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From the Phil. Pennsylvanian.

OPINION OF JUDGE KNOX

In the Matter of the Petition of Passmore Williamson for a Writ of Habeas Corpus.

JUDGE KNOX.—I do not concur in the opinion of the majority of this court, refusing the writ of *habeas corpts*, and shall state the reasons why, in my judgment, the writ should be granted.

This application was made to the court whilst holding a special session at Bedford, on the 12th of August, and upon an intimation from the counsel that in case the court had any difficulty upon the question of awarding the writ, they would like to be heard. Thursday, the 16th of August, was fixed for the hearing. On that day an argument was made, by Messrs. Meridith and Gilpin, in favor of the allowance of the writ.

I may as well remark here, that upon the presentation of the petition I was in favor of awarding the *habeas corpus*, greatly preferring that the right of the petitioner to his discharge should be determined on the return of the writ. If this course had been adopted, we should have had the views of counsel in opposition to the discharge, and moreover, if necessary, we could, after the return, have examined into the facts of the case.

I am in favor of granting this writ, first, because I believe the petitioner has the right to demand it at our hands. From the time of Magna Charta the writ of *habeas corpus* has been considered a writ of right, which every person is entitled to *ex merito justicia*.

"But the benefit of it (says Chancellor Kent) was in a great degree eluded in England prior to the statute of Charles II., as the judges only awarded it in term time, and they assumed a discretionary *power of awarding or refusing it.*" 2 Kent Commentaries, 26. And Bacon says, "Notwithstanding the writ of *habeas corpus* be a writ of right, and what the subject is entitled to, yet the provision of the law herein being in a great measure eluded by judges being only enabled to award it in term time, as also by an *imagined notion of the judges* that they had a discretionary power of granting or refusing it," the act of 31 Charles II., was made for remedy thereof.

I am aware that, both in England and in this country, since the passage of the statute of Charles II., it has been held that where it clearly appeared that the prisoner must be remanded, it was improper to grant the writ, but I know of no such construction upon our act of 18th February, 1785. The people of these United States have ever regarded the privilege of the *habeas corpus* as a most invaluable right, to secure which an interdiction against its suspension, "unless when in cases of rebellion or invasion the public safety may require it," is inserted in the organic law of the Union; and, in addition to our act of 1785, which is broader and more comprehensive than the English statute, a provision in terms like that in the Constitution of this State.

It is difficult to conceive how words could be more imperative in their character than those to be found in our statute of '85. The judges named are authorized and required, either in vacation or in term time, upon the due application of any person committed or detained for any criminal or supposed criminal matter, except for treason or felony, or confined or restrained of his or her liberty under any color or pretense whatsoever, to award and grant a *habeas corpus*, directed to the person or persons in whose custody the prisoner is detained, returnable immediately. And the refusal or neglect to grant the writ required by the act to be granted renders the judge so neglecting or refusing, liable to the penalty of three hundred pounds.

I suppose no one will doubt the power of the legislature to require this writ to be issued by the judges of the Commonwealth. And it is tolerably plain that where, in express words, a certain thing is directed to be done, to which is added a penalty for not doing it, no discretion is to be used in obeying the mandate.

The English statute confined the penalty to a neglect or refusal to grant the writ in vacation time, and from this a discretionary power to refuse it in term time was infered, but our act of assembly does not limit the penalty to a refusal in vacation, but it is sufficiently comprehensive to embrace neglect or refasal in vacation or in term time.

I have looked in vain through the numerous cases reported in this State to find that the writ was ever denied to one whose application was in due form, and whose case was in the purview of the act of Assembly.

In Republica *agt.* Arnold, 3 Yates, 263, the writ was refused because the prisoner was not restrained of his liberty, and therefore, not within the terms of the statute; and in *ex parte* Lawrence, 5th Binney, 304, it was held that the act of Assembly did not oblige the court to grant a *habeas corpus* where the case had already been heard upon the same evidence by another court. Without going into an examination of the numerous cases where the writ has been allowed, I believe it can be safely affirmed that the denial of the writ in a case like the present is without a precedent, and contrary to the uniform practice of the bench, and against the universal understanding of the profession and the people; but what is worse still, it appears to me to be in direct violation of the law itself.

It may be said that the law never requires a useless thing to be done. Grant it. But how can it be determined to be useless until the case is heard? Whether there is ground for the writ is to be determined according to law, and the determination should follow, not precede the return.

An application was made to the chief justice of this court for a writ of *habeas corpus* previous to the application now being considered. The writ was refused, and it was stated in the opinion that the counsel for the petitioner waived the right to the writ, or did not desire it to be issued if the chief justice should be of the opinion that there was not sufficient cause for the prisoner's discharge.

But this can in nowise prejudice the petitioner's right to the writ which he now demands. Even had the writ been awarded, and the case heard, and the discharge refused, it would not be within the decision in *ex parte* Lawrence, for there the hearing was before the court in term time, upon a full examination of the case upon evidence adduced, and not at chambers; but the more obvious distinction here is, that the writ has never been awarded. And the agreement of counsel that it should not be in a certain event, even if binding upon the client there, would not affect him here.

Now whilst I aver that the writ of *habeas corpus, ad sub jiciendum*, is a writ of right, I do not wish to be understood that it should issue as a matter of course. Undoubtedly the petition must be in due form, and it must show upon its face that the petitioner is entitled to relief. It may be refused if, upon the application itself, it appears that, if admitted to be true, the applicant is not entitled to relief; but where, as in the case before us, the petition alleges an illegal restraint of the prisoner's liberty, under an order from a judge beyond his jurisdiction, we are bound in the first place to take the allegation as true; and so taking it, a probable cause is made out, and there is no longer a discretionary power to refuse the writ. Whether the allegation or want of jurisdiction is true or is not, is determinable only upon the return of the writ.

If one has averred in his petition what, if true, would afford him relief, it is his constitutional right to be present when the truth of his allegations is inquired into; and it is also his undoubted right, under our *habeas corpus* act, to establish his allegations by evidence, to be introduced and heard upon the return of the writ. To deny him the writ, is virtually to condemn him unheard; and I can see nothing in the case which requires at our hands an extraordinary resistance against the prayer of the petitioner to be permitted to show that his imprisonment is illegal, that he is deprived of his liberty without due course of law, I am in favor of treating him as like cases have uniformly been treated in this commonwealth, by awarding the writ of *habeas corpus*, and removing the inquiry as to his right to be discharged until the return of the writ; but as a majority of my brethren have come to a different conclusion, we must inquire next into the right of the applicant to be discharged as the case is now presented.

I suppose it to be undoubted law that, in a case where a court acting beyond its jurisdiction has committed a person to prison, the prisoner, under our *habeas corpus* act, is entitled to his discharge, and that it makes no difference whether the court thus transcending its jurisdiction assumes to act as a court of the Union or of the Commonwealth. If a principle apparently so just and clear, needs for its support adjudicated cases, reference can be had to Wise *agt.* Withers, 3d Cranch, 331; 1st Peter's Condensed Reports, 552; Rose *agt.* Hinely, 4th Cranch, 241, 268; Den *agt.* Harden, 1st Paine Reports, 55, 58 and 59; 3d Cranch, 448; Bollman *agt.* Swartout, 4th Cranch, 75; Kearney's case, 7th Wheaton, 38, Kemp *agt.* Kennedy, 1st Peter's C. C. R., 36; Wicks *agt.* Caulk, 5 Har. and J., 42; Griffith *agt.* Frazier, 8 Cranch, 9; Com. *agt.* Smith, Sup. Ct. Penn., 1st Wharton Digest, 321; Com. *ex relatione* Lockington *agt.* the Jailer, &c., Sup. Ct. manuscript, 1814, Wharton's Digest, vol. 1st, 321; Albec *agt* Ward, 8 Mass., 86.

Some of these cases decide that the act of a court without jurisdiction, is void; some, that the proper remedy for an imprisonment by a court, without jurisdiction is the writ of *habeas corpus;* and others, that it may issue from a State court to discharge a prisoner committed under process from a federal court, if it clearly appears that the federal court had no jurisdiction of the case; altogether, they establish the point that the petitioner is entitled to relief, if he is restrained of his liberty by a court acting beyond its jurisdiction.

Neither do I conceive it to be correct to say that the applicant cannot now question the jurisdiction of the Judge of the District Court, because he did not challenge it upon the hearing. There are many rights and privileges which a party to a judicial controversy may lose if not claimed in due time, but not so the question of jurisdiction; this cannot be given by express consent, much less will acquiescence for a time waive an objection to it. (See U. S. Digest, vol. 1st, p. 639, Pl. 62, and cases there cited.) It would be a harsh rule to apply to one who is in prison, "without bail or mainprize," that his omission to speak upon the first opportunity forever closed his mouth from denying the power of the court to deprive him of his liberty. I deny that the law is a trap for the feet of the unwary.—Where personal liberty is concerned, it is a shield for the protection of the citizen, and it will answer his call even if made after the prison door has closed upon him.

If, then, the want of jurisdiction is fatal, and the inquiry as to its existence is still, open, the only question that remains to be considered in this: Had the Judge of the District Court for the Eastern District of the United States power to issue the writ of *habeas corpus*, directed to Passmore Williamson, upon the petition of John H. Wheeler. The power of that court to commit for a contempt is not denied, and I understand it to be conceded as a general rule by the petitioner's counsel, that one court will not reexamine a commitment for contempt by another court of competent jurisdiction; but if the court has no authority to issue the writ, the defendant was not bound to answer it, and his neglect or refusal to do so would not authorize his punishment for contempt.

The first position which I shall take in considering the question of jurisdiction is, that the courts of the United States have no power to award the writ of *habeas corpus*, except such as is given to them by the acts of Congress.

"Courts which originated in the common law possess a jurisdiction which must be regulated by the common law; but the courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend their jurisdiction.—The power to award the writ by any of the courts of the United States, must be given by written law." *Ex-parte*, Swartwout, 4 Branch, 75. *Ex parte*, Barre, 2 Howard, 65. The power of the courts of the United States to issue writs of *habeas corpus* is derived either from the 14th section of the Act of March 3d, 1833.

The section from the act of 1789 provides, that "all the courts of the U. S. may issue writs of *seire 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 either of the justices of the Supreme Court, as well as the Judges of the District Courts, may grant writs of *habeas corpus*, for the purpose of inquiring into the cause of commitment; but writs of *habeas corpus* shall in no case extend to prisoners in jail, unless 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."

The 7th section of the act of 2d March, 1833, authorizes "either of the Justices of the Supreme Court, or of any District Court of the United States in addition to the authority already conferred by law, to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by authority of law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any Judge or Court thereof, anything in any act of Congress to the contrary notwithstanding."

Now, unless the writ of *habeas corpus* issued by the Judge of the District Court was necessary for the exercise of the jurisdiction of the said court, or was to inquire into a commitment under, or by color of the authority of the United States, or to relieve some one imprisoned for an act done, or omitted to be done, in pursuance of a law of the United States, the District Court had no power to issue it, and a commitment for contempt in refusing to answer it is an illegal imprisonment, which, under our *habeas corpus* act, we are imperatively required to set aside.

It cannot be pretended that the writ was either asked for or granted to inquire into any commitment made under or by color of the authority of the United States, or to relieve from imprisonment for an act done or omitted to be done in pursuance of a law of the United States, and, therefore, we may to confine our inquiry solely to the question whether it was necessary for the exercise of any jurisdiction given to the District Court of the United States for the Eastern District of Pennsylvania.

This brings us to the question of the jurisdiction of the courts of the United States, and more particularly that of the District Courts. And here, without desiring or intending to discuss at large the nature and powers of the federal government, it is proper to repeat what has been so often said, and what has never been denied, that it is a government of enumerated powers delegated to it by the several states, or the people thereof, without capacity to enlarge or extend the powers so delegated and enumerated, and that its courts of justice are courts of limited jurisdiction, deriving their authority from the constitution of the United States, and the acts of Congress under the constitution. Let us see what judicial power was given by the people to the federal government, for that alone can be rightly exercised by its courts.

"The judicial power" (says the second section of the third article) "shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, to controversies between two or more states, between a state and a citizen of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a or state the citizens thereof and foreign states, citizens or subjects."

The amendments subsequently made to this article have no bearing upon the question under consideration, nor is it necessary to examine the various acts of Congress conferring jurisdiction upon the Courts of the United States, for an act of Congress can be found extending the jurisdiction beyond what is given by the Constitution, so far as relates to the question we are now considering. And if such an act should be passed it would be in direct conflict with the 10th amended article of the constitution, which declares that "the powers are not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the state respectively or to the people."

If this case can be brought within the judicial power of the courts of the United States, it must be either:

1st. Because it arises under the constitution or the laws of the United States.

Or, 2d. Because it it a controversy between citizens of different states, for it is very plain that there is no other clause in the constitution which, by the most latitudinarian construction, could be made to include it.

Did it arise under the constitution or the laws of the United States? In order to give a satisfactory answer to this question, it is necessary to see what the case was.

If we confine ourselves strictly to the record from the District Court, we learn from it that on the 18th day of July last, John H. Wheeler presented his petition to the Hon. John K. Kane, Judge of the District Court for the Eastern District of Pennsylvania, setting forth that he was the owner of three persons held to service or labor by the laws of the state of Virginia, said persons being respectively named Jane, aged about thirty-five years; Daniel, aged about twelve years, and Isaiah, aged about seven years; persons of color; and that they were detained from his possession by Passmore Williamson, but not for any criminal or supposed criminal matter.

In accordance with the prayer of the petition, a writ of *habeas corpus* was awarded, commanding Passmore Williamson to bring the said bodies of the said Jane, Daniel and Isaiah, before the Judge of the District Court forthwith. To this writ Passmore Williamson made a return, verified by his affirmation, that the said Jane, Daniel and Isaiah, nor either of them, were at the time of the issuing of the writ, nor at the time of the return, nor at any other time in the custody, power or possession of, nor confined nor restrained their liberty by him; and that, therefore, he could not produce the bodies as he was commanded.

This return was made on the 20th day of July, A. D. 1855. "Whereupon, afterwards, to wit: on the 27th day of July A. D. 1855. (says the record.) the counsel for the several parties having been heard, and the said return having been duly considered it is ordered and adjudged by the court, that the said Passmore Williamson be committed to the custody of the marshal, without bail or mainprize, as for a contempt in refusing to make return to the writ of *habeas corpus*, heretofore issued against him, at the instance of Mr. John H. Wheeler."

Such is the record. Now, whilst I am willing to admit that the want of jurisdiction should be made clear, I deny that in a case under our *habeas corpus* act the party averring want of jurisdiction cannot go behind the record to establish its non-existence. Jurisdiction, or the absence thereof, is a mixed question of law and fact. It is the province of fact to ascertain what the case is, and of law to determine whether the jurisdiction attaches to the case so ascertained. And says the 3d section of our act of '85, "and that the said judge or justice may, according to the intent and meaning of this act, be enabled, by investigating the circumstances of the case, to determine whether, according to law, the said prisoner ought to be bailed, demanded or discharged, the return may, before or after it is filed, by leave of the said judge or justice, be amended, and also suggestions made against it, so that thereby material facts may be ascertained."

This provision applies to cases of commitment or detainer of any criminal or supposed criminal matter, but the 14th section, which applies to cases of restraint of liberty "under any color or pretence whatsoever," provides that "the court, judge or justice before whom the party so confined or restrained shall be brought, shall, after the return made, proceed in the same manner as is hereinbefore prescribed, to examine into the fact relating to the case, and into the cause of such confinement or restraint, and thereupon either remand or discharge the party so brought, as to justice shall appertain."

The right and duty of the Supreme Court of a state to protect a citizen thereof from imprisonment by a Judge of a United States Court having no jurisdiction over the cause of complaint, is so manifest, so essentially necessary, under our dual system of government, that I cannot believe that this right will ever be abandoned or the duty avoided; but, if we concede what appears to be the law of the latter cases in the federal courts, that the jurisdiction need not appear affirmatively, and add to it that the want of jurisdiction shall not be proved by evidence outside of the record, we do virtually deny to the people of the state the right to question the validity of an order by a federal judge consigning them to the walls of a prison "without bail or mainprize."

What a mockery to say to one restrained of his liberty, "True, if the Judge or Court under whose order you are in prison, acted without jurisdiction, you are entitled to be discharged, but the burthen is upon you to show that there was no jurisdiction, and in showing this we will not permit you to go beyond the record made up by the party against whom you complain."

As the petitioner would be legally entitled, upon the return of the writ, to establish the truth of the facts set forth in his petition, so far as they bear upon the question of jurisdiction, we are bound, before the return, to assume that the facts are true as stated, and taking them, the case is this:

John H. Wheeler voluntarily brought into the state of Pennsylvania three colored persons, held by him, in the state of Virginia, as slaves, with the intention of passing through this state. Whilst on board of a steamboat, near Walnut street wharf, in the city of Philadelphia, the petitioner, Passmore Williamson, informed the mother that she was free by the laws of Pennsylvania, who, in the language of the petition, "expressed her desire to have her freedom, and finally, with her children, left the boat of her own free will and accord, and without coercion or compulsion of any kind, and having seen her in possession of her liberty with her children, your petitioner (says the petition) returned to his place of business, and has never since seen the said Jane, Daniel and Isaiah, or either of them, nor does he know where they are nor has he had any connection of any kind with the subject."

One owning slaves in a slave state voluntarily brings them into a free state with the intention of passing through the free state. Whilst there, upon being told that they are free, the slaves leave their masters. Can a Judge of the District Court of the United States compel their restoration through the medium of a writ of *habeas corpus* directed to the person by whom they were informed of their freedom? Or, in other words, is it a case arising under the constitution and laws of the United States?

What article or section of the Constitution has any bearing upon the right of a master to pass through a free state with his slave or slaves? Or when has Congress ever attempted to legislate on *this* question? I most unhesitatingly aver that neither in the Constitution of the United States nor in the acts of Congress can there be found a sentence which has any effect upon this question whatever. It is a question to be decided by the law of the state where the person is for the time being, and that law must be determined by the judges of the state, who have sworn to support the Constitution of the state as well as that of the United States—an oath which is never taken by a federal judge.

Upon this question of jurisdiction it is wholly immeterial whether by the law of Pennsylvania a slaveholder has or has not the right of passing through our state with his slaves. If he has the right, it is not in virtue of the constitution or laws of the United States, but by law of the state, and if no such right exists, it is because the state law has forbidden it, or has failed to recognize it. It is for the state alone to legislate upon this subject, and there is no power on earth to call her to an account for her acts of omission or commission in this behalf.

If this case could, by any reasonable construction, be brought within the terms of the third clause of the second section of Article Four of the Constitution of the United States jurisdiction might be claimed for the Federal Courts, as then it would be a case arising under the Constitution of the United States although I believe the writ of *habeas corpus* is no part of machinery designed by Congress for the rendition of fugitives from labor.

"No person (says the clause abovementioned) held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

By refference to the debates in the Convention, it will be seen that this clause was inserted at the request of delegates from southern states, and upon the declaration that in the absence of a constitutional provision, the right of reclamation would not exist, unless given by state authority. If it had been intended to cover the right of transit, words would have been used evidencing such intention. Happily there is no contrariety in the construction which has been placed upon this clause in the Constitution. No Judge has ever so manifestly disregarded its plain and unequivocal language as to hold that it applies to a slave voluntarily brought into a state by his master. Upon the contrary, there is abundant authority that such a case is not within either the letter or the spirit of the coustitutional provision for rendition of fugitives from labor. Said Mr. Justice Washington in *ex parte* Simmons, 6 W. C. R. Reports, 396:

☞ See 4th, page.