TEXT OF OPINION IN GIBBONS CASE

[Concluded from Page 3.]

Johns. 423; 1 Hill 170; 5 Iredell, 199; 1 Wedell 153; 2 Sandf. 724; 1 Carter, 160; 1 Blackf. 166; 25 Miss. 836; 2 Wheeler's Criminal Cases, p. 1; 14 Ad. & Ellis, 558. It may be also noticed that this proceeding is not entitled in the contested election case, but takes a separate title and number on the criminal side of the quarter sessions.

COMMON LAW POWER.

The broad proposition that this court "has no common-law power," is indeed novel, and in striking contract with the practice of the court since its organization. This contention overlooks the nature and extent of the common law, and how broadly it permeates all American jurisprudence. The common law of England is the basis of our jurisprudence, and its great principles are the foundation of the federal and state constitutions and state legislation. Each state has its common law, derived mainly from the common source, and without this its jurisprudence would be little more than a constitutional and statutory skeleton, largely deficient in material substance and life. Nearly all our legal principles, rules and forms, are of common-law origin. Common-law principles underlie all forms of action, and regulate all forms of procedure. Undeniably, common-law powers are indispensable to an adequate exercise of the ordained functions of this court. The power of a court is exercised through its decrees and their enforcement, and when its decrees are founded on the common law their enforcement proceeds in the course of the common law. The principles, rules and forms of the common law enter very largely into the adjudications of this court, both directly and by implication.

It is further contended that although this court may issue the writ of habeas corpus, by virtue of the act of June 24, 1895, one of its judges cannot do so in vacation. The question arose soon after the organization of this court, in Duff vs. McDonough, 2 Pa. Superiort Ct. 373. In that case our late Brother Wickham issued the writ in vacation and make it returnable to the next term. While the question received consideration, no official announcement was necessary in view of the disposition made of the case on other controlling grounds. Subsequently, in Com. ex rel. Robert E. Tryford vs. Harry A. Lowry, sheriff of Allegheny county et al., a case still pending in this court, a writ of habeas corpus was issued, also by our late Brother Wickham, in vacation, and upon the question of his authority to do this he wrote an opinion in which he said: "The inherent power of the Superior Court, or of any judge thereof in vacation, to grant a common-law writ of habeas corpus, whenever necessary, in aid to a pending appeal, is, and should be, beyond controversy, even if the right were not expressly conferred, as it is, by the Act of June 24, 1895, P. L. 212, erecting the court. It is an implied common-law power, not created by the habeas corpus act of 1785, but existing both before and since the passage of that act, in every court of record, invested with extensive appellate or supervisory jurisdiction, and, in a proper case, it is always grantable, whether applied for in term time or in vacation. It may be moulded to suit the exegencies of the particular case: Goslin v. Place, 32 Pa. 520; Williamson v. Lewis, 39 pa. 9; Duff v. McDonough, 2 Pa. Superior Ct. 373." This action of a single judge was afterward sustained by the court in banc. In resting the authority of a judge to issue the writ on the implied common-law power, Judge Wickham repeated an established principle and followed the precedents given by our Supreme Court and the courts of England.

ON PRINCIPAL AND PRECEDENT.

The judges of the King's Bench and common pleas of England found a similar lack of express authority in the British statute, but in order to carry out its manifest purpose and spirit they extended the powers, impliedly given to the courts, to a single member of those tribunals when the courts were not in session. On this point the Lord Chancellor, in Crowley's case, 2 Swanston's Chancery Reports, 42, said: "The statute gives no jurisdiction to the judges of the common pleas to issue a writ of habeas corpus, except in cases there mentioned; but then, by a construction in favor of the liberty of the subject, they have granted the writ in other cases, and have inferred from the statute giving to them power in specified instances, that they possess a general power to issue the writ. In this case Lord Eldon overruled the decision in Jenks' case, and vindicated, on principal and precedent, the power of a single judge to issue the writ and precedent, the power of a single judge to issue the writ in vacation, notwithstanding the want of express statutory authority.

The statutory writ of habeas corpus in Pennsylvania is of limited application. The cases to which it extends are of two classes only: public restraints, on bailable criminal charges, and private restraints on any pretense whatsoever. But the efficacy of the common law writ of habeas corpus reaches much farther, and takes many forms, according to the character of the case in which it is applied. The authority, given to this court, in the provision that "it may issue writs of habeas corpus," without limitation or restriction, from its nature embraces all writs of habeas corpus known to the law, whether common law or statutory. Without extending the discussion by reviewing the history and distinctive character of the several common law writs of habeas corpus, it is sufficient to say that the writ in the present case is a common law writ, and was not issued in pursuance of the habeas corpus act, but by virtue of the inherent common law power vested in the Superior court. "It is a form of remedy which can be administered only by a court in banc, though a single judge may allow the writ, on sufficient cause:" Lowrie, C. J., in Gosline vs. Place, 32 Pa. 523. "It has a much broader scope than that form of it which is secured by the habeas corpus act; for it may issue in all sorts of cases where it is shown to the court that there is probable cause for believing that a person is restrained of his liberty unlawfully or against the due course of law. The statutory remedy falls far short of this and we fall into inevitable confusion when we go into the common law province of the writ for the principles that are to rule within its statutory province:" Williamson vs. Lewis, 39 Pa. 9. It was also held by the Supreme court in that case that the writ of habeas corpus authorized by the act of 1785 could not be employed in cases of conviction for contempt of court. In those cases the common law writ is the proper remedy.

OUT OF NECESSITY.

It is an established principle of construction that "the power to render judgment involves in it the power to take the preliminary steps which lead to that result:" Commonwealth vs. Simpson, 2 Grant, 442. It is to be presumed, therefore, that in giving this court exclusive appellate jurisdiction of cases involving the liberty of the citizen, and to render final judgment therein, it was, ex necessitate rei, intended to confer the power necessary to give adequate effect to such appeals. In granting this power the legislature is to be understood as having in view the existing law, both common and statute: and in employing terms broad enough to embrace all lawful writs of habeas corpus, the legislature is presumed to have meant all such writs, under the common law and the statute of 1785. For a like construction of a generic term see Commonwealth vs. Bell, 145 Pa. 391. The validity of a sentence to imprisonment depends on the jurisdiction of the tribunal, and the regularity of the proceedings in which it is pronounced, and relief can be given only by a court having power to review and determine the question of jurisdiction or of regularity. This power, in the case in hand, is by the act of June 24, 1895, vested solely in this court. Its exercise is made effectual, by way of remedy, through the writ of habeas corpus, as ancillary to the writ of certiorari.

It has long been settled that certiorari and habeas corpus may be severally used as ancillary to each other. "If a habeas corpus at common law issues, and the return to it shows that the prisoner is held by virtue of proceedings in a court, or before a magistrate, over which the court issuing the habeas corpus has a supervisory authority, the said court may issue a certiorari to bring up the record; and may thereupon hear and decide the case, or review and correct the proceedings, in order to give efficacy to the writ of habeas corpus. If a certiorari be issued to bring up a case into a higher court for hearing or review, the court may also issue a habeas corpus to bring up the defendant, and may, in a proper case, admit him to bail to appear at the hearing and abide the vent; and the form of the recognizance must be adapted to the exigencies of the case. Old forms will not entirely suit new classes of cases, but must be moulded to suit them:" Gosline v. Place, 32 Pa. 524. If the writ may not be issued by a judge of this court, preliminary to a review of the proceeding by the court, the petitioner must suffer imprisonment, perhaps for months, until the meeting of the court; a result inconsistent with the right to a speedy determination of the legality of his imprisonment, which it is the purpose both of the appeal and the writ of habeas corpus to secure. The allowance of the writ in vacation is in conformity with the practice in the Supreme Court, as illustrated in Gosline v. Place, and Com. v. Bell, supra. Section 8 of the act of June 24, 1895, requires this court to "be governed by the rules which do now or may hereafter govern the practice in the Supreme Court." By section 12 of the act of May 19, 1897, an appeal from a sentence is to operate as a supersedeas when so ordered by the court below, or the appellate court or any judge thereof; and, the appeal having been duly taken in the present case, the allowance to the writ of habeas corpus may be regarded as, in effect, an order of supersedeas. The allowance of the writ does not imply error in the proceeding. It is a recognition, resting on the appellate court as a judicial duty, of the appellant's right to a review of the proceedings, and to a determination of the questions which his assignment of errors may raise, and meantime to be relieved, on such conditions as may properly be imposed, from the imprisonment which he avers to be unlawful. He is not to be deprived of this right by a construction of the judicial power based on technical narrowness rather than substantial justice. We are unanimously of opinion that the writ of habeas corpus was properly issued in this case, and that the proceeding is regularly before us for review.

SCOPE WELL DEFINED.

The scope of our power of review, in this class of cases, is defined by judicial decision. In the present case it is only necessary to indicate the limitations thus marked out. Adherence to this well-defined line of inquiry shows that many of the questions discussed on the argument and pressed for consideration are beyond the legitimate range of our investigation. We are to ascertain whether the court below had jurisdiction in the premises, and exercised it according to law; whether the offense of which the relator stands convicted was one which the court had power to punish summarily, and whether the sentence was lawfully imposed. These questions are to be determined by the record brought up with the certiorari. No exception is taken to the form or sufficiency of the commitment or the sheriff's return to the writ of habeas corpus. Any technical defect therein would seem to be supplied by the petition for the writ of habeas corpus, and we will therefore treat the commitment and the sheriff's return as sufficient, in view of the whole record.

The power to punish contempts of court is so well settled, by repeated adjudication, that it is unnecessary to rehearse the reasons given in support of this authority, or to cite the cases in which it is established. The practical question here is: Does the offense for which the relator was convicted constitute a contempt of court within the meaning of the law, for which summary punishment may be imposed? The argument that the disqualification under article 8, section 8, of the constitution, is not a disqualification in the legal sense, but a penalty, and applies only to the proof required of the voter before his ballot can be accepted by the election board, and cannot be inquired into thereafter, is radically unsound and conflicts with other sections of equal force relating to elections. Under the construction contended for, this provision of the constitution, manifestly designed to prevent fraud at elections, would become a shield, and a ratification of fraud because of its successful perpetration. Such a construction is not to be tolerated.

That the refusal by a witness to answer questions material to the issue of the case in which he is called, is a contempt of court, and punishable as such, is not and cannot be denied, as a general proposition. But it is set up in defense that the questions here propounded are excepted from the general rule, on the ground that the answers would tend to self-crimination: that the constitution provides that no person shall be compelled to give evidence against himself, and, as the relator has formally claimed the benefit of this clause, he cannot be compelled to give evidence against himself, and, as the relator has formally claimed the benefit of this clause, he cannot be compelled to answer, or be punished for his refusal. The answer to this objection is found in the constitution itself. By articles 8, section 10, it is provided that, "In trials of contested elections, and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony, upon the ground that it may criminate himself, or subject him to public infamy; but such testimony shall not afterwards be used against him, in any judicial proceeding, except for perjury i ngiving such testimony." To this it is replied that this provision is itself unconstitutional, because it is in conflict with the bill of rights which "is excepted out of the general powers of government, and shall forever remain inviolate." This question involves largely the sufficiency of the cause of conviction, and it may be doubtful whether we are required to rule upon it. But if the relator is being prosecuted for a matter which is not an indictable offense under the law of Pennsylvania, it would be our right as well as plain duty to examine the subject, and to discharge the relator if this be true: Com v. Kotner, 92 Pa, 376.

CONFLICT OF TERMS.

The question calls for the interpretation of the constitution. In this alleged conflict of the terms of that instrument. "The constitution is entitled, like other instruments, to a construction, as nearly as may be, in accordance with the intent of its makers:" Moers v. Reading, 21 Pa. 188. "A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them:" Com v. Clarke, 7 W. & S. 127. It should be construed in the light which the whole instrument throws upon it. The elective principle is, essentially, a vital force in our form of government and in the organic law. As the state develops and expands, the principle of the elective system grows in public importance and methods of execution. The progressive measures adopted from time to time, by constitution and statute, for the perpetuation and preservation of this principle, illustrate its paramount importance in government affairs. We may safely conclude, therefore, that the elective principle is one of "the great principles of the government" which it is the aim of the constitution to preserve, and all laws, constitutional and statute, relating to elections, should be construed to that end. The constiutional provision in question must be interpreted in the light which the whole instrument throws upon it, and the purpose and intent of the people in its adoption. Its manifest purpose was to protect the purity of the ballot box, and to this end it was deemed necessary to adopt constitutional measures, regulating the right of franchise. "A fraud upon the ballot box is a crime against the nation:" 83 Pa. 167. It is most necessary, therefore, to enforce all existing measures for the repression of this offense.

It is quite clear that those constitutional measures may be enforced without violating the bill of rights, which is to be construed in harmony with the other parts of the constitution and thus full effect given to every section of that instrument. The essential purpose of the clause of the bill of rights referred to, was to prevent the compulsory self-inculpation of those charged with crimes against the law. Any subordinate provision of law violative of that purpose must be declared null and void. Without conceding that the tenth section of article eight of the constitution is subordinate to the bill of rights, it is certain that this section may be sustained without conflicting with the purpose and effect of that clause. By section 9 of the bill of rights, "In criminal prosecutions, the accused cannot be compelled to give evidence against himself." But in cases within article 8, section 10, the witness who testifies to his own turpitude does not give evidence against himself, since the testimony thus given cannot be used as evidence against him in any judicial proceeding, except for perjury in giving it. Thus the very purpose of the bill of rights is preserved and absolutely secured in spirit and effect. To hold otherwise, and annu the tenth section of article eight, would deprive the people of a very important constitutional provision. It would open the doors to corrupt and fraudulent voting, against the plain intent of the law. The case of Commonwealth vs. Bell, supra, relied upon by the appellee, throws no light on this question. We think, however, that our conclusion is correct in principle and on governmental policy.

THE FIFTH AMENDMENT.

There is nothing in the federal constitution, as construed by the courts, in conflict with this conclusion. The fifth amendment, relied upon in the argument, is, like the other amendments, a restriction upon federal power, and does not extend to the states: Livingston vs. Moore, 7 Pet. 551. Subsequent cases are to the same effect. The case of Counselman vs. Hitchcock, 142 U. S. 547, arose under a federal statute—an act to regulate commerce, in a federal court. It cannot apply here, and is entirely consistent with the principle of the preceding cases.

The remaining questions call for but brief notice. It is contended that the offense was not committed in open court but before the examiners, who had full power to commit for refusal to answer, under the act of Feb. 26, 1831, and, therefore, the sentence of the court is illegal. We cannot adopt this view. The answer of the relator to the rule issued by the court was presented and read in open court by his counsel and in his presence. In this answer the relator refused to obey the order of the court by answering the questions as directed. This was a refusal in open court and, without more, was sufficient to warrant the proceeding. That he also refused to answer the same questions before the examiners is immaterial, in the view we take of the proceeding. It is, therefore, unnecessary to enter into a discussion as to whether a refusal before the examiners was in legal effect "in open court" within the meaning of the act of June 16, 1836, or whether the court could punish in this summary manner for a refusal to answer before the examiners. For like reason the argument that a fine only could be imposed for an offense not committed in the presence of the court does not apply, and requires no discussion.

The argument that many of the questions which the relator refused to answer involved no offense against the election laws and were not material to the issue of the contest is rather against the relator than in justification of his refusal to answer. An examination of the questions sent here shows very clearly that this is true of most of them. It is also true that those questions did not necessarily involve self-criminating answers. The situation in this respect is like that in the case of Com. v. Bell, supra, where the contumacious witness "refused to answer any question that could have had even a remote bearing on the material facts. Certainly, f'y responsive answers to many of the questions that were put o him * * * could not have had the slightest tendency to criminate him." On this point the Supreme court further said: "The relator was not he final arbiter of the question whether his answers to the interrogations propounded would tend to criminate him. It was the plain duty of the trial judge to decide that question." So in the present case, many of the questions do not indicate, even remotely, how answrs could tend to criminate the relator, and, under the decision referred to, the refusal to answer them was, prima facie, a contempt of court, without reference to the constitutional privilege. Whether the question calls for an answer which would tend to criminate the witness was for the judge to decide in the first instance; and his negative decision must prevail until overcome by satisfactory proof to the contrary. In addition to the protection afforded by the 10th section of article 8 of the constitution, there is in the present case a refusal to answer questions which did not tend to criminate and were, therefore, beyond the pale of th privilege under the bill of rights.

Th relator was duly sentenced by the court, which is an appropriate method for a court of criminal jurisdiction to declare its judgment and the punitive consequences.

What we have said sufficiently deals with al lthe material questions presented by the record of this case.

It follows from what has been said that the relator was not unjustly restrained of his liberty, and, having been released on bail pending the hearing and consideration of this case, without having complied with the sentence of the court below, eh must be remanded unto the custody of the respondent, to the end that said sentence be complied with. It is accordingly

Ordered that the relator do forthwith surrender himself into the custody of the sheriff of Lackawanna county, to the end that he sentence of the court of quarter sessions of said county, pronounced against him on December 20, 1898, for contempt of said court, be fully executed, and it is further ordered that he pay the costs of this proceeding.