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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 916

STATE OF TENNESSEE, EX REL. LUKE LEA AND LUKE LEA, JR.,

Petitioners,

vs.

LAURENCE E. BROWN AND FRANK LAKEY, AGENTS OF THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE AND BRIEF IN SUPPORT THEREOF.

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(b) Demurrer to petition sustained and writ theretofore issued quashed.

(c) Judgment affirmed by the Supreme Court of Tennessee, although it found that petitioners, not corporeally within North Carolina when crime charged committed, were convicted in that State solely on the theory of constructive presence.

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(b) The other opinion, two judges concurring, held that neither "leaving the custody" (not of itself an offense) nor conviction was a substitute for personal presence when alleged crime committed, but concurred in affirmance on the ground of an implied waiver of the right to resist extradition, so holding because petitioners, four months prior to the return of the indictments on which they were tried and on which extradition is sought herein, voluntarily appeared to answer a then pending indictment, later dismissed, which was materially different in scope, character, charges and parties from the subsequent indictments.

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(b) Nor has it been heretofore determined whether any act of the alleged fugitive outside of the extradition proceedings themselves can enlarge the powers of the asylum State so as to confer upon it jurisdiction to extradite over his objection a person who is not a fugitive from justice in the demanding State as that term is defined by the authorities.

(c) There is also presented the question of the issues that may be considered in an extradition proceeding after conviction. Is the status of the alleged fugitive affected by proceedings in the demanding State subsequent to the indictments? If so, may the courts of the asylum State inquire into such proceedings to the extent necessary to test the jurisdiction of the court in which the proceedings were had?

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(b) No facts are alleged in petition inconsistent with any statements, admissions or pleas at the trial. Petitioners objected to trial under subsequent indictments, challenged the validity thereof and the jurisdiction of the court at every stage of the proceedings. They did not experiment with the courts of North Carolina in the trial under these indictments.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 916

STATE OF TENNESSEE, EX REL. LUKE LEA AND LUKE LEA, JR.,

Petitioners and Appellants Below,

vs.

LAURENCE E. BROWN AND FRANK LAKEY, AGENTS OF THE STATE OF NORTH CAROLINA,

Respondents and Appellees Below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associated Justices of the Supreme Court of the United States:

Your petitioners, Luke Lea and Luke Lea, Jr., respectfully show:

The petitioners, citizens of Tennessee and physically within that State, seek a writ of *habeas corpus* to prevent their extradition from Tennessee to North Carolina. The demurrer admits that neither of the petitioners was within

the State of North Carolina at the time when the crime charged was committed.

The petitioners were convicted in North Carolina solely on the theory of constructive presence. After conviction and release on bond, they returned to Tennessee. The demand for extradition was made on the indictments upon which they were convicted, supplemented by the judgment of conviction. There is no claim that petitioners committed an additional crime in leaving the State of North Carolina after conviction or in refusing to return to serve the sentences imposed. At any rate, extradition was not sought on that ground.

The petitioners applied for and obtained the writ of *habeas corpus* in the Criminal Court of Montgomery County, Tennessee, where they were held in custody by the duly designated agents of the State of North Carolina under a rendition warrant issued by the Governor of Tennessee upon demand of the Governor of North Carolina (R. 1-2).

Respondents demurred to the petition. The demurrer was sustained and the writ theretofore issued was quashed. This judgment was affirmed by the Supreme Court of Tennessee on December 9, 1933, although the court found that petitioners were not corporeally within the State of North Carolina at the time the crimes charged were committed and were convicted therein solely on the theory of constructive presence.*

The time within which to apply for certiorari to this Court was extended until April 2, 1934, by an order issued by Mr. Justice Brandeis. The two written opinions (not yet officially published) filed in the Supreme Court of Tennessee are set out in the record (R. 410, 419).

*"All that they (petitioners) did was done in the State of Tennessee." *State* v. *Davis, Lea, et. al.*, 203 N. C. at page 32.

I.

New Federal Questions of Substance Involved.

These were considered and decided as Federal questions of first impression and public interest in both opinions rendered in the Supreme Court of Tennessee. On the date the judgment was affirmed, its Chief Justice announced in open court that a stay of execution would be granted as a matter of course for the full statutory period in which to make application for writ of certiorari to the Supreme Court of the United States, as *new Federal questions of importance* were presented in the case.

These questions involve the construction and application of Section 5278 of the Revised Statutes of the United States and Article 4, Section 2 of the Federal Constitution relating to extradition.

The petition for *habeas corpus*, which was demurred to, and which included in the exhibits thereto attached the record in the proceedings in the North Carolina courts, *charged and showed upon facts consistent with the record:*

(1) That the petitioners were not within the State of North Carolina at or about the time of the commission of the crimes charged for which their extradition was sought, and that their conviction was solely upon the theory of constructive presence (R. 52).

As construed by this Court, the Federal extradition statute "expressly or by necessary implication" prohibits the surrender by the asylum to the demanding State of any person not within the latter State when the alleged crime was committed, and in denying petitioners the benefit of this construction the Supreme Court of Tennessee deprived them of substantial Federal rights duly asserted in the courts of that State.

While agreeing on affirmance, the Tennessee Supreme Court divided three to two upon each ground upon which the right of extradition was upheld, the opinions affirming the judgment of the trial court expressing sharply divergent views as to these grounds (R. 410, 419).

(2) That the entire proceedings in the courts of North Carolina, under which the custody of petitioners was had and conviction obtained, including the indictments, judgments and bonds executed on appeal therefrom, were absolutely void under the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution (R. 3-51).

The petition for the writ of *habeas corpus* was not limited to a restatement of matters presented in previous applications for certiorari to this Court to review the North Carolina judgments, but presented many new and material matters, bearing on the jurisdiction of the North Carolina Court and the denial of due process in the trial, and the entirely new question of extradition (R. 34-35, 12-13).

The petition alleged that the North Carolina Court had no jurisdiction, that the conviction was obtained by fraud (extrinsic fraud affecting the jurisdiction), and that petitioners had been convicted without due process of law. In spite of the admission of the facts by the demurrer, the Tennessee Supreme Court refused to inquire into the validity of the proceedings (R. 416-418). It did not question the sufficiency of the allegations, showing a denial of due process and lack of jurisdiction in the North Carolina courts.

While refusing to pass on these questions the Supreme Court of Tennessee looked to and considered the North Carolina proceedings as affecting the status of petitioners as alleged fugitives from justice. "Custody" had or "conviction" obtained in these proceedings was the ground on which one of the opinions sustained the right of extradition.

The other opinion, which concurred in affirmance on the ground of an implied waiver of the right of petitioners to resist extradition, also looked to and considered the North Carolina proceedings in reaching that conclusion, but likewise refused to inquire into these proceedings to the extent necessary to test the jurisdiction of the courts in which such proceedings were had.

II

Articles of Constitution and Statutes Involved.

ARTICLE IV. SECTION 2. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A person charged in any State with Treason, Felony, or other Crime, *who shall flee from Justice,* and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime." (Italics ours.)

REVISED STATUTES 5278: "Fugitives from State or Territory. Whenever the executive authority of any State or Territory demands any person as a *fugitive from justice* of the executive authority of any State or Territory to which such person has *fled,* * * * it shall be the duty of the executive authority of the State or Territory to which such person *has fled* to cause him to be arrested and secured * * * and to cause the fugitive to be delivered. * * * (Italics ours.)

III.

The Federal questions of substance not heretofore decided by this Court, are these:

Broadly stated, the question is whether two citizens of Tennessee, at their homes when the alleged offenses were committed in the State of North Carolina, convicted therein solely on the theory of constructive presence, *asserting their*

right to resist extradition under the indictments on which they were convicted *at the first opportunity, may assert that right after conviction and after their return to Tennessee.*

If in the ordinary case they could not assert this right, can they do so where the *allegations of fact* in the petition for the writ of habeas corpus *show,* and the demurrer thereto admits, that *jurisdiction* was *procured* by *fraud* and the *conviction had* in flagrant *violation* of their *rights* under the *due process clause* of the *Fourteenth Amendment?*

More specifically we put the questions as follows:

(1) A party is not subject to extradition unless he was *corporeally* present within the demanding state at the time of the commission of the crime. *Does this rule apply where extradition is sought after conviction and when the petitioners are no longer within the demanding state?*

(It is stated in the petition and admitted that the petitioners were not corporeally present when the crimes charged were committed, the conviction having been on the ground of constructive presence.)

(2) In view of the fact that the right of extradition is based on statute, and is warranted only where the defendant is a fugitive from justice, can a party be extradited who is not a fugitive from justice? Or, in other words, does the conviction have a greater force than the original charge of crime?

(One of the opinions of the Supreme Court of Tennessee rendered by Judge Chambliss and concurred in by Judge McKinney, decided both these questions in favor of the petitioners, holding that they could not be extradited if they had not been in the demanding state when the crime occurred and that the conviction added nothing to the charge. Judge Chambliss sets forth clearly and historically the reasons for the negative answers to these questions.)

(3) Did the petitioners waive their right to resist extradition in a subsequent proceeding when they appeared voluntarily to answer to an indictment, where that indictment was dismissed and where they were then held and tried upon a new and different indictment?

(On this point the opinion of Judge Chambliss, concurred in by two other Judges, decided against the petitioners.)

(Can one be held to have voluntarily given a waiver without knowledge of the facts? Can it be held that acts performed under duress constitute a waiver of rights? Can one be held to have given a waiver when he protested against trial on the new and different indictments, in which new parties were added? Can any implied waiver confer upon the asylum state jurisdiction to surrender over his protest one who is not a fugitive from the justice of the demanding state?)

(Petitioners alleged that they had not waived their right to resist extradition under the new indictments but asserted that right at the first opportunity and upon the first demand for their rendition thereunder by the State of North Carolina.)

(4) If the accused was not in the demanding state at the time of the commission of the crime and is not therefore a fugitive from justice as defined by the authorities, does the fact that he appears for trial (in this case for trial under a different charge) and is convicted on the theory of constructive presence and permitted to leave the demanding state, deprive him of the right to raise the jurisdictional question on a subsequent extradition proceeding? In other words, may the accused show that he is not a fugitive from justice any time and any place where extradition is sought or is he limited in asserting this right to demand before trial?

(5) May the petitioners resist extradition from the State of Tennessee by showing in the courts of that State that the conviction in the Court of North Carolina (upon which the extradition proceeding is based) was without due process of law on a void indictment returned by a Grand Jury lacking jurisdiction, tried in a court likewise lacking jurisdiction, and that the conviction was the result of fraudulent practices, these fraudulent practices having been extrinsic as affecting the court's jurisdiction as distinguished from intrinsic fraud, which might have affected the merits of the case? Or otherwise expressed, can a citizen of the asylum state not otherwise subject to extradition, be extradited for the purpose of having him serve void sentences in the demanding state?

(The rendition warrants recited the judgments and it was expressly admitted by respondents herein that extradition was sought for the sole purpose of having petitioners serve the North Carolina sentences (R. 2, 66-67).

IV.

The Opinion of the Supreme Court of Tennessee.

(1) Judge Swiggart speaking for himself and two other judges, said:

> "There is no language in the constitutional provision (Federal) nor in the statute, expressly making presence in the demanding state at the time the crime was committed essential to the right of extradition."

So construing the statute, he held that petitioners were corporeally within "the legal custody and jurisdiction" of the State of North Carolina when they executed appeal bonds and that when they failed to return to answer the judgments they necessarily became "fugitives from justice." But the "crime" involved and for which extradition was asked was violation of the banking laws, not failing to appear to answer to a judgment.

Furthermore, the conclusion begged the question as to the "legality of the custody," and assumed the validity of the bonds. Under the allegations of the petition, all the proceedings were nullities and the bonds and the judgments void.

Judge Chambliss, Judge McKinney concurring, strongly dissented from the above expressed view of Judge Swiggart, saying in part:

> "Reliance is had upon the *appearance* and *conviction* of petitioners in the foreign state without reference to the fact, heretofore taken to be essential, of presence in the demanding state *at or about the time when the crime was committed*. No case is cited, or has been found, where the courts have held or hinted that a charge or showing of conviction of crime in the demanding state may be treated as a substitute for the charge of presence when the crime was committed. As said in Ex parte Lewis, 75 Tex. Cr. R. 320, 170 S. W. 1098, 1099 'Congress could have said, where a prosecution has ripened into a judgment, that that would be sufficient basis for the extradition; but that body has not so enacted, and until this occurs, the states are powerless to provide this as a basis for extradition'." (R. 421.)

Again quoting from this opinion:

> "Cases there are where persons have broken custody, or broken parole, and been extradited but in most of these cases the ground of extradition laid was the charge then pending that the person had committed a crime in the demanding state, in conspiring to break custody, as in *Drew* v. *Thaw*, 235 U. S. 432, * * * It is significant that the contention made in the foregoing cases was that, after conviction, no 'charge' of crime, as required by the language of the extradition statutes, longer remains, but no suggestion was offered or con-

sidered that the conviction could be treated as sufficient of itself, in substitution for the charge of crime committed in the foreign state. The essentiality of this requirement seems clearly to have been assumed as a condition of extradition. Conviction was held to be merely in confirmation of, not a substitute for, the charge of crime.''

(2) Thus two of the Judges were of the opinion that the conviction added nothing to the indictments and that one was not subject to extradition without proof of corporeal presence within the state at the time of the commission of the crime.

These two Judges, however, concurred in the affirmance on the ground that the petitioners had waived their rights to resist extradition because *they had voluntarily appeared in North Carolina in connection with another indictment.*

It is contended that in this there was error, that in view of the facts and allegations of the petition there was not waiver as a matter of fact. As to this, the allegations of the petition show the following:

An indictment was returned against petitioners and others on March 18, 1931. Before any process was issued or any demand made for extradition under this indictment, petitioners, though not subject to extradition, *voluntarily appeared in North Carolina on March* 27, 1931, *to answer this indictment.* No other criminal charge was then pending and so far as they knew none other was contemplated by the North Carolina authorities. *They were not tried on this indictment, which was later dismissed.* When, however, petitioners appeared for trial under the first indictment on July 27, 1931, new indictments were returned against them. The former indictment, in six counts, had alleged conspiracies, *all in October,* 1930, to defraud the Central Bank. J. Charles Bradford, the cashier of the bank,

was neither indicted nor mentioned therein. The new six count indictment added as alleged co-conspirators *"J. Charles Bradford and others to the Grand Jury unknown"* (R. 4-8, 52).

It is clear from the record that Bradford was added to the new indictment not for the purpose of trying him with the petitioners, but to make competent his acts and declarations in their absence. At the time Bradford was in a sanitarium and neither physically nor mentally capable of attending court. His condition was known to the prosecution. A large part of the trial record was made up of acts and declarations of Bradford not in the presence of petitioners. Jurisdiction in part was asserted on the ground of overt acts committed by Bradford. The subsequent indictments included a blanket charge of conspiracy, covering a different period of time, to violate substantially all the banking laws of the State of North Carolina, and a substantive charge of criminal misapplication of the funds of the Central Bank, based on fifty-two items of alleged misapplication not disclosed until the trial was under way. The misapplication indictment was returned on the date of the trial.

Petitioners did not experiment with the North Carolina Court on these indictments. They made no voluntary appearance thereunder but were held under orders of the court and later executed appearance bonds to avoid being put in jail and kept there during the trial.

They not only waived no rights but challenged the validity of the indictment, objected to trial thereon and to the jurisdiction of the court at every stage of the proceedings.

When petitioners appeared to answer the first indictment, they did not know and could not have known that Bradford, mentally incapable of making a defense, would

be named as an alleged co-conspirator, nor did they know that they would be involved in a dragnet of vague and indefinite charges. In the absence of such knowledge they insist that it cannot be said as a matter of law and in the face of allegations in the petition to the contrary, that they had voluntarily and intentionally waived rights (R. 4-8, 52).

Nor under authorities cited in the brief was the execution of bond to avoid imprisonment a waiver of any privilege or exemption. Such bonds were executed under duress.

(3) It is further contended that the determination as to waiver was in error in that there is nothing in the federal statutes to prevent one from raising the question of corporeal presence in the demanding state at the time the crime was alleged to have been committed on every occasion where extradition is sought and that to waive one demand for extradition can have nothing to do with resisting a second demand. Petitioners, however, resisted the first and only demand made by North Carolina for their rendition under these indictments, asserting such rights in their petition for the writ of *habeas corpus*. Assuming that one is not a fugitive from justice and therefore not subject to extradition, can any act of his add to the powers of the Governor of the asylum state or its courts in an extradition proceeding?

The Supreme Court of Tennessee seems to have decided the case as though the issue were being raised on appeal form the judgment of conviction. It is only on that theory that the question of conviction or of waiver of right to resist extradition could be material. In so considering the issue, the Court confused the right of the demanding state to try the alleged fugitives with its right to demand their surrender under the federal extradition statute. Although

North Carolina had the right to try petitioners when they were within its territorial limits, nevertheless when they left that state they could not be extradited under the federal extradition statute unless they were fugitives from justice within the definition of the authorities.

The confusion of the right to try with the right to extradite by the Supreme Court of Tennessee is shown by the following extract from the opinion of Judge Swiggart:

> "If, possessing jurisdiction, we should reach the conclusion that subsequent proceedings to the indictments in North Carolina were void, as in conflict with the due process clause of the Constitution of the United States, it would still be our duty to sustain the extradition, since such a ruling would leave the indictments undisposed of, and the relators would stand as charged with the crime in that state."

If the indictments on which extradition is sought remain unaffected by subsequent proceedings, and are sufficient "charges of crime" these indictments would not sustain the right of extradition where it clearly appeared that petitioners were not fugitives from justice. The "charge of crime" is only one of the essential jurisdictional facts in an extradition proceeding. No matter how perfect or complete the charge, the alleged fugitive may defeat the right of extradition thereon by showing that he was not corporeally within the state when the alleged crime was committed.

In the foregoing, as throughout the opinion, *flight from the state when present therein at the time the crime charged was committed* is confused with *leaving the state after an indictment found therein on a criminal charge.* This is an *entirely new construction* of the *federal extradition statute. Presence within the state after the crime* charged has been committed is *not a ground of extradition under the federal statute. Hyatt v. Corkran*, 188 U. S. 691.

If the bonds executed in North Carolina under these indictments affect the status of petitioners as alleged fugitives from justice, the validity of these bonds would then become a necessary issue. The petition alleges that these bonds were executed under duress and in a court without either jurisdiction or legal existence. The sufficiency of these allegations was not questioned by the court in its opinion.

V.

Reasons Why the Writ Should be Granted.

In holding the petitioners, who were not physically present in the State of North Carolina when the alleged crimes were committed, were subject to extradition as fugitives from justice, the Supreme Court of Tennessee decided a federal question of substance not theretofore decided by this Court.

In *Roberts* v. *Reilly,* 116 U. S. 80, 29 L. Ed. 544, 549; *Innes* v. *Tobin,* 240 U. S. 127, 60 L. Ed. 564; *Hyatt* v. *Corkran,* 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 757; *Illinois, ex rel. McNichols* v. *Pease,* 207 U. S. 100, and other decisions construing and applying the federal statute, it was held that a party cannot be extradited unless he was physically present in the demanding state when the crime was committed.

In these extradition cases the Court has always referred to the wording of Section 5278, to the effect that no one but a "fugitive from justice" is subject to extradition. The statute refers to the state "to which such person has fled". Unless one was present in the demanding state at the time of the commission of the crime, he cannot be said to have fled from that state. This applies both before and after conviction. Since the question is one of statutory construction, how can it be said that one who is *indicted*

for a crime is not extraditable unless he fled from the state, but that one who has been found guilty of the crime charged is extraditable even though he did not flee from the state? This is not what the statute says. The interpretation of the Supreme Court of Tennessee would make the statute read that one may be extradited if he is charged with a crime and has fled from the state, but that if one is convicted of a crime, he may be extradited even though he was not a fugitive from justice.

We suggest as a parallel example that if a state could permit a trial in the absence of a defendant (whether or not he waived his right to be present) and if the defendant were found guilty, he still would not be subject to extradition under the federal statute unless he had fled from the state, to wit, was a "fugitive from justice."

In *Innes* v. *Tobin, supra,* it was held that the statute "*expressly or by necessary implication*" *prohibits the surrender* of any person by the asylum to the demanding state where it clearly appears that such person is not a fugitive from the justice of the demanding state; and in *Hyatt* v. *Corkran, supra:* "We have found no case decided by this court wherein it has been held that the statute (said Section 5278) covered a case where the party was not in the state at the time when the act was alleged to have been committed. *We think the plain* meaning of the Act requires such presence." (Italics ours.)

Assuming that the papers presented in this case are regular in form, in that they properly charge the commission of a crime, there remains only one issue in the proceeding, namely: Are the petitioners fugitives from justice?

The petition recites that at the time of the commission of the crime alleged, the petitioners were not in the State of North Carolina. The demurrer admits this allegation. There is therefore no issue of fact to be determined by

the Court. It must stand admitted that the petitioners were not corporeally within the State of North Carolina at the time that the crime charged was committed. It therefore follows that the petitioners are not fugitives from justice and therefore are not subject to extradition.

As said by Judge Cullen in *People* v. *Hyatt,* 172 N. Y. 176 at 183:

> "There seems to be substantial unanimity in all the authorities on one proposition, that to be a fugitive from justice a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime.
>
> "It is totally immaterial that subsequent to the completion of the crime the accused returned to the demanding state and again departed from its borders."

See *Hyatt* v. *Corkran,* 188 U. S. 691, where the Court said at 719:

> "He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight."

This question of corporeal presence is not an incident. If the accused was not corporeally present in the demanding state at the time when the alleged crime was committed, the extradition proceeding must fail.

Munsey v. *Clough,* 196 U. S. 364 at 374;
Hyatt v. *Corkran,* 188 U. S. 691.

The cases above cited arose when the demand was made on an indictment before trial. *This Court has never passed upon the question of whether a different ruling would apply after conviction.* The reasoning of the Court, based as it is upon the clear wording of the statute that one cannot be extradited unless he is a "fugitive from justice", applies to

the situation whenever and however the question is raised.

The record shows other new questions. The Supreme Court of Tennessee denied the petitioners a federal right in concluding that there was a waiver. There is no support for this in the record. In fact, the finding is in direct conflict with the allegations of the petition. There is the further question of whether a party can waive the necessity of presence, this being an essential jurisdictional fact to the right of the asylum state to surrender the alleged fugitive over his protest to the demanding state. This Court has not decided whether a person convicted on any theory of constructive presence in the demanding state is subject to extradition after he returns to the asylum state. The petitioners were denied federal constitutional rights by the holding of the Courts of Tennessee that it could not consider the question of whether or not the proceedings in North Carolina were nullities and the judgments void. For instance, the petition alleges that jurisdiction was procured by extrinsic fraud affecting the jurisdiction as distinguished from fraud affecting the merits and that the trial court was without legal existence. It is submitted that if in an extradition case the state court may consider the proceedings in the demanding state as distinguished from the charge, then it should have determined the questions relating to the jurisdiction of the North Carolina Courts.

From the cases it would appear that from the statute as at present written, the inquiry in extradition proceedings is limited to three questions:

1. Indictment.
2. Presence at time crime was committed.
3. Identity of person.

Under the statute, extradition depends upon a charge of crime. Conviction adds nothing to it. No question of trial,

waiver or anything other than the above can be considered as a ground of extradition.

It is submitted that this is the law as at present adjudicated. Yet the Supreme Court has never passed upon the question, where the point has been raised after conviction, and the holding of the Tennessee court is to the contrary.

Prayer.

Upon the grounds and for the reasons herein set forth, your petitioners pray:

That a writ of certiorari may issue under the seal of this Court to the Supreme Court of the State of Tennessee, commanding the said Court to certify and send to this Court a full and complete transcript of the record and all the proceedings of the said Supreme Court had in this cause, to the end that this case may be reviewed and determined by this Court, as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Tennessee be reversed by this Court.

And petitioners pray for such further relief as to this Court may seem proper.

L. E. GWINN,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 916

STATE of TENNESSEE, ex rel. LUKE LEA and LUKE LEA, Jr.,
Petitioners and Appellants Below,

vs.

LAURENCE E. BROWN and FRANK LAKEY, Agents of the State of North Carolina,
Respondents and Appellees Below.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Controlling Dates.

The final judgment of the Supreme Court of Tennessee herein was rendered December 9, 1933. The statutory period in which to apply for certiorari was extended in an order issued by Mr. Justice Brandeis of this Court until April 2, 1934.

Jurisdiction.

This Court has jurisdiction upon the petition here filed to require by certiorari that this cause be certified to the Supreme Court for determination by it, and with like effect

as if the cause had been brought to the Supreme Court by unrestricted writ of error, or appeal. Judicial Code, Sec. 237 (B) as amended by Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937; U. S. Code Title 28, Sec. 344.

II.

Statement of the Case.

The petitioners, Luke Lea and Luke Lea, Jr., are citizens and residents of the State of Tennessee.

On or about March 18, 1931 an indictment was found against them in Buncombe County, State of North Carolina, the charge being, in effect, that they had conspired with one Wallace B. Davis, President of the Central Bank & Trust Company, of Asheville, North Carolina, to violate the Banking Laws of the State of North Carolina. They appeared in the State of North Carolina voluntarily for the purpose of defending themselves against this charge of crime. However, the indictment then pending was ultimately dismissed. When petitioners appeared for trial they were held subject to the order of the Court pending the return of new indictments upon which they were put to immediate trial. The difference in the indictments will be referred to later.

The case proceeded to trial over the objection of the petitioners, and petitioners were convicted. It was definitely established that at the time of the commission of the crime charged, *petitioners were not in the State of North Carolina, nor had any acts been committed by them in the State of North Carolina having any relation to the crime so charged.*

Petitioners were thereupon released on bond and returned to the State of Tennessee, from which North Carolina now seeks to extradite them. In the meanwhile an appeal was taken to the Supreme Court of North Carolina, where the conviction was affirmed and a writ of certiorari was denied by this Court.

The extradition proceeding now pending is based on the indictments upon which petitioners were tried and the judgment of conviction. Petitioners sued out a writ or *habeas corpus* in the *Criminal Court* of Montgomery County, Tennessee, the petition being based, among other things upon the following:

1) That the petitioners are not fugitives from justice because they were not in the State of North Carolina at the time the crime charged had been committed.

2) That due process had been denied in the North Carolina proceedings. In support of this allegation many material matters were presented for the first time and at the first opportunity; including:

a) *Fraud affecting the jurisdiction of North Carolina trial court.* It was alleged in the petition, and admitted by the demurrer, that false recitals of venue in the indictment, returned without evidence, were made with full knowledge of their falsity for the deliberate purpose of perpetrating a fraud upon the jurisdiction of the court and for the further fraudulent purpose of dispensing with the necessity for evidence of venue at the trial * * * and *that the prosecution corruptly and fraudulently packed the jury panel.*

b) *The question of the legal existence of the trial court—either as a de jure or a de facto tribunal.* Under the North Carolina procedure a plea to the legal existence of the court is nugatory. It may not be passed upon either by the trial court or by the supreme court on appeal. The question can only be effectively raised in a collateral proceeding.

The respondents, agents of the State of North Carolina, demurred to the petition which, by the very nature of the

plea, admitted the allegations of fact. On this state of the record, the demurrer was sustained and an appeal taken to the Supreme Court of Tennessee. The upholding of the demurrer was affirmed.

As the petition for a writ of certiorari to this Court shows, the Supreme Court of Tennessee was in accord with the petitioners' contention that they were not fugitives from justice within the definition of the term as defined by this Court. Three of the five members of the Court, however, held that petitioners were fugitives from justice because they had left the custody of North Carolina after the conviction. Two members of the Court dissented from this view. These two Judges in an opinion concurred in by another Judge held that petitioners, though not fugitives from justice, had waived their right to resist extradition under the subsequent indictments by appearing to answer the first indictment.

In so relying upon the effect of the appearance and of the conviction, the Supreme Court, however, refused to consider any questions relating to the validity of the proceedings in the State of North Carolina.

We submit and shall argue to this Court the following propositions:

1) That an extradition proceeding is based solely on the charge of crime, not a judgment of conviction; that the accused is not a fugitive from justice unless he was corporeally within the demanding state at the time of the commission of the crime charged.

2) That the conviction in the State of North Carolina in no way affects or changes the jurisdictional requirements, particularly in view of the fact that this conviction was based on *constructive* presence and not on *actual* presence in the State of North Carolina.

3) That if proceedings subsequent to the indictments dispensed with the jurisdictional requirement of corporeal presence when the crime was committed, then it was incumbent upon the court to consider the validity of such proceedings.

The petition for the writ of *habeas corpus* was filed in a two-fold aspect, to wit:

a) An assertion of the right to resist extradition;

b) An attack on the validity of the judgments separate and apart from the question of extradition.

(The theory on which this attack was made will be hereinafter stated.)

Since the Supreme Court of Tennessee refused to take jurisdiction for this latter purpose, the sole issue before this Court is the right of the petitioners to resist extradition. The invalidity of the North Carolina proceeding will be urged only as this question may bear on the right of extradition.

III.

Federal Questions Involved.

Instead of restating these questions here, reference is made to the statement thereof on page 3 of the petition for a writ of certiorari.

IV.

The Petitioners Are Not Fugitives from Justice.

All of the Judges of the Supreme Court of Tennessee concurred in the petitioners' contention that extradition would not ordinarily be maintainable if it appeared that the alleged fugitive was not corporeally in the demanding state at or about the time when the crime charged was committed.

However, some of the Judges were of the opinion that the subsequent proceedings and the conviction nullified the requirement that the alleged fugitive must have been corporeally in the demanding state at the time of the commission of the crime. Two members of the court disagreed with this view, but held that there had been a waiver of the present right to resist extradition.

It is submitted that neither of these views is tenable. The appearance in North Carolina for trial and the conviction are irrelevant and immaterial to the present issue. On a writ of *habeas corpus* to determine the validity of an extradition proceeding, the court is not concerned with the guilt or innocence of the petitioner. The sole questions presented are whether the papers required by the statute are in proper form and whether or not the accused was corporeally in the demanding state at the time the crime is alleged to have been committed.

> *Biddinger* v. *Commissioner of Police,* 245 U. S. 128 at 135;
>
> *South Carolina* v. *Bailey,* 289 U. S. 412 at 420.

It has been held by this Court that in such a proceeding, the accused cannot press any defenses which he may have. For instance he cannot raise the question that a statute of limitations has barred a prosecution. He may not question the technical sufficiency of the indictment.

> *Biddinger* v. *Commissioner of Police,* 245 U. S. 128;
> *Munsey* v. *Clough,* 196 U. S. 364 at 373;
> *Ex parte Reggel,* 114 U. S. 642.

The accused may not urge any defenses, nor present any extraneous facts other than his absence from the demanding state at the time the crime was committed. It would be a poor rule that failed to work both ways, which would permit the demanding state to raise other extraneous issues.

The words of the statute are clear. Section 662 of the Criminal Code and Criminal Procedure (Revised Stat. 5278) provides:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, * * * and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory charging the person demanded with having committed treason, felony or crime * * *."

Had it been the intention of the statute to consider extraneous factors such as conviction or waiver, proper provision would have been made therefor.

Under the express terms of Section 5278 of the Revised Statutes, the "indictment" or "affidavit" evidencing the charge of crime is the foundation of the right to demand the surrender of the alleged fugitive.

In a recent Texas case, *Ex parte Chittenden,* 61 S. W. (2nd) 1008, the court, construing the statute, held that extradition could not be based upon an "information". The precise question involved in the *Chittenden* case has not been decided by this Court. The express terms of the statute, however, make clear that the *"indictment" produced on the demand for extradition is the foundation of the right to extradite.*

If it be assumed that the papers presented in this case are regular in form, in that they charge the commission of a crime, the issue remains: Are the petitioners fugitives from justice?

The petition recites that at the time of the commission of the crime charged, the petitioners were not in the State of North Carolina. The demurrer admits this allegation. There is therefore no issue of fact to be determined by the Court. It therefore follows that the petitioners are not

fugitives from justice and therefore are not subject to extradition.

As said by Judge Cullen in *People* v. *Hyatt,* 172 N. Y. 176 at 183:

> "There seems to be substantial unanimity in all the authorities on one proposition, that to be a fugitive from justice a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime.
>
> "It is totally immaterial that subsequent to the completion of the crime the accused returned to the demanding state and again departed from its borders."

See *Hyatt* v. *Corkran,* 188 U. S. 691, where the Court said at 719:

> "He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight."

Corporeal presence is not an incident but an essential jurisdictional fact. If the accused was not corporeally present in the demanding state at the time when the alleged crime was committed, the extradition proceeding must fail.

Munsey v. *Clough,* 196 U. S. 364 at 374;
Hyatt v. *Corkran,* 188 U. S. 691.

The Supreme Court of Tennessee seems to have decided the case as though the issue were being raised on an appeal from the judgment of conviction involving the jurisdiction of the courts of North Carolina to try the petitioners. It is only on that theory that the question of conviction or of waiver of the right to extradition could be material.

Petitioners are not charged with any crime of having left North Carolina after the conviction; extradition is sought on the indictments on which they were convicted for crimes committed when they were not corporeally within the territorial limits of the State of North Carolina.

V.

No Element of Waiver or Estoppel is Properly Involved in this Proceeding and Neither Constitutes a Ground Upon Which Petitioners' Otherwise Clear Right to Defeat Extradition May be Denied.

Judge Chambliss, in his opinion, held that petitioners had waived their rights to resist extradition. This holding was not based on conviction, leaving the custody of the demanding state, or forfeiture of appeal bonds. It was based on the voluntary appearance of petitioners in Asheville, North Carolina, on March 27, 1931, to answer an indictment returned against them on March 18, 1931. *This indictment was later dismissed and bonds executed in connection therewith released.*

This opinion also suggests, though it does not so hold, that an element of estoppel is involved. In view of this suggestion, and also on account of the reference in the opinion of Judge Swiggart to certain pleas in abatement filed by petitioners, both waiver and estoppel will be discussed as they may have any bearing or apparent bearing on the issues involved.

A.

Petitioners did not expressly or by implication waive their rights to resist extradition under the indictment and proceedings thereon upon which extradition is sought.

No express waiver is claimed. Implied waivers of constitutional rights are not favored but must be clearly established.

That the finding of waiver is not only without support in the record but is in direct conflict with the allegations of fact in the petition, admitted by the demurrer, is too clear to admit of doubt.

"Waiver" is generally defined as the "voluntary relinquishment of a known right." *Ansorge* v. *Belfor,* 248 N. Y. 145 at 150; *Alsens A. P. C. Works* v. *Degnon Cont. Co.,* 222 N. Y. 34 at 37. In order to be binding, it must be made with *full knowledge of the facts. Bennecke* v. *Insurance Co.,* 105 U. S. 355. "It cannot be made out by uncertain implications but ought clearly to appear." *Manufacturing Company* v. *Chemical Company,* 126 Tenn. 18. It is a question of fact with intent as a controlling element. *Clark* v. *Kirby,* 243 N. Y. 295; *Alsens A. P. C. Works* v. *Degnon Cont. Co.,* 222 N. Y. 34 at 38. Where made an issue, the party against whom waiver is invoked may testify directly as to his intent. Implied waivers affecting constitutional rights are not favored in the courts of Tennessee. *Holt* v. *State,* 160 Tenn. 366.

No act of petitioners within the State of North Carolina could confer upon the State of Tennessee power to extradite them over their protest when it appeared that they were not fugitives from justice.

There is a material difference between the indictment on which petitioners voluntarily appeared in North Carolina and the indictments under which extradition is sought.

The indictments on which extradition is now sought in the instant case were returned four months after petitioners had appeared to answer the first indictment. New parties were added and additional charges were made. This present indictment was returned after petitioners had actually appeared for trial in North Carolina on the first indictment.

As effecting waiver—a voluntary act—it is not necessary that the difference between the original and the subsequent indictments be so substantial that trial on the latter without additional notice would constitute a denial of due process. *If the difference is such that a knowledge thereof might have influenced the petitioners' voluntary act, it cannot be said, as a matter of law on demurrer, that in appearing to answer the first indictment petitioners intended to waive, or did waive, any right to resist extradition under the subsequent indictments. Such a holding is an extra judicial speculation,—not a judicial decision based upon the allegations of the petition.*

The original six count conspiracy indictment alleged *separate and distinct conspiracies, all in October,* 1930, to defraud the Central Bank. *No reference was made in said indictment to J. Charles Bradford, Cashier of the Bank. The later six count indictment added as alleged co-conspirators "J. Charles Bradford and others to the Grand Jury unknown."* The condition of Bradford and the purpose of this change have been stated in the petition. It was a change that petitioners would have had a right to consider and necessarily would have considered in deciding upon the performance of a voluntary act.

Furthermore, after the original appearance, petitioners were indicted on a blanket charge of conspiracy, covering an entirely different period of time, to violate substantially all the banking laws of the State of North Carolina.*

* This indictment was later dismissed but its blanket charge was included in the single count indictment, alleging the substantive offense of misapplication, returned as hereinafter shown on the date of the trial. On motion to quash for duplicity, the state elected to waive the conspiracy charge in this count and ask a conviction only for the substantive offense, but was permitted to rely on the conspiracy and introduce evidence thereof as showing the means through which the alleged misapplication was made. It is referred to here because Judge Swiggart in his opinion states that counsel for petitioners are in error in stating

On the date of the trial they were indicted for the first time for the substantive offense of misapplying the funds of the bank, and put to immediate trial on this, and the new six count conspiracy indictment returned on the same date. The misapplication indictment was amended after the trial was under way by a bill of particulars, setting forth fifty-two alleged items of misapplication. Each item was thereafter treated as a "count" in the indictment and under the instructions of the Court could be the basis on which the jury returned a verdict of guilty.

Petitioners may have been entirely willing to appear and answer the original indictment, taking into consideration the validity thereof and the definite charges made, but entirely unwilling to appear and answer other charges which involved an alleged conspiracy with a person of unsound mind who could make neither defense nor explanation of his acts and declarations. All the alleged conspirators in the original indictment were capable of making such defense and explanation.

Judge Chambliss refers in his opinion to an affidavit of petitioner Luke Lea as evidence of waiver under the sub-

that this charge was waived. It was expressly waived as a *charge of crime* which under the North Carolina procedure was the equivalent of a "nol pros." Heretofore there has been no disagreement between counsel for North Carolina and petitioners on this point. Speaking with reference to the effect of such waiver, counsel for North Carolina at page 17 of their brief opposing petitioners' first application for certiorari to this Court (Number 362, October term, 1932) said: "The state was forced to election, which was equivalent to a nol pros as to the charge of conspiracy in that bill, leaving only the charge of misapplication." After the elimination of this charge, the misapplication indictment was void on its face, there being no allegation that petitioners were members of the class to which the offense of misapplication was clearly restricted.

sequent indictments. There is nothing in the affidavit so referred to which gives color to this inference. The portion of the affidavit material on this point is as follows (Trial Record, p. 22):

> "On March 16, 1931, an indictment was returned against said affiant and others by this Court, charging a conspiracy to violate the banking laws of said State. Said indictment was numbered 255 and reference is here made to the record of that Court for the contents of the same.
>
> "On March 27, 1931, affiant voluntarily appeared in the state of North Carolina, *to answer the charges contained in said indictment.*
>
> "Before making such voluntary appearance, and after he had been informed that said indictment had been returned against him, and had obtained a certified copy thereof, affiant was advised by counsel he had consulted that he was not subject to extradition to answer the charge embraced in said indictment, for the reason that he was not in the state of North Carolina at or about the time of the commission of the acts charged in said indictment, but affiant, notwithstanding his legal rights to remain in Tennessee, being convinced of his innocence and confident of his ability to establish such innocence upon a fair trial, voluntarily appeared as aforesaid."

It is clear that the voluntary appearance referred to was to *"answer the charges embraced in said indictment"*. This referred to the first indictment and not to the subsequent indictments.

The petitioners allege that they did not waive their right to resist extradition under the new indictments. They asserted that right at the first opportunity.

We submit that on the state of the record it was error to find, as a matter of law, that there had been a waiver of any kind whatsoever.

B.

Relators are not estopped by any averments in their plea of abatement, or otherwise, from resisting extradition in this proceeding.

Reference is made in both opinions of the Tennessee Supreme Court to the plea in abatement filed to the indictments on the date of the trial.

We quote therefrom as follows (Trial Record, page 17):

> "(2) and for further plea, these defendants and each of them, as aforesaid, say that there was no legal evidence before the said body purporting to act as a grand jury in this cause, and that these defendants, or any of them, were either actually or constructively present within said state at the time or times of the commission of the offenses alleged in the indictment.

> "(3) The defendants would further show that at the time of the returning of said purported indictment, there were pending before this court other purported indictments, being styled 'State of North Carolina *versus* Wallace B. Davis, Luke Lea, Luke Lea, Jr., and E. P. Charlet', and numbered 255 and 255a, and * * * undertaken to be returned by said purported grand jury at the March and April, 1931, terms of said court, undertaking to charge these defendants, and all of them, with the same alleged offenses undertaken to be charged, and, as these defendants are informed and believe, and therefore aver, will be relied upon and sought to be proven by the State in this cause, and these defendants, therefore, plead this fact of former suits pending to said purported indictments 255, 255a, and * * *."

The plea in abatement was overruled in its entirety (Trial Record, page 18).

No facts are alleged in the plea which are inconsistent with any facts alleged in the petition for habeas corpus.

A reading of the entire plea shows relators claimed then, as now, that they were not within the State of North Carolina at the time the crimes charged were committed.

If this plea should be construed as a recognition that the charges in the original indictment are identical with those in the indictments under which extradition is sought, that would not be controlling on any question of waiver or estoppel. As it bears on the charges made in the indictment, the plea states a conclusion of law—not a statement of fact.

As recognized in Tennessee, the doctrine of judicial estoppel is not applicable where the statement in a former proceeding is an opinion or conclusion of law as distinguished from a statement of fact. *Black Diamond Collieries* v. *Deal,* 150 Tenn. 474; *Southern Coal Co.* v. *Schwoom,* 145 Tenn. 191; *Tate* v. *Tate,* 126 Tenn. 169; *Stearns Coal Co.* v. *Jamestown Railroad Co.,* 141 Tenn. 203; *Houk* v. *Construction Co.,* 159 Tenn. 103.

The "*construction of a writing is a pure question* of law." *Tate* v. *Tate, supra.*

Where it is "*open to examination by everyone*", no one is misled by any construction of litigant, and the doctrine of judicial estoppel has no application. This is expressly held in *Tate* v. *Tate, supra,* and approved in *Houk* v. *Construction Co., supra,* in an opinion by Judge Chambliss.

In *Black Diamond Collieries* v. *Deal, supra,* Judge Cook, who rendered the decision, said:

> "However, mistaken statements or such as *involve an opinion, and are not the assertion of a fact, do not raise estoppel.* The oath to be binding as an estoppel must be wilfully false."

The allegations of the petition and the record do not show a case of trifling with the courts of North Carolina nor experimenting with their processes under the indictments upon which extradition is sought.

Petitioners did not voluntarily appear to answer the subsequent indictments nor procure a trial thereon. They filed no plea that recognized the validity of the indictments or the jurisdiction of the grand jury or that of the court in which they were tried. Objection was made at every step of the proceedings.

Petitioners again direct attention to the affidavit of petitioner Luke Lea, referred to in the opinion of Judge Chambliss. This affidavit, made before any trial, points out the difference between the indictment answered and the new indictments on which extradition of petitioners is sought. Quoting therefrom:

> "Affiant would further show the court * * * the very day set for affiant's trial on said first indictments, new indictments, including the matters set out in said indictments now sent against him and additional matters were returned against him in this court. * * * Affiant would further show the court that these new bills of indictment greatly and materially enlarged the scope of the former indictments, and do so to such an extent that affiant in order to prepare a proper and adequate defense, must review all his business transactions, which as has been stated hereinbefore, are manifold and varied, with many banks, both in and outside of Tennessee, and with many other businesses both in and outside of the State of Tennessee. That affiant is now four hundred miles away from all his own records, except the few which he brought here with him, for the purpose of meeting the charges and preparing the defense against the indictments already preferred, and the invalidity of which has been virtually acknowledged by counsel for both sides * * *.
>
> * * * * * * *
>
> "Affiant would further show the Court that regardless of whether said first indictments were sufficient to bring affiant within the jurisdiction of this Court, the use of the same for that purpose and then practically abandoning the same, and then returning a new indictment against affiant and forcing him to submit to trial on such new indictments is in violation of his right to a fair and impartial trial under the constitution of the State of North Carolina and in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, which includes the fundamental conception of a fair trial with reasonable opportunity to make defense to the charges made * * *."

If petitioners had recognized the validity of the North Carolina proceedings, or if petitioners had made any statement or declaration in these proceedings, inconsistent with their claim of absence when the crimes charged were committed, some element of estoppel might be involved.

North Carolina gave petitioners no opportunity to resist extradition on the new indictments. This may not have constituted a denial of due process, *but it does preclude the State of North Carolina from asserting estoppel against petitioners in the instant case.*

C.

The bonds executed in North Carolina are no bar to the right of petitioners either to resist extradition or to challenge the validity of the judgment of conviction.

The bond executed under the original indictment was released when that indictment was dismissed. The appearance bonds under the new indictments, returned by a grand jury to the regular term, while petitioners were detained under orders of the special term, were executed under duress. It was either execute these bonds or go to jail and stay there during trial.

The execution thereof was not a waiver of any right to resist extradition. Waiver necessarily "assumes existence of an opportunity for choice between relinquishment and

enforcement of right." (*Harris* v. *Sparks*, 222 Ky. 472, 1 S. W. (2d) 772.) This essential element was lacking.

Petitioners had no opportunity to choose between the enforcement and relinquishment of any right to resist extradition. They had no rights under the extradition statute which could be then and there asserted. Under such circumstances the execution of a bond was not a waiver of any claim or privilege that might later arise under the statute.

The execution of a bond to avoid being sent to jail is not a waiver of any privilege or exemption from arrest. (*Bragg* v. *Hatfield*, 124 Maine 399, 130 Atl. 234; *Baker* v. *Copeland*, 140 Mass. 332; *Laurel* v. *Triffin*, 12 Fed. 590; *Dickenson* v. *Farwell*, 71 N. H. 213.)

In *Bragg* v. *Hatfield*, 130 Atl. 234, the Court said:

> "The giving of a bond by a person privileged from arrest does not ordinarily constitute a waiver."

In *Baker* v. *Copeland*, 140 Mass. 332, the Court said:

> "Bond given *alio intuita* to procure his discharge from imprisonment, and the fact that he gave it does not indicate that he surrenders his right to object upon return of writ that service was illegal."

The same rule should be applied to the situation that confronted petitioners when the new indictments were returned.

It should also be applied to the bond executed on appeal from the judgment. The execution of such a bond is not a waiver of any right to assail the validity of the judgment in a *habeas corpus* proceeding and should not be construed as a waiver of the right to resist extradition. This right could not have been protected through refusal to execute the bond.

Nor is extradition a remedy for the enforcement of a forfeiture on a bond. In the well-considered case of *Fitz-*

patrick v. *Williams*, 46 Fed. (2d) 40, the Court of Appeals of the Fifth Circuit says:

> "The right of the surety to recapture his principal is not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond. *In re Von Der Ahe* (C. C., 85 F. 959). It is not a right of the State, but of the surety. If the State desired to reclaim a fugitive from its justice, in another jurisdiction, it must proceed by way of extradition in default of a voluntary return. It cannot invoke the right of a surety to seize and surrender his principal, for this is a private and not a governmental remedy."

The waiver of the right to resist extradition is not a condition of the right of appeal in the State of North Carolina. Its courts would have been without authority to insert such a condition in the appeal bond. If it had been so written in the bond, no authority therefor existing by law, petitioners by signing the bond would not be estopped from challenging its validity. This is the general rule with respect to bonds taken wthout authority. (*State of New Hampshire* v. *Riccardi*, 81 N. H. 223, 34 A. L. R. 309.)

The petition alleges and on sufficient grounds that the judgment is absolutely void; if so the bond is a nullity, but the Supreme Court of Tennessee refused to pass on this question.

D.

The appearance of the petitioners in North Carolina to answer the original indictment did not enlarge the powers given to the Governor of the State of Tennessee in an extradition proceeding based on subsequent indictments.

It is not necessary to discuss the question of whether petitioners could have expressly waived their right to resist extradition under the new indictments after demand there-

for was made by the State of North Carolina. There is no claim herein that *after* the present demand for extradition was made the petitioners waived any rights.

In this view it is not necessary to discuss the much controverted question of the right to waive a constitutional privilege.

This Court, in *Patton* v. *United States,* 281 U. S. 276, sustaining the right of the defendant to waive a jury in a criminal case in the Federal Court, held that this could only be done through the sanction of the court and the Public Prosecutor in *"addition to the express and intelligent consent of the defendant."*

If, as held in *Patton* v. *United States* (281 U. S. 276), the relinquishment of an important constitutional privilege requires an *"express and intelligent consent of the defendant"*, how can it be said that petitioners impliedly waived their rights to resist extradition under the present indictments months before the indictments had been returned?

In the instant case the corporeal presence of petitioners was an indispensable jurisdictional pre-requisite to extradition. An executive tribunal exercising judicial or quasi-judicial powers is without power to act in the absence of essential jurisdictional facts. *Ho* v. *White,* 259 U. S. at 279.

As affecting jurisdiction for trial, this Court has held: *"The party charged waives no defect of jurisdiction by submitting to a trial of his case on the merits"* (*Cook* v. *Hart,* 114 U. S. at page 194). If this be true as to the jurisdiction of a trial court, appearance to answer the charges in a pending indictment in the demanding state is not a waiver of essential jurisdictional facts in an extradition proceeding in the asylum state based on subsequent indictments.

In *Innes* v. *Tobin* (240 U. S. 127, at page 131) this Court said:

"Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication *prohibited* the surrender of a person in one State for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State." (Italics ours.)

If flight—not in the popular but in the legal sense—is jurisdictional, and the cases so hold, it is at least doubtful whether any agreement to waive extradition would be binding on the alleged fugitive or confer upon the asylum state power to extradite him over his objection when it clearly appeared that he was absent from the demanding state when the crime charged was committed.

But the point here is whether any action of the petitioners (outside of the extradition proceedings themselves) can confer power where it does not exist. The Governor can extradite a "fugitive from justice". That is the limit of his power. Where it clearly appears that the defendant is not a fugitive, the power of the Governor ends.

VI.

Leaving the "Custody and Jurisdiction" of the State of North Carolina Was Not a Criminal Act and Therefore Not a Ground of Extradition in this Proceeding.

Unless leaving the custody of a demanding state is of itself a violation of law, such departure does not grant to the demanding state any additional rights under the Federal extradition statute, nor does it confer any additional powers upon the executives of the asylum state.

When the state secures custody of a citizen from another state, *absent from its borders,* when a crime therein has been committed, it can protect its custody either by keeping him there or by making it an offense for him thereafter

to leave the custody. Where the state has failed to make "leaving the custody" a criminal act, the courts are not justified in amending the Federal extradition statute to supply the omission. This would be legislation, not construction.

Hobbs v. *McLean,* 117 U. S. 567;
Pirie v. *Chicago Title Company,* 192 U. S. 438;
De Lima v. *Bidwell,* 182 U. S. 1;
Hartman v. *Aveline,* 63 Indiana, 350.

In the opinion delivered by Mr. Justice Swiggart, the Supreme Court of Tennessee writes a new definition of the term "fugitive from justice." In effect that decision amends the Federal statute by state judicial interpretation. It makes presence after the indictment was returned a substitute for the corporeal presence at the time when the crime was committed. As at present adjudicated this is not the law of interstate extradition.

In the opinion of Judge Chambliss a similar fallacy appears. While sharply dissenting from the conclusion stated by Judge Swiggart, Judge Chambliss sustains the right of extradition of persons not "fugitives from justice" upon the ground of an implied waiver. This is likewise an amendment of the Federal extradition statute by state judicial construction. Where the charge of crime is based upon an indictment, that indictment is an indispensable jurisdictional prerequisite.

It is not aided by some other indictment. The charge of crime is only one of the jurisdictional elements. The corporeal presence of the accused when the crime was committed is the other essential jurisdictional fact. This may not be supplied by inference or implication that has no bearing upon the actual presence of the accused in the demanding state when the crime charged was committed.

VII.

If in an Extradition Proceeding any Effect May be Given to Proceedings in the Demanding State Subsequent to the Indictment, then the Validity of Those Proceedings is an Essential Element Which Must be Passed Upon on a Writ of Habeas Corpus.

The decision of the Supreme Court of Tennessee gives effect to the proceedings in North Carolina subsequent to the indictment. Nevertheless, in doing so, it refused to consider the allegations of the petition which showed that these proceedings were invalid, void and of no effect.

It cannot be denied that if the petitioners were convicted or were tried in a court lacking jurisdiction or if they were deprived of their federal constitutional rights, the proceedings were not merely voidable but absolutely void and of no effect whatsoever.

Miller v. *Aderhold,* 288 U. S. 206 at 211;
Windsor v. *McVeigh,* 93 U. S. 274 at 283;
People v. *Sturtevant,* 9 N. Y. 263 at 266;
Chase v. *Chase,* 95 N. Y. 373 at 381;
People v. *Liscomb,* 60 N. Y. 559 at 591.

In the *Liscomb* case, the court said at page 591:

"A party held only by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released by *habeas corpus.* It will not answer to say that a court having power to give a particular judgment can give any judgment, and that a judgment not authorized by law, and contrary to law, is merely voidable and not void, and must be corrected by error. This would be trifling with the law, the liberty of the citizen, and the protection thrown about his person by the bill of rights and the Constitution, and

creating a judicial despotism. It would be to defeat justice, nullify the writ of *habeas corpus* by the merest technicality, and the most artificial process of reasoning."

The petition for *habeas corpus* attacked the legal existence of the North Carolina court both as a *de jure* and *de facto* tribunal. Under the rule in North Carolina, this attack could not be made directly, but could only properly be asserted in a collateral proceeding. *State* v. *Hall*, 142 N. C. 714.

While the record imports verity and may not be impeached in a collateral attack, it is well settled that "*evidence outside the record but not inconsistent with the record*" may be introduced in a habeas corpus proceeding to show lack of jurisdiction, loss of jurisdiction or a denial of due process in the proceedings *in re Mayfield*, 141 U. S. 107; *Frank* v. *Mangum*, 237 U. S. 309; *In re Cuddy*, 131 U. S. 200; *Ex parte Nielsen*, 114 U. S. 418; *In Hans Nielsen*, 131 U. S. 86; *Ex parte Lange*, 18 Wall., U. S. 163; *Ex parte Bain*, 121 U. S. 1; *In re Bonner*, 150 U. S. 42; *Moore* v. *Dempsey*, 261 U. S. 86; *Ex parte Craig* (C. C. A.) 282 Fed. 154; *Stephens* v. *McClaughey* (8 C. C. A.), 207 Fed., 51 L. R. A., N. S. 390; *Eureka Bank Habeas Corpus* cases (Nevada, 126 Pacific 655; *Ex parte Davis* (Nevada), 110 Pacific 1131; *Ex parte Justice* (Oklahoma), 104 Pacific 1003, 25 L. R. A., N. S. 483; *Creasy* v. *Hall* (Mo.), 148 S. W., 914, 41 L. R. A., N. S. 914; *Bailey on Habeas Corpus*, Vol. 1, pp. 117, 159, 168, 174.

The judgment of conviction was attacked in the petition for extrinsic fraud affecting jurisdiction and on facts which showed that the petitioners had been deprived of their right to a trial by due process of law under the federal Constitution.

False or fictitious recitals of essential jurisdictional facts are such a fraud on the court and the parties that any judgment based thereon is subject either to direct or collateral attack on the ground of fraud affecting the jurisdiction. *Clausman* v. *Ledbetter*, 190 Ind. 605, 130 N. E. 230, 234; *Battle* v. *Atkinson*, 115 Fed. 884; *Bank of Araphoe* v. *Bradley*, 72 Fed. 896. The full faith and credit clause of the United States Constitution does not prevent the impeachment of a judgment, though rendered in the courts of another state, on the ground that it was procured by fraud. *Cole* v. *Cunningham*, 133 U. S. 107. Under the rule in Tennessee, judgment from other states may ordinarily be impeached for lack of jurisdiction over the present or subject matter or *for fraud affecting the jurisdiction*. *Terley* v. *Taylor*, 65 Tenn. 376.

*This is the rule as to property. Life or liberty should have equal protection.**

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* The two-fold aspect in which the petition was filed.—The prevention of extradition was not the only right which petitioners sought to enforce in their petition for the writ of *habeas corpus*. Under the theory of the petition they were not subject to extradition regardless of the validity of the judgments. Such an adjudication would not afford complete protection of their federal constitutional rights. Ordinarily, the place of detention fixes the venue in a *habeas corpus* petition. *Ferris, Extraordinary Legal Remedies*, Sec. 29, page 49. The court in which the petition was filed had jurisdiction of the agents of North Carolina. The rendition warrant recited the judgments. They accompanied the requisition papers. It was the insistence of petitioners that in the courts of Tennessee, having jurisdiction for one purpose (the determination of the right of extradition) and of the agents of North Carolina, pleading the judgments of conviction, also had jurisdiction to afford petitioners complete relief both by sustaining the right to defeat extradition and declaring that the judgments were void because obtained in violation of the federal constitutional rights of petitioners. Sustaining the right to resist extradition on the

The petition was filed in a state court but for the purpose of protecting the rights of petitioners arising under the Federal Constitution.

Upon the state equally with the federal courts rests the obligation to "*enforce and protect every right* granted or secured by the Constitution of the United States and the laws made in pursuance thereof *whenever these rights* are involved in any suit or proceeding before them." *Robb* v. *Connolley,* 111 U. S. 624.

If, as the demurrer admits, these allegations of fact are true, the proceeding in the State of North Carolina was void. Regardless of what the law might be with relation to extradition, it clearly cannot be the rule that a void proceeding and a void conviction is a substitute for the statutory requirements for extradition.*

ground that conviction added no force to the charge would only partially protect the federal rights of petitioners. The judgments would still remain a cloud on their reputation and a menace to their liberty. Since petitioners had no rights under the federal extradition statute which could be enforced in the courts of North Carolina, they could only obtain complete relief in a single proceeding in the courts of Tennessee. Unless these courts had jurisdiction of both questions raised in the petition, the federal rights of petitioners could only be asserted piecemeal in the courts of different jurisdictions.

* It was charged and shown in the petition that the court was not a duly constituted tribunal for the trial of criminal cases in that it was convened by the Governor of the State in violation of the laws and Constitution of North Carolina and held as a Special Term of the Superior Court of Buncombe County when the Regular Term of that court was actually in session and functioning as a *de jure* and *de facto* court of that county.

It was also charged and shown in the petition that the indictments, returned without evidence, contained false

If the Supreme Court of Tennessee would, under other circumstances, have been justified in considering the judgment of conviction, in this instance it had before it a record which properly attacked that judgment on grounds which

recitals of venue, made with full knowledge of their falsity for the deliberate purpose of perpetrating a fraud upon the jurisdiction of the court and the further fraudulent purpose of dispensing with any necessity of evidence of venue at the trial.

It was further charged and shown in the petition: that the jury panel was selected under the *ex post facto* law, administered to the disadvantage of the petitioners; that the jury panel was corruptly and fraudulently picked by the prosecution; that unknown to the petitioners, the jurors selected from this hand-picked panel had prejudged their case; that the so-called Special Term of court at which petitioners were tried adjourned immediately after sentence was imposed and they therefore had no opportunity to prevent the facts showing that the verdict of the jury was so tainted by prejudice and misconduct as to be in contemplation of law no verdict at all; that an extremely hostile court officer tampered with the jury to the prejudice of petitioners during the trial; that the solicitor in charge of the prosecution, through threats of indictment and "embarrassing publicity" for persons aiding petitioners in their investigation of the misconduct of the jury, materially interfered with that investigation; that the call of the Special Term was so timed that the Grand Jury at the Regular Term would find new indictments upon which petitioners would be immediately tried on the date of their appearance for trial under the first indictment; that class and community prejudice were deliberately injected into the trial with the connivance and through the design of the prosecution; that under the additional facts presented by the petition, the courts of North Carolina had neither jurisdiction nor color of jurisdiction to try and to proceed to judgment against petitioners; and many other material extrinsic facts bearing upon the validity of the proceeding and the jurisdiction of the court.

were not questioned for sufficiency by the Court in its opinion. It follows that in refusing to pass upon the validity of the North Carolina proceedings, the Supreme Court of Tennessee gave effect to a proceeding which was a nullity in deciding the issue of extradition raised by the petition for a writ of *habeas corpus*.

Conclusion.

While no case has been before this Court where extradition was sought *after conviction,* such is not an unusual proceeding.

Judge Chambliss, in his opinion, refers to numerous cases where extradition was sought and had after conviction. It is significant, however, as pointed out in his opinion, that none of these cases treats extradition as a substitute for either of the statutory grounds of extradition.

It is only on the theory that the "charge of crime" is not merged in the judgment of conviction that the right of extradition thereafter is sustained at all. No case holds that conviction changes the status of the accused as a fugitive from justice. If not corporeally present at the time the offense charged was committed, conviction on the theory of constructive presence does not put him there.

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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(18)

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IN THE

Supreme Court of the United States

at the

OCTOBER TERM, 1933

No. 916

STATE OF TENNESSEE, EX REL., LUKE LEA and LUKE LEA, JR.
Petitioners

VS.

LAURENCE E. BROWN AND FRANK LAKEY,
Agents of the State of North Carolina,
Respondents

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

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The brief of respondents at pages 10-12 thereof sets forth erroneous and entirely misleading statements of fact that call for a reply.

It is said that the "petition nowhere alleges that the petitioners were not within the State of North Carolina prior to the overt act of defrauding the bank, and during the progress of the conspiracy."

We quote from the petition as follows:

"The Solicitor, when he submitted the indictments to the grand jury, knew that petitioners were within the State of Tennessee at the time of the alleged conspiracies in counts one, and five, and at the time of the alleged misapplications under count seven of the indictment. Petitioners aver that the indictment was fraudulent in stating the formation of the alleged conspiracies within Buncombe County, North Carolina.

"Therefore, the prosecution knew when these indictments were submitted to the grand jury that petitioners were within the State of Tennessee when the alleged conspiracies were formed" (R. 35, 36).

"Petitioners, without question, were within the State of Tennessee at the time of the alleged conspiracies in counts one and five, and at the time or times of the alleged misapplications in count seven of the consolidated indictment. There was no evidence nor finding that petitioners entered into any agreement in the State of North Carolina, as alleged in counts one and five; nor was there evidence or finding that they cooperated within the State of North Carolina in the alleged misapplication.

"The Supreme Court (of North Carolina), in its opinion, substantially conceded that all that petitioners did was done within the State of Tennessee." (R. 41.)

"In this connection, petitioners also aver that a fraud was perpetrated both upon the Governor of North Carolina and the Governor of Tennessee, when the indictments, charging an offense committed by petitioners within Buncombe County, North Carolina, were presented for their consideration in the application to the Governor of North Carolina for requisition and in the request that the Governor of Tennessee honor such requisitions. When copies of the indictments upon which petitioners were convicted and sentenced were presented to the Governor of North Carolina, the Solicitor well knew that petitioners were not within the State of North Carolina on or about October 8, 1930, the date of the alleged conspiracies in counts one and five, upon which they were convicted, and that verdicts of "not guilty" or "dismissals" had been entered upon the other counts of said indictment. He also knew that the conspiracy charge embraced in count seven of the consolidated indictment, or the single count bill, had been waived or nol prossed. . . . Petitioners therefore aver . . . that they are entitled in this proceeding to show for this and other reasons heretofore stated, the true facts that establish that they were not within North Carolina at the time of the commission of the alleged offenses that constitute charges of crime against them by the State of North Carolina." (R. 55, 56).

"Petitioners aver that they have not waived extradition under the indictments upon which they were convicted, that they were not within

the State of North Carolina at or about the time of the commission of the alleged offenses for which they were convicted and that the theory upon which the Court asserted jurisdiction to convict and sentence them was the making of agreement and the performance of acts by petitioners within the State of Tennessee that had, or were of a nature calculated to have, an injurious effect or fraudulent result within the State of North Carolina." (R. 52.)

"Petitioners aver that they are not now and never have been fugitives from justice from the State of North Carolina, and therefore, they are not subject to extradition under the Federal Revised Statutes, S. 5278." (R. 52.)

The averment that petitioners "are not now and never have been fugitives from justice" presents an issue of fact and not merely a conclusion of the pleader. In *Kuney* v. *State* (88 Fla., 354, 355), 102 Sou. 547, it was expressly held that such averment presents an "issue of fact and not a mere conclusion of the pleader."

The petition alleges and the Supreme Court of Tennessee found as a fact that "neither of the relators was in the State of North Carolina at or near the time such conspiracy is alleged to have been formed nor when any overt act was committed in furtherance thereof." (R. 411.)

The point which respondents seek to establish is based solely on the conspiracy alleged in the single count bill. The petition alleges that this conspiracy charge was "nol prossed".

That such charge was waived or nol prossed has heretofore been conceded by respondents. We quote from respondent's brief, page 17 (Number 362, Oct. Term, 1932), opposing petitioners' first application for certiorari to this Court, where, in speaking of said charge of conspiracy it was said: "The State was forced to election, which was equivalent to a nol pros as to the charge of conspiracy in that bill, leaving only the charge of misapplication."

Said single count bill was submitted to the jury as a charge of misapplication only. (Record 295.)

As originally returned said count alleged a conspiracy "on or about the 10th day of May, 1930, and at divers other times both before and after said date." (R., 73.)

When the petition alleged that relators were not in North Carolina when any conspiracy was formed or any misapplication made they raised the issue of fact as clearly as such an issue could be made. Had this charge not been waived, the fact that petitioners at some time may have been in the State of North Carolina on some other business would not justify extradition where conviction could be had on the theory of constructive presence. (*People* v. *Enright*, Appellate Division, 217 N. Y. Sup. 288-295; *Taft* v. *Lord*, 92 Conn. 539.)

Heretofore North Carolina has claimed that all questions under the single count bill were 'academic". When the conspiracy charge was eliminated therefrom, and in our view before such elimination, such indictment is absolutely void on its face. It was not alleged that petitioners were members of

the class to which the offense of misapplication is expressly restricted. "Aiders and abettors" are not included in the North Carolina Banking Statute and that State has no general act under which they may be prosecuted as principal offenders. Said count was therefore void and the Court without jurisdiction to try petitioners thereunder.

Extradition may not be had upon a "nol prossed" charge or a void indictment.

Respectfully submitted,

Clarence Darrow,
Arthur Garfield Hays,
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John Schulman,
Attorneys for Petitioners.

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In the

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STATE OF TENNESSEE, Ex Rel. LUKE LEA AND LUKE LEA, Jr.,
Petitioners,
v.
LAURENCE E. BROWN and FRANK LAKEY, Agents of the STATE OF NORTH CAROLINA,
Respondents

Brief of Respondents Opposing Petition for Writ of Certiorari

---

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Petitioners and Appellants below,
v.
LAURENCE E. BROWN AND FRANK LAKEY, AGENTS OF THE STATE OF NORTH CAROLINA,
Respondents and Appellees below.

Brief of Respondents Opposing Petition for Writ of Certiorari

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STATEMENT OF PERTINENT FACTS

Petitioners were first indicted in North Carolina at the March Term, 1931, Buncombe Superior Court, by indictment containing six counts. (R. 256.) This indictment alleged that petitioners and Wallace B. Davis, an officer of the Bank, and E. P. Charlet, entered into a conspiracy to defraud the Bank. Petitioners voluntarily came into the State of North Carolina, entered into a bond in the sum of $5,000.00 each, on March 27, 1931, to appear on April 27, 1931, before said court "to answer the charge preferred against him for banking laws, and to do and receive what they shall by the Court be then and there

enjoined upon him there, and shall appear and attend at such time or times thereafter as the Court may appoint," etc. (R. 262-263.)

At the April Term, 1931, an indictment was returned against the same parties and J. Charles Bradford, Davis and Bradford being officers of the Bank, alleging a conspiracy to violate the banking laws of North Carolina, and the misapplication of its funds. (R. 265-6.) At the July Term, 1931, of said Court two indictments were returned against petitioners and Davis and Bradford, averring a conspiracy by and among them, and with J. Charles Bradford and others, by name to the jurors unknown. The last two indictments are in precisely the same terms as the original indictments, except that the name of Bradford is included as one of the co-conspirators. (R. 272 and following.) In fact, an affidavit was filed in that case voluntarily by these petitioners, and thereafter they filed a plea *averring that the indictments returned in July charged the same identical offenses as the original indictments, returned one in March and another in April, 1931.* Petitioners voluntarily entered into bond to answer the charges contained in these indictments on July 28, 1931. (R. 279-80.)

The case against all four defendants went to trial, defendants being present and participating therein, which trial resulted in a verdict of guilty as to petitioners on the first, fifth, and seventh counts (the two indictments having been consolidated and the one-count indictment having been designated as the seventh count). (R. 68.) Thereupon, after a motion for a new trial had been overruled, petitioners entered into a bond in the sum of $30,-000.00 and $20,000.00 each, respectively, that they should "make their personal appearance in the Superior Court of Buncombe County, and not depart the same without leave, and abide the judgment of the Supreme Court of North Carolina," etc. These bonds were made on August 26, 1931. (R. 298-99.)

These petitioners then appealed to the Supreme Court of North Carolina, and that Court on June 15, 1932, gave its opinion, finding no error in the trial. *State v. Lea,* 203 N. C. 13. Thereupon, petitioners made a summary motion, asking the North Carolina Supreme Court to reconsider the opinion and order a reargument or reverse the decision. This was denied and the petition dismissed June 29, 1932. *State v. Lea,* 203 N. C. 35. Petitioners then sought review by the Supreme Court of the United States, and petition for writ of certiorari was denied by this Court October 24, 1932. *Lea v. North Carolina,* 287 U. S. 649, 77 L. ed. 561.

Meantime, at July Term, 1932, Buncombe Superior Court, petitioners made motion for a new trial on alleged grounds of newly discovered evidence and jury bias or prejudice. The motion was denied by the Judge presiding, and they gave notice of appeal to the Supreme Court of North Carolina. The State made motion to docket and dismiss this appeal, which motion was allowed and the action of the Judge of Superior Court of Buncombe County sustained. *State v. Lea,* 203 N. C. 316. Again petitioners sought review by this Court, and on December 19, 1932, this Court denied the petition for writ of certiorari. *Lea v. North Carolina,* 287 U. S. 668, 77 L. ed. 576. In both petitions briefs were filed in this Court in behalf of defendants and the State of North Carolina.

In those petitions to the Supreme Court of the United States and in the briefs in support thereof, these petitioners presented to this Court the identical question they are now seeking to have reviewed here. Their contention then was, as it now is, that the crime if committed at all "was committed outside of North Carolina and beyond the reach of its courts"; petition in *Lea v. North Carolina,* Nos. 506 and 507, Supreme Court of the United States, October Term, 1932, page 3, and brief in support thereof, page 28, Exhibit No. 5, R. p. 442.

The judgment of conviction in the Superior Court of Buncombe County having thus been affirmed by the Su-

preme Court of North Carolina, and two petitions for writs of certiorari having been denied by this Court, the cause was regularly remanded to the Superior Court of Buncombe County, North Carolina, and when petitioners forfeited their bonds when called in the Superior Court on the fourth Monday in January, 1933, capias was issued for each of them and extradition sought from Tennessee.

The affidavit made by Luke Lea showing their voluntary appearance, after receiving advice of counsel that they were not subject to extradition, "for the reason that they were not in the State of North Carolina at or about the time of the commission of the acts charged in said indictment," appears on page 31 of the brief of adversary counsel. All of the foregoing facts clearly appear in the record, Exhibit 1 of the original petition being the record of the proceedings in the State of North Carolina.

Petitioners sought asylum in the State of Tennessee, and after a rendition or removal warrant had been issued by the Governor of Tennessee, upon a requisition of the Governor of North Carolina, petitioners sued out a writ of habeas corpus, which was heard by Judge Cunningham, and judgment filed on the 11th day of April, 1933; and upon appeal from the adverse judgment of that Court (R. p. 250) the Supreme Court of Tennessee, December 9, 1933 (R. p. 419), affirmed the judgment of the Court below in a decision holding that these petitioners were subject to removal to the State of North Carolina under the extradition laws of the United States; and the petitioners filed this application for a writ of certiorari to have the said judgment reviewed.

In the original hearing before Judge Cunningham upon the writ of habeas corpus, the petitioners succeeded in bringing into the record the entire proceedings in the trial in which they were originally convicted in North Carolina (being Exhibit No. 1 aforesaid), and produced no other evidence whatsoever except that contained in the affidavits

and petition filed before Judge Cunningham, and a part of this record, which were mere repetitions of matters set out in the original proceedings.

ARGUMENT

I

THESE PETITIONERS HAVING VOLUNTARILY SURRENDERED THEMSELVES INTO THE JURISDICTION OF NORTH CAROLINA TO STAND THEIR TRIAL UPON THE CHARGES PREFERRED, ALL QUESTIONS CONCERNING THE ORIGINAL RIGHT OF THE STATE TO HAVE THEM REMOVED OR EXTRADITED, AND ALL QUESTIONS CONCERNING THEIR RIGHT TO RESIST THE SAME, WERE THEREBY TERMINATED.

The petitioners Luke Lea and Luke Lea, Jr., are under bond in the sum of $30,000.00 and $20,000.00 each, respectively, for their appearance in North Carolina, voluntarily entered into to abide the judgment of the Supreme Court of North Carolina, and are, therefore, not in position to maintain this action, having voluntarily entered into their said bonds for their appearance in North Carolina.

By voluntarily giving bail to appear, the purpose of the removal proceedings had been accomplished, and all questions in controversy in the habeas corpus and in the removal proceedings terminated, and likewise the question whether there was a right then to remove them had been terminated.

> *Unverzagt v. U. S.*, (C. A. 1925) 5 Fed. (2d) 494;
> *Stallings v. Splain*, 253 U. S. 339;
> *Respublica v. Arnold*, 3 Yeates, 8 Pa. 263;
> *Dodge's Case*, 6 Mart. (La.) 569;
> *State v. Buyck*, 3 S. C. L. (1 Brev.) 460;
> *U. S. Ex. Rel. v. Tittemore et al.*, 61 Fed. (2d) 909;
> *Cyclopedia of Federal Procedure*, Vol. 5, Sec. 1890.

It is axiomatic that habeas corpus cannot be used as a substitute for writ of error or appeal.

This is a conspiracy case. The overt acts of defrauding the Bank occurred in Buncombe County, North Carolina. On proof that such conspiracy was formed and that thereafter overt acts were committed in furtherance thereof, all the conspirators were guilty, even though they were not personally present at the time of the overt acts.

> *Strassheim v. Dailey*, 221 U. S. 281;
> *Pierce v. State*, 130 Tenn. 44;
> *12 C. J.*, 669;
> *State Ex Rel. v. Bacon*, 164 Tenn. 404.

Petitioners having voluntarily entered their appearance before the Superior Court of Buncombe County, with full knowledge of their rights and upon legal advice, waived all inquiry into the matter of the right of North Carolina to demand their appearance.

> *Gracie et al. v. Palmer et al.*, 8 Wheat. 699;
> *Smith v. Jones*, 76 Me. 138;
> *In Re: Popejoy*, 26 Colo. 32, 77 A. S. R. 222.

Any right which one has to dispute the jurisdiction of a court, for any reason, must be asserted at the proper time, and in the proper manner, or it will be considered as waived.

> *Prentis v. Commonwealth*, (Va.) 5 Rand. 697;
> *Holliday v. Pitt*, 2 Strange 985;
> *Chase v. Fish*, 16 Me. 132-136;
> *McPherson v. Nesmith*, 3 Gratt. (Va.) 237.

The right to resist extradition is a personal right which must be asserted at the first opportunity, and may be waived, as any other right, and has been waived in this case.

"When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment."

> *Taylor v. Taintor*, 83 U. S. 366, 371;
> *Ex parte Wm. P. Carroll*, 86 Tex. Crim. Rep. 301;
> *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 152;
> *Ruggles v. Carey*, 3 Conn. 421;
> *Respublica v. Gaoler*, 2 Yeates (Pa.) 263;
> *Comm. v. Brickett*, 8 Pick. (Mass.) 140;
> *Boardman v. Fowler*, 1 Johns. Cas. (N. Y.) 413;
> *Wheeler v. Wheeler*, 7 Mass. 169.

Petitioners voluntarily submitted to the jurisdiction of the Superior Court of Buncombe County, North Carolina, and were tried and convicted, then voluntarily entered into bond for their appearance to abide the judgment of the Supreme Court of North Carolina, and thereafter left the State. They are in the same situation as escaped convicts, and are, therefore, fugitives from justice. The judgment of conviction conclusively established their guilt, and all that is necessary to convert a criminal under the law of a state into a fugitive from justice is that such criminal should have left the State after having incurred guilt therein.

> *Strassheim v. Dailey*, 221 U. S. 278;
> *Roberts v. Reilly*, 116 U. S. 80;
> *Ex parte Wm. P. Carroll*, 86 Tex. Crim. Rep. 301;
> *Ex parte Weinhause*, (Mo. App.) 216 S. W. 548;
> *People Ex Rel. v. Mallon*, 214 N. Y. Sup. 211;
> *People v. Benham*, 128 N. Y. Sup. 610;
> *Ex parte Colcord*, (S. D.) 207 N. W. 213;
> *Ex parte Williams*, (Okla.) 136 Pac. 597; 51 L. R. A. (N. S.) 668.

To say that one may be lawfully extradited upon indictment and before conviction when the law presumes him to be innocent, and then to say that one may *not* be ex-

tradited after conviction, which conclusively establishes his guilt, is to assert a legal contradiction. The purpose of the pertinent provision of the Federal Constitution, and the statute enacted in aid thereof, is to eradicate state lines, in order that the persons charged with the crime may be apprehended and put to trial, and those tried and convicted may be punished.

> *Biddinger v. Commissioner, etc.*, 245 U. S. 127;
> *Lascelles v. Georgia*, 148 U. S. 537.

Acts done outside of jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect if the State should succeed in getting him within its power.

> *Strassheim v. Dailey, supra* (Mass.);
> *Commonwealth v. Smith*, 11 Allen 243;
> *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356;
> *Simpson v. State*, 92 Ga. 41, 22 L. R. A. 248; 44 Am. St. Rep. 75;
> *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89.

The provisions of the Federal Constitution and the statutes enacted in aid thereof have never been construed narrowly and technically as if they were penal laws, but liberally, to effect their important purpose.

> *Biddinger v. Commissioner of Police, supra;*
> *Appleyard v. Mass.*, 203 U. S. 222;
> *Roberts v. Reilly*, 116 U. S. 80.

It is conceded on the record that petitioners voluntarily entered their appearance and submitted to the jurisdiction of the Superior Court of Buncombe County, North

Carolina, for trial upon the indictments then pending. Being thus before said Court and within its jurisdiction—

> "they might have been tried for any other offense than that specified in the pending indictments, without first having an opportunity to return to the State from which they were extradited (or voluntarily left), and in so trying them against their objection no right, privilege, or immunity secured to them by the Constitution and laws of the United States is thereby denied."

> *Lascelles v. State of Ga.*, 148 U. S. 537;
> *Kentucky v. Dennison*, 65 U. S. 717, 24 How. 66, 101;
> *Ex parte Reggel*, 114 U. S. 642;
> *Kerr v. Illinois*, 119 U. S. 436;
> *Mahon v. Justice*, 127 U. S. 700;
> *Cook v. Hart*, 146 U. S. 183.

Therefore, even if the second indictments were broader in their scope than the original indictments, or even if they embraced new and distinct offenses, petitioners were nevertheless subject to the jurisdiction of the courts of North Carolina, and were properly tried and convicted without the violation of any of their constitutional or statutory rights. Authorities *supra*.

II

THE REQUISITION HAVING BEEN HONORED AND THE RENDITION WARRANT ISSUED BY THE GOVERNOR OF TENNESSEE, THE ASYLUM STATE, THE BURDEN WAS UPON THE PETITIONERS TO SHOW BEYOND REASONABLE DOUBT THAT THEY WERE NOT IN THE DEMANDING STATE AT ANY TIME WHEN THE ALLEGED OFFENSES WERE ALLEGED TO HAVE BEEN COMMITTED. THE PETITION CONTAINS NO SUCH ALLEGATION AND THE PETITIONERS DID NOT CARRY THE BURDEN SO IMPOSED UPON THEM.

Particular attention of the Court is called to the fact that the petition nowhere alleges that the petitioners were not within the State of North Carolina prior to the overt acts of defrauding the Bank, and during the progress of the conspiracy. We think the petition is fatally defective in this particular. The case before Judge Cunningham on *habeas corpus* was equally defective as to evidence in that regard.

> *Ex parte Crowley,* 171 Cal. 58, 151 P. 739;
> *Strassheim v. Dailey,* 221 U. S. 286.

The most recent case on the subject is that of *South Carolina v. Bailey,* 289 U. S. 412, 77 L. ed. 1292. We here quote from what was there said on pages 421 and 422 (1297):

> "Considering the Constitution and statute and the declarations of this Court, we may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of the homicide. Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice."

The indictment was for a common-law conspiracy. The dates named in the indictment were from May, 1930, to November, 1930 (R. pp. 70-74). But conspiracy is an offense continuing in its nature—referred to sometimes as a "continuando" offense—and neither upon trial nor upon extradition is the State confined to the date named in the indictment.

> *State v. Lemons,* 182 N. C. 828, 109 S. E. 270;
> *State v. Peters,* 107 N. C. 876, 12 S. E. 74;
> *State v. Burton,* 138 N. C. 576; 50 S. E. 244.

The record in this case shows that the conspiracy, and the overt acts concerned in the accomplishment of its purpose, extended over the period both before and during that charged in the bills of indictment, during which time either or both of these petitioners might have entered into the conspiracy.

The record shows that Wallace B. Davis, codefendant with these petitioners, was within the State, had his home at Asheville, North Carolina, was there in active charge of the Bank's affairs, and by overt acts was engaged in carrying out the designs of his co-conspirators, these defendants.

> *Ex parte Montgomery,* 244 Fed. 967;
> *U. S. v. Kissell,* 218 U. S. 601, 54 L. ed. 1168;
> *Hyde v. United States,* 225 U. S. 347, 56 L. ed. 1114;
> *U. S. v. Green,* (D. C.) 115 Fed. 343.

In *Ex parte Montgomery,* 244 Fed. 967, only a short stay within the State, in the company of a co-conspirator, not upon the time named in the indictment, but still at a time when a conspiracy might have been entered into, was considered sufficient.

In the *Adams case, In re: Adams,* 7 Law Rep. 386, discussed in Moore on Extradition, Volume 2, Section 588, page 949, the Court held that Adams was a fugitive from

justice, because he came into the jurisdiction after the alleged crime of false pretense had been committed by way of representation from Ohio to a merchandising company in New York. Commenting on this, the writer of the text says:

> "We are free to admit that we do not perceive any great flaw in the reasoning of the Court, restricting it, as it was restricted by the facts in the particular case, to offenses to the commission of which corporeal presence is generally recognized as not essential."

The petitioners have not shown that they were not in the State of North Carolina during the progress of this conspiracy.

Doubtless, realizing this weakness of their position, petitioners seek to substitute for evidence two technical propositions, neither tenable: (a) that the demurrer to the original petition for habeas corpus *admits* that they were not in North Carolina when the crime was committed (petition p. 2); and (b) that the Supreme Court of North Carolina, in its opinion, says they were not (petition page 2). As to the first proposition, it is untenable because the relators put all of their evidence in their petition for writ of habeas corpus, and the demurrer is the equivalent of holding it insufficient, as indeed it was under the standards of this Court. As to the second, in the quoted remark of the Supreme Court, that Court was stating the contention of the defendants, *arguendo*.

The averment by petitioners in regard to their presence in North Carolina may be found on page 52 of the Record, first paragraph, in which they say they voluntarily came into the jurisdiction, "although they were not within the State of North Carolina at or about the time of the alleged offenses charged in the bill of indictment." This, from its context, evidently refers to the date named in the bill. At any rate, it is wanting in that specific statement of fact requisite to carry the burden resting upon them, and we have nowhere found any case where a gen-

eral statement of that sort, purely relative in its nature, and doubtless reflecting the interpretation of the law entertained by the pleader, has been accepted as satisfactory evidence of absence from the State. But the petitioner Luke Lea, Jr., is so unfortunate as to have included in the record an admission that he was in North Carolina, in the home of Wallace B. Davis, president of the Bank, and his alleged co-conspirator, in July or August, 1930, while, as the evidence discloses, the conspiracy was in progress, *dum fovet opus*. (Petitioners' Exhibit 1, record of trial in Superior Court of Buncombe County, North Carolina, page 640.)

This failure of petitioners to establish their absence from the demanding state goes to the substance of their defense, and is not relieved by matters of a purely formal nature relating to the pleadings. The demanding state has never conceded such absence, and it cannot be assumed. The question is not moot; and in this aspect the case is not even novel.

III

THE PETITIONERS ARE FUGITIVES FROM JUSTICE, WITHIN THE MEANING OF ARTICLE IV, SECTION 2, OF THE UNITED STATES CONSTITUTION, AND REVISED STATUTES 5278, RELATING TO EXTRADITION.

The defendants were corporeally present in North Carolina in the constitutional sense while charged with crime, inasmuch as they were physically present at the trial, *and after their conviction fled from justice*. The record shows that the petitioners voluntarily came to this State, submitted themselves to the jurisdiction of the Court, and were convicted; gave bond to reappear and abide the judgment, and afterwards took asylum in the State of Tennessee.

That a person may violate the laws of the State while beyond its borders is well settled law; he may then come into the State, be physically present therein, and, finding

himself charged with his crime, then literally, morally, consciously, legally and technically flee from justice. The fact that he was corporeally present within the State and fled from justice can have no necessary logical connection with either the place where the crime was committed or the time of its commission, and none, as we can see it, under the wording of the Constitution. That is to say, the Constitution looks only to the *charge* and to the *fugitivity,* which latter element, of course, involves a physical presence at some time within the State. In this case the jurisdiction of North Carolina attached to these petitioners when they voluntarily surrendered within the State and stood their trial.

If the principle announced in *Hyatt v. Corkran,* 188 U. S. 691, is to stand upon any rational basis, it must be confined to cases presenting the same factual situation; otherwise it is completely at variance with the plain wording of the Constitution and its declared purpose.

We will say further that if the Court should go into the question of the presence of the criminal within the State, or his absence therefrom, at the time the alleged crime was committed, as having a bearing on the possibility of his having committed the crime, it would go in the face of the principle so often stated by this Court, that on a habeas corpus proceeding growing out of extradition the Court will not consider the question of guilt in any aspect, and more especially upon the question of *alibi.*

Neither the Constitution nor the Act of Congress says anything about being in the State at or about the time the crime was alleged to have been committed. The presence of these petitioners in the State of North Carolina during their trial, actively participating in it, giving bond for their appearance, voluntarily submitting themselves to the jurisdiction of all the courts of the State, trial and appellate, while so physically present, and their subsequent evasion of the process of the Court and asylum in

Tennessee, fills every moral and legal requirement of fugitivity under the Constitution. Article IV, Section 2, 2d paragraph, provides:

> "A person charged in any state with treason, felony, or other crime, *who shall flee from justice,* and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

The constitutional provision referred to is not penal, but remedial, and should be given a liberal interpretation, in order that it may effectuate its purpose.

That purpose is well expressed in *Appleyard v. Massachusetts,* 203 U. S. 222, 227, 51 L. ed. 163:

> "The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

The question is, under such an interpretation: Is the constitutional provision sufficient to cover that most important necessity of society in relation to crime, the rendition and removal of an escaped convict who has literally fled from justice?

When is a man *charged with crime,* and for how long? Technically, no extradition can be had, of course, unless the charge is put into some legal form. That, however, is a matter of procedure and has nothing to do with the

definition of the term "charged," as used in the Constitution; otherwise, the murderer who has fled immediately after the crime and before legal accusation would be immune from removal from the asylum state. The charge existed before indictment, and does not merge into or end with conviction.

Hughes v. Pflanz, 138 Fed. 980.

The common-sense view of the matter, and one entirely consistent with the express wording of the Constitution, is that the charge or accusation continues, as is stated in *Hughes v. Pflanz, supra*, until the criminal has expiated his crime. In that view of the matter, a person who has violated the laws of the State, although not corporeally present, and who has afterwards submitted himself to its jurisdiction, becomes in a very real sense—and there is no doubt within the meaning of the Constitution—a fugitive from justice, when he flees that jurisdiction in order to avoid the consequences of his crime, that is to say, the measure of justice which the law has prescribed.

Nothing, however, could be added to the completeness of the discussion of this phase of the case by Justice Swiggart, in the opinion in the case found on pages 413 to 415 of the Record, to which we respectfully invite attention.

IV

THIS COURT HAS PASSED UPON THE REGULARITY AND VALIDITY OF THE TRIAL AND CONVICTION IN NORTH CAROLINA IN A DIRECT PROCEEDING, AND THESE MATTERS SHOULD BE ELIMINATED FROM PRESENT CONSIDERATION.

We are, of course, aware that the denial of the petitions for writ of certiorari in the two cases of *Lea v. North Carolina*, 287 U. S. 649 and 668, 77 L. ed. 561 and 576, cannot be set up or pleaded as *res judicata*, but we urge that the Court, having passed upon these matters

as presented by those petitions, should not again review the voluminous record submitted by these petitioners in a collateral proceeding with the same end in view.

Notwithstanding the claim to the contrary, these petitioners have presented nothing new in the record in this respect.

In the petition on page 3, petitioners make an assignment of "new Federal questions of substance involved." On page 5 they make an assignment of "the Federal questions of substance not heretofore decided by this Court." The two sections are confusing and conflicting. By analysis it will be seen that on page 3 the Federal questions involved are said to be (1) "that the petitioners were not within the State of North Carolina at or about the time of the commission of the crimes charged," etc., and (2) "that the entire proceedings in the courts of North Carolina, under which the custody of petitioners was had and convictions were obtained," etc., were absolutely void under the due process and equal protection clause of the Fourteenth Amendment to the Federal Constitution.

Under section 3, on page 5, it will be found that this is elaborated into five sections; only section 5 of which, on page 8, relates to the alleged irregularities and invalidity of the proceedings in North Carolina.

Petitioners are clearly in error in their statement that there is anything new in their presentation of this subject at this time. A brief examination will show that they were all presented to this Court under the former petitions for certiorari above referred to.

But that there should be no mistake about the matter, we say now, as heretofore when the proceedings in North Carolina were brought here for direct review and disposed of by this Court, as set forth above, that due process of law was observed throughout the proceedings in North Carolina, and the objection of the petitioners relate to procedural matters which this Court will not review.

The contentions made by the petitioners in this respect, and the charges made against the procedure in North Carolina, are found and discussed on pages 41-46 of the Brief; by an examination of the petitions heretofore presented to this Court in former certiorari proceedings, and more particularly by examination of petitioners' voluminous Exhibit 1, they will be found to be a rehash of the charges there made. We do not consider further answer to them necessary here except to say: (1) the allegation of fraudulent recitals as to the venue in the indictment is unjust, untrue, and extravagant, and arises solely out of the mistaken notion of law with respect to common-law conspiracy entertained by original counsel for petitioners; (2) there is no evidence whatever of either fraud or packing of the jury panel, and the jury in the main instance was drawn in exact accordance with the law existing at the time of the alleged offense, as well as the amendment thereto complained of by petitioners as being *ex post facto;* and (3) the question of the legal existence of the trial court involves only matters that have been passed upon by the Supreme Court of North Carolina in numerous instances, and passed upon again directly in the present case adversely to the position taken by the petitioners; all of which matters were considered and passed upon adversely to petitioners in their two other petitions for writ of certiorari to this Court referred to above.

No inquiry may be made in this collateral proceeding into the sufficiency of the indictment, the constitution of the jury, or other matters not affecting the jurisdiction of the trial court.

Glasgow v. Moyer, 225 U. S. 420;
Howard v. Fleming, 191 U. S. 126;
Matter of Spencer, 228 U. S. 652;
Drew v. Thaw, 235 U. S. 432.

We, therefore, respectfully urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

From Consolidated Statutes of North Carolina

Sec. 4625. **Defects, which do not vitiate.**—No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record" or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or vice versa; nor for omission of the words "against the form of the statute," or "against the form of the statutes," nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offense.