# AN OUTRAGE!

## The Attempt to Drag Wm. Budge from the Court's Presence.

### AN ASTONISHING SPECTACLE OF JUDICIAL HELPLESSNESS.

From the Ogden *Herald*, June 6th.

The *habeas corpus* case of President William Budge, of Paris, Idaho, was concluded before Judge Henderson Saturday night, June 4th. It developed into startling proportions, and may well rank as the greatest case, so far, in Judge Henderson's Utah experience.

The writ of *habeas corpus* was denied, and the petitioner was remanded. He was then taken in arrest by W. S. Hopson, Deputy Marshal of Idaho, and subsequently was admitted to bail in the sum of $3,000. Then he was re-arrested on another warrant, and again admitted to bail in the sum of $3,000. The proceedings and events of the night were sensational, and they form a chapter which should be placed fully on record.

At 7 o'clock, the hour appointed by Judge Henderson for the delivery of his decision upon the application for William Budge's discharge under the writ of *habeas corpus* issued by him some forty-eight hours previously; the petitioner, William Budge, and his attorneys, C. C. Richards, H. H. Rolapp, J. N. Kimball and W. R. White, were in court; and a large crowd of spectators, consisting of members of the bar and other interested parties, were also present. For some reason the Judge did not appear until 8 o'clock; and even then the matter was not soon taken up, because several other items of business seemed to require attention. But even the most disagreeable thing must be reached at last, and the court finally encountered the grave undertaking.

By this time W. S. Hopson, deputy marshal for Idaho Territory, Ogden Hiles, Assistant District Attorney for Utah, and a person known as L. R. Rogers were present; the latter two individuals representing the respondents in the *habeas corpus* proceedings. Also by this time nearly all the members of the bar had assembled, in anticipation of an interesting matter.

It was expected that the court would, without further delay, render a decision of the weighty question which had been so long under consideration. But when he announced his readiness to proceed to hear the case, counsel for respondents offered to file what they called an amended return, or a further return to the writ. This strange document recited that since the former return had been made, a deputy marshal from Idaho Territory had appeared in Ogden with a bench warrant from Judge Hayes, of the Third Judicial District of Idaho, and demanded the person of William Budge. Respondents therefore asked that the writ be denied, and that petitioner be remanded.

Counsel for the petitioner objected to the filing of such an amended return on these grounds:

That nothing in either the first or second return showed any authority in the United States Marshal of Utah, or any of his deputies to arrest or detain William Budge.

That the only evidence yet produced that William Budge was liable to arrest was a fact which arose subsequent to the date of issuance of writ; for the warrant described in the amended return was dated at Blackfoot, Idaho, June 3d, 1887, while the arrest of William Budge was made at Ogden, June 2, 1887.

That the only matters proper to be considered in a return by respondents to a writ of *habeas corpus* were facts existing at the time of arrest or issuance of writ.

"For," counsel for petitioner stated, "the question taken under advisement by the court was, whether there was any legal authority in the Marshal of Utah Territory to arrest and detain William Budge, and," counsel added, "such a proceeding might become interminable if a court could keep continuing a question of this kind from time to time, and considering new facts which were constantly arising."

The court stated that he was inclined to the opinion that the amended return should be filed. Evidently this meant an instruction to the clerk to file the return; because a moment later, when the court asked, apparently in some surprise, "Was the bench warrant from Judge Hayes dated after the issuance of this writ of *habeas corpus*?" and the junior counsel for respondents answered in a half apologetic tone, "Yes, sir;" "Well," said the court, resignedly, "the return is filed now, anyway, and it is too late."

Counsel for the petitioner then excepted to the ruling, and asked that the exception be noted and a full record be kept of the proceedings in this matter. Clerk Henderson evidently was as much surprised by the turn of affairs as the court, and replied that he had not made any record of the matter; but counsel for petitioner could prepare and supply him with such record as they desired.

The introduction of this amended return changed the appearance of the case materially. The facts which Judge Henderson had taken under advisement, and upon which he would base his decision, were no longer the only facts. The last question presented was of quite as great magnitude as the first, and at the same rate of progress would take another forty-eight hours, or longer, for decision.

Apparently supposing that their work was all to be done over again, and evidently getting weary of the tedious delays, counsel for the petitioner made a formal motion for his discharge under the writ of *habeas corpus*. The Judge asked what the court should do with Mr. Budge, if he was discharged; whether Deputy Hopson would re-arrest him or not. And Mr. Richards, counsel for Mr. Budge, replied:

"That is not in this case, your honor. Such a question is not before this court. The only point at issue here is, whether Mr. Budge is to be discharged from the illegal custody in which he is held. If your honor decides to discharge him, Mr. Budge will have to take care of himself, and Deputy Hopson carry his own responsibility."

Upon this point a brief debate ensued. The Court was clearly desirous of getting full information, because he frequently asked:

"What do *you* think of it, Mr. Hiles? What do *you* think of it, Mr. Rogers?

If the idea of Messrs. Hiles and Rogers was any clearer on the subject than was the idea of the Court, they possess a most extraordinary faculty of disguising their intelligence.

The Court cut the gordian knot by granting all that counsel for respondents requested. He denied the writ and remanded William Budge to the custody of Deputy Marshal Exum. In rendering this decision, and in the matters leading up to it, the court took judicial cognizance of the presence in the court-room of Deputy Hopson, and stated:

"Deputy Exum can do as he pleases now; but the deputy marshal from Idaho is here, and if Mr. Exum should refuse to turn Mr. Budge over, I would order Mr. Budge's discharge."

Counsel for the petitioner excepted to the order refusing his discharge.

Then ensued a delay of two or three minutes, which was occupied by Mr. Budge and his counsel in waiting to see what step would be taken by Deputy Exum, who had the petitioner in charge, or by Deputy Hopson, who had come to take him in custody. This same delay was occupied by the deputies named in preserving a state of masterly inactivity.

The monotony was broken by Mr. Budge, who, under instructions of his counsel, proceeded to a corner where Deputy Hopson was standing, and surrendered himself into that officer's care. This proceeding rather amazed the spectators, until a moment later Mr. Budge, still under the instruction of his counsel, demanded of Deputy Hopson that he be taken at once before the District Judge, who was then present on the bench, and admitted to bail. Mr. Budge then went personally to the Judge with his counsel and together they made a demand for an order admitting the applicant to bail. The warrant held by Deputy Hopson was also taken to the court and exhibited. This was a bench warrant, issued by James B. Hayes, Judge of the Third Judicial District Court of Idaho Territory, requiring the United States Marshal of Idaho to arrest Wm. Budge under an indictment for unlawful cohabitation. The warrant was dated at Blackfoot, Idaho, June 3d, 1887. Upon the back of it was endorsed:

"Admit to bail in the sum of $3,000.

"JAMES B. HAYES, Judge."

These last proceedings had been quietly taken, and their nature was only apparent to persons within the bar. But later the attorneys for the applicant made another formal demand in louder tones, that he be admitted to bail under sections 1,014 and 1,015 of the revised statutes of the United States, which they quoted, as follows:

"SEC. 1,014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a Circuit court to take bail, or any Chancellor, judge of a supreme or superior court, chief of first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, or any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

"SEC. 1015. Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

The court looked worried. Deputy Hopson arose and said:

"Your Honor, if this question is to be decided now I desire to have the District Attorney present to represent me."

The Judge looked relieved and said:

"Yes, send for Mr. Hiles."

Mr. Hiles came in after a little wait, and there ensued a scene such as was rarely witnessed in any court room in America. It would have been amusing if it had not been pitiable. Messrs. Hiles and Rogers resisted the application for bail, claiming that no warrant of law existed for such a thing. At one point Mr. Rogers was apparently about to settle the entire question to his own satisfaction if not that of everybody present, when Mr. Hiles said, in that emphatic tone of his, which would be ferocious if used by anybody else:

"You just hold on a minute," and then he, himself, proceeded with a characteristic speech.

In response, counsel for the applicant showed that not only was the law plain and unmistakable upon this point, but that precedents within the personal knowledge of everybody present had recently occurred—notably the cases of John W. Young, who was arrested in the East on a warrant issued at Salt Lake, and admitted to bail upon application to a magistrate of foreign jurisdiction; and the case of Septimus W. Sears, who was arrested at Chicago on a similar warrant, and there, under similar circumstances, admitted to bail. The fact was further cited that at the time of the arrest of George Q. Cannon, at Winnemucca, Judge Zane and Attorney Dickson fixed the amount of bail at $10,000, and telegraphed to Winnemucca that the magistrate there should accept that amount of security and release Mr. Cannon to appear before the Court at Salt Lake. Counsel further showed that it was evidently the intention of Judge Hayes that such a course should be pursued, because he had endorsed upon the back of the warrant the amount of bail which would be accepted. This warrant was issued by Judge Hayes with a full knowledge of the facts: That William Budge was at Ogden; that the warrant would be served here; and that doubtless application would be made for his release under bonds.

Judge Henderson did not see that sufficient grounds had been shown, and remarked:

"Parties should have known that this question was likely to arise, and should have come prepared to cite authorities to the court."

Counsel for the applicant said:

"Your Honor, we had no idea that authorities on such a point would be asked. We have quoted the United States statute plainly. This section has no annotations, showing clearly that it has never until now been brought into question; because all other sections which have been questioned and ruled upon have authorities noted on the margin."

Counsel said this very patiently, but one of them remarked afterward:

"The request for authorities on such a plain point as this was dumbfounding. I was as much surprised as if the court had asked me to quote authorities showing the right of a defendant to be discharged after having been acquitted at the hands of a jury. Everybody knows that when a man has been found not guilty by a jury, he is entitled to his discharge; but suppose a court were to say: "Well, I don't know about this. I have grave doubts as to my rights to discharge the defendant. Has this question ever been ruled upon? What do *you* think of it, Mr. Hiles? What do *you* think of it, Mr. Rogers? Parties should be prepared to meet a question of this kind when they know it is likely to arise.' I have seen hundreds of defendants discharged on acquittal; but if my own life depended upon it, probably I could not find a case in the books where a ruling had been made to that effect; for the simple reason that such a —— absurd question was never raised by any court in any civilized community."

The Court appeared to be in a most delightful state of indecision. When Mr. Richards stated a point with his well-known emphasis, the Judge would respond:

"Yes, I know; but——"

And when Mr. Hiles would make what he thought was an irresistible argument, the Court would still respond:

"Yes, I know, but——"

Or,

"Well, Mr. Richards, I don't know about that."

"Well, Mr. Hiles, I don't know about that."

Really, when counsel for the applicant were arguing, it seemed as if the court intended to decide against the granting of bail; and when counsel for the deputy marshal were arguing, it seemed as though the court was only waiting for them to get through a tedious harangue in order to fix the amount of bail and accept sureties.

While these proceedings were slowly emerging from the womb of time, Deputy or Bailiff McLennan, who was within the bar, remarked to some spectators:

"I wish I had that warrant. I'd get Budge out of here ——— quick."

Mr. Hiles, with his peculiar Irish *naivette*, and apparently in blissful unconsciousness of all that he and others had been saying, addressed the court;

"Your Honor, has Mr. Hopson any business here? Is there any reason for his remaining?"

Probably nothing was lacking to put the court in a most unenviable frame of mind; but if anything had been lacking, this last question supplied the deficiency.

Mr. White arose and began to cite to the court a case of similar nature in Idaho, when everybody was startled to see Deputies Hopson and Exum and Deputy or Bailiff McLennan make a rush for Mr. Budge, and, seizing him, attempt to take him from the room. Mr. Budge declined to go. Counsel for applicant had seen something hatching, and were on the alert. Mr. Kimball sprang to his feet, and interrupting Mr. White, exclaimed:

"Your Honor, I protest against this outrageous effort to remove the applicant from the presence of the court. It is an outrage on justice and decency. I never before saw such a flagrant act. These persons are in contempt of court, for it is a contempt to even serve a warrant in the presence of the court; and these men are here trying to drag Mr. Budge away from this room while these proceedings looking to his liberation are in progress and under consideration by your Honor. I repeat, your Honor, that it is a contempt of court, and these men should be fined and punished."

This vigorous denunciation had the effect to awe the deputies, but they were not otherwise checked. Probably the court did not observe their action, for he failed to rebuke it.

After all these events, counsel for the deputy marshal stated to the court that no order could be made admitting Mr. Budge to bail, because he was not before the court; Mr. Hopson was not before the court.

This was a new idea, which seemed to strike the Judge quite favorably, and he said:

"How is that? Is that so? Well, what do you say to that Mr. Richards? The court has no knowledge that Deputy Hopson is here with Mr. Budge."

And *this* was a new idea which seemed to strike the spectators, for they smiled.

The court had an hour or two hours previously taken judicial cognizance of the presence of Mr. Hopson. Mr. Hopson had also formally entered his appearance in court by sending for Mr. Hiles to represent him. The warrant under which the arrest was made, and the endorsed order thereon of Judge Hayes, fixing the amount of bail, had been exhibited to the court. Mr. Budge and his attorneys had gone to the judge's desk and requested his admission to bail. And finally counsel for Mr. Budge had made a formal demand that he be admitted to bail, and that question had been argued up one side and down the other for upwards of an hour. And yet here were men professing to know the law, gravely asserting that Hopson and his prisoner were not before the court! This would have been a very easy, and yet an astonishing way out of the muddle into which the court seemed involved. It would be easier to simply deny that anything had been done at all than to decide upon what had been done.

Counsel for the applicant, however, objected to this summary way of settling the question; and insisted that the matter was legally before the court, and must be decided. Further, that only one decision could properly be made under the law.

The only doubt seemed to be in the mind of the court. Messrs. Hiles and Rogers affected to be quite certain that their position was correct, and counsel for the applicant and all the other spectators seemed to wonder why the necessary order was not made at once to admit Mr. Budge to bail. That gentleman's attorneys had argued the matter patiently and well. If they had been teachers explaining A B C to a little child they could not have been more considerate in showing the plain letter of the law to the court. Mr. Richards, especially, went over the question repeatedly, pointedly, but respectfully, for his Honor's benefit.

Judge Emerson had been an attentive listener to the arguments in the matter; and finally he arose and addressed the Court, saying:

"If your Honor will permit me to speak as a friend of the Court, I desire to say a few words. I recognize the fact that, not being in the case, I have no standing here except by your Honor's permission; but it seems to me that the matter is very plain."

Then Judge Emerson reiterated in part the statements of law and fact advanced by counsel for the applicant; and added that he saw no reason why the request of the applicant for bail could be questioned.

Judge Henderson had bowed his head in grateful acquiescence, apparently, when Judge Emerson began to speak. But no sooner had Mr. Emerson, the late Judge of this district, taken his seat than Master L. R. Rogers arose and said:

"Your Honor, the gentleman who last addressed the Court said that he had no business in this case. I agree with him decidedly on that point. Everything else that he advanced, I dispute."

As he uttered these words Master Rogers turned his head, glittering with Hyperion curls, toward the place occupied by Judge Emerson. If the human eye possesses the power of expression, then Master Rogers' glance betrayed a strong belief that under his scathing words Judge Emerson had withered into nothingness, and that his seat would be vacant.

Such a thing, however, did not occur, and Judge Emerson arose, and without any anger or emotion, said:

"Your honor, I spoke by permission of the court."

Judge Henderson replied:

"That is all right."

But whether he meant that Judge Emerson's kindly address for the enlightenment of the court was all right; or whether he meant that the insult which Master Rogers addressed to the learned ex-Judge of this district was all right—listeners were left to determine in their own minds.

At last the court said;

"I am inclined to think that this applicant should be admitted to bail. But I desire parties to take notice that hereafter they must come prepared to cite authorities on questions of this kind, which they know may arise."

This was accepted as being a formal ruling to the effect that applicant would be admitted to bail. Counsel for Mr. Budge offered a bond after the usual form used in such cases. Where the alleged offense was recited the bond used the word "unlawful cohabitation." The same Master Rogers whose effulgent intelligence had been dazzling the spectators throughout all the proceedings, almost blinded the court, lawyers, and everybody else by shooting forth a ray of more intense brilliancy than ever.

He objected to the form of the bond upon certain grounds, among which was that it used the word "unlawful cohabitation," when the warrant charged "illegal cohabitation."

Mr. Richards drily remarked:

"Life is short."

Then addressing Master Rogers:

"If this bond is not acceptable to you, and you will prepare one which is satisfactory, we will execute it."

To this request Master Rogers superciliously replied that it was not his business to make the bond; but a few minutes later he was observed in the clerk's office busily engaged filling out the bond under the supervision of Mr. Budge's attorneys.

A bond in the sum of $3,000, with David H. Peery and William Driver as sureties, was executed and accepted by the court; and the court adjourned.

The Judge left the court room, and then the deputies significantly posted themselves at every point of egress. Mr. Budge was standing in the court room talking with one of his attorneys, Mr. Richards, when Deputy Hopson served another warrant upon him. It was a warrant issued by United States Commissioner Bixby, at Blackfoot, charging in general terms the crime of unlawful cohabitation, and was dated in January, 1887.

While the Idaho deputy was reading this paper, Mr. Richards hastened to the Judge's room, to request him to return and receive an application for bail. Arrived at the door of Judge Henderson's apartment, which is only across the hall from the court room, Mr. Richards stated that Mr. Budge had been rearrested, and asked Judge Henderson to return and receive the application.

In the meantime the reading of the warrant was completed, and the deputies attempted to remove Mr. Budge from the court room, where the arrest took place. Mr. Budge, in a very quiet tone, protested, stating that he desired to give bail. But Deputy or Bailiff McLennan, whose interest and authority in this matter it is difficult to define, began shouting: "Come along here! Get along!" and using much unnecessary profanity.

Mr. Richards quickly returned from his visit to the Judge, and at the door of the court room met Mr. Budge, who was being dragged along by McLennan and Hopson. Considerable noise was going on; and spectators who saw Judge Henderson following Mr. Richards hoped that he would instantly quell the disturbance, but he passed quickly along the side hall leading to the clerk's office, not choosing evidently to assert any authority in the matter.

Mr. Richards stopped the officers with Mr. Budge in charge and said:

"Mr. Hopson, we demand of you that you take Mr. Budge before a magistrate, to be admitted to bail."

Mr. Hopson seemed determined to move along; but once more Mr. Richards stopped them and again said quietly, but firmly:

"Mr. Hopson, we demand of you that you take Mr. Budge before a magistrate to be admitted to bail. There is a magistrate here, before whom we can get an immediate hearing."

Judge Henderson was invisible, but Justice Thomas D. Dee, whose authority in a matter of this kind, under Sec. 1014 of the Revised Statutes, is equal to that of a district judge, was at hand; and, upon being requested by Mr. Richards, stepped to the scene. Mr. Richards called the attention of Deputy Hopson to this act. Then the attorney spoke in a low tone to Mr. Budge, instructing him to make personally formal demand upon the deputy for the opportunity to give bail before Magistrate Dee. While lawyer and client were thus conferring, Deputy or Bailiff McLennan seized Mr. Richards by the shoulder and thrust him away from Mr. Budge's side, yelling:

"———, get away from here or you'll get hurt!"

A great many people were present, and previous to this time the indignation of a score or more of Mr. Budge's friends who remained with him, had been roused justly by McLennan's conduct. This last act of brutality intensified the feeling. But Mr. Richards remained perfectly composed, his face not even changing color at the impudent assault which was committed upon him; and he reiterated, in a voice of the utmost calmness, his demand in behalf of William Budge for the opportunity to give bail before the magistrate who was present. He warned the deputies that if they failed to accord this manifest right to Mr. Budge, they would do so at their peril.

Master Rogers bobbed up agitatedly at this point, and called Hopson and McLennan to one side, while Deputy Whetstone took the prisoner in charge. After a few moments of private conversation between Rogers, McLennan and Hopson, McLennan again took hold of Mr. Budge and began to march downstairs.

Mr. Kimball had been recalled by