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Civil Procedure -- Jurisdiction -- Habeas Corpus

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CASES NOTED

CIVIL PROCEDURE—JURISDICTION—HABEAS CORPUS

Plaintiff, who brought a civil suit for damages on a valid cause of action against Chicago City officials under the Federal Civil Rights Act,[1] was subsequently convicted of certain federal crimes and confined to the United States Penitentiary at Alcatraz Island, California. Interrogatories were filed by a defendant and stipulation was made to take the plaintiff's deposition in Chicago. Petition for a writ of habeas corpus ad testificandum was denied by the district court and without the plaintiff's presence the trial was unable to continue. The cause was dismissed. *Held*, the writ was properly denied for lack of jurisdiction under the "all writs" statute.[2] *Edgerly v. Kennelly*, 215 *F.2d* 420 (*7th Cir.* 1954).

A distinction is to be noted between the several types of habeas corpus writs.[3] Habeas corpus ad subjiciendum is the most common[4] and is ". . . the essential remedy to safeguard a citizen against imprisonment by State or Nation in violation of his constitutional rights."[5] Habeas corpus ad testificandum does not inquire into the alleged unlawful detention of the petitioner[6] but issues, ". . . for the production of witnesses who are confined in jail and who are beyond the reach of the ordinary subpoena. The issuance of such writ was at common law discretionary."[7]

The great mass of cases interpreting the habeas corpus statute[8] hold that the writ has no effect beyond the territorial jurisdiction of the issuing

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1. 17 STAT. 13-15 (1871), 42 U.S.C. §§ 1983, 1985, 1986 (1954).

2. STAT. 81-82 (1789), 28 U.S.C. § 1651 (1952), "The Supreme Court and all courts established by Act of Congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . . ."

3. 3 BL. COMM. 129-132; 39 C.J.S. 424-428; 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 108-125 (3d ed. 1944); Vol. 19, WORDS AND PHRASES (perm. ed.) "Habeas Corpus."

5. Darr v. Buford, 339 U.S. 200, 203 (1950).

4. Gilmore v. United States, 129 F.2d 199, 204 (10th Cir. 1942); Grieve v. Webb, 22 Wash. 2d 902, 903, 158 P.2d 73, 74 (1945).

6. Cuckovich v. United States, 170 F.2d 89, 90 (6th Cir. 1948); United States v. Rollnick, 33 F. Supp. 863, 866 (M.D. Pa. 1940).

7. Cuckovich v. United States, 170 F.2d 89, 90 (6th Cir. 1948); Bugg v. United States, 140 F.2d. 848, 850 (8th Cir. 1944); Murrey v. United States, 138 F.2d 94, 97 (8th Cir. 1943); 8 WIGMORE EVIDENCE 2199 (3d ed. 1940); 70 C. J., *Witnesses* § 64 (1935).

8. 36 STAT. 1167 (1911), 28 U.S.C. § 2241 (1952), "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" . . . and they "may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."

court.[9] It has been argued that this jurisdictional limitation is explanatory of and must be read into the "all writs" statute,[10] because, generally, valid exceptions to a statute must be express although certain implied exceptions may be made where necessary.[11] Such an express exception seems to be inherent in 28 U.S.C. § 2255[12] which was created to somewhat limit the widespread use and abuse of the habeas corpus petition in certain jurisdictions.[13] Similarly, under a provision of the Bankruptcy Act[14] imprisoned bankrupts are subject to court orders to testify and such orders have run beyond the territorial limits of the bankruptcy court and produced prisoners therefrom.[15] The District Court for the District of Columbia was apparently privileged to have writs run outside of the territorial limits of the District.[16] This jurisdictional problem is often solved by the determination of who has custody of the prisoner.[17]

Should the writ of habeas corpus ad testificandum be made an implied exception to the jurisdictional rule? The usual situation involving the use of this writ calls for the witness to appear and give testimony in criminal proceedings, and on several occasions the writ has issued to bring the witness from a federal penitentiary into a foreign state.[18] Some cases refusing the writ have indicated that were there a good reason for the prisoner's appearance it would be granted.[19] Still other courts have rationalized refusal

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9. Ahrens v. Clark, Att'y Gen., 335 U.S. 188, 190-193 (1948); McAfee v. Clemmer, 171 F.2d 131 (D.C. Cir. 1948); United States *ex rel.* Circella v. Neely, 115 F. Supp. 615 620-622 (N.D. Ill. 1953); United States *ex rel.* Dorsch v. Hunter, 101 F. Supp. 751 (W.D. Pa. 1951), *aff'd*, 196 F.2d 1017 (3d Cir. 1952); United States *ex rel.* Smith v. Warden of Philadelphia County Prison, 87 F. Supp. 339 (E.D. Pa. 1949), *aff'd*, 181 F.2d 847 (3d Cir. 1950); Phillips v. Hiatt, 83 F. Supp. 935, 937 (D. Del. 1949); Fiedler v. Shuttleworth, 57 F. Supp. 591, 592 (W.D. Pa. 1944).

10. See note 1 *supra;* Phillips v Hiatt, 83 F. Supp. 935, 937-938 (D. Del. 1949).

11. 82 C.J.S., *Statutes* § 382(b) (1953).

12. 62 STAT. 967 (1948); "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . . A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. . . ."

13. United States v. Hayman, 342 U.S. 205 (1952); Price v. Johnston, 334 U.S. 266, 292-301 (1948); REPORT OF THE JUDICIAL CONFERENCE 22-24 (1943).

14. 30 STAT. 544 (1898),, as amended, 11 U.S.C. § 53, Order 30 (1952).

15. United States *ex rel.* Marsino v. Anderson, 18 F. 133 (N.D. Ill. 1927); *In re* Thaw, 166 Fed. 71 (3d Cir. 1908) (witness would have been produced in court but for his insanity).

16. Noble v. Botkin, 153 P.2d 228 (D.C. Cir. 1946); Downey v. United States, 91 F.2d 223, 226 (D.C. Cir. 1937); this privilege was terminated by virtue of Ahrens v. Clark, 335 U.S. 188 (1948); *see* McAfee v. Clemmer, 171 F.2d 131, 132 (D.C. Cir. 1948).

17. Ahrens v. Clark, 335 U.S. 188 (1948); United States v. Quinn, 69 F. Supp. 488 (N.D. Ill. 1946); 3 MIAMI L.Q. 52 (1948).

18. United States v. Quinn, 69 F. Supp. 488 (N.D. Ill. 1946); United States *ex rel.* Patterson v. Brady, 57 F. Supp. 93 (D. Md. 1944); Sanders v. Brady, 57 F. Supp. 87 (D. Md. 1944); *In re* Hamilton, 11 Fed. Cas. No. 5, 976, at 319 (S.D. N.Y. 1867).

19. Tatum v. United States, 204 F.2d 324 (9th Cir. 1953); Gilmore v. United States, 129 F.2d 199 (10th Cir. 1942); Gibson v. United States, 53 F.2d 721 (8th Cir. 1931); United States v. Chinn, 74 F. Supp. 189 (S.D. W.Va. 1947); Ex *parte* Smith, 145 Me. 174, 74 A.2d 225 (1950); 4 MOORE'S FEDERAL PRACTICE § 26.11 pp. 1056, 1057.

of the writ by saying there was too much possibility of escape;[20] or the inconvenience was too great;[21] or the expense was prohibitive.[22] It has been suggested that in view of these considerations, depositions be taken at the place of confinement;[23] or that the sworn affidavits made by the prisoner-witness be filed with the court for use in the proceedings.[24] Quite obviously, a mere piece of paper precludes the benefit of personal testimony both as to the petitioning party and as to the judge and jury.[25] Beale states, "It is a general rule of law that where one has become subject to the jurisdiction of a court, the jurisdiction continues in all proceedings arising out of the litigation such as appeals and writs of error."[26] However, the argument that a district court which puts the prisoner in question beyond its territorial limits retains the power to bring the same person again therein has been refuted.[27]

The decision in this case can perhaps be attributed in part to the social stigma attaching to prisons and prisoners, and the consequent reticence of judges to allow the release of convicted criminals for a few days even under the most desirous of circumstances. It appears that it would have afforded a more equitable and reasonable solution to deny the petition on the basis of the court's discretion rather than to so soundly seal the door by applying the "no-jurisdiction, no-writ" rule; for it is conceivable that a similar situation in the future might demand a more equitable treatment than was allowed in this case.

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CONSTITUTIONAL LAW—INDIANS—INTOXICATING LIQUORS

The defendant was indicted for selling intoxicants to Indians.[1] A general demurrer was sustained by the lower courts[2] and the state appealed. *Held*: A statute prohibiting sale of intoxicants to Indians is not violative

20. Ahrens v. Clark, 335 U.S. 188, 191 (1948); Price v. Johnston, 159 F.2d 234 236, 237 (9th Cir. 1947); *Ex parte* Bagwell, 79 P.2d 395, 397 (Calif. 1938).

21. United States v. Hayman, 342 U.S. 205, 210-219 (1952); Ahrens v. Clark, *supra* note 22; Price v. Johnston, *supra* note 22; *Contra*, United States v. Quinn, 69 F. Supp. 488, 492 (N.D. Ill. 1946) (. . . if jurisdiction depends upon the matter of convenience, the convenience of the petitioner far outweighs that of the Goverment or the court).

22. Ahrens v. Clark, 335 U.S. 188, 191 (1948); Price v. Johnston, 159 F.2d 234, 236, 237 (9th Cir. 1937); Brewer v. United States, 150 F.2d 314, 315 (9th Cir. 1945); Neufield v. United States, 118 F.2d 375, 385 (D.C. Cir. 1941); *Ex parte* Bagwell, 79 P.2d 395, 396 (Calif. 1938).

23. State v. Brown, 89 So. 862 (Ala. 1921); *Ex parte* Bagwell, 79 P.2d 395, 396 (Calif. 1938); FED. R. CIV. P. 26(a).

24. Murrey v. United States, 138 F.2d 94, 97 (8th Cir. 1943); United States v. Chinn, 74 F. Supp. 189, 190 (S.D. W.Va. 1947).

25. Price v. Johnston, 334 U.S. 266, 280 (1948).

26. 1 BEALE, THE CONFLICT OF LAWS § 76.1 (1st ed. 1935).

27. Hauck v. Hiatt, 50 F. Supp. 534, 535 (W.D. S.C. 1943).

1. IDAHO CODE, § 18-4201 (1879).

2. Justice of the Peace Court and District Court of Bingham County.