instrument of insult; and we may adopt as sound law a ruling already noticed, that a person insulted by a libel has a right to remove it from a wall on which it is posted." *(1 Wharton's Cr. Law,* 176.)

"Danger must be immediate, and defense not to exceed attack. A future danger, as we will hereafter see, cannot be anticipated by an attack upon the expected aggressor, unless this be the only means of warding off the attack. Nor is the party attacked excusable in using greater force than is necessary to repel the attack, remembering that the danger of the attack is to be tested, as will be hereafter noticed, from the standpoint of the pary attacked, not from that of the jury or of an ideal person. Whoever, by his misconduct, puts another in a condition in which the mind cannot act with reasonableness, cannot complain that such reasonableness is wanting. If the injured party acts negligently or unfairly in coming to the conclusion that he is in danger of life, then he is liable for the consequences if he exceed the limit of self-defense; but if his conclusion be honest and non-negligent, then the party assailing him must bear the consequences of the mistake." *(1 Wharton's Cr. Law,* 176.)

I want to call the attention of the Court to the case of *Hale v. Lawrence, 21 New Jersey Law Reports, page 714:* This is a long case growing out of the great New York fire of 1835, in which suits were brought on account of the destruction of large amounts of property in the fire to save the city. I read from page 729:

"The right to take or destroy private property, by an individual in self-defense, or for the protection of life, liberty, or property, (if it can be esteemed a legal right at all) is one of a different character; it does not appertain 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 defence 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 extent of its exercise must depend upon the nature and degree of necessity that calls it into action, and this cannot be determined until the necessity is made to appear. Ld. Hale calls it the *lex temporis et loci,* and one of the counsel has aptly termed it the *lex instantis,* lawless, but not responsible. It is rather a right to justify an act done, than a lawful right to do an act of violence to the person or property of another, for such other has an equal right to defend his person or property from violence. A few instances will suffice to illustrate this right. A man may justify taking the life of his adversary where it is necessary to save his own, or destroying his neighbor's property, in some cases, for the preservation of his own. So the people of a neighborhood may justify a trespass on another's grounds to destroy noxious animals; and in a densely populated town, all may unite in destroying a building to stop a conflagration which threatens destruction to the rest. But in all these cases the act done is in the individual capacity of him who does it, and it is done upon his own responsibility and at his own peril. The law esteems all private property sacred from the violent interference of others, and he who takes, injures, or destroys it, will be held a trespasser, until he shows a justification. A necessity extreme, imperative or overwhelming, will constitute such a justification, but mere expediency, or public good, or utility, will not answer. The public interest or welfare is not left in the keeping of private individuals. 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."

Turning to page 732:

"And as public officers they had not, without the statute, the power to destroy either the buildings or the goods."

The Court then held that that was a right that existed in the individual as such, and not by authority of official capacity. (Continuing, p. 732):

"And much less the power to destroy them at their mere discretion, without legal responsibility. As individuals, their right of self-protection did not extend beyond that object, except at the instance of him whose life or property was placed in jeopardy. Men cannot constitute themselves judges, except in extreme necessity, and volunteer to set all things right, according to their own estimation of right, and determine the necessity of an act, which does not affect their own individual rights or interests. As a magistrate or public officer, the defendant had no

irresponsible and discretionary authority to destroy the plaintiff's property, unless it was granted to him by the Legislature. The defendant, then, without the provisions of this statute, had neither a natural, discretionary and irresponsible power, nor an official, discretionary and irresponsible power to do the act which by his plea he admits he did do. But he says the statute conferred that power upon him, and he exercised it pursuant to the statute. It will then follow that the statute pleaded in bar was a new grant of power, not before existing in the defendant, either in his individual or in his official capacity, and in my opinion it was a grant of eminent domain."

I read now from the case of *American Print Works v. Lawrence*, another case growing out of the same fire in New York, although tried in New Jersey. After the New York courts had refused relief, service was had on the defendants in New Jersey in suits brought there. Reading from page 257 of the same volume, 21 New Jersey Law Reports—

The Court: Reported in the 21 New Jersey Law Reports you say?

Mr. Burgess: Yes, sir.

"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 personal 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. It is referred by moralists and by jurists to the same great principle, which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy the instant demands of hunger; with tresspasing upon

the land of another to escape death from an enemy. It rests upon the maxim, *'Necessitas induciz privilegium quoad jura privata.'* Bacon's Elem. Reg. 5; Noys' Maxims, Max. 25 (Herring's Ed., §16; 2 Kent's Com. (2d Ed.) §338; *Stone et al. v. The Mayor* p. 30); Puffen lib. 2, c. 6, §8; Witherspoon's Mor. Phil. 136, *et al.,* 25 Wend. 173. And the common law adopts the principle of the natural law, and places the justification of an act otherwise tortious, precisely upon the same ground of necessity.

It must be so pleaded in justification. Hence the plea in such case is not the public good, the eminent domain, the sovereign power, but necessity. Com. Dig. Pl. 3, M. 30; 3 Chit. 1118.

It is true that by many writers of high authority the ground of justification of an act done for the public good, and of an act committed through necessity, are not accurately distinguished. They are both spoken of as grounded on necessity, and they doubtless are so. But the one is a *state,* the other an *individual* necessity, though oft'times resulting in a public or general good. The one is a civil, the other a natural right. The one is founded on property and is an exercise of sovereignty. The other has no connection with, or dependence upon, the one or the other.

Nor can property destroyed to prevent the spread of a conflagration, be said in any appropriate sense to be destroyed for the public good. It may be destroyed for the benefit of one, of a few, or of many; but it is not destroyed for the benefit of the State; nor is it taken in aid of any of these public objects, which it is the peculiar and appropriate duty of every State to foster and promote. I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the constitution."

I invite the attention of the Court to the following extract from ***Hare's American Constitutional Law,*** 2nd Vol., page 917:

"It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety. Whether the wooden houses should have been destroyed in the instance mentioned

by Chief-Justice McKean depended on the facts as then disclosed or apparent, and not on a result which could not be foreseen; and the indecision of the Lord Mayor would not have been less culpable if a sudden rain or shift of wind had extinguished the flames or given them another direction. What reason and duty dictate, is obligatory in morals; and such a necessity has always been deemed a justification by the law."

At page 906 of the same volume, it is said:

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveller shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens although they wear a uniform, and may, like other individuals, act as special constables, or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law.

A riot is not the only instance where necessity may confer powers that are unknown to the ordinary course of law; another may arise out of a conflagration. Ordinarily a man's dwelling is sacred to himself and his family,—a retreat which none can violate without the express mandate of the law. And yet it is every day's experience that when a fire occurs in a town or village the neighbors may enter without consulting the owner to extinguish the flames. The axe may be applied to the roof or walls, and part of the premises demolished to save the rest or the adjacent property. And so far does this go that if the flames attain such a height that they cannot be arrested by ordi-

nary means, the inmates of a house which is not on fire may be summarily ejected and the building blown up with gunpowder or destroyed by any other convenient means.

Such cases depend on the right of the commonwealth as an organic whole, and of individuals acting on her behalf, to do whatever is indispensable for the protection of life, liberty, and property, which is known in peace as the police power, and designated in war as martial law. The right to act under such circumstances is not confined to public officers or persons acting under an authority conferred by statute; and private persons may, when the need is urgent, do of their own motion what self-defence or the preservation of the lives and property of others requires."

At page 912 of *Hare's American Constitutional Law,* it is said:

"It is equally plain that he who, either in war or peace, relies on the warrant of necessity for going beyond the boundaries which ordinarily separate right from wrong, takes the risk on himself of proving that the circumstances were such as to justify his conduct."

Certainly, if that be true, then it must of necessity follow that we should be permitted to make proof of all the facts and circumstances, in order to show whether the defendant and his associates acted properly.

"If he succeeds in doing this ,the defence is complete; if he fails, he may be civilly or even criminally liable, notwithstanding the goodness of his intentions or the command of a superior whom he could not safely disobey. Such is the rule of the common law as administered in England agreeably to all the books in which the question has been considered; and it has been repeatedly applied in the United States."

At page 918:

"These views were sustained and the decision affirmed by Taney, C.-J., in delivering the judgment of the Supreme Court of the United States."

Judge Hare refers to the case of *Mitchell v. Harmony,* 13 How. 115, to which I shall refer hereafter and from which he quotes as follows:

"There are occasions where private property may be lawfully taken possession of or destroyed to prevent it falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property or take it for public use. Under these circumstances the govern-

ment is bound to make full compensation to the owner; but the officer is not a trespasser. But in every such case the danger must be present or impending, and the necessity such as does not admit of delay or the intervention of the civil authority to provide the requisite means. It is impossible to define the particular circumstances in which the power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appeared at the time will govern the decision, because the officer in command must act upon the information of others as well as his own observation. And if, with such information as he can obtain, there is a reasonable ground for believing that the peril is immediate or the necessity urgent, he may do what the occasion seems to require, and the discovery that he was mistaken will not make him a wrongdoer. It is not enough to show that he exercised an honest judgment, and took the property to promote the public service, he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the Court and jury to say whether it was so pressing as to justify an invasion of private right. Unless this is established, the defence must fail, because it is very clear that the law will not permit private property to be taken merely to insure the success of an enterprise against the public enemy."

Commenting on this case, Judge Hare says, (page 919):

"It was equally plain that the order given by the commanding officer in the case in hand was not a justification. Urgent necessity could alone give the right, and if it did not exist, the command was illegal, and did not vary the case. The point was so decided in a case cited by Lord Mansfield in *Mostyn v. Fabrigas;* and upon principle, independent of the weight of judicial decision, a military officer cannot justify himself for doing an unlawful act by producing the command of his superior.

This decision shows also that the question of probable cause is in this, as in most other instances, one of law for the Court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause. From this case, taken in connection with that of *Sparhawk v. Respublica,* we may draw the following inferences: (1) Expediency, policy, and a sincere regard for the public good will not justify the arrest of a citizen or an invasion of the right of property either in peace or war. (2) Acts of this description may be justified on the ground

of necessity, which must, however, be urgent, actual and imminent. (3) A belief that such a necessity exists will not be sufficient unless it is also shown to be well founded. But if there are reasonable and probable grounds for believing that the peril is imminent and the necessity urgent, the party will not become a trespasser because the information on which he relies proves to be false; for where the circumstances render it imperative to act, and cast the responsibility on an individual, he must be governed by what appears or can be learned at the time, and there may be probable cause for a belief which has no foundation in fact.

A subordinate stands, as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was crimnal to give. The question is, as we have seen, Had the accused reasonable cause for believing in the necessity of the act which is impugned? and in determining this point, a soldier or member of the *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier, consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances; and if the jury by whom the cause is tried render an erroneous verdict, the accused may be set at large by a pardon or through a motion for a new trial, which, though not allowed in England in criminal cases, is not infrequently granted in this country."

I read further from *Hare's American Constitutional Law,* Vol. 2, page 921:

"We have seen that whatever force is requisite for the defence of the community or of individuals is also lawful. The principle runs through civil life, and has a twofold application in war,—externally against the enemy, and internally as a justification for acts that are necessary for the common defence, however subversive they may be of the rights which in the ordinary course of events are inviolable. The application of the principle depends in the former case on considerations which are beyond the scope of the municipal law, and may be applied in the latter without waiting for the mandate of a court or the sanction of the legislature; although the question whether the necessity exists may be brought subsequently before a judicial tribunal,

and will be concluded by the judgment. There is to this extent due process of law, because the parties who have suffered deprivation have their day in court when the exigency has passed, and may, if there was no sufficient cause, recover compensation in damages or invoke the rigor of the criminal law. The right of a commanding officer to take private property for military use, to compel the inhabitants of a town which is threatened or besieged by a hostile force to labor for the erection of fortifications, or to arrest, imprison, or expel an individual who uses language calculated to induce the soldiers or townspeople to lay down their arms or revolt, will therefore be tested by the rule which applies to the conduct of the sheriff in using firearms to disperse a mob,—Was there reasonable and probable cause for believing in the existence of a peril that could be avoided in no other way?"

How could, in the nature of things, how could that defense ever be available unless we are permitted to show what the facts and circumstances were?

We next direct the attention of the Court to the decision of the Court of Criminal Appeals of Oklahoma, in the case of *Rodgers v. State,* beginning at 127 Pacific 358, reading from page 380.

The Court: Where does it begin?

Mr. Burges: It begins on page 358, but I am reading from page 380. I read only a sentence:

"The love of life and its preservation is a matter of instinct with all beings. Without this the human race would soon become extinct. The law of self-defence is, therefore, of necessity founded upon the law of nature, and is not, and cannot be, superseded by any law of society."

In the case of *Respublica v. Sparhawk,* 1 Dallas, page 357, the Court says: (It is a question of the lawfulness of the seizure)

"1st, Whether the appellant ought to receive any compensation or not, and 2nd, Whether this Court can grant the relief which is claimed.

"Upon the first point, we are to be governed by reason, by the law of nations, and by precedents analogous to the subject before us. The transaction, it must be remembered, happened *flagrante bello;* and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a trespass; which, from the very nature of the term, *transgressio,* imports to go beyond what is right. 5 Bac. Abr. 150. It is a rule, how-

ever, that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity form a part of our law."

The *American Print Works v. Lawrence,* is another case growing out of the destruction of property in New York, 23 New Jersey Reports, 590. I am reading from Page 602:

"The second special plea is so framed as to set up a justification arising out of the common law doctrine of necessity, and it seeks no aid from the statute. It sets out that there was a fire raging in the city of New York, which threatened destruction to a large portion of the city; that certain buildings were peculiarly exposed and likely to take fire, and communicate fire to other buildings, and but for the acts of the defendant, would have taken fire and communicated, etc.; that, to prevent the spread of the conflagration and the destruction of a large portion of the city, the immediate destruction of the said buildings was necessary, without waiting to remove the goods therein; and that for this purpose the defendant, a resident citizen and owner of valuable buildings in the city, caused the said buildings to be blown up, and did thereby necessarily and unavoidably destroy the goods, etc.

"The plea does not in terms aver that the goods were the cause of alarm and danger, and therefore the immediate object of destruction, but that necessity required the immediate destruction of the buildings, without waiting to remove the goods, which unavoidably involved the destruction of the goods. The plea sets up that the buildings and the goods were so connected, that the necessity of destroying the former, necessarily involved the destruction of the latter; and the justification is made to rest upon the ground, that the right to destroy the buildings must therefore include the right to destroy the goods.

"If, which I do not in the least doubt, there can be an imperious overwhelming necessity of instantly destroying buildings, without waiting to remove the goods stored therein, in order to prevent the spread of fire, I suppose this to be the mode in which that necessity must be pleaded, the goods themselves not being the cause of alarm or danger. The plea, therefore, does not seem to be obnoxious to the objection of argumentativeness. It is proper, however, to remark, that even if the plea were argumentative, it is an objection in point of form only, which cannot be raised by general demurrer. It would not be available, therefore, to the plaintiff in the present instance, all objections to mere form having been waived by pleading over.

It is urged, that to make a valid plea, setting up the exercise of

"But the leading objection taken to this plea is, that it does not show any individual or personal interest in the defendant, nor any immediate overwhelming danger to him or his property. the right of necessity, the defendant must show that his own property was in imminent danger, and that the destruction was for the purpose of preserving it. That it is not enough that this defendant was a resident citizen of New York, owning property and having a general interest in the safety and welfare of the city, but that he could only so interpose when the act became absolutely necessary to preserve his own property from immediate destruction. I do not so understand the doctrine, as applied to that branch of the law of necessity now in question.

"Such limited view was certainly not taken by this court on the former review; on the contrary, the language used in the leading opinion would seem to lead to a very different conclusion. The right to take or destroy private property by an individual in self-defence, or for the protection of life, liberty, or property, was said to be a private, and not a public or official right. It was said that it might 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 the defence of their common safety or in the protection of their common rights. Again, in reply to the argument, that the destruction of the store and its contents, for which suit was brought, was not for the public use and benefit, in the sense in which those terms were used in the passage referred to, and therefore that the doctrine of eminent domain was not applicable, it was said: the position would be true, if not done under the authority of the statute, but by the defendant by virtue of his natural right, and in defence of his own or of his neighbor's property, or by a number of individuals to prevent a common calamity that threatened a particular street or district. The force of the argument here depends upon the doctrine implied, if not directly expressed, that an individual may, in the exercise of the common law right of necessity, take and destroy private property, not only in defence of his own but of his neighbor's property, and that individuals in a community may so act to prevent a general calamity to that community, and in protection of their common rights. If it be asked, who is my neighbor, for whose benefit this right of charity and kindness, as well as of necessity, may be exercised?' let the necessity itself, for which it is intended to provide, be the answer. But the passages I have cited have been referred to, not so much to establish the view

which it seems to me may reasonably be adduced therefrom, as to show that this court is now not committed, even by *dicta,* to the more limited rule contended for by the plaintiff in error."

The Court of Appeals of Kentucky, in the case of *Chesapeake and O. R. Co. v. Commonwealth,* 84 S. W. 566, has said:

"In Stephens' Digest of Criminal Law, Art. 32, it is said: 'An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid the consequences which could not otherwise be avoided, and which, had they failed, would innflict upon him, or upon others whom he was bound to protect, inevitable or unavoidable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided.' "

The Supreme Court of the State of Texas, in the case of *Keller v. City of Corpus Christi,* 50 Tex. 614, reading from page 628, uses this language:

"There is, however, a distinction between the exercise of the right of eminent domain, and that of a police regulation to meet an impending peril, by the destruction of an adjacent building to prevent the spread of fire. The one can await the forms and tardiness of the law; the other is governed by a necessity which knows no law. Delay in the latter case may be certain destruction."

The Supreme Court of the United States, in the case of *Bowditch v. City of Boston,* 101 U. S. at page 16, has said:

"At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the Prerogative, 12 Rep. 13, it is said: 'For the Commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action.' There are many other cases besides that of fire,—some of them involving the destruction of life itself,—where the same rule is applied."

The Supreme Court of Indiana in *Conwell v. Emrie,* 2 Ind. page 35, thus announces the rule:

"This was an action of trespass in which the defendants were charged with pulling down a house. They pleaded not guilty, under an agreement authorizing them to give in evidence, under

that plea, every matter that might be got in under any special plea they could have adopted. The cause was tried by a jury, and the defendants had final judgment in their favor. The evidence is not upon the record. The following instructions are complained of:

'1. That men acting in case of fire, from sudden impulse, and upon good motives, are not to be held to strict accountability for their conduct; and if the jury believe from the evidence that the crowd engaged at the fire, and the defendants, really believed it necessary to tear the building down to save it from being consumed and consuming other buildings adjoining, the defendants are not guilty.'

2. Though there may not have been an absolute necesity, yet, if the danger was apparent, and seemed to be so, it was right to pull down the house.'

"In *The Governor, etc. v. Meredith,* 4 Term Reports 790, Buller, Justice, says: 'There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses, or raising bulwarks for the preservation and defence of the kingdom against the King's enemies.' Kent, in his Commentaries, Vol. 2, p. 238, says: 'So it is lawful to raze houses to the ground to prevent the spreading of a conflagration.' 'The maxim of the law is that private mischief is to be endured rather than a public inconvenience.'

"There is no doubt, then, as to the right to destroy buildings when necessary, in case of fire. The question is as to the state of facts which will justify the exercise of the right. The instructions given in this case say when men believe it to be necessary. It seems to us it should have been when there is reasonable ground to believe it to be necessary. This is analogous to the doctrine of probable cause in malicious prosecutions."

I call attention to the decision of the Supreme Court of Iowa in the case of *Field v. City of Des Moines,* 39 Ia. 575, and I read from page 577 of the opinion by Miller, Chief Justice:

"That any persons may 'raze houses to the ground to prevent the spreading of a conflagration,' without incurring any liability for the loss to the owner of the house destroyed, is a doctrine well established in the common law. The maxim of the law is, that 'a private mischief is to be endured rather than a public inconvenience.' 2 Kent's Com., 338. Lord Coke says: 'For the Commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action.'

In *Respublica v. Sparhawk,* 1 Dall., (Pa.) 383, McKean, Chief Justice, says: 'Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private inclosure. So, if a man is assaulted, he may fly through another's close. In time of war, bulwarks may be built on private grounds, * * * Houses may be razed to prevent the spread of fire, because of the public good.' In Dillon on Municipal Corporation, Sec. 756, the learned author states the common law doctrine as clearly and succinctly as it is anywhere to be found. He says: 'The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures in a city or compact town, to prevent the spreading of an extensive conflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains.' The ground of exemption from liability in such cases is that of necessity, and if property be destroyed, in such cases without apparent and reasonable necessity, the doers of the act will be held responsible.

To the same effect are the English authorities. Dicey, in his work on "The Law of the Constitution" at page 286, says:

"This notion is now known to be erroneous; the occasion on which force can be employed, and the kind and degree of force which it is lawful to use in order to put down a riot, is determined by nothing else than the necessity of the case.

"If then, by martial law be meant the power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England. Even, however, as to this kind of martial law one should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury, and that the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ considerably from the judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment a riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution."

The cases in which the law of necessity has arisen and been

pleaded out of the destruction of property to prevent the spread of fire or of contagious diseases are so numerous that it would not be profitable to pursue that line any further. Suffices it to say they have established rules as well founded on reason and well supported by authority as any in our law. Cases have arisen in which the propriety of the application of the rule of necessity has been denied, but the existence of that rule never.

In view of the fact that Your Honor has stated that it is your purpose to read all of the cases cited, I am going to refer to certain cases without taking the time to read them. I think this may properly be done in view of the fact that counsel for the state have access to them all and will have an opportunity to read them before submitting their argument on Monday next.

We direct the attention of the Court to the following cases:

The Mayor v. Lord, 17 Wend. 285;
The Mayor v. Lord, 18 Wend. 126;
Seavey v. Preble, 64 Me. 120;
Stone v. Mayor, 25 Wend 157 at 174.

In these cases, in order to prevent an epidemic of smallpox, buildings were destroyed. The discussion by the Court of the rule of necessity is an interesting one and contains the following statement:

> "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 less degree of care will not answer."

We respectfully suggest that this is especially applicable to such a case as the one at bar. The evidence will show that the necessity for prompt action, for efficient action, existed and those charged with the duty of protecting themselves and others would not have been justified in taking less than was necessary to accomplish the result simply because they might have believed that less would be sufficient.

We further invite the attention of the Court to the following cases:

In Re Moyer, 85 Pac. 190;
In Re Boyle, 57 Pac. 706, 45 L. R. A. 832;
Ex Parte McDonald, 143 Pac. 947;
In Re Jones, 77 S. E. 1029;
State v. Brown, 77 S. E. 243;
Commonwealth v. Shortall, 206 Penn. State 165, 55 Atlantic 952, 98 American State Rep. 759, 65 L. R. A. 193.

I respectfully ask the attention of the Court to this case as re-

ported in 65 L. R. A., because in the note there is contained, among other things, the charge to the grand jury by Chief Justice Cockburn with reference to the indictment for murder preferred against Colonel Nelson and Lieutenant Brand, as members of the Courts Martial which condemned George Gordon and Samuel Clark during the negro rebellion in Jamaica.

Also the following cases:

The Case of Armes, Popham 121, 79 Eng. Rep. Full Reprint 1227;
Rex v. Inhabitants of Wigan, 1 William Blackstone 47;
Phillips v. Eyre, L. R. 6 Q. B. Cases 1, at 15;
Rex v. Pinney, 3 State Trials N. S. 1, (Bristol Riot Cases);
The Queen v. Vincent, 3 State Trials N. S. 1038;
Mouse's Case, 12 Coke 63.

Two cases from the Supreme Court of the United States are also entitled to careful consideration:

Mitchell v. Harmony, 13 How. 15, 14 L. E. 75;
Moyer v. Peabody, 212 U. S. 78, 53 L. Ed. 410.

I take the liberty of reading the last paragraph of the opinion of the Court in *Moyer v. Peabody (supra):*

> "No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case."

I next invite the attention of the Court to some criminal cases in which the rule of necessity has been established by the courts. First in importance is the case of *The Commonwealth v. Blodgett,* 12 Metcalf, (53 Mass.) 56. This case is of controlling importance because it is most strikingly analogous in facts to the case at bar, being a prosecution for kidnapping, in which the defense relied upon by those charged with the crime, was that they acted under necessity. It is furthermore entitled to highest consideration because it is a decision of the Supreme Judicial Court of Massachusetts, a court whose opinions, in the language of a great Chief Justice of another state, have been distinguished for their profound ability and wisdom (Chief Justice Hemphill, 10 Tex. 211), and it is the opinion of that court, as expressed by Chief Justice Shaw, than whom no greater has ever occupied the supreme bench of any state. The case arose out of the Dorr Rebellion in Rhode Island; the defendants in that case were charged with kidnapping. The evidence discloses that they acted as members of the military forces of the organized and established government of the State of Rhode Island and under command of one of the military officers of that government. In that case some of the followers of Dorr, the unsuccessful rebel against the established government of the state, had escaped into the state of Massachusetts. They were followed into Massachusetts by the military force of the established government, were seized in a tavern in which they had taken lodgment and were carried across the line into Rhode Island for trial. Subsequently the state of Massachusetts demanded the return to its officers of those charged to have violated the laws of Massachusetts by this unlawful seizure. The state of Rhode Island recognized the demand and surrendered the alleged kidnappers to the state of Massachusetts for trial. Blodgett and another were tried before Chief Justice Shaw. Among their defenses they pleaded that it was necessary to the safety of the citizens of Rhode Island and their property and to the state of Rhode Island itself that these insurrectionists against its just authority should be seized and the state of Rhode Island, its people and their property protected from their threatened activities. Evidence was offered in support of this plea. This evidence included testimony showing the history of the rebellion in Rhode Island and the conditions existing

there at the time of the rebellion and at the time of the seizure. 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 acts complained of in the indictment, or if there was probable cause to suppose at the time the existence of such necessity, and the jury found such necessity or probable cause they were to acquit." (53 Mass. 84.)

The trial court further instructed the jury in effect:

> "That such captures were unlawful unless necessary in the defense of the lives and property of the citizens of Rhode Island at the time, of which necessity or probable cause, or supposed probable cause, the jury and not the State of Rhode Island was the proper judge." (53 Mass. 86.)

The opinion of the Supreme Judicial Court is too long to permit its embodiment in full in this argument. Suffice it to say at this time that Chief Justice Shaw, in the opinion worthy of him and of the great court for which he spoke, upheld the correctness in both of the instructions above quoted. We respectfully submit that it is impossible to distinguish the Blodgett case from the case at bar. The facts are strikingly analogous; the principles governing must be the same. That the necessity of action justified the action was unquestionably held by the Supreme Judicial Court of Massachusetts and that it need not be a real necessity, but only an apparent necessity was also indisputably held, and that the existence of that necessity, or the apparent existence of the necessity were questions solely for the jury was also indisputably held. In our judgment, the Blodgett case leaves no question for decision in this case.

In the case of *Wynehamer v. The People,* 13 N. Y. Appeals 377, the following language is used:

> "It is said that the Legislature has the conceded power to authorize the destruction of private property in certain cases for the protection of great public interests; as, for instance, the blowing up of buildings during fires and the destroying of infected articles in times of pestilence, and that the Legislature is necessarily the sole judge of the public exigency which may call for the exercise of this power. The answer is, that the Legislature does not in these cases authorize the destruction of the property; it simply regulates that inherent and 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 them, but they aim to introduce some method into the exercise of the right."

In the case of the *United States v. Ashton,* 2 Sumner 13, 24 Federal Cases No. 14,470, we have an opinion from Mr. Justice Story:

"Indictment against the defendants (James Ashton and others) for an endeavor to commit a revolt on board the ship Merrimack, of Boston, on the high seas. Plea, not guilty. At the trial it appeared, that the ship sailed from Boston on Saturday, 23d of August, 1834, on a voyage to Rio Janeiro, under the command of Capt. Eldridge. She was then in a leaky condition, and some efforts had been made by the captain to conceal the extent of the leakage from the crew at the time of their shipment and coming on board. The ship was twenty-nine years old. The crew, on discovering the leak, in going out of port, expressed a wish to the captain to return and have repairs made. The captain declined; but said if the leak increased he would return. On Wednesday, the 27th of August, the vessel encountered a gale, and strained very much; and the crew were up all the night pumping, and were much exhausted. The gale still continued, with every appearance of a continuance. The crew then conversed together, and went to the captain, and requested him to return to Boston to repair; and expressed a firm belief, that the ship was unseaworthy, and that all were in imminent danger of their lives. The captain declined; but proposed, that they should keep on, and if necessary, he would stop at the Western Islands for repairs. The crew insisted, that he ought to return back to Boston, and that the hazard of proceeding on the voyage was imminent. And then finding that the captain persisted in going on the voyage, declaring, that he thought the vessel seaworthy, they refused to do duty any further, and seceded, and remained below several hours, during which time the gale increased, and the ship was in great danger. The captain, at length, in order to induce the crew to return to duty, agreed to return to Boston; and accordingly he wore ship and returned to Boston, where he arrived on the ninth day after her departure. The crew at all other times during the voyage and in all other respects conducted themselves unexceptionably."

There is no need of going into the testimony in detail. Mr. Justice Story said:

"I do not think that the act for the government and regulation of seamen in the merchants' service has any bearing on the present case. The third section of that act merely provides for the case, where the mate and a majority of the crew of a vessel bound on a foreign voyage after the voyage is begun, and before the vessel shall have left the land, shall discover the vessel to be too leaky or otherwise unfit to proceed on the voyage; and under such circumstances it makes it the duty of the master to return to port. It does not, in the slightest manner, trench upon the general rights and duties of the seamen under the maritime law; but merely imposes an absolute duty on the master in the case specified. All other cases and circumstances remain, therefore, as they were before, to be governed by the general principles of law. In the present case the combination to resist the authority of the master is clearly established; and unless the seamen were, by the circumstances, justified in compelling the master to return home, the offence charged in the indictment is fully made out; and the onus is on the seamen to establish the justification. If the ship was at the time clearly seaworthy, and fit for the voyage, whether the seamen acted by fraud, or by mistake, or upon a fair but false judgment of the facts, it seems to me the offence was committed. If, on the other hand, the ship was at the time clearly unseaworthy and unfit for the voyage; they were fully justified in insisting upon her return home; and were guilty of no offence. The law deems the lives of all persons far more valuable than any property; and will not permit a master, under color of his acknowledged authority on board of the ship, from rashness or passion or ignorance, to hazard the lives of the crew in a crazy ship, or compel them to encounter risks and perform duties, which are so imminent and overwhelming, that they can escape only by the most extraordinary chances, and, as it were, by miraculous exertions. If he should order them into a boat on the ocean, at a time when they could scarcely fail of being swamped or foundered, they would not be bound to obey. His commands, to be entitled to obedience must, under the circumstances, be reasonable. The proposition cannot for a moment be maintained, that the crew are bound to proceed on the voyage in an unseaworthy and rotten ship, at the imminent hazard of their lives, merely because the master and officers choose in their rashness or judgment to proceed. It is true, that in all cases of doubt the judgment of the master and officers ought to have great weight, and from their superior intelligence, ability

and skill, it may be relied on with far more confidence than that of the crew. They are embarked in the same common enterprise and risks, and it cannot be ordinarily presumed that they will hazard their own lives in a vehicle, which is really unfit for the voyage. Still, if the case does occur, if they will insist on proceeding, no matter at what hazard to life, and the ship is unseaworthy, I am clear, that the crew have a right to resist and to refuse obedience. It is a case of justifiable self-defense against an undue exercise of power. Neither of these cases is of any real difficulty. But the case of difficulty is this,—suppose the ship to be in that state, in which the presumption of apparent unseaworthiness really arises, and the crew bona fide act upon that presumption, and the jury should be of opinion, that they acted justifiably upon that presumption at that time; and suppose upon the trial it should turn out, (as in the present case it may) that there is real doubt, whether the ship be seaworthy or not; or upon the evidence the case is nearly balanced in the conflict of credible as well as competent testimony, and the jury should on the whole deem the preponderance of evidence just enough to turn the scale in favor of seaworthiness; but not to place it entirely beyond doubt—I ask, whether, under such circumstances, the crew ought to be convicted of the offence charged, having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same; and where even the jury themselves might adopt the same opinion, although there might be an error in the fact of seaworthiness, as established at the trial? I have great difficulty in coming to the conclusion, that under such circumstances the crew were guilty of the offence charged. I am aware of the dangers of not upholding with a steady hand the authority of the master; but I am not the less aware of the necessity of having a just and tender regard for life. Seamen, when they contract for a voyage, do not contract to hazard their lives against all perils which the master may choose they shall encounter. They contract only to do their duty and meet the ordinary perils, and to obey reasonable orders. The relation between master and seamen is created by the contract; but that relation, when created, is governed by the general principles of law. Unlimited submission does not belong to that relation. I have great repugnance to creating constructive offences, and especially where there is perfect integrity of intention. I am aware, that in some cases crimes may be committed independently of any supposed intention to do wrong. But in most cases, and I think in a case of this nature, the intention

and the act must both concur to constitute an offence. There are cases even of the highest crimes, as of homicide, where an honest and innocent mistake in killing another, under circumstances of a reasonable presumption, though a mistaken one, that the party killed intended to kill the other party, when the latter will be excused by law.

"I have had this subject a good deal in my thoughts during the progress of this trial, (and the point is certainly a new one); and the strong inclination of my opinion at present is, subject to be changed by any argument hereafter urged, that the defendants ought not to be found guilty, if they acted bona fide upon reasonable grounds of belief, that the ship was unseaworthy, and if the jury, from all the circumstances, are doubtful, whether the ship was seaworthy, or even in a measuring cast should incline to believe the ship seaworthy. If she was clearly seaworthy beyond reasonable doubt, then the defendants ought to be convicted, for the facts of the combination and resistance are admitted.

"Upon these suggestions of the Court, the district attorney said that his own opinion coincided with that of the Court, and that he would enter a *nolle prosequi*. But he had thought it his duty to bring the case before the Court. And the Court said, that the case was very properly brought before it for decision."

Another instructive federal court case is that of the *United States v. Borden,* 1 Sprague, Federal Cases No. 14,625. In this case necessity was held to have justified a mutiny at sea.

In the case of the *Republic v. McCarty,* 2 Dall. 86, it was held: That the compulsory attendance of a man on a treasonable expedition in order to save his own life justified him under the law of necessity.

In the case of *The Gertrude,* 3 Story 68, Federal Cases No. 5370, it was held that foreign goods brought into the United States under the necessity created by a storm at sea were not so entered as to make the person introducing them liable to the criminal laws of the United States against the unlawful introducing of such goods without a permit from the collector.

In the case of the *William Ray,* (1 Payne), Federal Case No. 17,694, it was held by Livingston, Circuit Justice, that "A vessel which during the existence of our embargo laws departed from one port in the United States on a voyage to another it was obliged by irresistible necessity to put into a foreign port and sell her cargo, was not guilty of a violation of those laws."

We call the Court's attention to the case of *The Commonwealth v. Knox,* 6 Mass. 76, in which a mail carrier blowing his horn on a Sabbath day is held not to have violated the law because of the fact it was a matter of necessity.

The Court: That was a grave offense in those days.

Mr. Burgess: Very grave and argued with great seriousness in that case.

And in *Murray v. The Commonwealth,* 24 Pa. State 270, the keeper of a lock on a canal was held not to be guilty of violating the laws regulating work on the Sabbath because it was by way of necessity that the work be done.

Now, if your Honor please, after the discussion of the questions which I think must control the evidence to be introduced and the instructions to be given to the jury; a discussion of the principles which we think control in the trial of this case and the application of which are necessary to a right decision thereof, we come back to the actual question before the court at this time. That is, as to the right to make the opening statement of the case to the jury as has been outlined to your Honor by Mr. Curley. Of course, the right to make the statement is clear, if the right to introduce the evidence subsequently is either conceded or established. If Mr. Wootton at the time of the deportation was acting in the reasonable belief, in good faith entertained, that it was necessary to protect the life of himself and his family, or the lives of those with whom Wootton acted, that Fred Brown should be deported from Bisbee on that day, we are entitled to offer the evidence to show the facts, circumstances and conditions then existing creating the necessity. We are just as much entitled to offer evidence showing the necessity under the rule of self-defense, or the rule of necessity for deporting Brown as we would be entitled to introduce the evidence to justify his killing, had he been killed instead of deported. If, as a matter of fact and of law under all of the facts and circumstances then existing Wootton, or those acting with him would have been justified in taking the life of Fred Brown to save his or their own or the lives of those dependent upon them for protection, then this defendant and his associates would be clearly justified in imprisoning Brown or removing him from the district for the time being. If it be admitted

that Wootton had the right of self-defense, it must be conceded that he had the right to do anything less than taking Brown's life, just as much as he would have had the right to take his life. If facts and circumstances can be shown to exist which would require the submission to the jury of the question as to whether Wootton would have been justified under all of the facts and circumstances existing on the 12th day of July, 1917, in killing Brown, then the same facts and circumstances would justify the submission to the jury of the question as to whether Wootton was not legally justified in doing less than killing Brown. If Wootton's right of self-defense existed and existed to the extent of taking Brown's life, the greater includes the lesser and the right of self-defense must have existed to the extent of doing anything less than taking Brown's life. The existence of the right of self-defense as I have heretofore stated would not depend upon the actual existence of danger to Wootton or his associates or those dependent on them, but on the apparent existence. The existence of that right being dependent on the fact or the apparent fact, the evidence which would establish the fact or the apparent fact, must be submitted to the jury. To refuse to permit the introduction of the evidence showing the necessity for action on the part of Wootton or his associates, is to pre-judge the case and to hold that the right of self-defense does not exist, or the right to act under the rule of necessity does not exist. It would be for the Court to assume the functions of the jury. If the jury is to exercise its functions, the evidence upon which they must act must be submitted to them. If the evidence must be submitted the preliminary statement of what that evidence will be may be made as a matter of right.

If on the morning of the 12th day of July, 1917, or immediately prior thereto, Fred W. Brown was or had been engaged in an effort to take the life of Wootton or those associated with, or dependent upon them and had threatened so to do, and was then in such position as to justify a reasonable man in the belief that he, Brown, was going to carry out that threat, there can be no question but what Wootton would have the right to prove such facts. It is equally clear that we should not only have the right to prove what Brown was doing, but if he was acting with others and that had been proven, then we would have the right to prove what they were doing

—what all were doing. If Brown was acting in conjunction with thousands of others, who had banded themselves together for the purpose of doing things that greatly endangered Wootton's life and the lives of those dependent upon him and his property and that such persons so acting in conjunction with Brown and in the furtherance of a common end, were then acting so as to make reasonably apparent to a reasonable man their purposes and intentions, we should be entitled to introduce the testimony establishing these facts. Wootton would not be confined to the proof that they were seeking to take his life, but could offer evidence of their purpose to take the life of any person dependent upon him and whom it was his legal duty to protect, or who was in morals or law entitled to his protection. Even if such conspirators did not propose to take his life, but were banded together to destroy his property, or property that he had the legal or moral right to protect, we should have the right to establish that fact. We should undoubtedly have the right to establish the purpose for which the conspirators were bound together; the things they sought to attain; the means they were using or endeavoring to use to carry out their purpose, and what efforts they had made to accomplish their ends. Each and all of these things we say the evidence we shall offer will establish. We have the right to establish these facts, whether any part of them has been brought out by the state in its case or not. We are not confined in our defense by any limits the state may fix in the introduction of its case.

If on the morning of the 12th of July, 1917, Mr. Wootton, being a citizen of the City of Bisbee in the lawful pursuit of the ordinary affairs of life, was made aware that an organization had been formed by a large number of persons to bring about the destruction of his business and of his property and the business and property of large numbers of his neighbors and fellow citizens and that the accomplishment of that purpose would probably result in the destruction of the lives of many, or, if as a reasonable man, he was justified in believing and did honestly so believe from the facts and circumstances then existing, that such organization had been formed for the purposes heretofore stated and that those composing that organization were then about to act and that under the facts and circumstances it was impossible to arrest and carry before the courts in the

manner prescribed by the statutes each and all the persons so participating; that there were not sufficient jails to hold them; that there was no way that they could be detained under the law until peace could be established and order prevail and the ordinary process of the civil law brought into action, but that safety could be secured, peace established, order maintained and lives of the consiprators themselves saved by seizing them and deporting them beyond the Warren District, (whether within or without the State of Arizona, is a matter of no legal consequence) then in that event, such a condition of necessity existed as justified Wootton and his associates in acting exactly as they did act in this case, and in doing that thing which the state now charges—the kidnapping of Fred W. Brown. If Wootton had the lawful right, acting in conjunction with his neighbors and fellow citizens, because he honestly believed on evidence that justified a reasonable man in believing that those men against whom he acted, including the complainant Brown, had a fixed and determined purpose to take his life or to destroy his property or to do that which would be an irreparable injury to the community in which he lived in violence and in blood—then he and those acting with him had the right to seize and to hold such conspirators so their purpose of wrong and violence could not be done. If they had the lawful right to take them and to hold them in the Warren Ball Park, they had the equal right to take them and hold them without the State of Arizona, provided, in their judgment, honestly exercised, they believed nothing short of taking them without the state would result in saving the people and property in the Warren District. We assert that the evidence will show that it was a part of the policy of the organization with which Brown was acting at the time of the deportation to bring about the arrest of their members in such large numbers that they could not be confined in any available jail at or in the immediate neighborhood of the scene of their wrong-doing, and that this fact was known to those who were in charge of the deportation and under whom and with whom Wootton acted.

We assert the evidence will show that it was impossible to have held them in safety within, or in proximity to, the Warren District. We assert that the evidence will show that nothing but the seizure and removal of the deportees beyond the Warren District would

have prevented violence and bloodshed and that such was honestly believed to be the fact by Wootton and his associates on evidence that justified them as reasonable men in so believing. The exercise of this right by Wootton and his associates was in no way dependent upon the official character of the leader of the movement, Captain Wheeler, then the Sheriff of Cochise County. Their right was an inalienable right existing in them as men and not by virtue of any official character. If the facts existed, or appeared to exist, as we avow our evidence will establish, then Mr. Wootton and those acting with him would have been legally and morally justified in saving themselves and those dependent upon them, and their property by shooting down the men who were endeavoring or proposed to destroy their lives and their property, provided they could not have saved their lives and their property by doing less. If they could have saved their lives and their property by less drastic action, than taking life, it was their legal and moral duty to do so. Their rights and their duty may not be determined in the light of what we now know, or what may now appear to us to be true. The facts and circumstances as they saw them and honestly and reasonably believed them to exist on the 12th day of July, 1917, must control. We have the right, under the authorities that we have cited and under many more that could have been cited, to prove all of the facts and circumstances as they then existed or appeared to exist. We assert the right to show that a large number of men, probably about eighteen hundred, acted on those facts and circumstances as they then were, or as they reasonably believed them to be. We offer the evidence of the character of the organization; facts essential to the right decision of the case, as without them the proper value cannot be given to their threats. Without the knowledge of the character of the organization and the men composing it, the danger that lay in the threats they were making cannot be determined. The hiss of a chicken snake frightens no one; the rattle of a rattlesnake means danger imminent and overwhelming. Therefore, we must be permitted to show the character of the organization and the men making the threats. This is quite as important as to show the threats that were made. We must be permitted to show the power for carrying these threats out; the number of men banded together to carry them out, all the condi-

tions; the situation geographically and otherwise in which the people on both sides were placed; the industries which the one side was assailing and the other side defening; the character of the means, such as dynamite, to be used in making the assault on the lives and property of the district and the effect of explosions in the shafts of the mines; the danger to the people and their homes, to the isolated families, the men of which were forced to work to earn a living. All these things enter into the case. Without them no picture can be put before the jury of the conditions under which the defendant and his associates acted on the 12th day of July, 1917; conditions reasonably calculated to influence ordinary minds, conditions reasonably calculated to dictate and direct human conduct. All of these things are admissible in evidence for the purpose of showing whether or not on the morning of the 12th day of July, 1917, either one of the following conditions existed in the Warren District:

First, a condition under which the defendant, H. E. Wootton, found himself in reasonable fear of his life or the lives of those dependent upon him, or for the security of the property of which he was lawfully possessed and which he had a right to defend, an effort having then been made, or being then making, by Fred W. Brown and his associates, or any of them, to carry out the purpose of injury to the life or property of Wootton, thereby justifying an action under the right of self-defense.

Second, a condition in which, although no overt act at that time had been directed towards Wootton or those dependent upon him, or those whom he had a legal and moral right to defend, such a state of affairs existed in the Warren District, brought about by Brown and his associates, or such an apparent condition existed brought about by Brown and his associates, or apparently brought about by Brown and his associates, as a result of which Wootton and those acting with him reasonably believed the lives of the people or the security of the property of the district was in such imminent danger of a great and irreparable injury, for the prevention of which no adequate means were found in the law as to justify them in acting under the rule of necessity, as we confidently assert they did act.

I have not laid stress in this argument upon the fact that the United States was then at war; that, our evidence will show that the

object of the consiprators—or deportees, if you please, was the embarrassment of the government in the exercising of its functions and the discharge of the obligations it had taken upon itself in entering the war. All of that, we respectfully submit, is entitled to great weight. If it should be said that we were not specially charged with the duty of preserving the government of the United States and protecting it from harm, we reply, that it is a matter of common knowledge that in the time of war the minds of men are not in normal condition. Men do things in the carrying out of a revolutionary program that they would not think of doing to the accomplishment of private ends. Men otherwise law abiding, quiet, and peaceable, men who avoid strife and turmoil, when their country is in danger, do things and rightly do things that under ordinary conditions they would shrink from doing.

A great senator of the United States (Ben Hill of Georgia) once said:

> "Who saves his country, saves all things, and all things saved will bless him. Who lets his country die lets all things die and all things dying curse him."

The Supreme Court of California has well said:

> "Every state, and every community, has a right to adopt the means necessary to its own protection, and what those means are, the society must judge. The law of self-protection is as applicable to communities as to individuals. Communities are but corporations, or artificial beings, capable of united action through proper organs. Every member of society forms a part of this artificial being, and the state, therefore, has the greatest interest in preserving the lives of its people. The security, power, and greatness, of a state, depend upon the number and character of its population. The state, and each member of the body politic, have a reciprocal interest in the welfare of each other, and owe certain mutual duties and obligations to each. *(People v. Butler,* 8 Calif. 442.)

Counsel for the defense feel assured that a fair consideration of all the evidence in the case, the true measure and comprehension of all the facts and circumstances existing at the time of this most important act in the life of this state, as well as of this defendant, will show that he acted with wisdom and with courage in full recognition of his duty to himself and his country. We respectfully insist that

we are entitled to introduce the evidence which will establish the fact that such were his motives and such was his conduct.

OPINION OF JUDGE SAMUEL L. PATTEE

The evidence on the part of the State tends to show that on July 12th, 1917, a large number of persons variously estimated from 1100 to 1200 were forcibly seized at and in the vicinity of Bisbee, marched or conveyed to a ball park at Warren, and there loaded into freight cars and transported into the State of New Mexico. The evidence tends to make a clear case of an unauthorized and unlawful invasion of the rights of the persons thus transported and a plain violation of the section of the Penal Code of the State of Arizona under which the information in this case is framed.

The information charges the defendant, Wootton, with having kidnapped one Fred W. Brown. The evidence tends to show that Wootton was one of a large number who carried out what has been referred to as "The Deportation," and that Brown was one of a large number deported. The evidence introduced on behalf of the state may or may not be contradicted, but unless the matters testified to by the witnesses for the state are denied, some excuse or justification for the acts of the defendant and those with him is necessary to constitute a defense. To what extent or in what measure the burden is upon the defendant to excuse or justify the act complained of will not now be considered. But it at least devolves upon him to produce evidence which will raise a reasonable doubt in the minds of the jurors tending to prove some justification or excuse. This justification or excuse, if it amount to such, is found in a statement made by counsel for the defendant as to the matters proposed to be proved and to support which evidence is proposed to be offered. The nature of the statements will be considered later in this opinion.

Ordinarily the sufficiency of evidence to constitute a defense is considered after the evidence is offered and received. In this case, however, the somewhat unusual course has been pursued of stating what is proposed to be proven in advance and submitting to the Court the question whether evidence of such matters may be admitted. This course, however, was invited by counsel for both

parties in order to determine in advance of the offer of evidence and in advance even of a statement by counsel to the jury whether or not the matters stated amount in law to an excuse or justification, and whether or not evidence tending to prove the matters stated can be admitted. As a rule, the Court should proceed with great caution in passing upon disputed questions of law upon a mere opening statement of counsel, and with still more caution when the immediate question is the extent to which such opening statement may be made and the grounds it may cover. But in this case, in view of the fullness of statement and the extent of argument, the Court is perhaps as well able to pass upon such matters as it would be had the evidence been admitted and the question of law then presented. In such circumstances, however, it is obviously the duty of the Court to permit the opening statement of counsel and to allow the introduction of the evidence sought to be admitted, unless it is clear that the facts stated cannot constitute a defense or unless the matters respecting which evidence is sought to be introduced, with all reasonable inferences to be drawn therefrom, cannot amount to an excuse or justification of the act which is made the basis of the information.

The position of the state is that the matters stated cannot in any view of he law constitute any defense and do not amount to defensive matter, and that all evidence with respect to such matters should be excluded. Such a position necessarily concedes for the sake of the argument the truth of the matters stated, and thus is presented the question of law brought about by the contention of the state that such matters can in no view and under no circumstances be shown in evidence for the reason that if fully proven they could not be considered by the jury and could not constitute any defense to the charge made in the information.

It is contended by the defendant that the matters stated, if proven, furnish an excuse or justification for the act of the defendant, and those shown to be acting with him, for the reasons: First, that the act was done in the necessary self-defense of the defendant and of the citizens of the Warren District, and; Second, that such acts were necessary by reason of a threatened and overwhelming calamity about to be inflicted upon the citizens of the Warren District, or, at least, that the circumstances were such as to give reasonable ground

for belief that this was the situation, and that, therefore, what has been termed in argument the law of necessity applies.

The general rules of law governing the questions presented by the defendant will be considered, and first the law with respect to the right of self-defense. Some of the arguments advanced respecting the law on that subject are mere truisms that must be conceded by everyone. As argued by counsel for the defendant, if one man may defend himself against the attack of another, two may do so, and if two may do so, any number may do so. There is no place in the law where mere numbers, either of the assailed or assailants, either those claiming the right of self-defense or those against whom it is claimed, at all affects the legal question or the assertion of the legal right of self-defense. Any number of men finding themselves in a position where the right of self-defense arises may assert it, and if it extend to an entire community, or to all the persons constituting that community, then the community in the sense of all the persons who constitute it may likewise assert the right. But regardless of the numbers the rules of law regulating the right are the same. The right is no greater in the case of a community in the sense above mentioned than it would be in the case of an individual. The law recognizes no difference in the right of an individual to assert this defense and that of two or more persons, no matter how numerous. The rules by which such matters are to be governed and the law with respect to the right to assert such a claim are not in the least affected by the number of those asserting it.

The law of self-defense as applied to individuals is settled in this state both by statute and by judicial decision. Homicide, and, of course, any injury to a person less than homicide, is justifiable when committed in either of the following cases:

> "(1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
>
> (2) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumul-

tous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,

"(3) When committed in the lawful defense of such person, or of a wife or husband, parent, child, master or mistress, or servant, of such person, when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

(4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed or in lawfully suppressing any riot or in lawfully keeping and preserving the peace."

And Section 181 provides:

"A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which, homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

It is well settled under these provisions of the statute that the law of self-defense can only be successfully invoked in a case coming within the express terms of the statute. Mere threats, however violent, or long-continued, or mere fear, however honestly entertained, do not justify the infliction of death or bodily injury in self-defense. One cannot claim the right of self-defense or justify homicide or bodily injury under a claim of self-defense, because of mere threats against the life or person, or mere fear, though well-grounded and honestly entertained, of prospective or future injury or the taking of life, unless the danger appear to be imminent. In every case there must have been some act or demonstration upon which could be based a reasonable ground for the belief that at the time of the killing or infliction of other injury the one asserting self-defense was in imminent danger, and that it was necessary for him to kill or otherwise injure to save himself from death or great bodily harm. The extent or sufficiency of such hostile act or demonstration may depend on circumstances, and violent threats communicated to the party asserting

the claim of self-defense may justify action upon a lesser showing of hostility than in a case where no such threats had been made. But the rule is universal that there must be some hostile demonstration. The difference is only as to the extent of such demonstration which is necessary to warrant the party in acting in self-defense, and that depends upon the circumstances in each particular case. Authorities differ respecting the basis upon which the conduct of the one claiming self-defense is to be judged; some holding that the situation is to be viewed from the standpoint of the defendant, as it appeared to him at the time, and others that the matters are to be looked at from the standpoint of what would appear to a reasonable man under the circumstances to be the situation and the imminence of the threatened danger. Upon that point our statute settles the rule in favor of the latter position. But aside from that, it is settled by Section 181 of the Penal Code that mere fear, without an overt act or demonstration, cannot be made the basis of a claim of self-defense. The authorities upon these matters will be found collated in 21 Cyc., 814, 817 and 819. To justify, therefore, the claim of self-defense, the facts must bring the case within the rule as above stated, and Brown, the person charged with having been deported, must be shown to have been sufficiently an aggressor to bring the situation within such rules. Unless, therefore, there can be shown a situation in which not only threats of violence and fear of violence existed, but such hostile acts or demonstration as warrant the application of the rule of self-defense, that claim cannot be sustained. And unless Brown, either himself committed such hostile acts or made such hostile demonstration, or participated with others therein, the element of self-defense is wanting and cannot be asserted as a defense to the act complained of.

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 though 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:

> "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 prinnciple 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 personal 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 less 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 nitro-glycerine 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 clothes-line 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.

furnish instances of the application of the rule of necessity.

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. It appears from the statement of facts that Milligan had been arrested by order of the military commander of the District of Indiana and confined in a military prison in that state. He was subsequently placed on trial before a military commission convened by order of the commanding general upon charges of conspiracy against the government of the United States, affording aid and comfort to rebels against the authority of the United States, inciting insurrection and disloyal practices. He was tried before the military commission, found guilty and sentenced to be executed. In this situation he presented to the Circuit Court of the United States for the District of Indiana his petition for a writ of *habeas corpus,* seeking to be discharged from imprisonment. Milligan had been for many years a citizen of the United States residing in Indiana and had never been in the military or naval service of the United States. The application for the writ was submitted to the court and the two judges composing that court were divided in opinion and accordingly the case was certified to the Supreme Court of the United States. The case was argued for the petitioner by Messrs. J. E. McDonald, J. S. Black, Mr. Garfield and David Dudley Field, and by Mr. Speed, Attorney-General, Mr. Stanbury and Mr. B. F. Butler for the United States. The names of these counsel, distinguished in the legal history of this country, are in themselves an assurance that nothing was overlooked in the presentation of the matters before the court, and that no loose or inaccurate statement was made in argument, and the argument of counsel was reported at great length in the original edition of the 4th Wallace. Mr. Field, in discussing the merits of the matter, after presenting certain questions relating to the jurisdiction, said:

> "The argument upon the questions naturally divides itself into two parts: First, was the military commission a competent tribunal for the trial of the petitioners upon the charges upon which they were convicted and sentenced? Second, if it was not a competent tribunal, could the petitioners be released by

the Circuit Court of the United States for the District of Indiana upon writs of *habeas corpus* or otherwise?

The latter question is the one which involved the jurisdiction of the court. And Mr. Field then argued with great force and power that no such jurisdiction existed in a military commission and that its proceedings were an absolute nullity. Mr. Garfield, who followed Mr. Field in argument, said:

> "Had the military commission jurisdiction legally to try and sentence the petitioner? This is the main question."

And Mr. Black, who followed Mr. Garfield, said:

> "Had the commissioners jurisdiction, were they invested with legal authority to try the petitioner and put him to death for the offense for which he was accused? This is the main question in the controversy and the main one upon which the court divided. We answer that they were not; and therefore, that the whole proceeding from beginning to end was null and void."

Mr. Speed, Attorney-General, and Mr. Butler for the United States, said:

> "The questions resolve themselves into two. (1) Had the military commission jurisdiction to hear and determine the case submitted to them? (2) The jurisdiction failing, had the military authorities of the United States a right at the time of filing the petition to detain the petitioner in custody as a military or prisoner for trial before a civil court?"

These were the questions presented by counsel and considered by the court. General language used in an opinion must be considered in connection with and its meaning and effect determined by the questions actually before the court for determination. In the opinion of the court Mr. Justice Davis discusses at length what counsel for the petitioner had appropriately termed the main question, and that is, had the military commission jurisdiction to try and sentence the petitioner. Without attempting to quote from or to analyze the elaborate opinion of the court, it may be summed up by saying that the ruling was that in a state like Indiana which had not participated in the rebellion, whose courts were at all times open for the hearing of causes and the determination of the rights of parties, no extraordinary tribunal like a military commission could be given power to try the citizen for an offense and to sentence him to deprivation of liberty or life. And in passing upon these ques-

tions the energetic language of Mr. Justice Davis dwelt upon in argument of this case is that:

> "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its (the Constitution of the United States) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. But the theory of necessity on which it is based is false; for the government within the constitution has all the power granted to it, which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

The necessity spoken of here must necessarily refer to the claim of necessity made in that case. And that was what? Not the law of necessity spoken of in the cases and text books before cited; not the law of necessity invoked on behalf of the defendant in this case; but the necessity for the creation and establishment of an extraordinary tribunal not provided in the Constitution or the laws of the United States, to supersede or act concurrently with the duly established courts of the land. And again:

> "Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because the courts had declared penalties against the offenses charged, provided for their punishment and directed that court to hear and determine them."

was said with reference to the necessity of establishing a military tribunal and endowing it with power to hear and determine cases involving offenses which could as well have been heard before the duly constituted courts. No one can question the correctness of the decision in *Ex parte Milligan.* No one can properly seek to lessen the force of the decision nor the language used in announcing it. It is clear, however, that that language only relates to the situation then presented, and bears only upon the questions discussed by counsel and presented to the court for decision. As was said by the Supreme Court of Appeals of West Virginia in *State vs. Brown,* 77 S. E. 243:

> "It was against the attempted misapplication of martial law to the specific state of Indiana and her citizens on the ground of the existence of a state of actual war in other portions of the Union but not extending into Indiana, that the thunderous elo-

quence and invincible logic of Garfield, Black, McDonald and Mr. Justice Davis was directed."

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 as 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. 520; *Phillips vs. Fadden,* 125 Mass. 198; *People vs. Fick,* 26 Pac. 759; *State vs. 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 behalf 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 really not 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 applicaion of the rule of necessity if 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 existence 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 statement of the matters upon which evidence is intended to be offered has been reduced to writing and submitted to the Court. A copy is appended to this opinion. It is obvious that the matter set forth in the last paragraph of the statement is a legitimate subject of proof. The statute upon which the information in this case is based provides that:

> "Every person who forcibly steals, takes or arrests a person in this state and carries him into another country, state or county * * * is guilty of kidnapping."

To constitute the offense charged the carrying must of necessity be forcible, and if the person claimed to have been kidnapped went voluntarily or without the use of force the crime charged was not committed. Granting, as contended by the defendant, in argument upon another point, that the crime was as complete when the person claimed to have been kidnapped was taken to the Warren ball park as when he was taken into New Mexico, the state is necessarily held to proof of the particular offense charged, and that is that the party was carried from this state into the State of New Mexico. If, therefore, the transportation of Brown into New Mexico was not of the forcible character required by statute in order to constitute the crime, but was voluntary on his part, the proof of the crime fails, even though the accused might have been charged with kidnapping and transporting Brown from Bisbee to the ball park.

As to the claimed right of self-defense, the matters stated in the offer of proof fall short of bringing this case within the ordinary rule. According to that statement, there were threats of violence, there was preparation for the commission of violence, there were assaults committed, though it is not asserted upon any of the persons involved in this case; but there was nothing else. Defense presupposes an attack and self-defense can only be resorted to when there is some hostile act or demonstration directed against the person asserting the

claim. Threats are not sufficient, and preparation for an attack is not an attack. They may warrant preparation for a defense, but not the invasion of the right of another or the injury of another on the ground of self-defense. Applying then the ordinary rules governing the right of self-defense as laid down by our statutes and the authorities before cited, the facts proposed to be shown by the defendant fall short of laying a sufficient foundation for the assertion of such a right.

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 kidnapping 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 persons 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 the 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 conclusion 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 that 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 involved 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. Summarizing that offer of proof, so far as is necessary for consideration of the matter submitted, it is that about the year 1908 a conspiracy was entered into by a large number of persons having as its ultimate object the overthrowing of the government of the United States; and that to carry out the purposes of the conspiracy various means were resorted to and various acts performed which need not be stated in particular. But among them was the destruction of property of large value and the taking of the lives of various people. That upon the entry of the United States into the war with Germany the conspirators adopted various means to obstruct the prosecution of the war by the United States through interference with the production of materials necessary for that purpose, by opposing the enforcement of the laws relating to the drafting of persons suitable for military service, and to assist the enemies of the United States by hindering or obstructing this country in the prosecution of the war. That such conspiracy had grown until the number of conspirators exceeded 200,000; that among the means adopted was the calling of strikes in various industries engaged in the production of material necessary for the conduct of the war, and that about June 26th, 1917, such a strike was called in the

Warren District, which district embraced some of the largest copper mines in the United States and produced a large proportion of the world's copper supply; that such strike was not called for the purpose of securing better working conditions or higher wages, but for the sole purpose of embarrassing and defeating the United States government in the prosecution of the war with Germany and as a step in the destruction of private ownership of property, which purposes were admitted by those responsible for and in charge of the strike. That for the carrying out of these purposes a large number of persons styled conspirators, which number exceeded 3,000, had just prior to the 12th day of July, 1917, gathered together in said Warren District for the purpose of destroying the lives and property of persons within said district, including the defendants named in these various cases, and their families. That just prior to the 12th day of July, 1917, those so gathering in the said Warren District had from time to time assaulted various persons and were continuing to assault many persons, and had just prior to the last-named date stored and hid out within said district large quantities of dynamite and other high explosives for the purpose of destroying the lives and property of persons then within the Warren District, and had threatened such destruction, and that it was the avowed purpose of such persons to destroy the lives and property of persons within the Warren District other than the conspirators themselves upon or immediately following the 12th day of July, 1917. That on the evening of July 11th, 1917, one of the leaders of the conspirators and a member of the committee in charge of the strike notified the then Sheriff of Cochise County that he would no longer be responsible for the acts and conduct of the persons contemplating the acts before-mentioned, and that such persons had just prior to the 12th day of July, 1917, stated that they had large quantities of fire-arms and ammunition hidden within the Warren District for the purpose of destroying the lives of persons in said district other than themselves. That these conditions and threats were just prior to the 12th day of July, 1917, conveyed to the then Sheriff and to those acting with him on that day, including the defendant, and that acting upon such conditions and such information the Sheriff attempted to procure assistance from the Governor of the State of Arizona and from the federal government, and to secure the

sending of troops into the Warren District for the purpose of protecting lives and property from death and injury then imminent and being threatened, and believed by the Sheriff and the various defendants as reasonably prudent men to be imminent, but that no troops were sent and no aid extended by the state or federal government. That the numbers of those styled conspirators and the contemplated unlawful acts before-mentioned were constantly increasing, and large numbers of men were coming into the district. And thereupon, believing as reasonably prudent persons that immediate action was necessary in order to save the lives and property of the persons within the Warren District from destruction at the hands of the persons before-mentioned, it was necessary that the so-called conspirators be immediately removed from the Warren District and delivered to some organized authority sufficient in number and sufficiently equipped to detain them and prevent their return into the Warren District for the purpose of carrying out their purpose and to prevent other persons from assembling in great numbers and releasing them and enabling them to carry out such objects, the defendant in connection with the Sheriff and others, did cause the persons styled conspirators, among whom were the persons claimed to have been deported, to be removed from the Warren District and delivered to the military authorities at Columbus, New Mexico, who thereupon accepted and thereafter detained them. And it is further offered to be shown that Fred W. Brown, the person named in the information herein, was one of the conspirators and was actively engaged with the other persons in the furtherance of and in the carrying out of the objects and purposes before-mentioned.

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 destruction of their lives and property without having the right to take steps to proect 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 appearinng 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 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 affect 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 case 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.

CHARGE TO THE JURY

JUDGE PATTEE.

GENTLEMEN OF THE JURY: The defendant, H. E. Wootton, is charged by the information filed in this case with the crime of kidnapping. The information charges in substance that within the County of Cochise and State of Arizona, on the 12th day of July, 1917, the defendant Wootton did forcibly take and arrest one Fred W. Brown and forcibly convey him from the County of Cochise and State of Arizona into the State of New Mexico without having established a claim to him according to the laws of the United States and the State of Arizona. The statute under which this indictment is framed and under which this case is prosecuted is Section 185 of the Penal Code of the State of Arizona, which reads as follows:

> "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, without having established a claim according to the laws of the United States or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like any person to go out of this state, or to be taken or removed therefrom for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person, 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."

Under this statute to constitute the crime of kidnapping certain things must be proven and these are, (1) that the accused took or arrested another person and carried him into another country, state or county or to another part of the same county. (2) That such taking and conveying into another state, county or country was done forcibly. While the statute denounces other acts as criminal, constituting the crime of kidnapping, so far as this case is concerned the particular acts charged in the information bring into play only the

portion of the statute which relates to the forcible taking and transportation of another into another state, county or country. The third element of the offense is that the forcible taking and carrying into another state, county or country must be without having established a claim according to the laws of the United States or of this state. Establishing a claim means simply the procurement of lawful process for the taking of a person from one state, county or country into another. Various provisions of law have been enacted granting the right under some circumstances to remove a person from one jurisdiction to another for purposes of trial and the issuance of process for that purpose, and when such process has been issued and the steps provided by law have been taken the removal of a person from one county, state or country to another becomes lawful and in such a case it may properly be said that a claim has been established. In this case, however, there is nothing in the evidence to show that any such claim was established nor any right growing out of any regular process of law to transport Mr. Fred W. Brown, the person named in the information, from the State of Arizona to the State of New Mexico and hence that element of the offense is completely proven in this case. In other words the removal of Fred W. Brown from Arizona to New Mexico, if he was removed, was not justified by any claim established under the laws of the United States or of this state and you may treat as conclusively proven the fact that no such claim has been established. So far then as the substance of crime is concerned the things necessary to be proven by the state are that Fred W. Brown was actually taken and carried from the State of Arizona into the State of New Mexico and that such taking and carrying was forcible. That Brown actually went from the County of Cochise in the State of Arizona into the State of New Mexico is not disputed; that he was actually arrested and marched to the place which has been designated in the testimony as the Warren ball park is not disputed and so far as that portion of the journey is concerned there is no serious dispute that he was forcibly taken from Bisbee to the Warren ball park. But the crime charged in the information is not the taking from one part of Cochise County to another, it is not the taking from Bisbee to the Warren ball park, but the taking from the County of Cochise to and into the State of New

Mexico and hence the guilt or innocence of the accused is to be determined by whether the particular crime charged in the information has been proven. The defendant cannot be convicted of any offense except that particularly charged against him. He cannot be convicted of forcibly taking Brown from one place to another except as particularly specified in the information and hence, though the statute makes it a crime to forcibly take and carry any person from one part of a county to another, that is not the crime here charged and of such a crime the defendant cannot be convicted.. It is for you to determine, therefore, whether the defendant forcibly took and carried Brown from some place in this county and state into the State of New Mexico and if this be proven by evidence which satisfies your minds beyond a reasonable doubt then the commission of the offense has been proven unless some matter of defense is established under the rules as I shall present them further in these instructions. But in addition to the actual taking and carrying from this state into the State of New Mexico as alleged in the information the state must also prove that the taking and carrying was forcible. One who voluntarily goes or permits himself to be taken from one state into another is not in law forcibly taken and carried and in such a case the crime of kidnapping is not established. It is incumbent, therefore, upon the state to prove in this case not only that Brown was actually taken and carried from this state into the State of New Mexico, but that he was forcibly so carried and that he did not voluntarily go from the one state to the other. The charge as I have stated is the taking of Brown from this county and state into the State of New Mexico and that such taking and carrying was forcible in character. If at any stage of the proceedings before the taking of Brown into New Mexico he had a reasonable opportunity to withdraw from the body of men then being deported and not go to New Mexico and such opportunity was without unreasonable conditions and he failed to avail himself of such opportunity, but in spite of such opportunity permitted himself to be taken to New Mexico then his going there is to be deemed voluntary and not forcible, unless his failure to avail himself of such opportunity was due to conditions imposed which he was not bound to accept or unless it was induced by fear created by the acts of the defendant and those associated with

him. If, however, an opportunity was given to Brown to withdraw and to remain within this county and state coupled with the condition that he should assist in the deportation of others or take any part in such deportation such condition was unreasonable provided such deportation was not justified by the law of necessity and Brown was under no obligation to accept it and notwithstanding his failure to accept such condition the subsequent carrying of him into New Mexico would in law be deemed forcible. If, also, such an opportunity was afforded him and he failed to avail himself of it through fear of injury to himself if he should so avail himself of such opportunity and such fear was of a character that would be entertained by a reasonable man and was caused by the acts of the defendant and those associated with him or any of them, and acting upon and through such fears alone Brown failed or refused to avail himself of the opportunity then he would be excused from so failing or neglecting to avail himself and the carrying of him from this county and state into New Mexico would nevertheless be deemed to be forcibly done within the meaning of the statute under which this prosecution is brought.

The burden of proof to establish the guilt of the accused and to establish every material allegation of the information and element of the crime charged is upon the state and these matters must be established by evidence which satisfies the minds of the jury beyond a reasonable doubt. It is incumbent, therefore, upon the state to establish not only that Brown was actually taken and carried from this county and state into the State of New Mexico, but also the forcible character of such taking and carrying and if the jury entertain a reasonable doubt whether he was forcibly taken and carried into New Mexico the defendant is entitled to the benefit of such doubt and consequently to a verdict of not guilty. If the evidence leaves in the minds of the jury a reasonable doubt whether the carrying of Brown into New Mexico from this state was voluntary on his part, the defendant is likewise entitled to the benefit of such doubt. But in determining this matter the jury should take into consideration all the facts and circumstances respecting the claimed seizure or arrest and carrying of Brown into New Mexico, for the purpose of determining whether or not in fact he was given an

opportunity to avoid the removal into New Mexico and whether in fact he refused to avail himself of such opportunity if one was afforded, and whether or not such failure or refusal was caused by the imposing of unreasonable conditions or by fear of injury to himself reasonably entertained, caused by conditions which the defendant and those associated with him had brought about; and if the jury believe beyond a reasonable doubt that even though Brown did have such an opportunity or was afforded such an opportunity to avoid being removed to New Mexico but that the conditions brought about by defendant and those acting with him in what has been termed the deportation were such as to excite the fears of a reasonable man that by availing himself of such an opportunity he might cause serious injury to himself and that Brown entertained such fear and acted solely by reason thereof in refusing to avail himself of the opportunity to avoid such removal or that the offer of such opportunity was coupled with unreasonable conditions as before specified, then the jury should find that the removal of Brown to New Mexico, if he was so removed, was forcible notwithstanding an opportunity was given him to avoid such removal, and in this connection the jury should consider also the facts and circumstances shown by the evidence with respect to the manner and character of the so-called deportation and whether Brown had information respecting the purpose for which he was arrested or taken into custody and the extent to which such arrest or seizure was to be carried. And if Brown had no knowledge or notice that he was to be removed from the State of Arizona into the State of New Mexico at the time when an opportunity was given him to withdraw from the body of men seized by those conducting the so-called deportation, but believed in good faith that he had been merely arrested upon a charge of some criminal offense and would be given a hearing or trial within this county and state upon such charge, such fact may be considered by the jury in determining whether or not Brown's failure or refusal to avail himself of the opportunity to escape removal to the State of New Mexico, if such opportunity was afforded him, was induced by such belief or whether the same was voluntary on his part. But on the other hand if Brown, having this opportunity before the actual removal into the State of New Mexico without conditions and not

induced by fear or injury to himself, elected to be taken to the State of New Mexico and for that reason did not avail himself of such opportunity, then his going was voluntary and such removal to New Mexico did not constitute the crime of kidnapping and upon this point, if the jury entertain a reasonable doubt whether his going was voluntary, the defendant is entitled to the benefit of such doubt and should be acquitted. Naturally, the question just presented in these instructions is the one to be first determined by the jury. You will ,therefore, first determine from the evidence whether the taking of Brown into New Mexico was forcible or whether he went voluntarily and if after considering the evidence on that subject you entertain a reasonable doubt whether his removal to New Mexico was forcible, you need go no further. If you have a reasonable doubt after a fair and candid consideration of the evidence on that subject whether Brown was forcibly taken into New Mexico or have a reasonable doubt whether he did not go voluntary then it is at once your duty to return a verdict of not guilty without consideration of any other question in the case. But should you believe from the evidence beyond a reasonable doubt that the taking or carrying of Brown into New Mexico was forcible and that he did not go voluntarily, then you will pass to the consideration of the remaining questions in the case.

And in this connection, gentlemen, while the defendant alone is on trial and while he is charged with forcibly taking Brown into New Mexico it is not necessary that he should personally have done all the acts which resulted in Brown's being taken into the latter state. Whenever a number of men act in concert in the commission of an offense, whatever is done by one for the purpose of carrying out the commission of the offense is in law deemed done by all. A statute of this state provides that all persons concerned in the commission of a crime whether it be a felony or a misdemeanor, and whether they directly committed the act constituting the offense or aided and abetted in its commission or not being present have advised and encouraged its commission are principals in a crime so committed. Under this statute, therefore, every person concerned in or who aided or assisted or abetted in or who advised and encouraged the so-called deportation which took place in the Warren District on July

12th, 1917, is guilty of the crime of kidnapping if such crime was committed. If, therefore, the jury believe that the defendant Wootton took any part in or aided or assisted or abbeted or advised and encouraged the taking of Brown and carrying of him into the State of New Mexico then the defendant is responsible for all that was done by any of the persons connected with or engaged in the commission of such act to the same extent as if he had in person committed every one of such acts.

It is not necessary that the taking and carrying of any person from one state to another be for an unlawful purpose or with criminal intent beyond the intent to actually take and carry such person out. The crime is complete whenever one forcibly takes and carries another from this state to another state without having established a claim under the laws of the United States or of this state regardless of the purpose for which said taking and carrying are committed and the only intent necessary to constitute the crime is the intent to actually do the act of taking and carrying such person.

As stated before, gentlemen, should you find from the evidence beyond a reasonable doubt that Brown was forcibly taken and carried from this county and state into the State of New Mexico and that he did not voluntarily go and that the defendant participated or aided and assisted in any way or to any extent in the taking and carrying of Brown into the State of New Mexico then you will pass to the remaining question in the case. But before discussing the law relating to that question it may be well to refer to a number of matters that have been more or less referred to by counsel or mentioned in the testimony. By the statute of this state and by law irrespective of statute an individual is given the right to defend himself, his person and his property against any unlawful and unwarranted attack by another. This right extends not only to the individual but to any number of individuals and to a community and in a proper case the people of a community have the same right to defend their persons and property against unwarranted and unlawful attacks as has the single individual. But this case presents no situation calling for the application of that rule of law. The defense of necessity will be referred to and discussed later but the evidence in this case does not show such an attack as would warrant the

application of the doctrine of self-defense or render self-defense a proper matter for your consideration. You may, therefore, lay aside any question of self-defense as a defense in this case for the simple reason that the evidence does not warrant you in considering that subject. There is no self-defense involved. If the so-called deportation, including the taking and carrying of Brown from this county and state into the State of New Mexico, is excusable it is only under a rule of law which has been referred to by counsel and for want of a better designation will be here referred to as the Law of Necessity. It has been said by an eminent writer that "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 action was not disproportionate to the evil." This admirable language, gentlemen, sums up in its briefest form the so-called rule of necessity. It is obviously a rule that can be rarely invoked and only successfully invoked under extreme circumstances but when the circumstances are such as to justify its application and the one charged with the crime has acted strictly within such rule it completely excuses an act which would otherwise constitute a criminal offense. The law of necessity simply excuses one when threatened with an overwhelming peril, a peril imminent and immediate and which ordinary means are insufficient to avoid, in taking it upon himself to take such steps as may be necessary to avert the threatened peril even though it involves the invasion of the rights of others. An individual, a number of persons, or a community which faces threatned destruction of life and property and the peril of such destruction is imminent and immediate and overwhelming may, if necessary to avert such peril, not await an attack or the actual consummation of the threatened destruction in whole or in part but may act affirmatively to avert the threatened peril and if in so doing the rights of others are invaded such invasion is excusable and the one committing the invasion is guilty of no crime. But, necessarily, the evidence claimed to present such a situation should be viewed by the jury with caution and only in the event that such immediate threatened peril is shown and no reasonable means of avoiding it except by commission of the act complained of is shown can the law of necessity be given effect. Before you can find that

an otherwise unlawful act is excused by reason of the law of necessity you must find from the evidence that the impending danger feared by the defendant was actually present and in operation and the necessity must be based upon the reasonable belief that no other remedy was available under the circumstances. In addition, as stated by the learned author whose words have been quoted, the remedy invoked must not be disproportionate to the evil sought to be averted. The liberty of the citizen is not to be lightly for trivial causes invaded and the forcible removal of one to another state must be based upon real or reasonably apparent necessity for the doing of that particular act. A person may not be deprived of his property or forcibly removed from his place of abode under the plea of necessity unless the threatened danger is so great and immediate as to actually require or appear to a reasonable man under the circumstances to require that such course be taken in order to avert the threatened peril and that such threatened peril is of a character not out of proportion to the invasion of the rights of the citizen. Moreover, the law of necessity cannot justify going beyond real or reasonably apparent necessity. If under such a claim the rights of a citizen are invaded and he be deprived of his property or removed to any distance from his place of abode such act even though excusable in the beginning ceases to be so when the necessity ends and if a lesser degree of invasion of the rights of the citizen is actually or to a reasonable man apparently sufficient to avert the threatened peril, then necessity ceases with a sufficient degree of violation of the rights of another and if such violation be carried further it becomes unlawful and not only becomes unlawful as to the extent to which it is carried further than real or apparent necessity requires, but renders the entire act from its beginning unlawful. Moreover, it is not only real, actual and threatened imminent danger that may justify the application of the law of necessity but a situation apparently of that character so appearing to a man of reasonable care and prudence. And as well may that rule be invoked as an excuse for what would otherwise be a violation of law where the situation presents to the mind of a reasonable man the apparent danger of such imminent peril as when such real and threatened peril actually exists. And when men act upon such an apparent peril, provided that the appearance is justified

in the mind of a reasonable man the honest and actual belief that such an imminent threatened, immediate peril exists and he acts upon such belief and upon nothing else, the rule is the same as though such peril actually exists.

So, in this case, if the jury believe that at the time of the so-called deportation there actually existed in the Warren District a real, threatened and actual danger of immediate destruction of life and property or that the appearances were such as to create a belief to that effect in the mind of a reasonable man and that the defendant and those associated with him honestly entertained that belief and acted thereon and in so doing and acting upon such belief invaded the rights of others and deprived others of liberty then a case is presented which calls for the application of the rule of necessity and so far as they invaded the rights of others who were responsible for the creation of such condition or apparent condition and in so far as they only went to the extent of what was actually necessary to avert the threatened peril their acts are in law excused. But if the jury believe that there was no such condition of imminent and threatened destruction of life and property in the Warren District or that conditions were not such as to lead to the belief in the mind of a reasonable man that said imminent and threatened peril existed then the deportation cannot be justified under a claim of necessity. Moreover, if the jury believe notwithstanding any real or apparent condition presenting an imminent and overwhelming peril existed yet if the defendant and those acting with him went beyond what was necessary or in the opinion of a reasonable man would be deemed necessary to avert such peril then likewise they cannot be excused under the pleas of necessity. Nor can the plea of necessity be invoked to justify the invasion of the rights of those who were not responsible for the creation of the condition, if such existed, that either did or reasonably appeared to create a situation of imminent and threatened peril. Necessity would never justify the seizure and removal of one who had no part in the creation of such a condition and it could not warrant under any circumstances the seizure and deportation of one who had no part in creating the condition or apparent condition even if such existed. And so in this case the plea of necessity cannot justify the defendant or any others acting with

him in seizing or depriving any one not actually participating in the causing of the condition that might lead to the claim of necessity. In this case even though the jury believe that a situation was presented calling for the application of the rule of necessity the seizure and deportation of Brown cannot be justified unless Brown himself was an actual participant or aided and assisted or abetted in the bringing about of the condition that led to the deportation if such condition was one which really or apparently threatened an immediate and overwhelming peril. If, therefore, the jury believe and are satisfied beyond a reasonable doubt that Brown, the person charged with being deported, was in no way responsible for and in no way participated in or aided or assisted or abetted those who brought about such a condition, even though the jury believe such a condition existed, his deportation cannot be justified. I have said, gentlemen, that one may act upon a situation of apparent necessity, but to justify action that must have been the sole reason and basis for the action sought to be excused. One who acts from any other motive than that of actual necessity or apparent necessity based upon a reasonable belief honestly entertained that such condition exists and such belief is induced by a situation which would give rise to such a belief in the mind of a reasonable man cannot justify or excuse his act under the plea of necessity. If he acts from any other motive, no matter what, or for any other purpose than to avert the threatened peril his act is inexcusable and if it involves the commission of what would ordinarily be a crime he should be found guilty. So applying these rules to this case it is indisputed that for some time prior to the so-called deportation there existed among the miners or some of them employed by the various companies operating in the Warren District what has been referred to as a strike. The laws of this state recognize the right of employees to strike, that is to collectively cease work. It recognizes their rights to make demands upon their employer, reasonable or otherwise, and recognizes their right to strike if such demandss be refused or for any other reason or for no reason at all. Strikes in themselves are lawful. Striking employees have a right to peacefully persuade others to cease work. They have a right to station persons in suitable places to peaceably seek to dissuade others from working. They have the right to do what has

been referred to as picketing and the laws of this state recognize their right to do so and so long as they are peaceable and seek only by peaceable means to attain the end for which the strike is called and to peaceably dissuade others from working they are entirely within their legal rights. They have no right, however, to resort to force or intimidation either against the employers or their property or against non-striking employees, and intimidation may as well be evidenced by acts and conducts as words. The so-called deportation, if taken as a means for breaking up or ending the strike, was wholly unlawful. Even though the striking employees may have gone beyond the law and resorted to force and intimidation that alone would not justify their forcible removal from the district. Nor could the character of the employees or any organization of which any of them may have been members in itself justify the deportation. Nor could any disloyalty to this government, even though in time of war, justify the deportation. The rights of the citizens are the same in time of war as in time of peace so far as everyone except the government is concerned and no expressions of disloyalty, no treasonable utterances, no failure to measure up to that standard of patriotism that is the duty of every good American citizen could in itself justify a forcible seizure and removal of even the disloyal from the district in which they were. No membership in any society or organization no matter what its teachings, no matter how pernicious its doctrines, or how un-American its utterances, could justify such deportation. There must have been as before stated such a condition of imminent and threatened peril, real or reasonably apparent, as to be actually imminent, and such threatened destruction of life or property really or apparently imminent as would as before stated excuse the invasion of the rights of others before such condition could furnish an excuse or justification for the seizure and removal of others. But in considering whether such a condition existed in the Warren District the jury are entitled to consider all the facts and circumstances shown by the evidence including the character of those engaged in the strike so far as it may be shown by the evidence, the membership of any of them in any organization, and the character and teachings of that organization, not as justifying or excusing the deportation but as circumstances to be given such weight as under all the evidence the

jury believe them to be entitled to in determining whether a condition of overwhelming and imminent peril, real or reasonably apparent, existed. For this purpose evidence was admitted concerning the teachings and doctrines of the organization known as the Industrial Workers of the World or more commonly referred to as the I. W. W. The law does not justify the deportation of members of that organization because they are such. The organization and its doctrines are not on trial and the deportation of any member of that organization, irrespective of other conditions, would be as unlawful as that of a non-member. The only purpose for which that evidence can be considered is in determining the character and purpose of the organization and its members as one of the circumstances which may be entitled to more or less weight in determining what was the situation in the Warren District at and immediately preceding the so-called deportation. It is for the jury to determine what the character of that organization was, to what extent the literature read in evidence reflects the teachings and doctrines of the organization itself or the individual views of the several writers and then no matter what conclusion the jury may reach as to the character of that organization and the doctrines as believed in by its members it is no more than a circumstance to be given such weight and only such weight as the jury think it entitled to in connection with all of the other facts and circumstances shown by the evidence in determining what the situation was in the Warren District; and from this and from all other circumstances shown by the evidence, the acts and conduct of the defendant and those acting with him, and of those deported and those acting with them, the jury are to determine what was the situation in the Warren District on and prior to the 12th day of July, 1917. And for the purpose of determining such condition the jury may consider and give whatever weight they may think it is entitled to, no more or no less, to the acts and conduct and sayings of those engaged in the strike or acting in concert with them, of the acts and conduct and sayings of those who conducted the so-called deportation or acting in concert with them, and all the other evidence respecting the conditions in the Warren District and from all the evidence determine whether or not the situation existed at and prior to the so-called deportation which would justify or excuse the defendant

in acting under the claim of necessity. Another subject may be referred to. Evidence has been given respecting the acts and conduct of the Sheriff of Cochise County and those claiming to be acting as deputies of the Sheriff during the so-called deportation and prior thereto, but neither the defendant or any of those connected with him in the so-called deportation can justify that act upon the theory that either the Sheriff or the defendant or any others acted in the capacity of an officer. The duties of officers of the law, as peace officers, are defined by the statutes of this state and the powers conferred on them as officers are likewise defined by law and beyond the power expressly given by law no officer can go and no act beyond the power conferred upon him by law can be justified and for any act in excess of the power given him by law he may be held criminally and civilly responsible. The powers of an officer given by law do not include the removal of any citizen from this state except in obedience to lawful process issued by competent authority for that purpose. The so-called deportation of a number of people and particularly of Brown, the person mentioned in the information, cannot, therefore, be justified or excused by reason of any claim that the defendant or anyone acting with him was acting as an officer of the law for the preservation of the peace or the protection of lives or property. Whatever might be said as to the question of necessity the act cannot be justified or excused by reason of a claimed acting as officers of the law and if the defendant among the others engaged in conducting the so-called deportation acted upon the belief that he was performing his duty imposed upon him as the deputy of the Sheriff or as a member of the *posse comitatus* summoned by the Sheriff, his act cannot be justified. And if such was the motive and purpose and he did not act under the rule of necessity and under circumstances which warranted his acting under that rule, his act is inexcusable in law and he should be found guilty of the crime with which he is charged. There is no such thing as an officer acting as such under the rule of necessity. As is said by an eminent court, "This rule pertains to individuals, not to the state. It has no connection with or dependence upon the sovereign power. It is a natural right existing independently of sovereign government. The principle applies as well to personal as to real estate, to houses as to property, in solitude as in a crowded

city, in a state of nature as in civil society." This right it will be seen, therefore, springs not from statutory law or from any law, but from the natural right every community has to protect itself against threatened and overwhelming peril and when such protection involves that which constitutes the invasion of the rights of others it can only be justified when the situation exists or, under circumstances from which it appears to a reasonable man to exist, which justifies the exercise of this natural right.

That Brown, the person named in the information, was actually taken from this county and state into New Mexico is not disputed. That the defendant to some extent participated in the seizure and removal of Brown into New Mexico is admitted by the accused himself. The questions for the jury, therefore, are these:

1. Was Brown forcibly carried from this county and state into the State of New Mexico or did he go voluntarily?

2. If he did not go voluntarily but was forcibly taken into New Mexico was the act excused by reason of the law of necessity?

And these are questions for the jury and for the jury alone to determine from the evidence.

Every person charged with crime is presumed to be innocent until proven guilty by evidence which satisfies the minds of the jurors of his guilt beyond a reasonable doubt. The burden of proof is always upon the state to satisfy the jury beyond a reasonable doubt of the guilt of the defendant and of every allegation necessary to make up the crime charged. This burden never changes and the presumption of innocence remains with the defendant throughout the trial and until removed by a verdict of guilty at the hands of the jury. The removal of a citizen from this state to another without establishing a claim under the laws of the United States or of this state, that is, without process for that purpose issued pursuant to some law of the United States or of this state, is presumably unlawful and presumptively constitutes the crime of kidnapping, provided the taking and carrying into another state was forcible. The burden is upon the state to prove beyond a reasonable doubt that the taking of Brown from this county and state into the State of New Mexico was done forcibly and that Brown's going was not voluntary, and if the jury entertains a reasonable doubt upon that subject the defendant is

entitled to the benefit of it and to an acquittal at their hands. On the other hand if they are satisfied beyond a reasonable doubt that the taking of Brown into the State of New Mexico was forcible and not voluntary on his part then it is the duty of the jury to find the defendant guilty of the crime charged unless such act was executed under the rule of necessity. There is no presumption that one who forcibly seizes and carries a person into another state acts under the law of necessity and when such a claim is made the burden is upon the one asserting it, but such burden only goes to this extent, that he must produce such evidence as will raise in the minds of the jury a reasonable doubt whether he did not act under all the circumstances in accordance with the rule of necessity. If the jury after consideration of all the evidence entertain a reasonable doubt whether the defendant and those acting with him were not justified in acting as they did under the law of necessity their duty is always to give the defendant the benefit of such doubt and acquit him, but if they have no reasonable doubt they should return a verdict of guilty. To justify the claim that an act is excused under the law of necessity it must also appear that there was no other available manner of averting the threatened peril and if the jury believe that other and not unlawful means could have been resorted to by which the threatened peril could have been as well averted and that a reasonable man would under all of the circumstances have believed that such other means could as well be adopted the plea of necessity becomes unavailable.

I have stated, gentlemen, that the guilt of the accused and all the things necessary to be proven to constitute the crime charged must be proven by evidence which satisfies your mind beyond a reasonable doubt. A reasonable doubt may arise either from evidence or want of evidence in the case. It is a term difficult to define and definitions or descriptions have usually added little or nothing to the meaning of the term reasonable doubt. It is exactly what its name implies, a reasonable doubt remaining in the minds of the jurors after considering all of the evidence in the case fairly and candidly for the sole purpose of ascertaining the truth. It is not a mere fanciful or possible doubt but a reasonable doubt. The Supreme Court of this state has adopted and recommended as a part of the charge to be

given to juries, the definition or description stated years ago by one of the most eminent American judges in this language:

> "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than to the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it."

You, gentlemen of the jury, are made by law the sole judges of the weight of the evidence and of the credibility of the several witnesses who have testified before you. It is for you and you alone to say what is proven and not proven in the case. It is for you and you alone to say what weight should be given to the testimony of any witness or what effect should be given to any of the facts and circumstances which you deem proven in the case. The Court cannot aid you by attempting to sum up or discuss the evidence. The constitution and the laws of this state imposes upon trial judges silence upon such subjects and it is for the jury to remember what the evidence was, aided as they will be by the arguments by counsel, to determine what witnesses testified truthfully or otherwise, to determine what facts and circumstances may have been proven in the case, and to give such facts and circumstances such weight as under all the evidence they deem them entitled to. In considering the testimony of a witness and in passing upon the credibility to be given to the testimony of any witness there are certain matters that the jury

are entitled to take into consideration and that is the manner and appearance of the witness while testifying, the impression made upon the jurors by the witness while testifying whether the testimony of the witness carries with it the impress of truth or otherwise. Other things that may be considered by the jury in determining the weight to be given to the testimony of any witness or the credibility of such witness' testimony are the witness' knowledge or means of knowledge, or lack thereof, of the matters to which he testifies; any reason, if any can be shown, or motive, if any be shown, for giving the testimony that he did; any interest in the result of the case, if any such be shown; and any prejudice or bias displayed by the witness while testifying, if any such were displayed, and generally any other facts and circumstances which the jury may deem established by the evidence and which in their judgment bear upon or throw any light upon the weight of the testimony or the degree of credibility to which his testimony is entitled.