

United States ex ret. Standing Bear
v.
George Crook, a Brigadier General of the Army of the U.S.

Before Elmer S. Dundy, U.S. District Judge for Nebraska. Habeas Corpus. 1879.

On the 8th of April, 1879, the relators, Standing Bear, and twenty-five others, during the session of the court held at that time at Lincoln, presented their petition, duly verified, praying for the allowance of a writ of habeas corpus, and their final discharge from custody thereunder.

The Petition alleges [. . .] that the relators are Indians who have formerly belonged to the Ponca tribe of Indians, now located in the Indian Territory; that they had some time previously withdrawn from the tribe and completely severed their tribal relations therewith, and had adopted the general habits of the whites and were then endeavoring to maintain themselves by their own exertions, and without aid or assistance from the general government; that whilst they were thus engaged, and without being guilty of violating any law of the United States, they were arrested and restrained of their liberty by order of the respondent, George Crook.

[. . .]

On the 18th day of April the writ was returned, and the authority for the arrest and detention is therein shown. The substance of the return to the writ, and the additional statement since filed, is that the relators are individual members of, and connected with the Ponca tribe of Indians; that they had fled or escaped from a reservation situated some place within the limits of the Indian territory; had departed therefrom without the permission of the government, and at the request of the secretary of the interior, the general of the army had issued an order which required the respondent to arrest and return the relators to their tribe in the Indian territory, and that pursuant to the said order, he had caused the relators to be arrested on the Omaha Indian reservation, and that they were in his custody for the purpose of being returned to the Indian territory.

It is claimed upon the one side and denied upon the other, that the relators had withdrawn, and severed for all time, their connection with the tribe to which they belonged. [. . .] The other matters stated in the petition, and the return to the writ, are conceded to be true, so that the questions to be determined are purely questions of law.

[. . .]

The district attorney discussed at length reasons which led to the writ of habeas corpus [. . .]. It was claimed that the laws of the realm limited the right to sue out this writ to the free subjects of the kingdom, and that none others came within the benefits of such beneficial laws. And reasoning from analogy it is claimed that none but American citizens are entitled to sue out this high prerogative writ in any of the federal courts.

[. . .]

Section 751 of the “Revised Statutes” declares that “the supreme court and the circuit and district courts shall have power to issue writs of habeas corpus.” Section 753 confers the power to issue writs on the judges of said courts within their jurisdiction, and declares this to be “for the purpose of inquiry into the cause of restraint of liberty.” Section 753 restricts the power, limits the jurisdiction, and defines the cases where the writ may properly issue. That may be done under this section where the prisoner “is in custody under or by color of authority of the United States or in custody in violation of the constitution or of a law or treaty of the United States.” Thus it will be seen that when a person is in custody or deprived of his liberty under color or authority of the United States, or in violation of the constitution or laws or treaties of the United States, the federal judges have jurisdiction and writ can properly issue.

[. . .]

Now it must be borne in mind that the habeas corpus act describes applicants for the writ as persons or parties, who may be entitled thereto. It nowhere describes them as citizens, nor is citizenship in any way or place made a qualification for suing out the writ, and is the absence of express provision or necessary implication, which would require the interpretation contended for by the district attorney, I should not feel justified in giving the words person or party such a narrow construction. The most natural, and therefore most reasonable way, is to attach the same meaning to words and phrases when found in a statute that is attached to them when and where found in general use. If we do so in this instance then the question cannot be open to serious doubt. Webster describes a person as “a living soul; a self-conscious being: a moral agent; especially a living human being; a man, woman or child; an individual of the human race.” This is comprehensive enough, it would seem, to include even an Indian. [. . .] On the whole it seems to me quite evident that the comprehensive language used in this section is intended to apply to all mankind, as well the relators as the more favored white race. This will be doing no violence to language nor to the spirit or letter of the law, nor to the intention, so it is believed of the law-making power of the government.

[. . .]

I must hold, that Indians, and consequently the relators, are persons, such as are described by and included within the laws before quoted. It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court, and therefore, the court must be without jurisdiction in the premises. This is a non-sequitor, I confess I do not know of another instance where this has been done, but I can also say that the occasion for it perhaps has never before seen so great. It may be that the Indians think it wiser and better in the end to resort to this peaceful process than it would be to undertake the hopeless task of redressing their own alleged wrongs by force of arms. Returning reason, and the sad experience of others similarly situated, has taught them the folly and madness of the

arbitrament of the sword. They can readily see that any serious resistance on their part would be the signal for their utter extermination. Have they not then chosen the wider part, by resorting to the very tribunal erected by those they claim have wronged and oppressed them. This, however, is not the tribunal of their own choice but it is the only one into which they can lawfully go for deliverance. It cannot therefore be fairly said that because no Indian ever before invoked the aid of this writ in a federal court, that the rightful authority to issue it does not exist. Power and authority rightfully conferred does not necessarily cease to exist in consequence of long non-use. Though much time has elapsed and many generations have passed away since the passage of the original habeas corpus act from which I have quoted, it will not do to say that these Indians cannot avail themselves of its beneficent provisions simply because none of their ancestors ever sought relief thereunder.

Every person who comes within our jurisdiction, whether he be European, Asiatic, African, or "native to the manor born," must obey the laws of the United States. Every one who violates them incurs the penalty provided thereby. When a person is charged, in a proper way, with the commission of a crime, we do not enquire upon the trial in what country the accused was born, nor to what sovereign or government allegiance is due, nor to what race he belongs. The questions of guilt and innocence only form the subjects of inquiry. An Indian then, especially off from his reservation, is amenable so the criminal laws of the United States the same as all other persons. They being subject to arrest for the violation of our criminal laws and being person such as the law contemplates and includes in the description of parties who may sue out the writ, it would indeed be a sad commentary on the justice and impartiality of our laws, to hold that Indians, though natives of our own country cannot test the validity of an alleged illegal imprisonment in this manner, as well as a subject of a foreign government who may happen to be sojourning in this country but owing it no sort of allegiance. I cannot doubt that congress intended to give to every person who might be unlawfully restrained of liberty under color of authority of the United States the right to the writ and a discharge thereon. I conclude then, that so far as the issuing of the writ is concerned, it was properly issued, and that the relators are within the jurisdiction conferred by the habeas corpus act.

A question of much greater importance remains for consideration, which when determined will be decisive of this whole controversy. This relates to the right of the government to arrest and hold the relators for a time for the purpose of being returned to a point to the Indian Territory, from which it is alleged the Indians escaped. I am not fain enough to think that I can do full justice to a question like the one under consideration. But as the matter furnishes so much valuable material for discussion, and so much food for reflection, I shall try to present it, as viewed from my own standpoint, without reference to consequences or criticism, which though not specially invited, will be sure to follow.

A review of the policy of the government adopted in its dealings with the friendly tribe of Poncas, to which the relators at one time belonged, seems not only appropriate, but almost indispensable to a correct understanding of this controversy. The Ponca Indians have been at

peace with the government, and have remained the steadfast friends of the whites for many years. They lived peaceably upon the land and in the country they called their own.

[. . .]

On the 12th of March, 1858, they made a treaty with the United States by which they ceded all claims to lands except the following tract: "Beginning at a point on the Niobrara river and running due north so as to intersect the Ponca river twenty-five miles from its mouth, thence due south to the Niobrara river, and thence down and along said river to the place of beginning, which tract is hereby reserved for the future home of said Indians." In consideration of this cession the government agreed "to Protect the Poncas in the possession of the tract of land reserved for their future homes, and their persons and property thereon, during good behavior on their part." Annuities were to be paid them for thirty years, houses were to be built and schools were to be established and other things were to be done by the government in consideration of said cession. On the 10th of March, 1865, another treaty was made, and a part of the other reservation was ceded to the government. Other lands, however, were to some extent substituted therefore, and "by the way of rewarding them for their constant fidelity to the government, and citizens thereof, and with a view of returning to the said tribe of Ponca Indians their old burying grounds and corn fields." This treaty also provides for paying \$15,000 for spoliations committed on the Indians.

On the 29th day of April, 1858, the government made a treaty with the several bands of Sioux Indians, which treaty was ratified by the senate on the 16th of the following February, in and by which the reservations set apart for the Ponca under former treaties were completely absolved. This was done without consultation with, or knowledge or consent on the part of, the Ponca tribe of Indians.

On the 15th of August, 1876, Congress passed the general Indian appropriation bill, and in it we find a provision authorizing the secretary of the interior to use \$25,000 for the removal of the Ponca to the Indian Territory, and providing them a home thereto, with consent of the tribe.

In the Indian appropriation bill passed by congress on the 27th day of May, 1878, we find a provision authorizing the secretary of the interior to expend the sum of \$80,000 for the purpose of removing and locating the Ponca Indians on a new reservation near the Kaw river.

No reference has been made to any other treaties or laws, under which the right to arrest and remove the Indians is claimed to exist.

The Poncas lived upon their reservation in Southern Dakota and cultivated a portion of the same until two or three years ago, when they removed therefrom, but whether by force or otherwise does not disappear. At all events, we find a portion of them, including the relations, located at some point in the Indian territory. There the testimony seems to show, is where the trouble commenced. Standing Bear, the principal witness, states that out of 581 Indians who went from

the reservation in Dakota to the Indian territory, 158 died within a year or so, and a great proportion of the others were sick and disabled, caused in a great measure, no doubt, from change of climate, and to save himself and the survivors of his wasted family, and the feeble remnant of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, "he might live and die in peace, and be buried with his fathers." He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully and forever severed his and their connection with the Ponca tribe of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose all who were able to do so went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have a long since continued to intermarry, gave them employment and ground to cultivate so as to make them self-sustaining. And it was when at the Omaha reservation and when thus employed, that they were arrested by order of the government for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or necessity of removing them by force from their own native plains and blood relations to a far off country in which they can see little but new made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live again where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. Such instances of parental affection and such love of home and native land may be heathen in origin, but it seems to me they are not unlike Christian in principle.

What is here stated in this connection is mainly for the purpose of showing that the relators did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self sustaining and living without support from the government. This being so, presents the question as to whether or not an Indian can withdraw from his tribe, sever his tribal relations therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.

[. . .]

If Indian tribes are to be regarded and treated as separate but dependent nations there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could therefore withdraw therefrom at any time. The question of expatriation has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried out between our own and foreign governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government and it is now no longer an open

question. It can make but little difference then whether we accord to the Indian tribes a national character or not, as in either case I think the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence.

[. . .]

In most, if not all, instances in which treaties have been made with the several Indian tribes, where reservations have been set apart for their occupancy, the government has either reserved the right or bound itself to protect the Indians thereon. Many of the treaties expressly prohibit white persons being on the reservations unless specially authorized by the treaties or acts of congress for the purpose of carrying out treaty stipulations.

Laws passed for the government of the Indian country, and for the purpose of regulating trade and intercourse with the Indian tribes, confer upon certain officers of the government almost unlimited power over the persons who go upon the reservations without lawful authority. Section 2149 of the revised statutes authorizes and requires the commissioner of Indian affairs, with the approval of the secretary of the interior, to remove from any "tribal reservation" any person being thereon without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians. The authority here conferred upon the commissioner fully justifies him in causing to be removed from Indian reservations all persons thereon in violation of law, or whose presence thereon may be detrimental to the peace and welfare of the Indians upon the reservations. This applies as well to an Indian as to a white person, and manifestly for the same reason, the object of the law being to prevent unwarranted interference between the Indians and the agent representing the government. Whether such an extensive discretionary power is wisely vested in the commissioner of Indian affairs or not, need not be questioned. It is enough to know that the power rightfully exists, and, where existing, the exercise of the power must be upheld. If, then, the commissioner has the right to cause the expulsion from the Omaha Indian reservation of all persons thereon who are there in violation of law, or whose presence may be detrimental to the peace and welfare of the Indians, then he must of necessity be authorized to use the necessary force to accomplish his purpose. Where, then, is he to look for this necessary force? The military arm of the government is the most natural and most potent force to be used on such occasions, and section 2150 of the revised statutes specially authorizes the use of the army for this service. The army, then, it seems, is the proper force to employ when intruders and trespassers who go upon the reservations are to be ejected therefrom.

The first sub-division of the Revised Statutes last referred to provides that

"The military forces of the United States may be employed in such manner and under such regulations as the President may direct. First. In the apprehension of every person who may be to the Indian country in violation of law, and in conveying him immediately

from the Indian country, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law.”

This is the authority under which the military can be lawfully employed to remove intruders from an Indian reservation. What may be done by the troops in such cases is here fully and clearly stated, and it is this authority, it is believed, under which the respondent acted.

[. . .]

All Indian reservations held under treaty stipulations with the government must be deemed and taken to be a part of the Indian Country, within the meaning of our laws on that subject. The relators were found upon the Omaha Indian reservation, and being a part of the Indian country, and not being a part of the Omaha tribe of Indians, they were there without lawful authority, and if the commissioner of Indian officials deemed their presence detrimental to the peace and welfare of the Omaha Indians, he had lawful warrant to remove them from the reservation, and to employ the necessary military force to effect this object in safety. General Crook had the rightful authority to remove the relators from the reservation, and must stand justified in removing them therefrom. But when the troops are thus employed they must exercise the authority in the manner provided by the section of the law just read. This law makes it the duty of the troops to convey the parties arrested by the nearest convenient and safe route to the civil authority of the territory or judicial district in which such persons shall be found, to be proceeded against in due course of law. As general Crook had the right to arrest and remove the relators from the Omaha Indian reservation, it follows from what has been stated that the law required him to convey them to this city and turn them over to the marshal and United States attorney to be proceeded against in due course of law. Then proceedings could be instituted against them in either the circuit or district court, and if the relators had incurred a penalty under the law, punishment would follow. Otherwise they would be discharged from custody. But this course was not pursued in this case, neither was it intended to observe the laws in that regard, for General Crook's orders, emanating from higher authority, expressly required him to apprehend the relators and remove them by force to the Indian Territory, from which it is alleged they escaped. But in what General Crook has done in the premises no fault can be imputed to him. He was simply obeying the orders of his superior officers as a good soldier ought to do, but the orders, as we think, lack the necessary authority of law, and are therefore not binding on the relators.

[. . .]

I have searched in vain for the semblance of any authority justifying the commission in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place, or for any other purpose than what has been stated. Certainly, without some specific authority found in an act of congress, or in a treaty with the Ponca tribe of Indians, he could not lawfully force the relators back to the Indian Territory, to remain and die in that country, against their will. In

the absence of all treaty stipulations or laws of the United States authorizing such removal, I must conclude that no such arbitrary authority exists. [. . .] No fact exists, and nothing has occurred, so far as the relators are concerned, to make it necessary or lawful to exercise such an authority over them.

[. . .]

The reasoning advanced in support of my views, leads me to conclude:

First. That an Indian is a PERSON within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States.

Second. That General George Crook, the respondent, being commander of the military department of the Platte, has the custody of the relators, under color of authority of the United States, and in violation of the laws thereof.

Third. That no rightful authority exists for removing by force any of the relators to the Indian Territory, as the respondent has been directed to do.

Fourth. That the Indians possess the inherent right of expatriation, as well as the more fortunate white race, and have the inalienable right to “life, liberty, and the pursuit of happiness,” so long as they obey the laws and do not trespass on forbidden ground. And,

Fifth. Being restrained of liberty under color of authority of the United States, and in violation of the laws thereof, the relators must be discharged from custody, and it is so ordered.