

Case No. 2,119.

In re BULL et al.

[4 Dill. 323.]¹

Circuit Court, D. Nebraska.

1877.²

HABEAS CORPUS—REV. ST. §§ 753, 5278, 5279, CONSTRUED—POWER OF FEDERAL COURT TO RELEASE ON HABEAS CORPUS PERSONS IN CUSTODY UNDER STATE AUTHORITY.

1. A person indicted in a state court for an act done in pursuance of a law of the United States, may be discharged from custody under such indictment, on a writ of habeas corpus, issued by a federal court or judge, under section 753 of the Revised Statutes of the United States.

[Cited in *Re Neagle*, 39 Fed. 851.]

2. The relators were indicted in a state court for kidnapping, and were in custody under such indictment; they applied to a federal judge for a writ of habeas corpus, stating, in their petition for the writ, that they were indicted for acts done by them under sections 5278 and 5279 of the Revised Statutes of the United States, in executing a requisition for the surrender of the person alleged to have been kidnapped as a fugitive from justice; it appearing to the circuit court, on appeal, that this claim of the relators was not true: *Held*, that they were not entitled to be discharged, and the order of the district judge of the district, discharging the relators, was reversed.

[Cited in *Re Burke*, Case No. 2,158; *Re Miller*, 42 Fed. 308.]

[Appeal from the district court of the United States for the district of Nebraska.

[At law. Petition by Jesse H. Bull and William Turtle for a writ of habeas corpus, directed to Samuel McClay, sheriff, requiring him to produce the petitioners. On the return of the writ the petitioners were discharged from custody by the district judge. The sheriff appealed, and the order of discharge was reversed.]

One John H. Blair was indicted in Chicago, in Cook county, Illinois, for perjury. The governor of Illinois issued his requisition, in due form, upon the governor of Nebraska, demanding the surrender and return of Blair to the state of Illinois. Mr. Bull, one of the relators, was appointed messenger, or agent, by the governor of Illinois, to receive and

convey Blair to Cook county. The governor of Nebraska complied with the requisition, and caused the arrest of Blair in Lancaster county, Nebraska, and delivered him to Mr. Bull. Mr. Turtle, the other relator, was the assistant of Bull. Instead of taking Blair to Chicago by the nearest route, Bull and Turtle took him to St. Louis, and from thence one of them took him to New York, and thence to England, where he was arrested as soon as the ship on which he sailed had landed, and he was there confined in prison some months, until he was demanded by the government of the United States, and released by the government of Great Britain. This demand and release were upon the ground that Blair had been abducted from the United States. On Blair's return to this country he proceeded to Nebraska, and the criminal proceeding in Illinois has never been prosecuted. After Blair's return, the grand jury of the state district court of Lancaster county, Nebraska, found an indictment against Bull and Turtle for kidnapping Blair, and forcibly and illegally taking him out of the state of Nebraska. They were arrested by the respondent, the sheriff of Lancaster county, upon a *capias* issued by the Lancaster district court upon this indictment, and were held in custody under that writ. They, thereupon, presented their petition for a writ of habeas corpus to the Hon. E. S. Dundy, the district judge of the United States for Nebraska, properly verified, setting forth, in substance, that they were restrained of their liberty and unlawfully imprisoned by Samuel McClay, sheriff of Lancaster county, the respondent; that they were so restrained and imprisoned solely for acts lawfully done by them under and by virtue of the constitution and laws of the United States; that the state of Nebraska was proceeding to try and seeking to convict and punish them for said acts in violation of the constitution of the United States, and the laws made in pursuance thereof; that the respondent claimed the right to hold the said relators by virtue of a *capias* issued by authority of law from the state district court of Lancaster county; that the *capias* was based upon an indictment found by the grand jury of said county, in May, 1876, against the relators, for kidnapping one John H. Blair, on or about the 6th day of November, 1875; that the laws of the United States specially and specifically authorized the relators to do the acts complained of, and for which they were indicted; that the said Blair had been indicted in Cook county, state of Illinois, for the crime of perjury there committed, and had fled to the state of Nebraska, when and where he was duly arrested as a fugitive from justice; that the governor of the state of Illinois issued his requisition in due form upon the governor of Nebraska, demanding the surrender and return of the said Blair to the state of Illinois; that Jesse H. Bull was duly appointed messenger to receive and convey to said state the said Blair; that the governor of the state of Nebraska duly honored the said requisition, and caused the arrest of said Blair, who was properly and lawfully delivered to the said messenger; that the said Turtle was present assisting said Bull, at his request; and that the several things here enumerated are the identical acts for which they were indicted, and are now held in custody. The writ was issued, and the respondent made return to the writ and produced the relators, as he was commanded to do. The return to the writ shows clearly enough that the respondent then held the relators on a *capias* duly issued

from the district court of Lancaster county, as stated in the petition. When the writ was returned, the relators filed a replication to the return, reiterating the substance of the petition. Counsel for the respective parties being present, the hearing was at once entered upon. Proceedings were had “in a summary way to determine the facts of the case, by hearing the testimony and arguments,” for the purpose of disposing of the relators, “as law and justice require,” as provided by section 761 of the Revised Statutes of the United States. After hearing all the testimony, the district judge entered an order discharging the relators from the custody of the respondent. [U. S. v. McClay, Case No. 15,660.] The facts of the case, the law pertaining to it, the positions taken by the respective counsel, and the conclusions of the district judge, were stated with great clearness in an opinion which accompanies the record on this appeal.

The district judge summed up his conclusions as follows: “These views lead me to conclude—1. That Blair was properly indicted in Cook county, state of Illinois, for the crime of perjury. 2. That the requisition and warrant issued by Governor Beveridge, of Illinois, under which Bull acted as messenger, were regular in form, and, therefore, valid and binding on all concerned. 3. That the warrant issued by Governor Garber, of Nebraska, on which Blair was arrested and removed from this state, was regular on its face, and was a valid and lawful one. 4. That all of these proceedings were had under and in pursuance of the constitution of the United States, and the act of congress passed in pursuance thereof, known as the ‘extradition act.’ 5. That any effort or attempt on the part of the state authorities to hold or punish the relators for the removal of Blair under the requisition for extradition, is without authority and void. 6. That the writ in this case was properly issued, and inquiry thereunder properly made, for the purpose of showing that the relators were held in custody for removing Blair from this state on the requisition of the governor of Illinois. It necessarily follows that the relators have not invoked in vain the aid of this ‘high prerogative writ.’ They must, therefore, be discharged from the custody of the respondent, and it is so ordered.”

The respondent, the sheriff, appealed to this court from the order discharging the relators from custody, and the cause was submitted on the pleadings, proofs, and exhibits.

Hunter & Sawyer and Brown, England & Brown, for appellant.

Lamb, Billingsley & Lamberson and R. E. Knight, for relators (appellees).

DILLON, Circuit Judge. The writ of habeas corpus in this case was issued by the district judge for this district, under the authority conferred by that clause of section 753 of the Revised Statutes of the United States which relates to the case of a prisoner “in custody for an act done in pursuance of a law of the United States.” The law of the United States here referred to is to be found in sections 5278 and 5279 of the Revised Statutes, providing for the demand and surrender of fugitives from justice. The relators claim that they have been indicted in the state court and arrested by its process for an act done by them in pursuance of the law of the United States relating to this subject, as incorporated in the two sections of the Revised Statutes above cited.

If the relators had been indicted and were in custody solely for acts done in pursuance of this statute, I agree with the learned district judge, in the elaborate and able opinion which he has filed in the case, that they could be properly discharged on habeas corpus. The cases referred to by him fully support his judgment on this point. *U. S. v. Jailer of Fayette County* [Case No. 15,463]; *Ex parte Robinson* [Id. 11,934]; *Ex parte Jenkins* [Id. 7,259]; *In re Neill* [Id. 10,089]; *Ex parte Smith* [Id. 12,968]; *Ex parte Bridges* [Id. 1,862]; *U. S. v. Morris* [Id. 15,811]; *Ex parte Robinson* [Id. 11,935].

If the identity of the act which forms the basis of the indictment with the act done in pursuance of the United States statute appeared on the face of the record, there seems to be no doubt as to the power of the federal court or judge, under the legislation of congress, to discharge the prisoner on habeas corpus. *Ex parte Bridges* [supra]. If this identity does not thus appear, the cases above cited establish a settled construction of the existing statute relating to the writ of habeas corpus, that this may be shown by proofs aliunde. Testimony on this subject was introduced before the district judge by the relators and by the respondent; and the same evidence is now before the circuit court. The district judge found, as a matter of fact, that all that was done by the relators within the territorial limits of Nebraska, was done by them under and in pursuance of the act of congress. In other words, he found as a fact that the purpose of the relators not to convey and deliver Blair to the proper authorities in Illinois, under the requisition, was formed after they had left the state of Nebraska, and not until they had reached the city of St. Louis. And thus finding, he held that their acts could not, by "relation," reach back to the time when they originally received Blair at Lincoln, in Lancaster county, Nebraska, so as to make them guilty of the crime of kidnapping within the last named county. I have read all the proofs in this case with attention and care; and while I admit that there is much conflicting testimony, I am constrained to differ with my learned brother as to what it

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ought to be taken (on such a hearing as this) as establishing, or as tending to establish, with, such cogency as to make it proper to withdraw the case from the state tribunals by means of the writ of habeas corpus.

Upon the proofs before me, I am not satisfied that the relators kept within the scope of their duty under the requisition, or acted in pursuance of it. On the contrary, it seems to me that there is strong ground to maintain and believe that the procuring of the indictment against Blair in Chicago, the application for the requisition, and for the arrest of Blair, and the taking of him out of the state of Nebraska, and to England, were all part of a plan, formed beforehand, to effect this precise result, and that it was not the intention of the relators, at any time, to take their prisoner, under the requisition, to the state of Illinois to answer to the indictment. If so, it is clear that the relators could not justify their acts under sections 5278 and 5279 of the Revised Statutes, and they ought, in this event, to answer to the criminal justice of the state whose laws they have violated.

There is no provision of law for the removal of such a case as that of the indictment against the relators to a court of the United States for trial. Where it is clear that the imprisonment under the state authority is for an act done in pursuance of federal authority and warranted by it, it may be conceded that the federal judicial tribunals or judges may, on habeas corpus, discharge the prisoner from custody. But this should appear with reasonable certainty to justify a federal court or magistrate in withdrawing the case in this summary manner from the jurisdiction of the state court. If the latter court proceeds with it and denies the party any of the rights given or secured by the constitution, laws, or authority of the United States, he has a remedy by a writ of error in the supreme court of the United States. Rev. St § 709.

An order will be entered in this court reversing and setting aside the order of the district judge discharging the relators from the custody of the respondent. Ordered accordingly.

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]

² [Reversing U. S. v. McClay, Case No. 15,660.]

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