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Ex Parte Mccardle

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Court : US Supreme Court

Decided On : 1868

Appeal No. : 74 U.S. 506

Appellant : Ex Parte Mccardle

Judgement :

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Ex parte McCardle

74 U.S. (7 Wall.) 506

APPEAL FROM THE CIRCUIT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

1. The appellate jurisdiction of this court is conferred by the Constitution, and not derived from acts of Congress, but is conferred "with such exceptions, and under such regulations, as Congress may make," and, therefore, acts of Congress affirming such jurisdiction have always been construed as excepting from it all cases not expressly described and provided for.

2. When, therefore, Congress enacts that this court shall have appellate jurisdiction over final decisions of the Circuit Courts in certain cases, the act operates as a negation or exception of such jurisdiction in other cases, and the repeal of the act necessarily negatives jurisdiction under it of these cases also.

3. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.

4. The act of 27th March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the Judicial Act of 1789, which authorized appeals to this court from the decisions of the Circuit Courts in cases of habeas corpus, does not except from the appellate jurisdiction of this

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court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of habeas corpus.

The case was this:

The Constitution of the United States ordains as follows:

" 1. The judicial power of the United States shall be vested *in one Supreme Court,* and in such inferior courts as the Congress may from time to time ordain and establish."

" 2. The judicial power shall extend to all cases in law or equity arising *under this Constitution, the laws of the United States,* "

&c.;

And in these last cases, the Constitution ordains that,

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations, as the Congress shall make.* "

With these constitutional provisions in existence, Congress, on the 5th February, 1867, by "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and *from the judgment of the said Circuit Court to the Supreme Court of the United States.*

This statute being in force, one McCardle, alleging unlawful restraint by military force, preferred a petition in the court below, for the writ of habeas corpus.

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The writ was issued, and a return was made by the military commander admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission upon charges founded upon the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

Upon the hearing, the petitioner was remanded to the military custody, but, upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal bond, for costs, he was admitted to bail upon recognizance, with sureties conditioned for his future appearance in the Circuit Court, to abide by and perform the final judgment of this court. The appeal was taken under the above-mentioned act of February 5, 1867.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied. [Footnote 1]

Subsequently, on the 2d, 3d, 4th, and 9th March, the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress, [Footnote 2] returned with objections by the President, and, on the 27th March, repassed by the constitutional majority, the second section of which was as follows:

" *And be it further enacted,* That so much of the act approved February 5, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed. "

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The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here by his duties in the Court of Impeachment, the cause was continued under advisement. Argument was now heard upon the effect of the repealing act.

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THE CHIEF JUSTICE delivered the opinion of the court.

The first question necessarily is that of jurisdiction, for if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking,

conferred

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by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. The United States* [Footnote 3] particularly, the whole matter was carefully examined, and the court held that, while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said further that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court,

"its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other

appellate jurisdiction. It is made in terms. The provision of the act of 1867 affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction, the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and, when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, affords any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction. [Footnote 4]

On the other hand, the general rule, supported by the best elementary writers, [Footnote 5] is that, "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crecker,* [Footnote 6] and more recently in *Insurance Company v. Ritchie.* [Footnote 7] In both of these cases, it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal, and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised. [Footnote 8]

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

[Footnote 1]

See *Ex parte McCardle,* 6 Wallace 318.

[Footnote 2]

Act of March 27, 1868, 15 Stat. at Large 44.

[Footnote 3]

10 U. S. 6 Cranch 312; *Wiscart v. Dauchy,* 3 Dallas 321.

[Footnote 4]

Lanier v. Gallatas, 13 Louisiana Annual 175; *De Chastellux v. Fairchild,* 15 Pennsylvania State 18; *The State v. Fleming,* 7 Humphreys 152; *Lewis v. Webb,* 3 Greenleaf 326.

[Footnote 5]

Dwarris on Statutes 538.

[Footnote 6]

54 U. S. 13 Howard 429.

[Footnote 7]

72 U. S. 5 Wallace 541.

[Footnote 8]

Ex parte McCardle, 6 Wallace 324.

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