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[Pg 1]

PASSMORE WILLIAMSON

vs.

JOHN K. KANE.

ACTION FOR FALSE IMPRISONMENT, BEFORE THE COURT OF COMMON PLEAS OF DELAWARE COUNTY.

A R G U M E N T O F

JOSEPH J. LEWIS, ESQ.

OF WESTCHESTER,

ON THE PART OF THE PLAINTIFF,

Delivered at Media, December 17th and 18th, 1856.

PHONOGRAPHICALLY REPORTED BY DAVID W. BROWN.

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1857.

PASSMORE WILLIAMSON VS. JOHN K. KANE.

This is an action for false imprisonment instituted in the Court of Common. Pleas of Delaware County, to recover damages for assaulting the plaintiff and imprisoning him, and detaining him in prison for three months. The complaint is set out in a declaration containing six counts, in some of which the circumstances attending the commission of the offences charged are particularly detailed.

The defendant pleaded five pleas:

1. The first alleges that the defendant was duly commissioned Judge of the District Court of the United States; that being such judge he was privileged from answering in any civil suit for anything done or commanded by him as judge; that, on the 27th of July, 1855, a motion was made in the District Court to commit the plaintiff for contempt, because he had refused to make return to a writ of habeas corpus directed to him by the Court; that the defendant, as judge, had adjudged the plaintiff guilty of the contempt charged; and thereupon a warrant, signed by defendant as judge, issued out of the court to the marshal, by virtue of which the plaintiff was arrested and imprisoned, which were the trespasses complained of in the declaration.

2. The second plea makes substantially the same allegation, with the addition, that by virtue of the warrant issued to the marshal the plaintiff was detained till he purged himself of the contempt; which being done on the 3d day of November, 1855, he was discharged.

3. The third plea embraces all the circumstances alleged in the second, and sets out besides, briefly, the substance of the writ of habeas corpus.

4. The fourth plea only varies from the second in some immaterial particulars.

5. The fifth plea alleges the appointment of the defendant as judge—that on the 18th day of July 1855, John H. Wheeler, a citizen of Virginia, and Minister &c., being temporarily in Pennsylvania, petitioned the District Court for a habeas corpus to be directed to the plaintiff—on the allegation that three persons held to service or labor by the laws of Virginia, and owned by the petitioner, were detained by the plaintiff—that the defendant as judge granted the habeas corpus—that afterwards, to wit, July 19th, 1855, an alias writ issued, directed to the plaintiff, returnable the next day—that the plaintiff appeared at the time appointed, and made his return, stating that the persons named in the writ were not then, nor when the writ was issued, nor at any other time, in the custody or power of the plaintiff—that leave was given to the relator to traverse the return, whereupon the parties were heard by their counsel, and evidence adduced before the defendant as judge—that the defendant as judge, being of the opinion that the return was untrue and illusory, adjudged the plaintiff guilty of contempt, and ordered him to be committed to the custody of the marshal of the district—that neither the plaintiff nor his counsel made any objection to the jurisdiction of the court—that an order of commitment issued, under which the plaintiff was committed to prison, to await the further order of the court—that he remained in prison till he purged himself of the contempt; and that these are the trespasses complained of.

To these pleas the plaintiff replied that the defendant committed the trespass complained of of his own wrong, and without the causes alleged in the pleas.

The defendant thereupon demurred specially, to the replication as applicable to the first, third and fifth pleas, and stated several causes.

1. That by the replication the plaintiff attempts to put in issue mere inference and matter of law.

2. That it attempts to put in issue matter of record.

3. That the replication is double and multifarious.

On the second and fourth pleas he joined issue.

The plaintiff joined in demurrer.

The argument was opened by Mr. Sheppard, one of the defendant's counsel, who addressed the court at an adjourned court in September last.

Mr. Broomall, one of the plaintiff's counsel, who was to have followed Mr. Sheppard, having been obliged to leave the court during Mr. Sheppard's argument, the further hearing of the case was postponed to an adjourned court, to be held on the 17th of December, 1856.

Dec. 17, 1856. On the meeting of the Court, Mr. Broomall rose to address the Court, but being in ill health was able to utter only a few sentences, before he was obliged to withdraw, and Mr. Lewis was called upon, unexpectedly, to proceed.

ARGUMENT.

I am rather disappointed, if the Court please, in the continued indisposition of my colleague, (Mr. Broomall,) inasmuch as it has prevented me, as it did at the last term, from consulting with him as to the course of the argument to be pursued in the present case.

I shall, however, proceed to state the views which present themselves to my mind, following, to a certain extent, the argument which has been exhibited on the other side. I shall not follow it throughout, but merely so far as I think will be sufficient to furnish the answer; for I prefer to reply in a general way to all that has been said, rather than to take up and criticise the various authorities in the order in which they have been presented.

It is objected that the replication is bad in law.

First,—Because it traverses "inference and conclusion of law."

Such is not in effect the traverse.

The issue on the first plea arises thus:—The Plaintiff alleges an assault on his person; the Defendant justifies the trespass on the allegations:

That he was a judge of the District Court;

That, on motion in that Court, that the Plaintiff be committed as for a contempt in refusing to make return to a writ of habeas corpus, the Defendant, *as judge* of the Court, ordered him to be committed.

This is an assertion that the injury was done by the Defendant in his judicial character—as a branch of the government: and if that is true, it is a defence. The important and decisive fact stated is, that the act was done *as judge* of the District Court of the United States.

This fact the Plaintiff controverts, and would place his denial on record. How is that denial to be made? The Defendant says by demurrer. But a demurrer would *admit the fact*. A demurrer, therefore, would not raise the issue desired, and the only issue to be taken on the plea. That can be done only by a denial of the *material fact* alleged. That denial is appropriately made by the replication, which avers that the Defendant committed the trespass in his own wrong, and not for the cause alleged.

Whether the Defendant *acted as judge*, or in his own wrong, does not depend upon any fact stated in the plea, but on facts outside of the plea altogether. The plea sets forth that the Plaintiff was committed for contempt in refusing to make return to a *habeas corpus ad subjiciendum* issued by said Court. Whether this is true or not, depends on the fact as to whether the Court had jurisdiction; for, if the Court had no jurisdiction, the proceedings are *coram non judice*.

In some cases of *habeas corpus ad subjiciendum* the Court has, and in others it has not, jurisdiction. The inquiry then involves the question: for what cause did the writ issue? If for any one of a certain class of cases, the Defendant *acted as judge*: if for any one of another class, he did not act *as judge*—there was in fact, *no writ, no judgment, no order, no court, no judge*. The question is, therefore, a question of fact, depending upon another fact, viz.: the subject of complaint in the *habeas corpus*.

Now it is the Plaintiff's case that the writ issued for a cause of which the District Court and the judge of the District Court had no cognizance, and that, therefore, there was *no writ, no judgment, no order, no court, no judge*; and that the Defendant's plea in every *material part*—all but the mere matter of inducement—IS UNTRUE.

The denial, therefore, in the replication is not a traverse of "inference or conclusion of law," but of the facts alleged in the plea; and the issue raised by the replication *de injuria sua propria*, requires an ascertainment of the cause of complaint on which the habeas corpus was founded. Where the matter of right or of law results from facts, it is traversable. Here we have a matter of law resulting from a matter of fact; and that, in every case, has been held to be traversable. [Commonalty *vs.* Carterbury, 3 Wil. 233-4. Step. on Pl. 216.] In 1 Smith's Leading Cases, 59, we find the same principle laid down in these words:

> "If the defendant state in his plea some fact, on the existence or non-existence of which the question whether he be a trespasser *ab initio*, or not, depends, there it will be sufficient to reply *de injuria*."

As in Kerby *vs.* Denby, trespass for breaking and entering plaintiff's dwelling and imprisoning him, the defendants

justified under a ca: sa: "*the outer door being open*;" it was held that the averment in the plea that the outer door was open was a material averment, for the door being open was a condition precedent to the defendant's right to enter; and therefore the plea was sufficiently traversed by the *general replication, de injuria*. [1 Mees. and Welsb. 336.]

In the case in hand the fact stated in the plea that the defendant "*as judge as aforesaid*" did the act complained of, is one on the existence or non-existence of which the question whether the defendant be a trespasser or not, depends; and that fact is sufficiently traversed by the general replication, *de injuria*.

In Chancey *vs.* Win. [12 Mod. 680] Holt J. says:

> "If, in trespass against a constable, he justifies for that he was constable and the plaintiff was breaking the peace, for which he committed him, may not the Plaintiff reply *de injuria sua propria absque tali causa*?"

These are the very words, it will be seen, in which the justification is made in this case, and the plea is precisely the same.

In Selby *vs.* Burdons [23 E. C. L. 14] Park J. says:

> "As a general proposition, it is untrue that authority of law may not be included in a traverse, it being clear that an arrest by a private individual or peace officer is by an authority of the law; and yet pleas containing such a justification may be denied by a general traverse."

The modern English courts have departed from the rules adopted in Crogate's case, and admit the replication in many cases in which those rules would not admit it. [See note to Crogate's case, Smith's Leading Cases, 55: 44 L. L.]

A note to the case of Curry *vs.* Hoffman, [2 Am. L. Reg. p. 252] is as follows:

> "The later English cases warrant the use of the replication *de injuria*, though the plea sets up a justification under an authority given by the law, unless it be at the same time derived mediately or immediately from the plaintiff, or be the process of a court of record. Barden *vs.* Selby, 9 Bingh. 756. [in error]; Bowler *vs.* Nicholson, 12 Ad. & Ellis, 341; Edmunds *vs.* Penniger, 7 Q. B. 558; Price *vs.* Woodhouse, 16 M. & W. 1; See, however, Worsley, *vs.* The South Devon Rail Road Company, 3 Eng. L. & Eq. 230."

Undoubtedly the plea might have been framed in such a manner as to make the allegation that the defendant acted "as judge as aforesaid" in the matter complained of, a mere inference of law, deduced from the facts previously stated in the plea. In such case it would not have been traversable. Had the plea, after merely setting out that the defendant was judge of the United States District Court, proceeded to state all the proceedings on the *habeas corpus* from Wheeler's petition to the commitment for contempt, and then alleged that the commitment was made *by virtue of his authority as judge*, the *virtute cujus* would have been an inference of law. But the plea does not set out the whole matter: it sets out merely the judgment of contempt. (I am confining my observations now altogether to the first plea, because my remarks in regard to that will apply to the third; the principle raised by the fifth plea is distinct from that which will be involved in the consideration of the others.) The plea does not set out the whole array of facts in justification, but includes in the allegation of the defendant's authority as judge, a matter of law and of fact. Whether the defendant acted as a judge, or not, is not a consequence of facts previously stated. If it were, then the whole matter would be a question of law; but, inasmuch as there is an important fact alleged, (that is, that the defendant acted as judge,) and all the proceedings are not set out, it is competent for us to deny that important fact by the replication *de injuria*. It does not appear by the record whether he acted as judge, or in his own individual character. Such being the fact, they have left that matter at large. The allegation covers all that is not set out in the plea, and therefore it may be denied by a general replication of *de injuria sua propria*. In such case, it is settled beyond controversy, a traverse is proper. [1 Chitty on Pl. 613. Beal *vs.* Simpson, 1 Ld. Ray 410. 1 Wms. Saunders 23, n. 5. Lucas *vs.* Nockells, 4 Bing. 729. 15 E. C. L. 138. Stickle *vs.* Richmond, 1 Hill 81.]

But, secondly, it is alleged that *de injuria*, etc., cannot be replied where plea sets up matter of record by way of justification.

Here it is alleged, on the part of the plaintiff, that *there is no record*. Whether there is, or not, depends upon a fact to be proved: whether, in what he did, the defendant acted, as he has alleged, *as judge*. If he did not act as judge, there was no court and, of course, there was no record. In other words, if the Court had no jurisdiction, there were no such

proceedings as those alleged in the plea. *There was no motion, no contempt, no order of commitment.* The *absque tali causa* is a denial that the defendant acted as judge, and of all that is alleged of his proceedings in that character. But, it is said, we cannot deny a matter of record except by a plea of *nul tiel record*; for to do so in this way would be to put a matter of record "in issue to the common people."

This proposition assumes the very fact in issue. It assumes that the defendant did the act as judge, that there is a record, and alleges that we cannot deny the existence of this record because, by the proceedings of a court that had no jurisdiction, it appears that it had jurisdiction. Such is the argument of the other side. The plaintiff denies the jurisdiction of the Court, and to show that all the proceedings set out in the plea are nullities, and the alleged record no record, proposes to prove that the Court had no jurisdiction. Is he to be told that that which is alleged to be a record, is to be judged only by the paper assumed to be a record? That is the sense of the argument (if it has any); and yet the law is undoubted that whether a pretended record is true or false, may be inquired into "by the common people." The Court cannot by recording a falsehood obtain jurisdiction, nor prevent an issue to the country to determine *the fact*.

In Robson *vs.* Eaton [1 T. R. 62], the judgment of the Court of Common Pleas was held a nullity as to a party named in the record, because he had not authorized an appearance for him. In Borden *vs.* Fitch [15 John. 162], it was held that the decree of another Court, duly appearing by the record, was not conclusive, it appearing that the Court had not jurisdiction of the party to be affected by it. The same doctrine is maintained in Andrews *vs.* Montgomery [19 John. 162]. In Shumway *vs.* Stillman [4 Cowen, 294], Justice Sutherland, delivering the opinion of the Court, quotes with approbation from the decision in Borden *vs.* Fitch, that "to give any binding effect to a judgment, it is essential that the Court should have jurisdiction of the person and of the subject matter; and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. *The want of jurisdiction makes it utterly void for any purpose.*" The case of Bissell *vs.* Briggs [9 Mass. 467], is to the same point, and also Aldrick *vs.* Henry [4 Conn. R. 280], where it was decided that if the defendant did not appear, the record was void, though it was averred in it that he did appear. In Starbuck *vs.* Murray [5 Wend. 148], it was held that in an action on a judgment the defendant may show, under any proper plea, the fact that the Court had not jurisdiction.

The want of jurisdiction need not be pleaded specially: it may be shown under the general issue. On this point I would refer to 1 Kent's Com. 280 (note a), where it is said: "The doctrine in Mills *vs.* Duryee, is to be taken with the qualification that in all instances the jurisdiction of the Court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the Court had no jurisdiction over his person."

The most of these cases were suits on judgments recovered in another State; but the rule is the same whether the judgment was recovered in the same or another State. [Conkling on Jurisdiction, 393.]

It is, therefore, very clear that where a record is set up which is void for want of the jurisdiction of the Court, the trial is not necessarily by the record. There is no such principle as that a void thing shall prove itself.

But here there is no record pleaded. The proceedings in which the defendant claims to have acted as judge, are not pleaded as a record.

In the first plea the defendant has studiously avoided showing the foundation of the proceeding; has omitted the *prout patet per recordum*, essential where a record is pleaded, and has satisfied himself with averring that the defendant *acted as judge* on the motion for judgment, and in ordering the plaintiff to be committed. The replication, therefore, is a denial of the matter of defence as stated in the plea.

Had the plaintiff replied *nul tiel record*, there would have been a departure, and a rejoinder of *tali habetur recordum* would have raised an issue outside of the prior pleading, for the reason that there is no record pleaded. When there is a general allegation in a plea of the facts which, it is said, a record would prove, if given in evidence, without any proffer of the record or any *prout patet per recordum*, do we ever see an answer, by plea, of *nul tiel record*? Such an answer would be insensible—it would have no meaning; for no record being pleaded, you cannot properly reply that there is no such record. The party upon the other side could, without exposing himself to any objection, set out the facts which he expects to prove by record; but, unless he pleads the record in the technical manner in which records only can be pleaded, it is impossible for us to reply *nul tiel record*, and all that we can do is to deny the existence of the facts which he has alleged upon the face of his plea.

In the third instance, it is alleged as a cause of demurrer, that the replication is multifarious and double. Now, no replication has ever been held bad upon that ground, if the several facts put in issue constitute one single ground of defence. [Smith's Leading Cases, note to Crogate's case, p. 57; 44 L. L. 124; Curry *vs.* Hoffman, 2 Am. L. Reg. 251;

Stickle *vs.* Richmond, 1 Hill, 77.]

In this case the whole plea is one consistent defence, the point of which is that the trespass complained of was committed by virtue of a warrant issued by the defendant as judge of the District Court of the United States; and in pleading to that effect he necessarily states,

First, That he was judge.

Secondly, That *as judge* he held the plaintiff in contempt.

Thirdly, That, being in contempt, the plaintiff was, by a regular order, committed to the custody of the marshal.

All these were necessary allegations—not one could be spared; without any one of them, the plea would have been insensible. They make but one matter of defence; they tender but one single issue; and such being the case, it was competent to deny the allegations contained in the plea. In contradicting the whole, we contradict but one single cause or point of defence: the denial raises but the one question: whether or not the matters contained in the plea are true.

In Stickle *vs.* Richmond and Curry *vs.* Hoffman the replication, it is true, protests the authority of the officer, and, by protesting, admits it: then it goes on to deny, under a general allegation for the residue of the cause, the facts stated in the plea. But this protestation of the matter of inducement, in the introduction to the plea, was merely as a measure of precaution, *ex majori cautelâ*. It was not necessary to the singleness of the replication, for without this matter of inducement, which introduced all that followed, the plea would have been imperfect. The replication denies in substance only the facts which are alleged in the body of the plea; it does not affect to traverse matter that was *mere* inducement, and, therefore, merely necessary to be alleged in order to introduce what followed.

The allegation, in this case, that the defendant was a judge, is certainly as much an integral part of the *unit* which a plea ought to be, and which the plea here is, as any other allegation. Without it the plea would want a member necessary to its legal constitution and completeness.

These observations, made in a general way, dispose of the first three points. The fourth cause of demurrer has been already considered in connection with the first. The third plea is not materially different from the first, as it contains all the facts there set forth, omitting merely the insensible and extraneous matter as to the legal obligation of the defendant.

It may be remarked that these technical questions with regard to the form of the replication are not matters of much interest in pleading at any time. The only effect which can result from raising them is to create delay, for, if your Honor, thinking the replication informal, should be inclined, on that ground, to give judgment in favor of the defendant, the universal practice at present is, not to give judgment, but to allow the party an opportunity to amend; and even after a case has gone to the Supreme Court, it repeatedly happens that that Court, rather than give judgment upon a special demurrer, will send the case back, in order that the pleadings may be amended and the cause be determined upon its merits.

The raising of these questions of special pleading is, therefore, a mere matter of experiment, and can answer no valuable purpose, unless, indeed, by a special defence some advantage is to be obtained which the party cannot have by submitting all the facts to the jury under the general issue; but, wherever the general issue can be pleaded, and the party can have under it the full benefit of his defence, the courts now will compel him to take his defence in that way, and he will not be allowed to load the record with special pleas that are not necessary to exhibit the merits of the cause. The practice of our courts in this respect is every day becoming more liberal. Avoiding all determinations resting upon mere matters of form, and endeavoring to reach the substance and justice of the case, they make the rules of pleading subservient to that object.

I have looked at this question, therefore, with less interest than I have felt in other and more important points in the case; and those I shall now proceed to discuss somewhat more at length and with a greater degree of attention.

The fifth plea sets out the facts which show, as we think, that the defendant had not jurisdiction, and, therefore, on demurrer, the plaintiff has the same advantage as if he had demurred. This is admitted upon the other side. We are brought, then, to the consideration of the question, whether these pleas are good in law and an answer to the action.

The defendant takes his stand on the principle of judicial inviolability. Called on to answer for an act of official usurpation, by which a peaceable citizen, who had violated no law and infringed upon no right, was treated as a common malefactor, and shut up for three months in prison, he points to his ermine as his protection, and insists on complete immunity from accountability for the outrages, because it was perpetrated in his character as judge. Such an answer is an

insult to the law: the plea is a libel on our free institutions. According to every principle of reason and justice, the fact that the injury was inflicted under color of official prerogative but sharpens its sting and gives it ten-fold aggravation.

The proposition that a judge is not responsible to a party injured for anything he may do in abuse of his power and beyond his jurisdiction as judge, is, if not new, at least *startling* to the professional mind of this country, and requires to be sustained by irrefragible argument.

What is the argument? It is this: that the right to issue the writ of habeas corpus and to commit for contempt, is a question under the constitution and laws of the United States; that, the defendant having decided that right, his decision is a judicial determination of the question, and binds all the State courts till that judgment is reversed on appeal. Such is the argument of the other side. It comes from an expected quarter. It was long since said by Jefferson that the most formidable enemy to the liberty of the citizen, under our system, was the usurping tendencies of the Federal Judiciary. Here is a manifestation of the cloven hoof, the sound of whose tread was caught afar off by that sagacious and vigilant friend of constitutional freedom.

But our State courts have not yet bowed the knee so low in servility to the Moloch of Federal power as to sanction this argument. Even Judge Lowrie, (whose opinion has been referred to, and who, in voluntary abnegation of State authority when solicited for the protection of personal liberty against Federal usurpation, has shown most reverence to the highest power,) has excepted as out of the terms of his submission, the case of an action for damages against the wrong-doer. “I speak not here,” (says he in his opinion,) “of the action for damages for excess of authority.” [P. Williamson’s case.]

Now it is an elementary principle that where a court has no jurisdiction, all the proceedings are *coram non judice*; there is no court and consequently no judgment. The proceedings may be inquired into in every other court in which they are brought by a party claiming a benefit under them. An authority in this point is the ease of *Ex parte* Randolph, [2 Brockenbrough’s Reports, 472.] The words of that decision are as follows:

> “It was settled as early as the great Marshalsea case in 10 Coke, 76, and the principle has never been departed from, that where a court has jurisdiction, and proceeds *in verso ordine*, or erroneously, there the proceeding is only voidable; but where the court has not jurisdiction of the case, there the whole proceeding is *coram non judice* and void; and the books, both English and American, abound in cases exemplifying this principle.”

In *Ex parte* Watkins [3 Peters 203] the same principle is laid down.

If the District Court then had no jurisdiction in the proceeding against Mr. Williamson, there is no judgment of that court that stands in the way of your adjudging between the parties. Whether that court had jurisdiction is to be decided here, not by the void record of a void judgment, but by an inquiry into the fact as to whether the allegation of jurisdiction is true or false.

A void thing can prove nothing, and whether it be void or valid is to be made out by proof recognized as valid. Whether a court has jurisdiction is usually a mixed question of law and of fact, or rather of law depending on fact. That question is to be determined by our courts, as all other questions of judicial cognizance are determined,—by the evidence laid before them. When such a question is presented to a State court it must be determined by the law of the State, and the court will look to all proper sources for the evidence of what the law is, as well the decisions of the United States courts as of other courts. Whether the defendant was right or wrong in assuming jurisdiction is not to be decided by his own determination to assume jurisdiction, (for that would be to make his will the law,) but by the Constitution and acts of Congress, and by the construction given to them by other and better judges.

As was said in the case of Starbuck *vs.* Murray [5 Wend. 158:]

> “Unless a court has jurisdiction, it can never make a record which imports an uncontrollable verity to the party over whom it has usurped jurisdiction; and he ought not, therefore, to be estopped by any allegation in that record, from having any fact which goes to establish the truth of a plea alleging a want of jurisdiction.”

To the defendant’s proposition Chief Justice Tilghman in the Olmstead case [Brightley’s Reports, 9] puts an emphatic negative. “The United States,” (he says,) “have no power, legislative or judicial, except what is derived from the Constitution. When these powers are clearly exceeded, the independence of the States and the peace of the Union demand that the State courts should, in cases brought properly before them, give redress.”

The servile doctrine of submission to Federal usurpation received at that day no countenance in our courts.

[Here the Court took a recess till 2½ o'clock P. M. On the reassembling of the Court, Mr. Lewis, resuming his argument, said:]

In the course of my remarks this morning I referred to decisions of the Supreme courts of certain States, and to the decision of the Circuit Court of the United States, showing that wherever the court had no jurisdiction there its proceedings were *coram non judice* and void. Those cases also show that the question whether a court had jurisdiction was not to be determined by the void record of a void judgment, but by an examination into the fact as to whether the jurisdiction assumed was rightfully exercised. I now proceed to show by other cases of still higher authority, as far as regards the District Court of the Eastern District of Pennsylvania, that that is the law of the courts of the United States.

In the case of Elliott *vs.* Piersol [1 Peters, 328], Judge Trimble, in delivering the opinion of the court, remarks:

> "It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the county court of Woodford county, and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree that, if the county court had jurisdiction, its decision would be conclusive, but we cannot yield an assent to the proposition, that the jurisdiction of the county court could not be questioned, when its proceedings were brought collaterally before the Circuit Court. We know nothing of the organization of the Circuit Courts of the Union which can contradistinguish them from other courts in this respect.
>
> "When a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, *if it act without authority, its judgments and orders are regarded as nullities*. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. *They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.*
>
> "This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

This doctrine is approved in the Chemung Canal Bank *vs.* Judson [4 Selden, 254], decided in June, 1853, before the New York Court of Errors, the highest court of record in the State of New York. After citing at length the passage which I have read, Justice Ruggles says:

> "The power of this court, therefore, to inquire into the jurisdiction of the District Court of the United States, is undoubted; and the power of that court to inquire into the jurisdiction of this, is equally clear."

The principle is re-affirmed in Thompson *vs.* Tolmie, [2 Peters, 156.] Justice Thompson in that case observes:

> "If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right and afford no jurisdiction, and may be rejected when collaterally brought into question."

In the case of Voorhees *vs.* Bank of U.S., [10 Peters, 449], decided as late as January, 1836, Justice Baldwin says:

> "The line which separates error in judgment from the usurpation of power, is very definite. In one case it is a record importing absolute verity; in the other, mere waste paper."

In Wilcox *vs.* Jackson, [23 Peters, 498], decided in January, 1839, Justice Barbour, after speaking of the judgments of courts acting within their jurisdiction, remarks:

> "But directly the reverse of that is true in relation to the judgment of any court acting beyond the pale of its authority. The principle on this subject is concisely and accurately stated by the court in the case of Elliott *vs.* Piersol [1 Peters, 340] in these words." He then quotes the whole passage already read.

In the case of Grignon *vs.* Astor, [2 Howard, 319], Justice Baldwin says:

"This is the line which denotes jurisdiction and its exercise in cases *in persona*: where there are adverse parties, the court must have power over the subject matter and the parties."

In the case of Hickey *vs.* Stewart, [3 Howard, 850], the proceedings of the Court of Chancery of Mississippi were brought in question, and it was decided that they are wholly void, the court having no jurisdiction. Justice McKinley, delivering the opinion in that case, says:

"According to the decision in the case of Henderson *vs.* Poindexter, above referred to, Starke's claim, when submitted by his heirs to the Court of Chancery, was utterly void; and no power having been conferred by Congress on that court to take or exercise jurisdiction over it for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void.

"In the case of Rose *vs.* Himely, Chief Justice Marshall said: 'A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it has decided, could have no legal effect whatever. The power of the court, then, is of necessity examinable, to a certain extent, by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide the questions which it professes to decide, must be considered.' Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined."

After quoting the passage from Elliott *vs.* Piersol, which has been already referred to, Justice McKinley continues:

"The same doctrine was maintained by this Court in the case of Wilcox and Jackson, [13 Peters, 511], and the case of Elliot and others *vs.* Piersol and others, referred to, and the decision approved. These cases being decisive of the question of jurisdiction, we deem it unnecessary to refer to any other authority on that point. From the view we have taken of the whole subject, it is our opinion, the decree of the Supreme Court of Mississippi would have been no bar to the action of the plaintiffs in this case, if the subject-matter of the suit had been within its jurisdiction. But we are of the opinion that the court had no jurisdiction of the subject-matter, and that the whole proceeding is a nullity."

A still more recent case is that of Williamson *vs.* Berry, [8 Howard, 495], which was decided in the year 1850. The court there said:—

"We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject, may be enquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the law of nations, the practice in chancery, or the municipal laws of States.

"This court applied it as early as the year 1794, in the case of Glass et al. *vs.* Sloop Betsey, [8 Dall. 7]; again, in 1808, in the case of Rose *vs.* Himely, [4 Cranch, 241]; afterwards in 1828, in Elliot *vs.* Piersol, a case of ejectment, [1 Peters, 328, 340.] This is the language of the court in that case, not stronger though than it was in the preceding cases."

The passage from Elliot *vs.* Piersol, already referred to, is here quoted at length, and the opinion continues:—

"This distinction runs through all the cases on the subject. This court announced the same principle in Wilcox *vs.* Jackson, [13 Peters, 499] and twice since in the second and third volumes of Howard's Supreme Court Reports. [Shriver's Lessee *vs.* Lynn et al., 2 How., 59; Lessee of Hickey *vs.* Stewart et al., 3 How., 750.]"

The court then go on to decide that the Chancellor of the State of New York had improperly assumed jurisdiction of the case that was before him, and that all his proceedings were void.

Thus the authority is ample for the proposition that the proceedings of a court beyond its jurisdiction are nullities, and afford no protection to any officer executing its judgments or decrees. Such an officer is merely a trespasser. If the

officer who executes the process is a trespasser, it follows necessarily that the judge who orders it, is at least equally so. Upon no reasonable principle can the ministerial officer be held responsible, and the judicial officer, (whose ignorance or whose error was the cause of the mischief,) be excused. The reason that avoids the judgment and process together, makes all concerned answerable, from the judge to the marshal or the deputy to whom the last service was confided. It is a well-known legal principle, that in trespass all are principals; and it is not easy to perceive how one who has been active in causing a trespass, by his order or decree for its commission, can be less a wrong-doer than the agent, who merely obeys the command of his superior.

Still the question recurs: had the defendant jurisdiction in the proceedings against the plaintiff?

The fifth plea assumes to exhibit the ground on which the writ of *habeas corpus* issued: that Wheeler was the owner of three persons held to service or labor by the laws of Virginia; that they were detained from his possession by the plaintiffs; and that the *habeas corpus* issued to the plaintiff, commanding him to bring before the defendant the bodies of the persons detained.

Had the defendant jurisdiction, as judge of the District Court of the United States, to issue a writ of *habeas corpus* on such a complaint? Whether he had or not, depends on the question whether the power to issue the writ in such a case is conferred by any act of Congress compatible with the Constitution of the United States.

It was long ago decided that the Supreme Court of the United States, being created by written law, and their jurisdiction being defined by written law, cannot transcend that jurisdiction, and that the power to award the writ of *habeas corpus* by any of the courts of the United States, must be given by written law. [Ex parte Bollman, 4 Cranch, 75.]

The fourteenth section of the Judicial Act, is that to which we are referred as containing a grant of the power. That section provides that:—

> "All the before mentioned courts of the United States [the Supreme, Circuit and District courts], 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 justices of the District Court, 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 gaol, 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."

Whatever difficulties may at one time have existed as to the construction of this act, it has been so often considered and construed by the courts, that its meaning may be said to be definitively ascertained. The suggestion of a controversy as to whether the words, "which may be necessary for the exercise of their respective jurisdictions," apply to writs of *scire facias* and *habeas corpus*, or only to the writs "not specially provided for by statute," is too late by nearly half a century. This question was fully considered and decided more than fifty years ago in the case of *Ex parte* Bollman, by Chief Justice Marshall, to whose exposition nothing can he advantageously added, and who put a construction upon this statute which has been acquiesced in ever since. It is a little remarkable that the judges of the Supreme Court of Pennsylvania have overlooked that decision altogether, and have treated this statute as if the words, "which may be necessary for the exercise of of their respective jurisdictions," were to be applied to the writs of *habeas corpus*.

Chief Justice Marshall, in the case I have mentioned, determines the sense, not by verbal criticism nor by grammatical construction, but "by the nature of the provision and by the context;" and he makes it clear that the phrase in question was not intended to limit the power of the courts to issue writs.

But the Chief Justice proceeds in that case to consider other parts of the act of Congress, and finds in them the true limit to the exercise of the power conferred. In the sentence which follows that which authorizes the courts to issue writs of *habeas corpus*, it is said that "either of the judges of the Supreme Court, as well as the judges of the District Courts, shall have power to grant writs of *habeas corpus for the purpose of inquiring into the cause of commitment*."

By comparing this provision with the previous grant of the power, and considering, in connection with it, the subsequent proviso and the thirty-third section in reference to admitting prisoners to bail, the construction arrived at is that the power to award writs of *habeas corpus* is confined to those cases in which prisoners have been committed under or by color of the authority of the United States, or are to be brought into court to give testimony; that the power of the United States courts to issue writs of *habeas corpus* is restricted wholly to those cases in which the authority of the

United States is in some way involved.

[Mr. Henry Wharton here begged leave to correct Mr. Lewis, who, he conceived had mistaken the language of Chief Justice Marshall. He thought that the interpretation given by the court, was that the words referred to were not restrictive upon the exercise of the power to grant writs of *habeas corpus*. According to his recollection, the Chief Justice in the course of his decision, had said with reference to this argument: "This may be grammatically correct, but we prefer to rest our decision on the general principle that by the terms of the act itself, and by its intention, all the courts of the United States have the right to issue writs of *habeas corpus*." It had been expressly decided (Mr. Wharton thought) that the Supreme Court have the right to issue writs of *habeas corpus* generally, and the writ which they were empowered to issue was the *habeas corpus ad subjiciendum*—not any writ peculiar to their jurisdiction.]

Mr. Lewis. Undoubtedly Chief Justice Marshall decided that the term "*habeas corpus*," as contained in the Constitution and in the 14th section of the Judicial Act, referred to the writ of *habeas corpus ad subjiciendum*, and that all the courts of the United States had authority to issue that writ; but Chief Justice Marshall did not decide that they had authority to issue that writ in all cases where the party applying for it was under confinement;—and it is on just this point that the question arises. That the District Court of the United States has authority *in certain cases* to issue the writ there can be no kind of doubt; but that it has no authority to issue the writ in any case except where the prisoner is in confinement "under or by color of the authority of the United States" is just as clear as any principle in the law.

Mr. Rawle, in the second edition of his work on the Constitution, page 118, remarks:

> "It is at any rate certain that Congress, which has authorized the courts and judges of the United States to issue writs of *habeas corpus* in cases within their jurisdiction, can alone suspend their power, and that no State can prevent those courts and judges from exercising their regular functions, *which are, however, confined to cases of imprisonment professed to be under the authority of the United States*." "But the State courts and judges possess the right of determining of the legality of imprisonment under either authority."

This principle is also laid down in Com. *vs.* Fox, 7 Barr, 336; Com. *vs.* Smith, before Chief Justice Tilghman in 1809; and in many other cases.

Judge Story observes in the second chapter of his Commentaries:

> "The statute of Charles Second has been in substance incorporated into the jurisprudence of every State in the Union, and the privilege has been secured in most, if not in all, of the State constitutions by a provision similar to that existing in the Constitution of the United States."
>
> "Congress have vested in the courts of the United States full authority to issue this great writ in cases *falling properly within the jurisdiction of the National Government*."

Curtis, in the first volume of his Commentaries (page 252) observes:

> "It was then settled upon great consideration that the first sentence of the statute grants the great writ of habeas corpus to all the courts of the United States when in session; but as they are not always in session, the second sentence vests the power in every judge of those courts also."

After observing that the Supreme Court could issue the writ as a part of its appellate jurisdiction, he says: "This, however, went no farther than to decide that the Supreme Court may always by *habeas corpus inquire into the cause of commitment by any other court of the United States*."

In the case of *Ex parte* Dorr [3 How. 104], the power conferred by this 14th section of the Judicial Act came again to be considered by the Supreme Court, and Justice McLean, in delivering the opinion of the court, held this language:

> "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. As the law now stands an individual who may be indicted in a Circuit Court for treason against the United States is beyond the power of Federal Courts and judges, if he be in custody under the authority of a State.”

In the case of *Ex parte* Barry, before Judge Betts, in the Circuit Court of the United States for the Southern District of New York, he decided that he had no jurisdiction by *habeas corpus* in a controversy as to the custody of a minor. This, if it be law, is decisive of the question which we are now considering. The case appeared subsequently, in a somewhat different shape, before the Supreme Court of the United States, under the name of Barry *vs.* Mercein, and in the report of that case [5 How. 108], I find the opinion of Judge Betts quoted as follows:

> “A procedure by *habeas corpus* can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government, at the suggestion and instance of an individual most probably, but still in the name and capacity of sovereign, to ascertain whether the infant in this case is wrongfully detained and in a way conducing to its prejudice.”
>
> “What question can be regarded as, in principle, more local or intro-territorial than those which pertain to the domestic institutions of a State,—the social and domestic relations of its citizens? Or what could probably be less within the meaning of Congress than that, in regard to these interesting matters, the courts of the United States should be empowered to introduce rules or principles, because found in the ancient common law, which should trample down and abrogate the policy and cherished usages of a State, authenticated and sanctified as a part of her laws by the judgment of her highest tribunals?”
>
> “We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it.”

These quotations go to show distinctly that in a case falling clearly within the cognizance of the municipal law, and not in any way affecting the power of the United States government or coming under its authority, the courts of the State or territory being vested with jurisdiction of the case, the courts of the United States are excluded and have no authority to interfere.

It has been decided that the inquiry into the cause of commitment extends to cases of imprisonment under both civil and criminal process. [*Ex parte* Randolph, 9 Peters, 12; 2 Brock. 447.] This was a case from a circuit court and turned on the want of jurisdiction of auditors. It was decided that the jurisdiction of court and judges was the same, and was controlled by the clause limiting it to inquiry into the cause of commitment.

In referring to the source of jurisdiction (on page 476) the court say: “Now, the act of Congress authorizes us to issue the writ ‘*for the purpose of inquiring into the cause of commitment*;’” and on page 477 it is observed:

> “And, certainly, we are well warranted in making this reference to the common law; because, although it is admitted by all that it is not a source of jurisdiction, yet it is habitually, rightfully—nay, necessarily—referred to for the definition and application of terms; indeed, there are many terms in the Constitution which could not otherwise be understood.”

That is to say, that for the explanation of terms in the constitution and acts of Congress, and for no other purpose in relation to this writ, is the common law referred to.

Conkling in the last edition of his Treatise on the Jurisdiction of the Courts of the United States, referring to the interpretation given to the 14th section of the Judicial Act by Chief Justice Marshall, says:

> “It will be seen from this brief review of the judicial decisions relative to the writ of *habeas corpus ad subjiciendum*, that the power conferred upon the courts and judges of the United States to grant it, by the Judicial Act, is strictly limited to the cases therein specified. *It is only in behalf of persons in confinement ‘under or by color of the authority of the United States,’ or ‘committed for trial before some court of the same,’ that the power can be exercised.* In all such cases, except after final conviction before a court of competent jurisdiction, the writ may be awarded either by a Circuit or District court, or by a judge of the District court, and, it is presumed, also by a justice of the Supreme Court. This power was accordingly exercised, as we have seen, by the Circuit

Court for the Eastern District of Virginia in the case of Randolph, who was in custody under a warrant of distress issued by the Solicitor of the Treasury; and by the Circuit Court for the Southern District of New York in the case of Kaine, who had been committed by a commissioner. In virtue of the same authority, a person committed on a warrant issued by a commissioner under the act commonly known as the Fugitive Slave Act, was brought up on a writ of habeas corpus awarded by the District Judge of the Northern District of New York.

"In all these cases it was sufficient that applicants were 'in custody under or by color of the authority of the United States.' But, as we have seen, according to the interpretation given to the Constitution in Marbury *vs.* Madison, and in *Ex parte* Bollman and Swartwout, there is a further and very comprehensive limitation to the power of the Supreme Court, although no such distinction is made by the fourteenth section of the Judicial Act. The *original* jurisdiction of that court being specified in the Constitution, Congress, it was held, had no power to enlarge it; and, consequently, the authority of the Supreme Court to grant a writ of *habeas corpus* is restricted to cases falling within the scope of its appellate power, and cases (should any such arise, requiring this form of redress) affecting an ambassador, other public minister or consul, or to which a State is party."

"The highly important powers to be exercised by means of the writ of *habeas corpus* confided to the national judiciary by later acts of Congress for the purpose of preventing undue obstruction of the laws and breaches of the international obligations of the United States, have not happily as yet, so far as I am aware, called for judicial exposition."

"In the first sentence of the fourteenth section of the act of 1789, conferring upon the courts of the United States power to issue writs of habeas corpus, it will be noticed these writs are simply named, without any descriptive words expressive of their nature or uses; while in the next sentence it is said 'that either of the justices of the Supreme Court, as well as the judges of the District courts, shall have power to grant writs of *habeas corpus for the purpose of inquiring into the cause of commitment*.'

"The reason of this doubtless is that, there being several species of writs of *habeas corpus*, all of which it was proper to empower the courts to grant, it was necessary in conferring the power on them to use the word in its generic sense; while, on the other hand, the writ of *habeas corpus ad subjiciendum* being the only species of writ properly issuable by a single judge, it was deemed expedient to describe it. Next and lastly comes the proviso: 'provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, 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.'

"Speaking of this proviso, the Chief Justice took occasion to observe that 'it extends to the whole section;' or, in other words, it defines and limits the scope of the power to award writs of *habeas corpus* conferred upon the courts as well as upon the judges. This interpretation, the only one indeed of which the language of the act is susceptible, has ever since been assumed and uniformly acted upon by the Supreme court as unquestionable."

The learned author, whose accuracy and ability are strongly exhibited on every page of his valuable work, adds to the sentence last quoted from the text, the following significant note:

"*It seems, nevertheless, to have been altogether overlooked in a case of recent occurrence in the Eastern District of Pennsylvania*—a case that has elicited no inconsiderable degree of public attention and interest. The proceedings I allude to have been strongly marked throughout by features of a most extraordinary and anomalous character, and seem destined to occupy a conspicuous place in the judicial history of this country."

It may be remarked that Alfred Conkling, the author of the book from which I have just read, was himself for a number of years United States District judge for the Northern District of New York. He had no inconsiderable experience in regard to all these matters, and was thoroughly acquainted with the practice and the decisions of the Supreme Court upon the subject. He sums up the whole matter in the remarks which I have read, and distinctly says that the authority of the judges of the United States courts to issue writs of *habeas corpus* is confined to cases in which the person seeking to be relieved is confined under or by color of the authority of the United States; and he declares that this distinction, which was first shadowed out in the case of *Ex parte* Bollman and Swartwout, and has since been observed in every case in which the subject has undergone investigation, was in a most remarkable manner overlooked in a late case in the Eastern District of Pennsylvania—alluding to this very case in terms sufficiently intelligible.

An application was made during the year 1830 by a recruiting officer at Albany to Judge Conkling, to bring before

him, by *habeas corpus*, for the purpose of discharge, an enlisted private soldier, arrested for a small debt upon process from an inferior court of the State; but the judge, considering it perfectly clear that he had no authority to issue the writ in virtue of the general power conferred by the Judicial Act, and entertaining doubts as to the act of 1799, advised an application to the Supreme Court of the State. [See note to p. 239 of Conkling's Treatise.]

In the case of United States *vs.* French, [Gallison's Reports, page 1], decided as long ago as 1812, the same distinction is laid down. The language of the court in that case is:

> "We have no authority in this case to issue a *habeas corpus*. The authority given by the Judicial act of 1789, ch. 20, sec. 14, is confined to cases where the party is in custody under color of process under the authority of the United States, or is committed for trial before some court of the United States, or is necessary to be brought into court to testify. It does not extend to cases where the process is from a State court, and the object is to surrender the party in discharge of bail."

In the case of *Ex parte* Smith, [3 McLean, 121], the jurisdiction of the United States court to issue a *habeas corpus* was sustained expressly on the ground that the petitioner was detained by virtue of authority emanating from the United States.

From the cases to which I have referred, and others which are noted in the work of Judge Conkling, it appears unquestionable that the courts of the United States have power to issue the writ of *habeas corpus* only in certain prescribed cases, of which this is not one. It is unnecessary, therefore to pursue farther this branch of the argument.

It is certain that the act of 1833, called the "Force Act," has no application to this case. That was an act passed by Congress for the purpose of preventing any interference with the authority of the general government, by the State of South Carolina; and there is nothing either in the words or intention of the act, that can be supposed to give jurisdiction to the District court of the United States in such a case as this.

It is unnecessary, in fact, under these decisions to inquire specially into the jurisdiction of the District Court of the United States, which is of a most limited character. That court has not the remotest color of power or authority over such a case as this or the parties to it. The only court that could pretend to such authority is the Circuit Court of the United States; and that court, as has been shown, has denied that it has it.

If the defendant acted as judge, and not as a court, he clearly had no jurisdiction, because the persons for whose production the writ issued were not alleged to be under commitment of any kind, either under civil or criminal process. If he acted as a District Court, his power was no larger than that which he possessed as judge of such court, and his action was equally beyond his jurisdiction. Such being the case, the whole proceeding is a nullity, and affords no justification to anybody.

As far as I can understand the language of the act, and the judicial interpretations given to it, the court and the judge have equal power to issue the writ of *habeas corpus* whenever any case calls for the intervention of the authority of the United States—the court, when it is in session; the judge, when the court is not in session; but in both instances the power to issue the writ is confined by the proviso, to those cases in which the persons seeking relief 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."

If this be the correct construction of the Judicial Act—if in all these decisions the United States judges themselves have not erred in determining as to their jurisdiction, then it must be certain that the District Court of the United States had no jurisdiction of the present case. It is shown upon the very face of the fifth plea that no jurisdiction actually existed, for that plea sets forth that the writ of *habeas corpus* issued upon complaint of John H. Wheeler, of Virginia, for the purpose of relieving from custody certain persons whom he claimed as slaves—a case that did not come within the provisions of the act of Congress, and which did not, for any reason that can be imagined, call for the interference of any United States court. It was a case falling clearly within the municipal laws of the State, and in which an appeal might have been made with great propriety to the courts of the State, charged with the protection of her own citizens. The courts of the United States could not interfere in this case for any purpose to which the United States could properly be a party. By the petition itself, it would appear that these persons were not fugitive slaves, and whether they were fugitive slaves or whether they were freemen, does not affect the question. The power of the United States courts in either case is precisely the same; there is no power given to any court of the United States to interfere upon the subject.

This construction of the Judicial Act is not only reasonable in view of its words, but necessary in reference to its

spirit and the objects which it was designed to answer. All questions relating merely to the domestic relations of the citizens of Pennsylvania on our own soil, are properly cognizable by our local tribunals. The government of the United States has nothing to do with them; its interference in regard to them is wholly uncalled for. Our own courts are competent to afford every remedy, and nothing but a disposition to intermeddle with what does not belong to them, can prompt the action of the Federal courts in such cases. The framers of the Judicial Act never contemplated conferring upon the courts of the United States the right to issue the great writ of *habeas corpus ad subjiciendum* where the authority of the general government was not in some way concerned. The genius of the Constitution gives no sanction to such an idea; the whole theory of our complex system repudiates it. One great object, ever kept in view both in framing the Constitution and in the enactment of laws to carry out its purposes and provisions, was to prevent a conflict of authority. This was regarded as a vital point, involving the stability of the government. But the construction given to the statute, on the part of the defendant, would tend to bring the powers of the Federal and of the State courts into perpetual collision. Under that construction, process would clash with process; sheriff and marshal would be continually crossing each other's path.

It is said that the jurisdiction here assumed has been repeatedly exercised. If such is the fact, it only shows the tendency of Federal power to usurpation and the necessity of giving it a check. There is one reported case, (United States *vs.* Green,) in which Judge Story took cognizance of a question relating to the custody of a minor; but nothing was said on the subject of jurisdiction, and no final order was made. In his Commentaries on the Constitution, that eminent judge has given no countenance to a doctrine that seeks to break down the proper barriers to the ambition of Federal authority, and make the United States courts common arbiters of the rights of citizens under State laws and institutions. Those barriers it is the incumbent duty of the State courts to protect. They have been hitherto observed by all United States judges, (except, as Judge Conkling says, in one case of "a most extraordinary and anomalous character,") wherever the question has been made, but how long such will continue to be the case, if our tribunals are unmindful of an unjustifiable infringement upon their rightful prerogatives, let the history of all past usurpations answer.

It is insisted for the defendant that whether he acted within or without his jurisdiction as judge, he is not answerable civilly in a court of justice to the party injured. This position cannot be maintained upon principle; for, as I have already said in substance, where there is no jurisdiction there is no process, and the ground of justification fails. He that orders the arrest, and he that executes the order, are equally liable. The extent of the liability is the only question; and that is to be judged by the proper tribunal, after weighing all the facts.

The modern precedents conform to the legal principle. Beaurain *vs.* Sir William Scott [3 Camp. 388] was decided March 6, 1813. An action was instituted against the defendant, judge of the ecclesiastical court, on the ground that he had made a decree in excess of jurisdiction. The case was tried before Lord Ellenborough, and that the action was maintainable was not denied. [See note to this case.] "Where the judge of any spiritual court excommunicates for a cause of which he has not the legal cognizance, he is also liable to be indicted at the suit of the king. 2 Inst. 623; 2 Bl. Com. 101."

In the case of Dicas *vs.* Ld. Brougham, [25 E. C. L. 418] before Lord Lyndhurst, December 3rd, 1883, it was contended by Campbell, Solicitor General, that no action lay against a judicial officer, and the English authorities cited in the defendant's paper-book were all referred to. Platt, in answer, cited Beaurain *vs.* Scott:

> "Lord Lyndhurst, C. B. There the judge had no jurisdiction. The judge is protected only where he has jurisdiction."

The whole controversy turned on that point—whether the Chancellor, in sending Dicas to prison, acted within his jurisdiction.

In Houlden *vs.* Smith [68 E. C. L. 382], decided February 26, 1850, Justice Patterson said: "We have found no authority for saying that he [a judge of a court of record] is not answerable for an act done by his command and authority, where he has no jurisdiction;"—and the plaintiff had judgment.

If, therefore, the doctrine of judicial inviolability ever obtained (and, whatever may be said in some old cases, I am far from admitting that it did,) it is now thoroughly exploded; and a judge is no further protected from the proper consequences of his acts of trespass than any other person. It would be indeed strange if he should be exempt from liability, while those executing his orders are held liable,—especially as his first duty consists in ascertaining the just boundaries of his powers, while theirs is deemed to be discharged only by the most implicit and unquestioning obedience.

Having referred to the cases which seem to bear directly upon the question of judicial responsibility, it is unnecessary to labor the argument further on that point; and I shall proceed to lay before the court the reasons why, in my apprehension, these pleas ought to be stricken off.

The first case to which I will refer is that of McBride *vs.* Duncan [1 Wharton, 269.] This was an action of trespass brought against the Sheriff of the city and county of Philadelphia for carrying away certain goods and chattels alleged to be the property of the plaintiff. The defendants pleaded "not guilty, with leave to give the special matter in evidence," but afterwards obtained a rule to show cause why the general issue should not be withdrawn and special pleas filed in its stead. This rule was made absolute at the March term, 1835. They then filed six special pleas. To the first four of these pleas the plaintiff put in a replication concluding to the contrary; to the fifth and sixth, he replied "*nul tiel record*." To the replication to the first plea the defendants demurred specially; to the replication to the second, third and fourth pleas they rejoined the *similiter*. The case then came up on the issue of *nul tiel record*, and the demurrer to the replication to the first plea, and the questions, were very ably argued by Mr. J. A. Phillips and Mr. W. M. Meredith for the plaintiff, and Mr. F. W. Hubbell for the defendant. In that case, *without any formal motion*, (as appeared from the report, and as I have also learned from one of the eminent gentlemen who were engaged in the argument of the cause,) but on a mere suggestion made in the course of the argument by one of the counsel, the Supreme Court struck off the pleas. Judge Sergeant, delivering the opinion of the court, said: "It has been contended that the matter of these pleas was not admissible under the general issue;" and he then proceeds to show that the whole matter in defence might be given under the general issue. He then observes:

> "Still, though the general rule is that a defendant is not permitted to put in special pleas which amount to the general issue, and the court will strike them off, yet there are exceptions; for, in some cases, by the English rules the defendant may take his choice and frame his plea so as to escape being liable to the objection. This is effected by the device of giving color, as in these pleas is done, by alleging that the plaintiff was in possession of the goods by a bailment from Linn for safe-keeping, and by fraudulent conveyances from him. And where such course reserves to the defendant any serious advantage he might otherwise lose, he would, strictly speaking, be entitled to take his choice, and resort to the circuity of special pleading, instead of this plain path of 'not guilty.'
>
> "No important advantage can attend the defendant's special pleading in the case before us, while it leads to delay and burthens the records with volumes which serve little or no purpose but the exercise of ingenuity and learning. It is said [Hob. 127] that it is a good reason for pressing the general issue, instead of special pleading, that 'it makes long records where there is no cause.' In Pennsylvania this remark applies with peculiar force. The genius of our jurisprudence is not favorable to the practice of special pleading, and the cases are rare in which the time and attention of the court have been occupied by disputes upon it. There is no class of the profession employed peculiarly in its study, nor would our trivial attorney's fee compensate for the labor of it. Our system has been to try causes on the general issue with notice of the special matter. To that system our laws and practice conform; and justice, it is believed, is as well administered as where another system prevails. It is remarkable that in some actions which the courts have invented and fostered as best calculated for the trial of right, such as ejectment and trover, there is no special pleading; and in *assumpsit* it is not required.
>
> "It is not meant by these remarks to intimate that there are not cases in which special pleas are necessary and proper, and in which the law of the case cannot be administered without them; or that an intimate knowledge of that branch of the law is not indispensable to the advocate. But where justice may be fully attained without it, where special pleading involves the cause in prolixity and delay without conferring any real benefit on him who resorts to it, the court ought, in the exercise of their legal discretion, and for the prevention of the evils that would result, to enforce the rule that the defendants shall not plead specially what amounts to the general issue."

In Troubat and Haly's Digest this case is referred to as settling the practice of Pennsylvania in this particular.

The question then remains whether the defendant could have the benefit of all his defence under the general issue; and we have only to refer to the English cases in order to be satisfied that that is the fact, for there is no one of those cases where the general issue was pleaded, in which the defendant had not the full benefit of his defence under that plea.

In the case of Houlden *vs.* Smith, already referred to, the plea was "not guilty," and under that all the defence was given.

In the case of Rosset *vs.* King [17 E. C. L., 595] the court refused to allow the defendant, in an action of *assumpsit*, to plead the general issue, and also several special pleas that the money mentioned in the declaration was due only for

differences arising out of stock-jobbing transactions; as such matter might be given in evidence under the general issue. All the pleas, therefore, were stricken off, with the exception of the general issue plea, under which the defence was given.

The case of Coster *vs.* Wilson, [3 M. & W., 411], was an action of trespass for assault and false imprisonment, brought against a justice of the peace, who, as it was supposed, had improperly assumed jurisdiction. On an investigation, the opinion of the court was that he had jurisdiction, and his right to issue the writ complained of was therefore sustained. In this case the plea was "not guilty," and under that plea the whole defence was given.

In the case of Hammond *vs.* Teague, [19 E. C. L., 97], the opinion of the court, as stated in the syllabus, was, "The court will not allow a party to plead, in *assumpsit*, matter which may be given in evidence under the general issue, unless the plea be simple and not likely to perplex the plaintiff."

As far as concerns the merits of the case before us, no party can be deprived of any possible advantage by granting the motion which we make to strike off the pleadings. If the general issue plea had been entered, the case would have been fairly at issue and might have been tried at the last term of the court. The only effect of perplexing the case by these questions of pleading is delay.

Whether or not the general replication *de injuria* is applicable in a case of this kind, is a question of very considerable nicety. In two cases to which I have already referred, the plea of *de injuria* was used and allowed. In another case, the inquiry was made by Lord Holt, why it might not be used. Other cases which have been referred to, have shown that the use of the *de injuria* or general traverse, is not now in the English courts a matter of the same nicety as formerly; and that the plea is now used in many cases where a century ago it was disallowed. Still, if we go to the older cases—if we refer to Crogate's case, and consider the principles there settled as still in force, and applicable to all cases of a similar kind, it requires much accuracy of judgment and a familiar knowledge of the science of special pleading, to determine in what cases it is applicable. There are a great number of decisions upon the subject, many of which are conflicting and contradictory. Judge Tyndal has said, in a recent decision in the court of King's Bench, that the cases are not to be reconciled. What is the result? We are involved in a labyrinth of special pleading in relation to a subject which requires no plea but the general issue to afford the defendant every advantage he can desire as to the production of his proof.

But it is argued on the other side, that the rules of pleading require that a single point shall be made in answer to the plea; that we cannot answer it generally, but must reply some particular fact, and thus raise an issue upon that fact alone. The only object to be accomplished by this is to have the cause decided without reference to all the facts, but only upon that single fact which, according to the argument of the other side, must be presented in answer to the plea. This course will bring up but one single point without eliciting the evidence in relation to the general merits of the case, and will thus prevent the jury from having all the light which a proper investigation of the subject would afford. If such be the object of these pleadings, it cannot find sanction in the spirit of the law or in the sense of justice entertained by the court. On the contrary, inasmuch as our custom has been not to burden our records with elaborate pleadings—inasmuch as the studies of the profession have been of an entirely different nature, and our practice from the earliest period has been in conformity with a more liberal and enlarged system of pleading, there seems to be no propriety in an attempt to revive in a case of this kind (or, in fact, in any case) this recondite and almost extinct science, for the purpose of raising single issues of this character. Under the general issue the defendant can have the benefit of every defence which can be suggested. He can have the opinion of the court upon every question of law as it may arise, and if he be not satisfied with the instructions of the judge he can have them reviewed. The tendency of all recent practice and of all recent legislation, both in this country and in England, is favorable to general issue pleading in preference to special pleading. I have here a book, which is an exposition of the forms of practice in England under the Procedure Acts of 1852-54. The system of pleading is there reduced to the simplest possible elements. A declaration can be written in three lines, and a plea in three words; and in general the business of the courts is conducted upon this system to the entire satisfaction of the profession.

[Mr. Lewis here read specimens of the legal forms, as abridged and simplified under the new system.]

This is the nature of the pleading under the recent Procedure Acts, and it has revolutionized the whole system of English pleading, although that had been already greatly simplified by the rules adopted some years ago. This is another, and a far longer step towards attaining that simplicity which now seems to be the object of the courts. While in England the courts are casting off every shred of the old vesture of the English law, there is no reason why we should clothe ourselves in their discarded garments, instead of following the example which they have set, or, at least, adhering to our

own precedents and being governed by our own system which, from the first, has favored simplicity in pleading.

And, as I observed this morning, whatever might be the ultimate decision upon these technical questions, no useful purpose can be subserved by their discussion. A motion to amend the pleadings would at any time obviate all objections. Our courts will not now allow the merits of a cause to be strangled in a mesh of special pleading, by an attempt of either party to show his skill in the practice of this abstruse and now almost obsolete science.

[Mr. Lewis having closed, he was followed on the same afternoon by Mr. G. M. Wharton, and the subsequent morning by Mr. Henry Wharton, both on the part of the defendant. When the latter gentleman had concluded, Mr. Lewis replied as follows:]

If anything could clearly illustrate the propriety of the motion that has been made, it would be the several arguments upon the other side which we have had here three months ago, yesterday and to-day, on the subject of these special pleas.

Such is the state of the law upon the particular matter now before the court, raised by the special demurrer of the opposite side, that it is very difficult for the most experienced man in practice and the most astute legal logician to understand what is to be the result; and if we must necessarily go through with this case as it has been commenced, with the pleadings in their present shape, the final determination of the judges, who have as little experience in these matters as the bar, must be very uncertain. For there is not a judge of any common pleas court of the State of Pennsylvania, nor one sitting upon the bench of the Supreme Court, who is familiar with the law relating to special pleading; and, even though familiar, not one of them could, without considerable difficulty, embarrassment, study and labor, satisfy his mind as to what ought to be the result of an argument upon the pleadings as they now stand. The only way to rid the record of the embarrassment which its present condition produces, is to strike off all the pleas and compel the party to plead the general issue, upon which every question, both of law and of fact, can be judged by the appropriate tribunal. We thus bring the record to such a condition that we all understand our rights; we are all at home, and each party can have the benefit of the facts as he is able to prove them, and of the law as it arises from those facts, by asking the instruction of the court with regard to matters of law and the decision of the jury with regard to matters of fact.

This motion to strike off the pleas is met upon the other side by several objections. One is, that the defendant by his pleas has shown matter of justification in law and is entitled to an issue of law to be determined by the judges. This position is untenable: it is not shown by the record—it is not the fact. The question of jurisdiction is undoubtedly a question of law *where the facts are ascertained*. The gentleman who has just closed his argument upon the other side asserts that the facts are ascertained and truly set down in the plea; but in that respect he is entirely mistaken. The facts are not ascertained in the plea. The plea, it is true, contains a general *allegation* that in this matter the defendant acted as judge; but whether he did act as judge is not a question of law, but is actually a question of fact. Taking the facts as stated in the first and third pleas, without anything more, they would, without doubt, constitute a case in which the defendant would be entitled to judgment. But the facts there stated *are denied*. The all-important fact that the defendant acted as judge in relation to this whole matter is precisely the question upon which we take issue by the general plea. Therefore, the fact is not ascertained; it is not truly represented; we are at issue upon that particular matter by the pleas as they now stand.

That is the issue admitted to be raised by these pleadings—whether or not the defendant did act as judge. If he had joined issue on that plea, then undoubtedly the facts pertaining to the question of jurisdiction, (which we are entitled to give in evidence,) would necessarily come up, and it would be for the court to say whether those facts constituted a defence. The defendant then would have the benefit of the law as applied to such a state of facts, in a charge to the jury that he had or had not jurisdiction.

But he refuses to take issue upon those facts, and insists that we shall offer in reply some single fact, or deny some one of the several allegations which he has made. Were we to do what he thus suggests, we would be bound to take issue either upon the allegation that there is such a record as is there referred to, or upon some other allegation contained in his plea, or allege some fact on which an issue involving the question of jurisdiction might be raised.

But, (as I observed in my argument yesterday,) he has not set out the whole proceedings, but only a part. He does not show how this question came before him. He begins by stating that he is commissioned as judge, and then goes on to say that on a certain motion in the court in a matter of contempt, the judgment of the court was had, and that Mr. Williamson was committed under that judgment. He does not set out any of the intermediate proceedings; and on those intermediate proceedings depends the question whether he had any jurisdiction of the cause. In order, therefore, that your Honor may correctly expound the law in relation to the question of jurisdiction, and in order to enable the jury to decide as to the facts on which that question depends, we must necessarily have those facts before us. How can we have them? We must

have them either by a general denial of what is stated upon the record—that he has committed the act complained of as judge—or by stating some particular fact in regard to that matter. It is contended upon the other side that we must either plead that there is no such record, or must state some particular fact which will show that Judge Kane had no jurisdiction; that we may do either, but cannot do both. The necessary conclusion from this is that we cannot have the benefit of our whole defence, but only of a defence arising upon a single allegation; that we must, at the hazard of losing our cause, select and take issue upon some particular fact, without having the benefit of all the facts which bear upon the case. The object which the defendant proposes to gain in driving us, by this system of special pleading, into a direct replication with regard to his plea is, that we shall tender issue upon some one, single, particular fact. In speaking of this matter yesterday, Mr. G. M. Wharton observed, that such was our only course; and if we are not permitted to put in the replication *de injuria*, his observation is certainly correct: we must then select and take issue upon some one particular fact stated in his plea, or must set up in reply some one particular fact within our own cognizance which he has not there stated, and on that single fact we must stand or fall. This is to narrow down the issue—to prevent the plaintiff from having the benefit of all the facts—to compel us to select and rely upon only a part of our case; thus incurring the hazard of making an erroneous selection by which we may jeopard a judgment in our favor. Now, I submit to your Honor, that a resort to special pleading having such consequences, and, therefore, presumptively for the purpose of attaining them, is not to be favored.

But what is the present state of the record? Here are five pleas; they are replied to generally; issue is taken upon two, and a special demurrer put in to the replication as to the others. What arises necessarily from this condition of the record? We must have a trial before a jury to determine the matters of fact as to the pleas which are at issue; and in addition to that, we have these questions of law which are raised upon the demurrer. When your Honor has given a judgment upon the questions raised on the demurrer, that does not settle the issue raised upon the pleas; that issue must still be tried; and when that trial has been had, what will be the result? Your Honor must give judgment upon the whole record; and then the question will arise, what is the effect of these pleas, and this judgment and the verdict of the jury altogether, as far so regards that record? Thus another embarrassing question must come up, and another argument.

Mr. Henry Wharton, (interrupting:) Certainly, it will be admitted that if judgment be given in our favor on the pleas, that it is an answer to the action.

Mr. Lewis. That depends upon what view the court shall take of the law on that subject—it is a question yet to be decided.

I have explained the state of the record. Now, is not that issue to the contrary upon the matter of fact to be tried?

We had it stated here yesterday, that in the city of Philadelphia it is very usual to try the matters of fact, first and afterwards argue the matters of law arising on the demurrer. In this district we usually determine matters of law first, and afterwards try the issues of fact. But, at all events, when the issues both of law and of fact have been determined, then comes a motion for entering judgment. That motion is for the consideration of the court; and upon the whole record the judgment of the court is to be rendered.

Now, the simplest, easiest, readiest way of determining this whole matter, and avoiding these embarrassing questions with regard to what is to be the effect of the proceeding from beginning to end, is to present a question of this kind in the accustomed way, by a plea under which the defendant can have the full advantage of his defence in the broadest latitude, and under which the plaintiff, unembarrassed in the conduct of his case, can have the full benefit of whatever evidence he may be able to adduce.

In the present state of the pleadings, other difficult points may arise, when we come to the trial of the issues of fact. These relate to the admissibility of evidence. Under the familiar issue of not guilty no embarrassing questions of evidence can arise; but under an issue in which technicality has been accustomed to be regarded more than the merits of the parties or the justice of the cause, the same cannot be said. The artificial logic of special pleading pinches everywhere and has no sympathy for fair play.

It is said by the counsel on the other side that the defendant is entitled to be regarded as having acted honestly, and that he should not be precluded from any possible means of defence. I do not wish to say any thing here in relation to the position which the defendant occupies. Whether he acted honestly in the present case is not a question upon these pleadings. When the subject shall come before the jury, it maybe a question how far he can avail himself of the presumption in favor of the honesty of his purposes. Perhaps it may appear that, though no *particular* malice existed, yet a species of malice equally the subject of animadversion and punishment did exist; and if the jury should happen to think so, they, judging from all the circumstances of the case, may render their verdict accordingly. I suppose Lord Chief

Justice Jeffreys could be charged with no personal ill feeling against Alice Lee, when she was tried before him; but he had the infamous object of serving those in power; and such an object as that may be in the eye of a modern judge as well as of one that lived two hundred years ago; and wherever that is the case, it is as much malice deserving castigation as if he were actually moved by a feeling of spite against the person who is the victim of his illegal proceeding.

It is said that the defendant here is entitled to the benefit of the judgment of the court upon the matters of law. Undoubtedly he is; but he can more readily and directly have the benefit of those matters of law by instructions upon the subject from the bench, than by pleas, and replications, and demurrers, such as now exist upon this record; because those questions of law will be presented in such a shape that all difficulty as to the true points involved in the case will be relieved.

But if the defendant is entitled to the benefit of the decision of the court on the questions of law, the plaintiff is equally entitled to the benefit of a trial before a jury with regard to the questions of fact; and it is for the purpose of bringing the questions of fact fairly before a jury, the proper tribunal for questions of fact, that we wish these pleas stricken off. We do not desire to deprive the defendant of any reasonable advantage which should be allowed him, but we wish to preserve to ourselves the reasonable advantage to which we are entitled. We want to have the questions of law decided by the court—the questions of fact determined by the jury; and the only way to attain this, is to have the general issue plea entered, by which all the questions will be thus properly presented.

It is reason enough for striking off these pleas, that they render the proceedings embarrassing to both court and counsel. Why, what is the state of the law as regards questions arising upon this very record? The ancient guides are one way, the modern guides directly another. The opinion given by Judge Kent, when on the bench of the Supreme Court of New York, is referred to as showing what he regarded as law. He considered that the record of a court was not to be disregarded, even though it was alleged to be the record of a court not having jurisdiction, and an argument in opposition to this opinion he pronounced "miserable sophistry;" whereas, a subsequent judge of the same court has declared that that very defence is available, and that the record which Judge Kent considered good evidence of all it contained, was in fact no record whatever; and Chief Justice Marshall, in one of his opinions, has said the same thing.

I mention this for the purpose of showing how differently judges have regarded this subject, and how, following one set of guides, you go one way, and following another set of guides you go another. Now, which are we to follow? That is a question, we all know, for the decision of the tribunal to which this case shall ultimately go, if these pleas remain. We do not wish a question of this uncertain character to be presented to any tribunal; and, I submit to your honor, it is fair in us to desire to avoid questions of uncertain solution—questions depending upon the construction which shall be given to the law by the tribunal which is finally to determine it, whose decision must depend altogether upon which set of guides they will follow. Whichever way a judge might incline to give judgment, he could very easily find law enough to support his decision. The judges of the Supreme Court would have no difficulty, as the record now stands, in giving judgment either way, *and well the defendant knows that*; and that may be one of the objects that he has in view in presenting this case in its present shape, for it would be very easy for a court of the last resort to find support in a multitude of authorities (for "their name is legion") for any judgment which it might be their pleasure to pronounce.

The proper course to be pursued in this case is, I think, settled, if anything can be considered as settled, by the decision of the Supreme Court in the case of McBride *vs.* Duncan, referred to yesterday. An attempt has been made to criticise that case; but when your Honor shall come to examine it, you will see that it was an action of trespass, as this is an action of trespass; that the pleas there are pleas of justification, as these are pleas of justification.

Mr. Henry Wharton.—(Interrupting.) They amount directly to a traverse of the plaintiff's allegations.

Mr. Lewis.—They are pleas in which the defendant as sheriff justifies his levying upon the property of the defendant on a *fieri facias*.

Mr. Wharton. They *pretend* to be so; they are not so in fact.

Mr. Lewis. Exactly what *they* are in shape *these* are in shape; these are pretended justifications, just as those are.

What were the replications? To the first four of these pleas the plaintiff put in a replication concluding to the country; to the fifth and sixth he replied, *nul tiel record*. Then there were special demurrers to those pleas. An endeavor was made in that case to raise a question of special pleading; why, I do not know, unless it was to compel the plaintiff to reply to a single fact, so as to have a single issue before the jury, instead of presenting all the facts of the case for their determination. What did the court do? Upon the case coming up before them, after the replication and the special demurrer to the replication and an argument by counsel, they struck off the pleas *of their own motion*.

This case is then a most emphatic reprehension of this form of pleading, by which it is attempted to get up special issues with regard to a case where a party can have the full benefit of his defence under the general issue. This case has no resemblance whatever to the case of Bower *vs.* Roth, [4 Rawle, 83.] In that case it was decided that "it is no cause of demurrer to a special plea that the facts set forth in it may be given in evidence under the general issue;" and certainly it is not, but it is a cause for striking off the pleas, in order that the facts may be given in evidence under the general issue.

I know that in the last edition of Troubat and Haley's Digest, the case of McBride *vs.* Duncan is referred to as over-ruling the decision in Bower *vs.* Roth; but on examining the cases we will find that such is not an accurate statement of the law; for one decides merely that "it is no cause of demurrer to a special plea that the facts set forth in it may be given in evidence under the general issue;" the other decides that it is cause for striking off the pleas. If we had considered it cause of special demurrer, we would have demurred to the pleas; but under the decision in Bower *vs.* Roth, we could not demur on that ground. We can, however, at any time ask to have the pleas stricken off; not because they *amount* to the general issue, (and the whole argument on the other side seems to have been directed against that idea,) but for the reason given in the case of McBride *vs.* Duncan; that everything alleged by the defendant as a matter of defence, can be given in evidence under the general issue; that he can have the same advantages under the general issue as under the pleas which he has offered.

Mr. Henry Wharton.—I find that in the case of Bower *vs.* Roth, the court put their judgment on the general ground, and distinctly affirm the right of the defendant to put on record matters of law.

Mr. Lewis.—He may put them on record; but the question of striking off, when it arises, is a different matter. If a motion had been made in that case to strike off the pleas, according to the principle of the decision in McBride *vs.* Duncan, it would have prevailed; but a special demurrer would not prevail for the same cause.

But it is said that this motion to strike off the pleadings comes too late. That cannot be. The case of McBride *vs.* Duncan settles that. In that case, not only was the general issue plea (which we ask to have pleaded here) waived, but it appears that the general issue was pleaded and afterwards withdrawn, these special pleas being substituted. Then there was a replication and a special demurrer, and an argument before the court; and after all this the pleas were stricken off.

Undoubtedly, in England, some fifty years ago, it would have been too late after issue had been joined to make a motion to strike off. It is too late there (or *was*, not long since,) to amend your pleas upon special demurrer after you have joined in demurrer. In England you never see leave given to amend after argument on demurrer; the judgment of the court is always rendered upon the pleadings as they stand; but in this country we universally allow an amendment after an argument and judgment in demurrer. The right to amend in Pennsylvania is secured by the act of Assembly, for the reason that, in our State, the science of special pleading is little cultivated or regarded, and it serves the purposes of justice to allow the party to amend his pleading at any time before the verdict is rendered. The idea, therefore, of our motion being too late is an obsolete idea—like the Bank of the United States, it is a thing that does not belong to modern times, and is not to be found in any Pennsylvania book of practice—at all events, in none written within the last twenty-five years.

I hold, therefore, that it is perfectly clear, not only that the motion to strike off in this case comes within time, according to the precedent of McBride *vs.* Duncan, but also that these pleadings are, in their character, such as come within the purview of the judgment in that case, and that to them the reasons there assigned fully apply.

Here there is no necessity even for notice of special matter. The mere entry of the general issue plea of "not guilty" puts every question at issue of which the defendant can avail himself in his defence. This I have shown not only to be the case of McBride *vs.* Duncan, but even by the cases cited in the English books. Thus in the case of Sir William Scott, a judge of the highest court of admiralty in the kingdom—

Mr. Henry Wharton, (interrupting): That case was brought against him not as a judge in admiralty, but as an assistant to one of the ecclesiastical courts—not a court of record.

Mr. Lewis.—That distinction, as far as regards the ecclesiastical and admiralty courts in England, is more nominal than real. Though *technically* not courts of record, they are *actually* so to all intents and purposes.

Mr. Henry Wharton.—Their proceedings are matters for the jury.

Mr. Lewis.—Their proceedings are shown by a certificate instead of a record.

Mr. Henry Wharton.—They are proved as matter of fact.

Mr. Lewis.—Yes, sir; the judge certifies the proceedings, and his certificate is taken as evidence. It is, to be sure, in contemplation of law not taken as importing absolute verity like a record, but in practice it is treated with equal respect, and differs from record evidence only technically.

Mr. Henry Wharton.—The regularity of those proceedings is to be determined by the jury, not by the court.

Mr. Lewis.—Technically it is to be determined by the jury, but under the instructions—the *binding* instructions—of the court. Whenever a matter of that kind comes before a jury, the court will instruct them as to the manner in which they must find; and the certificate of a judge of admiralty or a judge of any of the consistorial courts, is considered by the courts as having the essential virtues of record evidence; for it is as much binding upon the court, and they will instruct the jury that it is just as much to be regarded. So that whether the judge is a judge of admiralty or of one of the ecclesiastical courts, and whether his record is to be treated as a matter of fact or a matter of law, is a mere technicality: it has nothing of substance in it.

But it is said in regard to this fifth plea, that in it everything is alleged that constitutes a matter of defence, as well as everything of which the plaintiff can avail himself upon his side. This is not exactly the fact. There are matters outside of this fifth plea; and, although they are referred to, perhaps, in the general allegation, and are therefore to be shown under the general traverse which we have filed; yet, if that traverse is, as they say, irregular, and we are bound to stand upon this fifth plea in its present form, what is the question that then arises? It is this: Do the facts set forth in it constitute a full justification of the defendant? Now, why does the defendant desire that this plea in this particular shape shall constitute the matter to be adjudged, either in this court or the court above. The object is very easily seen—it is perfectly transparent. Judge Black, in his opinion in reference to the present case, has already decided that the presumption arising from this record is that the slaves referred to were fugitive slaves. He uses these words:

> "A part of the Jurisdiction of the District Court consists in restoring fugitive slaves; and the habeas corpus may be used in aid of it when necessary. It was awarded here upon the application of a person who complained that his slaves were detained from him. *Unless they were fugitive slaves they could not be slaves at all*, according to the petitioner's own doctrine; and if the Judge took that view of the subject, he was bound to award the writ."

It having thus been decided by Judge Black that the persons named in the application for the *habeas corpus* are to be presumed, from the state of the record, to have been slaves, it follows, that if the defendant can get us into court upon a demurrer to a plea which sets forth this state of things, he is sure of Judge Black's opinion in his favor when the case shall come before the Supreme Court, for it must be presented there in precisely the shape in which it was when Judge Black delivered his opinion. If on the other hand, we be permitted to show that the persons named in this petition were not fugitive slaves, but were indeed free persons, having been brought into Pennsylvania by the voluntary act of Mr. Wheeler, their former master, then Judge Black's opinion has no bearing whatever upon the case: we then have a new case, not presented by the record before, in which we are to have the opinion of the judge anew upon a state of the law in regard to which he is not committed.

It was therefore very desirable to the defendant that he should compel us to demur to this plea in its present shape, corresponding, as I presume it does, with the proceedings of the defendant's court as now appearing on the face of what is here assumed to be the record. We have several certified copies of that record obtained at different times. They do not happen to agree. This plea, I presume, shows what the alleged record could now show. But we do not consider that this alleged record exhibits the true state of the facts. There are many circumstances outside of it that give a color and character to the proceedings, and to every mind desirous of embracing the whole case and weighing it with a view to an honest judgment, vitally important. These can be exhibited on the general issue. Why shall they not? Does the defendant wish to keep them out of sight? Is he unwilling the country shall have a faithful history of this anomalous and remarkable proceeding from the beginning? We court the exhibition of the truth and the whole truth, and circumstances require of the defendant that he should do no less. The country expects a full and open inquiry. Justice to him and to us can be done in no other way. In order to this end the pleas must be struck off.

[The argument here closed, the Court announcing that the decision would be rendered at its session at Media, on the fourth Monday in February.]

TRANSCRIBER'S NOTES

The following change was made to the original text:

Page 20: But the the State ==> But the State

[The end of *Passmore Williamson vs. John K. Kane* ... by Delaware County Court]