

In Re Burrus

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Appellant : In Re Burrus

Judgement :

In re Burrus - 136 U.S. 586 (1890)

U.S. Supreme Court In re Burrus, 136 U.S. 586 (1890)

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No. 10, Original

Submitted March 10, 1890

Decided May 19, 1890

136 U.S. 586

ORIGINAL

SYLLABUS

A district court of the United States has no authority in law to issue a writ of habeas corpus to restore an infant to the custody of its father when unlawfully detained by its grandparents.

MR. JUSTICE MILLER delivered the opinion of the Court.

This is an application by Thomas F. Burrus to this Court, in the exercise of its original jurisdiction, for a writ of habeas corpus to relieve him from the custody and unlawful imprisonment, as he declares, in which he is held by Brad D. Slaughter, United States Marshal of the State of Nebraska, in the jail at Omaha, in said state, by virtue of an order of the district court of the United States for that district. Upon the filing of the petition in this Court, a rule was entered and served upon Slaughter to show cause why said writ of habeas corpus should not issue. To this rule Slaughter made return. In this return he says that

"the said petitioner is in his custody under and by virtue of an order and judgment of the Honorable

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Elmer S. Dundy, Judge of the United States court for the District of Nebraska, a copy of which order is hereto attached, and forms a part of this my return to aforesaid writ."

He further attaches to this return a

"true and correct copy of the whole proceedings in the controversy that brought about the judgment and order aforesaid, and he holds the said Thomas F. Burrus in his custody subject to and in pursuance of the aforesaid order and said judgment of the court, and submits whether he is entitled to his discharge as prayed for."

This return is signed "Brad D. Slaughter, Marshal of the United States for the District of Nebraska." The substance of this record shows that Louis B. Miller, of the Town of Oxford, County of Butler, and State of Ohio, and a citizen of that state, was the father of a child named Evelyn Estelle Miller, who was born on the 7th day

of October, 1881; that his wife died on the 18th of May, 1882, while he and his wife were residing in Nemaha County, in the State of Nebraska, and that while his wife was lying sick of measles, from which she ultimately died, the child was taken, under the directions of a physician, to the residence of the grandfather, Thomas F. Burrus, and Catherine Burrus, his wife, who were, and now are, residents of said Nemaha County, and citizens of the State of Nebraska. Since that time, Miller has married again, and, having a house and home, and being well prepared to take care of his child, he has desired its care and custody, and made frequent demands of the said Thomas and Catherine Burrus that they deliver it up to him, which they have uniformly refused to do.

Under these circumstances, Miller made application, on the 4th day of April, 1889, to Hon. Elmer S. Dundy, District Judge of the United States for the District of Nebraska, for a writ of habeas corpus to recover the care and custody of the child, reciting the circumstances hereinbefore stated and also some other matters tending to show that the home of Burrus was not a fit place for the child to be brought up. Upon this petition, the writ was issued and the defendant Burrus and his wife appeared before Judge Dundy at a regular term of the district court. They stated the fact that they had had the

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care and custody of the infant from a very short time after its birth, and still had it, and that they had taken good care of it, were capable of taking good care of it, and were very much attached to it, and it was attached to them, and they claimed the right to continue in the custody and control of the child, who was then between eight and nine years old.

Afterwards, on the 25th day of June, 1889, Judge Dundy made an order that said Evelyn E. Miller, the child, was improperly detained and kept by Thomas Burrus and Catherine Burrus, and that she, the said Evelyn E. Miller, should be awarded to the care and custody of her father, Louis E. Miller, the petitioner, and that said Burrus and wife produce the child before the court within five days from the date of said order. From this order an appeal was taken to the circuit court for that district,

before Judge Brewer, who decided that neither he nor the circuit court had any jurisdiction to hear the case on appeal, and remitted the case to the district court. On the 16th of December, 1889, an order was made reciting that the court had heard the argument of counsel on a motion to stay proceedings and dismiss the cause for want of jurisdiction of the court, and the court being of opinion that the cause was properly before it, and that the judge had jurisdiction of the same, and ordering that the stay of proceedings theretofore granted be terminated, and that the judgment of the court made on the 25th day of June, 1889, be carried into effect. It appears that the order for the delivery of the child to the father was obeyed in the presence of the court, but that, Miller having started from Omaha for his home in Ohio with the child, the petitioner, Burrus, and his wife got into the same train, and crossed the Missouri river on that train, and that when they reached Council Bluffs, in the State of Iowa, on the opposite side of the river, they again made efforts to secure possession of the child. The result of these efforts was that the father proceeded somewhat further into the State of Iowa, while the defendants, taking possession of the child with violence and against the will of the father, returned with it to the State of Nebraska. Thereupon Burrus and his wife were called before the district court by a writ of attachment

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for contempt in disobeying the orders of the court, and for this contempt Burrus was committed to imprisonment for three months in a county jail, in the custody of the Marshal of Nebraska. It is from this imprisonment that he now seeks to be relieved by the present proceedings in this Court, and the foundation of his claim of right to be so relieved is that neither the District Court of Nebraska nor Judge Dundy, the judge of that court, had any jurisdiction whatever in the original case of habeas corpus before him. That is the only question in the present case, for we have no power under this writ to inquire into mere errors committed by the district court in the progress of that case, and if we had, we are not satisfied that any such errors exist, save as to the alleged error of the assumption of jurisdiction in the case. Whether such jurisdiction existed is therefore the sole question before us.

The question of the extent of the authority of the courts of the United States to use the writ of habeas corpus as a means of releasing persons held in unlawful custody has always been clouded with more or less doubt and uncertainty. The Constitution, by declaring that "the privilege of the writ of habeas corpus shall not suspended unless when, in cases of rebellion or invasion, the public safety may require it," added to the exalted estimate in which that writ has always been held in this country and in England. By the fourteenth section of the act establishing the judicial courts of the United States, it is declared

"That all the beforementioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law, and that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment, *provided* that writs of habeas corpus shall in no case extend to prisoners in jail unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. "

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It will be seen in this section that while there may be many writs not specifically provided for in the statute which shall be within the powers of the courts of the United States, the framers of that statute were careful to mention specifically the writs of scire facias and of habeas corpus, and to make some special provisions in regard to the latter. As to the power of the courts to issue any of these writs, it was said that they must be necessary to the exercise of the jurisdiction of the respective courts and agreeable to the principles and usages of law. In reference to the writ of habeas corpus, it is expressly enacted that either of the Justices of the Supreme Court as well as judges of the district courts shall have power to grant the writ for the purpose of an inquiry into the cause of commitment. This latter clause has been interpreted occasionally as authorizing the issuing of the writ in any case where a person is imprisoned or confined by an order of a court,

for the purposes of an inquiry into the cause of commitment. But the proviso, proceeding upon the idea of the first clause, that in order to the issuing of this writ it must be necessary for the exercise of the jurisdiction of the court which issues it, declares that the writ

"shall in no case extend to prisoners in jail unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This statute, of course, left cases of prisoners in confinement by order of state authorities without the benefit of this writ from the courts or justices or judges of the United States, and the law remained in this condition until the events connected with the nullification proceedings in South Carolina, by which officers of the United States engaged in collecting the revenue and performing other duties in that state were for that reason subjected by the laws of South Carolina to imprisonment. In the recent case of *Cunningham v. Neagle*, [135 U. S. 1](#) , we have had occasion to review the course of legislation by Congress on the subject of the writ of habeas corpus, which has mainly, as now found in the Revised Statutes of the United States, reference to provisions for protecting the individual

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liberty of persons, citizens of the United States and subjects or citizens of foreign governments, from illegal imprisonment under state authority. It is not necessary to go over that field on this occasion. It is sufficient to say that the net result of the discussion is that all the courts of the United States, and the justices and judges of all its courts, are authorized to issue the writ of habeas corpus in any case where a party is imprisoned or held in custody for an act done by or under the authority of the laws of the United States, or where his imprisonment is in violation of the Constitution of the United States, or where it is supposed to be in violation of the law of nations or of the United States, in all which cases the federal courts and judges have jurisdiction to make inquiry into the matter and, in the language of the statute, when the prisoner is brought before them and the matter is inquired into, the court or justice or judge shall "dispose of the party as law and justice require."

It is not now the law, therefore, and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of habeas corpus. In order to obtain the benefit of this writ and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws, or treaties of the United States.

It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction, because, when the prisoner is brought before the court or justice or judge, his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued, and it is upon such hearing to be finally determined by the tribunal before whom the prisoner is brought whether his imprisonment or custody is in violation of the Constitution or laws or treaties of the United

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States. The cases on this subject, as they have been decided in the courts of the country, are not altogether in accord, but we think this is a fair statement of the law as it stands at the present time, under the statutes of the United States and the decisions of this Court.

This subject was considered with much ability in [Ex parte McCordle](#), 6 Wall. 318. In that case, although the court was speaking mainly of the jurisdiction of this Court by way of appeal, yet it made the following observation with reference to the Act of February 5, 1867, 14 Stat. 385, then recently passed. The language of that statute was that, in addition to the authority already conferred on the several courts of the United States and the justices and judges of said courts, they shall 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 it shall be lawful for such person so restrained of his or her liberty to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known, and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States."

In reference to this statute, Chief Justice Chase, speaking for the Court in that case, said:

"This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the national Constitution, treaties, or laws. It is impossible to widen this jurisdiction, and it is to this jurisdiction that the system of appeal is applied."

The provision of this statute is reproduced, with others on the same subject, in section 753 of the Revised Statutes.

In [Ex Parte Dorr](#), 3 How. 103, and application was made to

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this Court for a writ of habeas corpus to bring up the body of Thomas W. Dorr, of Rhode Island, on whose behalf it was alleged that he was held under sentence of death in violation of the Constitution and laws of the United States. The law then existing on the subject of the powers of the Court in awarding writs of habeas corpus was the fourteenth section of the Judiciary Act of 1789, which we have already recited. This Court, construing that section, said:

"The power given to the courts in this section to issue writs of scire facias, habeas corpus, etc., as regards the writ of habeas corpus is restricted by the proviso to cases where a prisoner is"

"in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify."

"This is so clear from the language of the section that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction, and that they qualify and restrict the preceding provisions of the section is indisputable. Neither this nor any other court of the United States or judge thereof can issue a habeas corpus to bring up a prisoner who is in custody under a sentence or execution of a state court for any other purpose than to be used as a witness, and it is immaterial whether the imprisonment be under civil or criminal process."

The motion for the habeas corpus was overruled. It was on account of this limited power of the federal courts to issue writs of habeas corpus that the various statutes referred to in *Ex parte Neagle* have since been passed, among the rest, the one construed by this Court in *Ex parte McCardle*, in which it is clear from the language of Chief Justice Chase that the original limitation upon the power remains except as it is extended by the statute of 1867 and others on the same subject.

In the case before us, there was no pretense that the child was restrained of its liberty or that the grandfather withheld it from the possession and control of the father under or by virtue of any authority of the United States, or that his possession of the child was in violation of the Constitution or any law or treaty of the United States. The whole subject of the

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domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States. As to the right to the control

and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon an act of Congress or any treaty of the United States or its Constitution.

The case of *Barry v. Mercein*, 5 How. 103, 46 U. S. 119 -120, is very instructive on this subject. Mr. Barry, who was a subject of the Queen of Great Britain, married an American lady, and after the birth of two children, they separated, Mr. Barry residing in Nova Scotia and the wife in the State of New York. Mr. Barry made application first to the Court of Chancery of New York by a writ of habeas corpus to recover possession of his daughter. In the case of *People v. Mercein*, 8 Paige 47, 55, Chancellor Walworth refused the relief he asked, saying that

"a writ of *habeas corpus ad subjiciendum*, however, is not, either by the common law or under the provisions of the Revised Statutes [of New York], the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant."

Mr. Barry then made application to the Circuit Court of the United States for the Southern District of New York, where his case was heard by Judge Betts (see 42 F 113), who delivered a very careful and a very able opinion, which has been furnished to us, in which he held that his court could not exercise the common law function of *parens patriae*, and therefore had no jurisdiction over the matter, nor had it by virtue of any statute of the United States. The petitioner in that case alleged that he was a nativeborn subject of the Queen of Great Britain, residing in Nova Scotia, and that his wife was the daughter of Mary Mercein, then a citizen of the State of New York, and that the mother and daughter held the custody of his child in violation of law. Judge Betts then, in a very able opinion, discusses the jurisdiction of the courts of the United States generally, and especially of the circuit court, in regard to a case like this, with the result which we have stated.

Prior to this, the petitioner had made application to this Court, in the exercise of its original jurisdiction, for the writ of habeas corpus, but the Court declared that the case was not of that class of which it could assume original jurisdiction, and that no ground for the exercise of appellate jurisdiction was presented, and it therefore refused the application. [Ex Parte Barry](#), 2 How. 65. From the judgment of the circuit court by Judge Betts, Mr. Barry brought the case to this Court by a writ of error, and a motion was made to dismiss the case for want of jurisdiction in this Court. In this case, which was very elaborately argued, the opinion of the Court was delivered by Chief Justice Taney, in which he said that

"in the argument upon this motion, the power of the circuit court to award the writ of habeas corpus in a case like this has been very fully discussed at the bar. But this question is not before us unless we have power by writ of error to reexamine the judgment given by the circuit court and to affirm or reverse it, as we may find it to be correct or otherwise."

He then proceeds to say that the appellate jurisdiction of the Supreme Court is governed by the amount or value in controversy, and adds:

"In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute, and it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations."

[Barry v. Mercein](#), 5 How. 103, [46 U. S. 119](#) -120.

So far as the question whether the custody of a child can be brought into litigation in a circuit court of the United States, even where the citizenship of the opposing parties is such as ordinarily confers jurisdiction on that court, the matter was left undecided in the case of *Barry v. Mercein*. Obviously, although the statutes of the United States have since enlarged the jurisdiction of the circuit courts by declaring that they shall have original cognizance, concurrent with the courts of the several state, of all civil suits arising under the Constitution or laws of the United States or

treaties made or

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which shall be made under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his child does not arise under the Constitution, laws, or treaties of the United States, and is not dependent on them.

But whether the diverse citizenship of parties contesting this right to the custody of the child could, in the courts of the United States, give jurisdiction to those courts to determine that question has never been decided by this Court that we are aware of. Nor is it necessary to decide it in this case, for the order for a violation of which the petitioner is imprisoned for contempt is not a judgment of the circuit court of the United States, but a judgment of the district court of the same district. There is apparently a studied effort in the record before us to treat the proceeding as one in the District Court of the United States for the District of Nebraska, and also as one before the judge of that court, but we apprehend that it must be considered for what it is worth, as the judgment of the district court, both the order for the delivery of the child to its father and the order for the imprisonment of the present petitioner for contempt being made in that court. The jurisdiction of that court is not founded upon citizenship of the parties, and though the original petition of Miller, the father of the child, was amended after the judgment was rendered so as to show that he was a citizen of the State of Ohio, and the defendants, Burrus and wife, were citizens of Nebraska, it is not perceived how that averment aids the parties in the present case, for the district courts of the United States have not jurisdiction by reason of the citizenship of the parties. If, therefore, there was no other ground of jurisdiction of that court in the habeas corpus case by which the child was delivered to its father, it was entirely without jurisdiction.

We have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of habeas corpus is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction. Of course

this does not mean that they have jurisdiction in all cases to issue the writ of habeas corpus, but that they have such jurisdiction when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ. Whatever, therefore, may be held to be the powers of the circuit courts in cases of this kind where necessary citizenship exists between the contestants which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds two thousand dollars in value, we know of no statute, no provision of law, no authority intended to be conferred upon the district court of the United States to take cognizance of a case of this kind either on the ground of citizenship or on any other ground found in this case. According to this view of the subject, the whole proceeding before the district judge in the district court was *coram non judice* and void, and the attempt to enforce the judgment by attachment and imprisonment of Burrus for contempt of that order is equally void. *Ex parte Rowland*, [104 U. S. 604](#) .

The petitioner is therefore entitled to his discharge, and the rule against Slaughter, the marshal, is made absolute, and the writ of habeas corpus will issue if that be necessary to his release.

MR. JUSTICE BREWER dissented.