

WINSLOW'S CASE.

to refuse to examine into the nature of the crimes for which a person has been surrendered. This is the decision of a point of criminal law, and is of no intrinsic importance in this discussion, until the practice has become open, general, and notorious, and has been applied to persons in whose fate the surrendering government has deigned to take an interest. After a long acquiescence in such a practice, so applied, it might come to be a part of international law; but it would have obtained that character wholly from the acquiescence. None such has yet been given, or can be pretended.

Take the somewhat analogous case of the capture of a hostile vessel in neutral waters. The mode and place of capture are no defence in the prize court; but the government whose vessel has been taken may insist that the neutral shall interpose. So the accused person, though he may have no standing in court but to the indictment found against him, should have the right to insist that the government which surrendered him shall enforce the immunities of its asylum. This is the general idea in the minds of the courts who have made the decisions. We go farther, and say that the prisoner himself should have this right as matter of strict law. As was said upon another occasion, if this is not the law, it ought to be. This, to be sure, has not much to do with international law directly; but it is an interesting and important matter in its indirect bearing.

It is idle to expect that governments will have the information or the disposition to interpose in ordinary cases; and we venture with diffidence to suggest, that, in constitutional countries at least, the courts should not give up their right to decide such a question. In France, it is tolerably plain, the new order is a device to save trouble, and, in effect, to evade the obligations of the admitted law. The ambassador of the surrendering governments may never hear of the case, or may not care about it; and what the prosecuting government is pleased to call justice will prevail, whatever becomes of the right of asylum. Mr. Clarke has shown, in another connection, how careless all governments are of the rights of their obscure and suspected subjects; and one of the cases commonly cited to prove

the practice in question, that of *Lamirande*, was a clear case of kidnapping, for which no redress was ever obtained. He was stolen from Canada, after a judge of the highest court had intimated that he should release him; and was tried and convicted in France, in contravention of all rules of honour.

Again: the distribution of powers is such in constitutional countries, that the executive department, however well disposed, cannot impose its will upon the courts. It happens fortunately, in *Lawrence's* case, that the President can act through the prosecuting officers, *Lawrence* being charged with crimes against the General Government; but in the great majority of instances this would be impossible. Our people have not yet forgotten *McLeod's* case, which threatened at one time to bring on a war with England on a similar question. Nor is it to be overlooked, that we are so accustomed, in the United States and in England, to defer to the opinion of the courts, that we are in danger of mistaking a refusal by them to decide such a question for a decision of it, of which this discussion furnishes a notable example.

If, however, the practice of the courts has become inveterate, which we are not willing to admit, it is essential that the older treaties should be speedily changed, so as to contain full covenants on this subject; which many of our late treaties, such as that with Italy, do contain. So established, our courts must take notice of them. If murder and forgery and other crimes, for which we are ready to ask and to grant surrender, are to be committed by wholesale, as some late occurrences seem to indicate as probable, there is no objection to providing that any crime within the scope of the treaty may be tried, though not specially noticed in the demand; but this is as much as any government ought to ask or to yield. If treaties are not made, statutes should be passed to give the courts the necessary powers.

England became uneasy on this matter in 1870, and passed a statute forbidding the government to surrender a criminal until assured by the demanding government that he would be tried only for the crime proved against him at the time of his demand; and requiring their own