A.C. 41464	:	APPELLATE COURT
In the Matter of a Petition for a Common Law Writ of Habeas Corpus,	:	
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Plaintiff,	:	STATE OF CONNECTICUT
v.	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Defendants.	:	AUGUST 30, 2019

MOTION FOR RECONSIDERATION *EN BANC*

Pursuant to Connecticut Practice Book § 71-5, Plaintiff, the Nonhuman Rights Project, Inc. ("NhRP"), moves this Court to reconsider *en banc* its decision dated August 20, 2019 ("Decision"). This motion concerns questions of law. No facts are in dispute. *En banc* reconsideration is necessary as the Decision directly conflicts with controlling Connecticut Supreme Court precedent, including *Jackson v. Bulloch*, 12 Conn. 38 (Supreme Ct. of Errors 1837) and *Connecticut Assn of Boards of Educ Inc v. Shedd*, 197 Conn. 554 (1985), and Appellate Court precedent, *Johnson v. Commissioner of Correction,* 168 Conn. App. 294 (2016).

I. Brief History

Habeas corpus has a long and honored tradition as a vehicle by which unrelated third parties may bring actions to vindicate the fundamental right to bodily liberty of those

considered to lack rights.[1] Rooted in the fundamental Connecticut common law values of liberty, equality, and autonomy, this case continues that tradition.

On November 13, 2017, the NhRP filed a Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") seeking a good faith extension or modification of the common law of habeas corpus on behalf of Beulah, Minnie, and Karen, three elephants illegally detained by the defendants ("Commerford"). The NhRP seeks only the recognition of the elephants' common law right to bodily liberty protected by habeas corpus and their immediate release from their illegal detention.

On December 26, 2017, the trial court declined to issue the writ on the alternate grounds the NhRP lacked standing and the Petition was "wholly frivolous on its face in legal terms" under Practice Book § 23-24(a)(1) and (2). This Court affirmed the trial court's determination that the NhRP lacked standing, but on an entirely different ground.

II. Specific Facts

Multiple unrebutted affidavits from some of the world's most prominent elephant cognition experts, summarized in the Brief of Plaintiff-Appellant ("Brief") at 5-6, demonstrate that elephants are extraordinarily cognitively complex, self-aware, and autonomous beings. Beulah is a female Asian elephant in her mid-forties who was captured in 1967 in Myanmar. Commerford has owned her since 1973. Commerford has owned Minnie, a female Asian elephant, since at least 1989. Karen, a female African elephant in her mid-thirties, was captured around 1983. Commerford has owned her since 1984.

[1] 11 *Halsbury's Laws of England* 783 (4th ed. 1976).

III. Legal Grounds

This Court concluded the NhRP lacked standing because "[Beulah, Minnie, and Karen], not being persons, lacked standing in the first instance," Decision at 41, as the elephants are not persons because they are "incapable of bearing duties and social responsibilities required by [the] social compact." *Id.* at 46.

The Decision directly conflicts with controlling Connecticut Supreme Court precedent and Appellate Court precedent in four ways.

First, under *Jackson v. Bulloch*, the NhRP's standing did not depend upon the elephants having standing. Second, under *Connecticut Assn of Boards of Educ Inc v. Shedd* and other controlling authorities, this Court improperly resolved the question of standing by determining the merits of the case. Third, under *Johnson v. Commissioner of Correction,* the NhRP was prejudiced by its lack of opportunity to adequately address the merits of the case both in the lower court and this Court. Fourth, Beulah, Minnie, and Karen are already legal persons whose status as beneficiaries of an *inter vivos* trust created pursuant to C.G.S.A. § 45a-489a does not turn on their capacity to bear duties and social responsibilities; neither should their right to bodily liberty so turn under *Jackson v. Bulloch.*

1. Under *Jackson v. Bulloch*, the NhRP's next friend standing did not require Beulah, Minnie, and Karen to have standing.

This Court erroneously concluded that the NhRP lacked standing because "the real party in interest for whom the 'next friend' seeks to advocate for, *must* have standing in the first instance." (Emphasis added) Decision at 42. This statement directly conflicts with *Jackson v. Bulloch,* in which James Mars, a former slave and stranger to Nancy Jackson

who as a slave lacked standing to bring her own action, had third-party standing to seek a common law habeas corpus writ on Jackson's behalf.[2]

As a slave, Jackson lacked standing to bring her case. She was not part of the "social compact" noted in the 1st section of the Connecticut Bill of Rights and was not even part of the "people" secured from unreasonable searches or seizures by the 8th section of the Connecticut Bill of Rights. 12 Conn. at 42-43. *Jackson*, which remains controlling, has never been overruled,[3] has been cited by the Connecticut Supreme Court four times since just 1990,[4] yet was inexplicably ignored by this Court. *See* Brief at 7.

Jackson also favorably cited the famous habeas corpus cases of *Somerset v. Stewart*, 1 Loftt 1 (K.B. 1772) and *Commonwealth v. Aves,* 35 Mass. 193 (1836). 12 Conn. at 41. In *Somerset*, the great English judge Lord Mansfield issued the common law writ of habeas corpus sought by James Somerset's next friends to determine whether he could

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[2] "One day when I was at work in the store, a gentleman came where I was; he asked if this was deacon Mars. I said 'Yes, sir. He said Mr. Bulloch was about to send Nancy to Savannah, 'and we want to make a strike for her liberty, and we want some man to sign a petition for a writ of habeas corpus before Judge Williams; they tell me that you are the man to sign the petition,' I asked him who was to draw the writ; he said Mr. W. W. Ellsworth. I went to Mr. Ellsworth's office with man. I signed the petition. I then went to my work." James Mars, *Life of James Mars, A Slave born and sold in Connecticut. Written by Himself* 48 (Dodo Press 1864) (Litchfield Literary Books 2019).

[3] *See Herald Pub. Co. v. Bill*, 142 Conn. 53, 61–62 (Conn. 1955) ("A decision of this court is a controlling precedent until overruled or qualified.").

[4] *See State v. Webb*, 238 Conn. 389, 410 n. 20 (1996); *State v. White*, 229 Conn. 125, 151 (1994); *State v. Joyner*, 225 Conn. 450, 466 (1993); *State v. Lamme*, 216 Conn. 172, 181 (1990).

actually be a slave.[5] In *Aves*, the great American judge Lemuel Shaw issued the writ of habeas corpus on behalf of a six-year old slave girl named Med whose next friend was the Boston Anti-Slavery Society.[6]

Similarly, in *Arabas v. Ivers*, 1 Root 92 (Conn. Super Ct. 1784), a slave named Jack Arabas fled from New York into Connecticut where he was captured and imprisoned in the New Haven jail until a next friend obtained a habeas corpus writ on his behalf.

As slaves, Nancy Jackson, James Somerset, Med, and Jack Arabas lacked standing to challenge the legality of their detention, but did so through next friends, a situation that would recur in New York.[7] *E.g.*, *Lemmon v. People,* 20 N.Y. 562 (1860) (abolitionist obtained habeas corpus writ on behalf of eight detained slaves); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (abolitionist obtained habeas corpus writ on behalf of slave). *See also United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 696-697 (D. Neb. 1879); Stephen Dando–Collins, *Standing Bear is a Person - The True Story of a Native American's Quest for Justice*, 85, 86, 117 (Da Capo Press 2004) (Standing Bear's attorneys brought habeas corpus petition in his name directly despite the US district attorney's

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[5] *See* Steven M. Wise, *Though the Heavens May Fall – The Landmark Trial That Led to the End of Human Slavery* 114-116 (Da Capo 2005).

[6] *See* Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Lemuel Shaw* 62 (Oxford 1957) ("The case presented a wholly novel situation . . . and in point of law as without precedent in any state or federal report.").

[7] The NhRP has obtained two habeas corpus orders to show cause on behalf of nonhuman animals in New York. *See The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015) and *The Nonhuman Rights Project, Inc., on Behalf of Happy, v. Breheny*, Index No. 1845164 (November 16, 2018). Their issuance implicitly recognized that the NhRP had standing. In *Stanley,* the court explicitly found the NhRP "met its burden of demonstrating that it [had] standing" under CPLR 7002(a). 16 N.Y.S.3d at 905.

argument that "Indians had no more rights in a court of law than beasts of the field."); *Ex Parte West*, 2 Legge 1475 (NSW 1861) (habeas corpus writ issued to white man who heard respondent say he kidnapped a child who lacked standing because he was an aborigine).

2. In direct conflict with numerous Connecticut Supreme Court decisions, this Court improperly resolved the question of standing by determining the merits of the case.

"[T]he question of standing is *not an inquiry into the merits.*" *Connecticut Assn of Boards of Educ Inc v. Shedd*, 197 Conn. at 557 n. 1 (emphasis added); *accord Maloney v. Pac*, 183 Conn. 313, 321 n.6 (1981); *State v. Pierson*, 208 Conn. 683, 687 (1988); *State v. Iban C*, 275 Conn. 624, 664 (2005). "Standing requires no more than a colorable claim of injury....[S]tanding exists so that a party may attempt to vindicate 'arguably' protected interests." *Connecticut Assn of Boards of Educ Inc*, 197 Conn. at 557 n. 1; *accord Presidential Capital Corp v. Reale*, 231 Conn. 500, 505 (1994).

At the heart of the merits is whether Beulah, Minnie, and Karen are "persons" entitled to the right to bodily liberty protected by habeas corpus. Although the merits were not on appeal, the Decision concluded that the elephants are not "persons" as they cannot bear duties and social responsibilities thus improperly resolving standing by determining the merits in direct conflict with the above controlling authorities.[8] *See Electrical Contractors*

[8] During oral argument, this Court repeatedly inquired into the merits despite being repeatedly reminded by NhRP counsel that the trial court's decision was based on standing and frivolity, that the NhRP lacked the opportunity to litigate the merits before the trial court, and that the central issue of elephant personhood was not on appeal. *See* Tr. 4/22/19 at 19-30. *E.g.*, "JUDGE LAVINE: . . . It seems to me that one of the central issue[s] here is whether we can consider an elephant, these elephants[,] to be a person under the law? Would you agree that's a very central issue? ATTY. WISE: That's the merits which. . .we were unable to get to in our case, because we were thrown out on standing. . . ." A2.

Inc v. Dep't of Educ, 303 Conn. 402, 438 n. 28 (2012) (refusing to consider claim because it "would involve consideration of the merits, rather than the issue of the plaintiffs' standing").

3. The NhRP was prejudiced by the lack of opportunity to address the merits of the case.

The trial court concluded, without a hearing, that the NhRP lacked standing because it "failed to allege a significant relationship with the elephants." Decision at 41. Accordingly, that was the focus of the Brief. Contrary to this Court's assertion, however, the Decision did *not* resolve "standing on a *slightly different* basis than that on which the habeas court relied." *Id.* at 41 n. 6 (emphasis added). Rather it denied standing "for a more fundamental reason—the elephants, not being persons, lacked standing in the first instance." *Id.* at 41. In short, the grounds for the standing decision in the lower court and this Court had absolutely nothing to do with each other.

The Brief plainly did not "extensively" address the ground on which this Court relied, whether Beulah, Minnie, and Karen are "persons." Decision at 41 n. 6. Although the last 10 pages discussed, in summary form and without benefit of a record generated by a lower court hearing, why the elephants should be recognized as "persons," the Brief did not address this Court's specific ground of affirmance: that the elephants are not legal persons because they are "incapable of bearing duties and social responsibilities required by [the] social compact."[9] *Id.* at 46.

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[9] Doing so would require a thorough discussion of the authorities on which this Court relied as well as the many it failed to mention, including, among many others, *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1056-57 (2018) (Fahey, J., concurring).

Because the NhRP never had an adequate opportunity to address the merits, this Court's determination of the merits was severely prejudicial. *See Johnson v. Commissioner of Correction,* 168 at 298 n. 8 (dismissal on alternative grounds proper where "the petitioner will suffer no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief") (citing *State v. Martin,* 143 Conn. App. 140-153 (2013)).[10]

4. Beulah, Minnie, and Karen are already legal persons and the recognition of their right to bodily liberty does not turn on their capacity to bear duties and social responsibilities.

Plaintiff summarily addresses a small portion of this Court's personhood determination in this Motion, though the merits should not have been addressed by this Court at all. Specifically, as beneficiaries of a C.G.S.A. § 45a-489a *inter vivos* trust, Beulah, Minnie, and Karen are by definition legal persons.[11] Further, the recognition of their right to bodily liberty does not turn on their capacity to bear "duties and social responsibilities required by [the] social compact," Decision at 46,[12] for the following reasons.

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[10] *See also Martinez v. Empire Fire and Marine Ins Co*, 151 Conn.App. 213, 226 (2014) ("An appellate court is authorized to rely upon alternative grounds *supported by the record* to sustain a judgment.") (emphasis added) (internal quotations and citation omitted).

[11] *See* RESTATEMENT (THIRD) OF TRUSTS § 43 Persons Who May Be Beneficiaries (2003); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); Kate McEvoy, "§ 2:16. Pet trusts," 20 CONN.PRAC., CONN.ELDER LAW § 2:16 (2014 ed.).

[12] The NhRP recently submitted a 24-page memorandum of law extensively addressing why, *inter alia*, the duties and responsibilities holding in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dept. 2014) is contrary to binding precedent in its ongoing New York litigation. Available at: https://www.nonhumanrights.org/content/uploads/Supplemental-Memo-of-Law-Upon-Transfer.pdf.

First, what Connecticut's "social compact" may require is wholly irrelevant.[13] *Jackson* ordered Nancy Jackson freed pursuant to a common law writ of habeas corpus, 12 Conn. at 54, notwithstanding that slaves were neither parties to Connecticut's "social compact" as set forth in the 1st section of the Bill of Rights[14] nor one of the "people" protected by the 8th section of the Bill of Rights. 12 Conn. at 43.

Second, no Connecticut court has ever found that Connecticut's "social compact" conditions rights on the capacity to bear "duties and social responsibilities."[15] C.G.S.A. § 45a-489a bestows the rights of trust beneficiaries—and therefore legal personhood—upon nonhuman animals without any requirement that they bear "duties and social

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[13] That habeas corpus may never have been "intended" to apply to a nonhuman animal, as this Court states, Decision at 45, does not mean that it does not apply. In *In re Hall,* 50 Conn. 131, 132, 133 (1882), the Supreme Court of Errors construed a statute permitting qualified "persons" to become attorneys to include both black men and women, though, as the Court noted, "it probably never entered the mind of a single member of the legislature that black men would ever be seeking for admission under it," and despite "the admitted fact that [the statute's] application to women was not in the minds of the legislators when it was passed." *See also Edwards v. Attorney General of Canada,* A.C. 124 (Privy Council 1930) (Privy Council held women were "persons" eligible for appointment to the Senate though their personhood in this regard had not been within the contemplation of the drafters of the 1867 Canadian Constitution).

[14] *See State v. Webb*, 238 Conn. 389, 410 n. 20 (1996).

[15] Although the Court cited *Moore v. Ganim*, 233 Conn. 557, 598 (1995), Decision at 45-46, the quoted passage on which the Decision relied does not purport to construe a "duties and social responsibilities" requirement in Connecticut's "social compact," as the passage mentioned neither "duties" nor "responsibilities."

responsibilities."[16] Moreover, the only United States high court judge who has addressed the issue, New York Court of Appeals Judge Eugene M. Fahey, recently and emphatically rejected the claim that the capacity to bear duties is required for habeas corpus. *See Nonhuman Rights Project, Inc.*, 31 N.Y. 3d at 1056-57 (2018) (Fahey, J., concurring).[17]

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[16] *See* also *Stanley*, 16 N.Y.S.3d at 898, 901 (referring to "this state's recognition of legal personhood for some nonhuman animals under [EPTL § 7-8.1]").

[17] *See also People v. Graves*, 78 N.Y.S.3d 613, 617 (4th Dept. 2018) ("it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations *or animals*.") (citing, *inter alia*, *Matter of Nonhuman Rights Project, Inc. v. Presti,* 124 A.D.3d 1334, 1335 [4th Dept. 2015]) (emphasis added)), and noting "the Court of Appeals has written that personhood is '*not a question of biological or "natural" correspondence*.'" (quoting *Byrn v. New York City Health & Hosps. Corp.,* 31 N.Y.2d 194, 201 (1973) (emphasis added)).

APPENDIX

Page

NO: AC 41464	:	APPELLATE COURT
NONHUMAN RIGHTS PROJECT	:	STATE OF CONNECTICUT
V.		
R.W. COMMERFORD & SONS	:	APRIL 22, 2019

B E F O R E:

THE HONORABLE DOUGLAS S. LAVINE, JUDGE
THE HONORABLE CHRISTINE E. KELLER, JUDGE
THE HONORABLE NINA F. ELGO, JUDGE

A P P E A R A N C E S:

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brought the common law in that was intended to perfect the common law not to undermine the common law.

JUDGE LAVINE: Mr. Wise, I'd like to change the subject for a moment, Judge Elgo may get back to that. It seems to me that one of the central issue here is whether we can consider an elephant, these elephants to be a person under the law? Would you agree that's a very central issue?

ATTY. WISE: That's the merits which lastly we were unable to get to in our case, because we were thrown out on standing and it was said that it was frivolous even though habeas corpus writs having given now at least worldwide to five nonhuman animals, including in our case in New York, one is an elephant, in November a Judge issued a writ of habeas corpus on behalf of an elephant -

JUDGE LAVINE: Right. I understand where we are procedurally, but I do want to ask you, I think it's before us, what are the attributes and characteristics that would make an elephant or any wild animal deemed to be for legal purposes a person?

ATTY. WISE: Well, what are the attributes that make anyone a person? Right now you and I, everyone in this courtroom, we are all persons, it's not clear why we are, but one possibility is that being human in 2019 is a sufficient though not a necessary condition for personhood, but we all know in Connecticut itself, 200 years ago, being human was not a sufficient condition because there were human slaves here and there were slaves in England and it

was clear that - and at one point there'd been women or children or Jews throughout history, being a human has not been a sufficient condition. Right now it appears since World War II, you have the International Treaty for Human Rights Declaration of Human Rights Article 6 and you have the International Convention on Political and Social Rights, saying that every individual presumably meaning every human being is entitled to be a person before the law, but it's not clear exactly what the reason is.

JUDGE LAVINE: Does your argument extend to other forms of animals in the wild?

ATTY. WISE: Our argument extends to elephants, that's all we're talking about right now.

JUDGE LAVINE: No. I'm asking you because it's a logical question how far this proposition goes. You're asking a Court, not a legislature, to make a radical change in the law and I want to have you prognosticate as to where this leads?

ATTY. WISE: Okay. I'm happy to do that. I would like to point out again that this is what we're hoping to flush out in the Superior Court, we weren't allowed to do that.

JUDGE LAVINE: I understand that.

ATTY. WISE: So, so what we're going to talk about here is a much more truncated version of what we would do in a Superior Court.

JUDGE LAVINE: That's fine.

ATTY. WISE: Okay. So what the Nonhuman Rights Project has done is to look at the values and principles that the Judges in Connecticut deeply believe in. And it's clear for example if you look at the McConnell v. Beverly Enterprise case, the Stamford Hospital v. Vega case that they all talk about the fact that self-determination is at the heart of who a human being is. Some human beings do not have those, most human beings do, at the very least it's something that's extraordinarily important to all the Judges of the State of Connecticut that they preserve the autonomy and self-determination of those who are within Connecticut. Now so far until the Nonhuman Rights Project filed our lawsuits, the only entities that they had ever dealt with was the autonomy and self-determination of human beings and that is once all human beings were made persons, because as I said 200 years ago there were many slaves in the State of Connecticut who are obviously human.

JUDGE LAVINE: But the reason they weren't considered full human beings, slaves, et cetera -

ATTY. WISE: No, they're persons.

JUDGE LAVINE: They were persons, they were human beings, but due to social or political conditions, they were deemed for legal purposes to be other, that was unjust.

ATTY. WISE: Indeed it is and without making a direct comparison between elephants and slaves this is unjust as well. If I may help define our terms?

JUDGE LAVINE: Sure.

ATTY. WISE: A person in law is an entity who is capable of having rights. On the other hand a thing is an entity who is not capable of having rights.

JUDGE ELGO: Let me ask you this, because of course I looked at Black's Law Dictionary and person is really divided into two concepts, there's a natural person, which is very clearly defined, you know, as a human being and then there's a theoretical person, right, it's a person for whom, you know, the legislature for example or our government has assigned corporations, entities as having legal recognition as a person. Why would not elephants then if to the extent there is a claim of personhood seek out that status or whatever status for legal recognition as its own entity through the legislature, wouldn't the legislature be the more appropriate body to evaluate all of these issues that not only have implications for elephants but implications for all animals who have some degree of the kind, you know, that you are claiming here. Because it seems to me that for a Court or the Courts to try to evaluate this issue is, we really don't have that authority or power to look at all of the implications and as you say public policy implications. I mean what you have said, this is an extraordinary comment and I don't know if you were - I think you were citing, but the statement that you make as public policy determines personhood and as a writ of habeas corpus in Connecticut is solely a common law remedy it is

for the Courts alone to decide whether Beulah, Minnie and Karen are persons. And it seems to me that that's a daunting and beyond frankly our pay grade to be able to make that determination given all that you are suggesting we have to consider.

ATTY. WISE: I haven't suggested anything, Your Honor, except the fact that these elephants are being illegally detained, that they are entitled to be free, that they're entitled to go to sanctuary and we have a suggestion as to where that sanctuary is going to be. Other than that, we're not suggesting anything else.

JUDGE ELGO: But part of the jurisdiction is a determination of whether or not this is a person, isn't it?

ATTY. WISE: Well yes, they have to be a person or they're not entitled to -

JUDGE ELGO: Okay. So there's no doubt that they have to be a person? And there's no precedent yet?

ATTY. WISE: Yes. They already are persons, Your Honor.

JUDGE ELGO: But there's no legal precedent that we can rely on that says that elephants are persons?

ATTY. WISE: Your Honor, I'm trying to keep up with you here because - but I may end up going backwards.

JUDGE ELGO: Okay.

ATTY. WISE: Yes. Elephants are already persons, every animal within the State of Connecticut is already a person because of the Pet Trust Act that was

passed almost 20 years ago which made every animal the beneficiary of a trust.

JUDGE KELLER: Why does that make them a person?

ATTY. WISE: Because in order to be a beneficiary of a trust you must be a person, unless you are involved in a -

JUDGE KELLER: Unless there's a statute that says an animal can be the benefit of a trust.

ATTY. WISE: I'm sorry, Your Honor.

JUDGE KELLER: Unless there's a statute enacted that allows an animal to be the beneficiary.

ATTY. WISE: Yes. And there is one.

JUDGE KELLER: Well then that doesn't make them a person, it just makes a law that says animals can be a beneficiary of a trust. It doesn't make the animal a person.

ATTY. WISE: To be the beneficiary trust means you have a legal right and in order to have a legal right of necessity you must be a person.

JUDGE KELLER: Well animals have some rights. They have a right not to be treated cruelly.

ATTY. WISE: I do not agree.

JUDGE KELLER: We have chapters and chapters of legislative enactment.

ATTY. WISE: I do not agree.

JUDGE KELLER: That protect animals.

ATTY. WISE: Animals can be protected, but they

do not have a right any more, they don't have a right any more, Your Honor, then say - an anticruelty statute does not give a dog a right any more -

JUDGE KELLER: Just like we're now talking about having dogs become the subject of custody cases and dissolution proceedings, that doesn't -

ATTY. WISE: That is a different thing.

JUDGE KELLER: It may give them some right to have someone argue what would make them happier, but it doesn't make them people, it doesn't make them persons.

ATTY. WISE: People - human beings are one kind of persons, all of them weren't persons at one time. Right now it makes them all one kind of person. In New Zealand a river is a person, a national park is a person. In the United States a corporation is a person, a ship is a person, the State of Connecticut is a person. We have to be careful not to mix up people or human and person.

JUDGE KELLER: But corporations are a combine of persons acting as a group of persons, that's what makes them a person because there's the action of human beings behind them and directing them.

ATTY. WISE: That's only because they're unable to initiate their own or try to validate their rights, you need some - and any more than when my children were one year old, they were persons, but they still needed someone else to be able to act on their behalf.

JUDGE KELLER: But they're still asserting the

collective right of human persons, partnerships, corporations, ships.

ATTY. WISE: But not my two year old, Your Honor, and also if you look in New Zealand, the Whanganui River is a person who can sue and be sued. A national park is a person. In India the holy books for the Sikh religion is a person. The Hindu idol is a person. In fact every nonhuman animal in India under the Nagaraja case has both constitutional and statutory rights. As showed you Cecilia a Chimpanzee in Argentina has been released pursuant to a writ of habeas corpus.

JUDGE LAVINE: But in this culture and this time and place and we're all limited by the time and place we're in.

ATTY. WISE: Indeed.

JUDGE LAVINE: Wouldn't it be more productive to go to the legislature as Judge Elgo I think hinted and say look, the categories we're dealing with are rigid, they don't encompass animals that a sanctioned. We all know that a dog or a cat is not the same thing as a table or a chair and yet they are considered to be things under the law or have been considered. So why wouldn't that be a good productive use of energy to try to get another category established for example?

ATTY. WISE: Well, Your Honor, we thing this is a good productive use of energy. We've come before you by filing the lawsuit seeking a common law writ of habeas

corpus. That is the duty of the Court, it is not the duty of the legislature, it is a duty of the Court. To the extent that - I'm not saying that the legislature -

JUDGE ELGO: But you're just picking -

ATTY. WISE: I'm sorry, Your Honor.

JUDGE ELGO: You're picking a device that you're saying yes, we agree with you that the legislature doesn't handle, you know, writs of habeas corpus, but they do handle and address the kinds of big public policy, issues and concerns that you want to have addressed and far better than the Courts.

ATTY. WISE: Your Honor, this sort of thing has been done before, perhaps not in Connecticut but in other places and perhaps the greatest example was Lord Mansfield in the 1772 case of Somerset v. Stewart where you had James Somerset who is a slave who appears to be a thing, his lawyers or his barristers then bring before the Court of King's Bench, they seek a common law writ of habeas corpus. And Lord Mansfield says that slavery is so odious the common law will not support it he's referring to human slavery and James Somerset is no longer a thing, James Somerset has then become a person. It is just as important for the Courts to make these kinds -

JUDGE ELGO: Here's my - I understand that point, all right. But here is from Cotto v. Commissioner of Correction, it's a 2017 case, all right.

ATTY. WISE: Yes, Your Honor.

JUDGE ELGO: So in that case it says although the writ of habeas corpus has a long common law history, the legislature has enacted numerous statutes shaping its use, all right, such as, and it specifically identifies 52-466. And then it goes on to state although we recognize that the provisions of the statutes governing habeas corpus do not control the outcome, it is well established that statutes are useful source of policy for common law adjudication particularly when there's a close relationship between a statutory and common law subject matters, all right. So here we are we're looking at writ of habeas corpus, right?

ATTY. WISE: Yes, Your Honor.

JUDGE ELGO: And we're also looking at a whole body of law by the legislature where they have developed a statutory framework that specifically addresses the subject of animals and how they are treated, right? So why given that there is this body of law that should inform the extent I think to which we are using this writ or looking at whether or not we should use this writ applied as to elephants when in fact there is this statutory framework that addresses the conditions of animal rights?

JUDGE LAVINE: Please answer and we're going to have a few more minutes of argument to cover some other issues.

ATTY. WISE: Okay. Your Honor, these have to do with animals, there's a million species of animals.

JUDGE ELGO: And elephants are an animal, right?

ATTY. WISE: Yes.

JUDGE ELGO: So why wouldn't they be encompassed by the statutes?

ATTY. WISE: Because the elephants are autonomous things as you saw in all of the experts affidavits, they are extraordinary things, they are so much closer to you and I then they are to a firefly or they are to a toad. They have a right because they are autonomous and because the Court believes in autonomy the Court protects autonomy wherever it can be found.

JUDGE ELGO: Well but the New York cases -

ATTY. WISE: These are autonomous beings.

JUDGE ELGO: The New York cases that you've cited while they did not address the standing issue or they found standing on part of the Nonhuman Rights Project, they didn't find personhood, did they on the part of the chimpanzees that were at issue, correct?

ATTY. WISE: In the third department and first department, they did not, the only High Court Judge who's talked about this is Judge Fahey from the May 8, 20018 opinion as you probably saw, he and correctly so said that both the third department and first department and they are wrong. And if I may say, Your Honor, one of the reasons that the third department and the Lavery case was wrong and because this Court brought up Black's Law Dictionary, the third department said that in order to be a person, you must be able to have the capacity for to have rights and duties.

JUDGE ELGO: But the New York Court of Appeals did have binding precedent, correct?

ATTY. WISE: The New York Court of Appeals has simply twice refused to hear the case with Judge Fahey concurring the last time saying he had voted against this three years ago, he's now changed his vote and he explains why they're wrong.

JUDGE ELGO: All right.

JUDGE LAVINE: Mr. Wise, I want to ask you about one other very important area?

ATTY. WISE: Oh, of course.

JUDGE LAVINE: We're going to go over a little bit but we're allowed to do that.

ATTY. WISE: Thank you, Your Honor.

JUDGE LAVINE: I want to ask you about the whole issue of frivolity.

ATTY. WISE: Yes.

JUDGE LAVINE: As I read Judge Bentivegna's decision, he concluded that there was a lack of standing and that the case was frivolous.

ATTY. WISE: Yes, Your Honor.

JUDGE LAVINE: I think he applied a very narrow reading of what frivolous is which is to say frivolous in a narrow legal sense, that is, there was little or no likelihood of success at this time in this place. I would like to know and I think frivolity, that's a very fair reasonable use of the term in legal terms, it's also used

NO: AC 41464	:	APPELLATE COURT
NONHUMAN RIGHTS PROJECT	:	STATE OF CONNECTICUT
V.		
R.W. COMMERFORD & SONS	:	APRIL 22, 2019

CERTIFICATION

I hereby certify the foregoing pages are a true and correct transcription of the audio recording of the above-referenced case, heard before the aforementioned Honorable Appellate Court Judges of Connecticut, on the 22nd day of April, 2019.

Dated this 21st day of August, 2019, Hartford, Connecticut.

Lori Van Buren
Court Recording Monitor

At I.A.S Part ___ of the Supreme Court of the State of New York, held in and for the County of Orleans, at the Courthouse thereof, 1 South Main Street, Suite 3, Albion, NY on the 16th day of October, 2018
November

PRESENT: HON. Tracey A. Bannister
Justice of the Supreme Court

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

TMB
~~[PROPOSED]~~ **ORDER TO SHOW CAUSE**

Index No.: 18-45164

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise, Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part ___, Room ___, of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the 14th day of December 2018 at 11:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;

B. Awarding Petitioner the costs and disbursements of this action; and

C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, by personal delivery, on or before the 26th day of November 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than the 3rd day of December, 2018. Reply papers, if any, must be served on or before the 10th day of December 2018.

Dated: 11/16, 2018
Albion, New York

Honorable Tracey A. Bannister

ENTER:

Ex parte WEST. (1)

1861.
Dec. 18.
Stephen C.J., *Milford* J. and *Wise* J.

Habeas Corpus—56 Geo. III, c. 100, s. 3—*False return.*

The truth of the return to a writ of *habeas corpus* may be impeached and inquired into under the 56 Geo. III, c. 100 (s. 3), which is in force in New South Wales.

It is the right and duty of the Court to issue a rule *ex mero motu*, calling upon a respondent to show cause why an attachment should not issue against him, if it has reason to believe that his return to a writ of *habeas corpus* is untrue.

THIS was an application for a writ of *habeas corpus*, calling upon Mr. *Collins*, a squatter, to produce in Court an aboriginal boy named "*Tommy*," alleged to be in his custody, and to show cause why he detained the boy. The application was based upon an affidavit of Mr. *David Russell*, to the effect that he had heard *Collins* say that he had "rushed" the boy from among his tribe, and that the boy would never see his tribe again.

Dec. 16,

Milford, for the applicant, the Rev. *John West*. A stranger can apply for a writ in such a case. *Case of the Hottentot Venus* (2).

The COURT granted the writ, returnable on Wednesday, Dec. 18, notice of the proceedings, with a copy of the affidavit, to be given to the *Attorney-General*.

Dec. 18,

The return of *Alexander Keith Collins*, stated that the boy *Tommy* was in his custody with the consent of his father, and of his own free will, and the boy was produced in Court.

Faucett, *Milford* with him, for the Rev. *John West*, wished to controvert the truth of the return.

[The COURT. The return must be first filed.]

Faucett moved that the return be filed.

The COURT ordered the return to be filed.

Faucett, and *Milford*, impeached the truth of the return.

The affidavit of *David Russell* was read, the objection of the other side, that no copy had been served on them, being overruled.

(1) *The Sydney Morning Herald*, Dec. 17, 19, and 28, 1861. (2) 13 East 197.

1861.

Ex parte WEST.

Isaacs, for the respondent, *Collins*. There is no necessity for an inquiry. The respondent is willing to abide the decision of the Court.

The *Attorney-General* stated (on the inquiry of the Court) that the Crown was willing to take charge of the boy.

The CHIEF JUSTICE said that except as to how the lad was to be disposed of there was no difficulty whatever in the case. The respondent had produced the boy in Court in obedience to the writ, and had made a return which was, *prima facie*, quite good, as tending to show that respondent had received the legal custody of the boy from his father. The writ was issued under the common law power of the Court, under which the return would formerly have been conclusive. But it had been already decided that the 56th George III, was in force in this colony, and by that statute the truth of the return could be impeached, and when so impeached must be inquired into by the Court. It was impeached in the present case by the affidavit on which the writ had been granted. It might be that *Collins* withheld all explanation under legal advice, and therefore his conduct would not be open to the comments which it would otherwise have been fairly liable to; but the plain fact was this:—that there was only evidence on one side, and that the effect of this evidence was to show that the return to the writ was a false one, and that the child had been stolen from his parents. It might be admitted that the boy had been most kindly treated, but no end would justify an act such as was alleged to have been committed. It was a moral wrong—an outrage—an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation. It was not a light matter, but the infliction of an insufferable wrong—a misdemeanor for which any person who committed it was liable to heavy punishment by fine and imprisonment. Looking at the natural results of such acts, it might be that the best interests of the country would suffer. Suppose it was true that these boys were run down like wild animals, and stolen from their parents and relatives, it was a natural result that the latter should pursue with vengeance the people of the same race as the offender. Such would be probably the case with the whites in the event of any corresponding outrage by the blacks. These people were British subjects, and if held responsible for crime on the one hand, should be protected from outrage on the other. The respondent having made what, as the case now stood, must be held to be a false return, and having failed to show that he had the slightest right to the charge of the boy, must pay the costs of this proceeding. It was simply absurd to assume that there was anything tyrannical in directing an inquiry

1861.

Ex parte WEST.

Stephen C.J.

of the nature alluded to, although if any further inquiry had taken place, care would have been taken that the evidence thus obtained should not be used for any other purpose than the legitimate one of seeing what was to be done with the boy. The boy must now be delivered over to the Colonial Secretary on the part of the Government.

MILFORD, J., considered the question one of dry law. The return showed *prima facie* a right to the custody of the boy. The Court, proceeding to investigate the truth of this return under its statutory power, had evidence on oath that *Collins*, according to his own admission, had stolen the boy, thereby committing a high misdemeanour. There was no evidence on oath to controvert this, and they were thus bound to assume that the return was false.

WISE, J., concurred with his learned colleagues. It was a first principle of justice that the liberty of the subject should be protected, and the aborigines who were held to be British subjects, even without their own concurrence, and as such to be amenable to punishment, were equally entitled with the whites to this protection. His Honor equally concurred with the other members of the Court as to this child-stealing, if committed, being a gross outrage, and stated his belief, as at present advised, that such an act as this, or the abduction of natives from any of the South Sea Islands, would be punishable under the statute against slavery.

Ordered that the boy be handed over to the Colonial Secretary, costs to be paid by respondent.

On Dec. 27,

the respondent, *Collins*, was called on by rule *nisi*, issued on the order of the Court, *ex mero motu*, to show cause why an attachment should not be issued against him for having made a false return.

Darvall, Q.C., *Martin*, Q.C., and *Isaacs*, showed cause. The Court has no jurisdiction to issue this rule *ex mero motu*. Mr. *Collins* obeyed the Court by producing the boy, leaving their Honors to deal with him as they thought fit, and had not claimed to retain the boy in his own custody. The truth of his statement, now that the Court had dealt with the boy, was unimportant.

Their HONORS had no doubt that it was their right and their duty to issue this rule. Mr. *Collins* was called upon to do two things: to bring up the body of the boy, and to make a statement—a true statement—of the reasons for his detention. He (*Collins*) had done but one of these things, for although he produced the body, and made a

1861.

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The Court.

statement, the only evidence on oath before the Court went to impeach the veracity of that statement. It was most probable that it could be sustained, but it was necessary for the character, not only of Mr. *Collins*, but of the country itself, that this should be done. The power now exercised was precisely the same as that under which they committed witnesses for gross prevarication of evidence.

The affidavits of *George Barber*, squatter, and Mr. *Collins* were read.

The COURT held that there was no necessity for further affidavits, or for argument. The statements made to Mr. *Russell* had evidently been so made in joke.

Rule discharged.

proceeding for the future, and as a proof of the detestation of the jury to the action itself.†

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the office precedents, which had been produced since the Revolution, are no justification of a practice in itself illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.*

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Observed, that if the jury found Mr. Wilkes the author or publisher of No. 45, it will be filed, and stand upon record in the Court of Common Pleas, and of course be produced as proof, upon the criminal cause depending, in barr of any future more ample discussion of that matter on both sides; that on the other side they should be equally careful to do justice, according to the evidence; he therefore left it to their consideration.

The jury, after withdrawing for near half an hour, returned, and found a general verdict upon both issues for the plaintiff, with a thousand pounds damages.

After the verdict was recorded, the Solicitor-General offered to prefer a bill of exceptions, which the Lord Chief Justice refused to accept, saying it was out of time.

The Court sat at nine o'clock in the morning, and the verdict was brought in at twenty minutes past eleven o'clock at night.

[1] EASTER TERM, 12 GEO. 3, 1772, K. B.

SOMERSET *against* STEWART. May 14, 1772.

On return to an habeas corpus, requiring Captain Knowles to shew cause for the seizure and detainure of the complainant Somerset, a negro—the case appeared to be this—

That the negro had been a slave to Mr. Stewart, in Virginia, had been purchased from the African coast, in the course of the slave-trade, as tolerated in the plantations; that he had been brought over to England by his master, who intending to return, by force sent him on board of Captain Knowles's vessel, lying in the river; and was there, by the order of his master, in the custody of Captain Knowles, detained against his consent; until returned in obedience to the writ. And under this order, and the facts stated, Captain Knowles relied in his justification.

Upon the second argument, (Serjeant Glynn was in the first, and, I think, Mr. Mansfield) the pleading on behalf of the negro was opened by Mr. Hargrave. I need not say that it will be found at large, and I presume has been read by most of the profession, he having obliged the public with it himself: but I hope this summary note, which I took of it at the time, will not be thought impertinent; as it is not easy for a cause in which that gentleman has appeared, not to be materially injured by a total omission of his share in it.

Mr. Hargrave.—The importance of the question will I hope justify to your Lordships the solicitude with which I rise to defend it; and however unequal I feel myself, will command attention. I trust, indeed, this is a cause sufficient to support my own [2] unworthiness by its single intrinsic merit. I shall endeavour to state the grounds from which Mr. Stewart's supposed right arises; and then offer, as appears to me, sufficient confutation to his claim over the negro, as property, after having him brought over to England; (an absolute and unlimited property, or as right accruing from contract;) Mr. Stewart insists on the former. The question on that is not whether slavery is lawful in the colonies, (where a concurrence of unhappy circumstances has caused it to be established as necessary;) but whether in England? Not whether it

† Vita reipublicæ pax, et animi libertas et libertatis, firmissimum propugnaculum sua cuique domus legibus munita.

* Ut pœna ad paucos, metus ad omnes pertingat,
Judicandum est legibus non exemplis.

ever has existed in England; but whether it be not now abolished? Various definitions have been given of slavery: one of the most considerable is the following; a service for life, for bare necessaries. Harsh and terrible to human nature as even such a condition is, slavery is very insufficiently defined by these circumstances—it includes not the power of the master over the slave's person, property, and limbs, life only excepted; it includes not the right over all acquirements of the slave's labour; nor includes the alienation of the unhappy object from his original master, to whatever absolute lord, interest, caprice or malice, may chuse to transfer him; it includes not the descendible property from father to son, and in like manner continually of the slave and all his descendants. Let us reflect on the consequences of servitude in a light still more important. The corruption of manners in the master, from the entire subjection of the slaves he possesses to his sole will; from whence spring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train; the danger to the master, from the revenge of his much injured and unredressed dependant; debasement of the mind of the slave, for want of means and motives of improvement; and peril to the constitution under which the slave cannot but suffer, and which he will naturally endeavour to subvert, as the only means of retrieving comfort and security to himself.—The humanity of modern times has much mitigated this extreme rigour of slavery; shall an attempt to introduce perpetual servitude here to this island hope for countenance? Will not all the other mischiefs of mere utter servitude revive, if once the idea of absolute property, under the immediate sanction of the laws of this country, extend itself to those who have been brought over to a soil whose air is deemed too pure for slaves to breathe in it; but the laws, the genius and spirit of the constitution, forbid the approach of slavery; will not suffer it's existence here. This point, I conceive, needs no further enlargement: I mean, the proof of our mild and just constitution is ill adapted to the reception of arbitrary maxims and practices. But it has been said by great authorities, though slavery in its full extent be incompatible with the natural rights of mankind, and the principles of good government, yet a moderate servitude may be tolerated; nay, sometimes must be maintained. Captivity in war is the principal ground of slavery: contract another. Grotius De [3] J. B. & P. and Pufendorf, b. 6, c. 3, § 5, approves of making slaves of captives in war. The author of the Spirit of Laws denies, except for self-preservation, and then only a temporary slavery. Dr. Rutherforth, in his Principles of Natural Law, and Locke, absolutely against it. As to contract; want of sufficient consideration justly gives full exception to the considering of it as contract. If it cannot be supported against parents, certainly not against children. Slavery imposed for the performance of public works for civil crimes, is much more defensible, and rests on quite different foundations. Domestic slavery, the object of the present consideration, is now submitted to observation in the ensuing account, its first commencement, progress, and gradual decrease: it took origin very early among the barbarous nations, continued in the state of the Jews, Greeks, Romans, and Germans; was propagated by the last over the numerous and extensive countries they subdued. Incompatible with the mild and humane precepts of Christianity, it began to be abolished in Spain, as the inhabitants grew enlightened and civilized, in the 8th century; its decay extended over Europe in the 4th; was pretty well perfected in the beginning of the 16th century. Soon after that period, the discovery of America revived those tyrannic doctrines of servitude, with their wretched consequences. There is now at last an attempt, and the first yet known, to introduce it into England; long and uninterrupted usage from the origin of the common law, stands to oppose its revival. All kinds of domestic slavery were prohibited, except villenage. The villain was bound indeed to perpetual service; liable to the arbitrary disposal of his lord. There were two sorts; villain regardant, and in gross: the former as belonging to a manor, to the lord of which his ancestors had done villain service; in gross, when a villain was granted over by the lord. Villains were originally captives at the Conquest, or troubles before. Villenage could commence no where but in England, it was necessary to have prescription for it. A new species has never arisen till now; for had it, remedies and powers there would have been at law: therefore the most violent presumption against is the silence of the laws, were there nothing more. 'Tis very doubtful whether the laws of England will permit a man to bind himself by contract to serve for life: certainly will not suffer him to invest another man with despotism, nor prevent his own right to dispose of property. If disallowed by consent of parties, much more when by force; if made void when commenced here,

much more when imported. If these are true arguments, they reach the King himself as well as the subject. Dr. Rutherforth says, if the civil law of any nation does not allow of slavery, prisoners of war cannot be made slaves. If the policy of our laws admits not of slavery, neither fact nor reason are for it. A man, it is said, told the Judges of the Star-Chamber, in the case of a Russian slave whom they had ordered to be scourged and imprisoned, that the air of England was too pure for slavery. The Parliament afterwards punished the Judges of the Star-Chamber for such usage of the [4] Russian, on his refusing to answer interrogatories. There are very few instances, few indeed, of decisions as to slaves, in this country. Two in Charles the 2d, where it was adjudged trover would lie. *Chamberlayne and Perrin*, Will. 3d, trover brought for taking a negro slave, adjudged it would not lie.—4th Ann. action of trover; judgment by default: on arrest of judgment, resolved that trover would not lie. Such the determinations in all but two cases; and those the earliest, and disallowed by the subsequent decisions. Lord Holt.—As soon as a slave enters England he becomes free. *Stanley and Harvey*, on a bequest to a slave; by a person whom he had served some years by his former master's permission, the master claims the bequest; Lord Northington decides for the slave, and gives him costs. 29th of George the 2d, c. 31, implies permission in America, unhappily thought necessary; but the same reason subsists not here in England. The local law to be admitted when no very great inconvenience would follow; but otherwise not. The right of the master depends on the condition of slavery (such as it is) in America. If the slave be brought hither, it has nothing left to depend on but a supposed contract of the slave to return; which yet the law of England cannot permit. Thus has been traced the only mode of slavery ever been established here, villenage, long expired; I hope it has shewn, the introducing new kinds of slavery has been cautiously, and, we trust, effectually guarded against by the same laws. Your Lordships will indulge me in reciting the practice of foreign nations. 'Tis discountenanced in France; Bartholinus De Republicâ denies its permission by the law of France. Molinus gives a remarkable instance of the slave of an ambassador of Spain brought into France: he claims liberty; his claim allowed. France even mitigates the ancient slavery, far from creating new. France does not suffer even her King to introduce a new species of slavery. The other Parliaments did indeed; but the Parliament of Paris, considering the edict to import slavery as an exertion of the Sovereign to the breach of the constitution, would not register that edict. Edict 1685, permits slavery in the colonies. Edict in 1716, recites the necessity to permit in France, but under various restraints, accurately enumerated in the Institute of French Laws. 1759 Admiralty Court of France; Causes Celebrées, title Negro. A French gentleman purchased a slave, and sent him to St. Malo's entrusted with a friend. He came afterwards, and took him to Paris. After ten years the servant chuses to leave France. The master not like Mr. Stewart hurries him back by main force, but obtains a process to apprehend him, from a Court of Justice. While in prison, the servant institutes a process against his master, and is declared free. After the permission of slaves in the colonies, the edict of 1716 was necessary, to transfer that slavery to Paris; not without many restraints, as before remarked; otherwise the ancient principles would have prevailed. The author De Jure Novissimo, though the natural tendency of his book, as appears by the title, leads the other way, concurs with [5] diverse great authorities, in reprobating the introduction of a new species of servitude. In England, where freedom is the grand object of the laws, and dispensed to the meanest individual, shall the laws of an infant colony, Virginia, or of a barbarous nation, Africa, prevail? From the submission of the negro to the laws of England, he is liable to all their penalties, and consequently has a right to their protection. There is one case I must still mention; some criminals having escaped execution in Spain, were set free in France. [Lord Mansfield.—Rightly: for the laws of one country have not whereby to condemn offences supposed to be committed against those of another.]

An objection has arisen, that the West India Company, with their trade in slaves, having been established by the law of England, its consequences must be recognized by that law; but the establishment is local, and these consequences local; and not the law of England, but the law of the plantations.

The law of Scotland annuls the contract to serve for life; except in the case of colliers, and one other instance of a similar nature. A case is to be found in the History of the Decisions, where a term of years was discharged, as exceeding the usual limits of human life. At least, if contrary to all these decisions, the Court

should incline to think Mr. Stewart has a title, it must be by presumption of contract, there being no deed in evidence: on this supposition, Mr. Stewart was obliged, undoubtedly, to apply to a Court of Justice. Was it not sufficient, that without form, without written testimony, without even probability of a parol contract, he should venture to pretend to a right over the person and property of the negro, emancipated, as we contend, by his arrival hither, at a vast distance from his native country, while he vainly indulged the natural expectation of enjoying liberty, where there was no man who did not enjoy it? Was not this sufficient, but he must still proceed, seize the unoffending victim, with no other legal pretence for such a mode of arrest, but the taking an ill advantage of some inaccurate expressions in the Habeas Corpus Act; and thus pervert an establishment designed for the perfecting of freedom? I trust, an exception from a single clause, inadvertently worded, (as I must take the liberty to remark again) of that one statute, will not be allowed to over-rule the law of England. I cannot leave the Court, without some excuse for the confusion in which I rose, and in which I now appear: for the anxiety and apprehension I have expressed, and deeply felt. It did not arise from want of consideration, for I have considered this cause for months, I may say years; much less did it spring from a doubt, how the cause might recommend itself to the candour and wisdom of the Court. But I felt myself over-powered by the weight of the question. I now, in full [6] conviction how opposite to natural justice Mr. Stewart's claim is, in firm persuasion of its inconsistency with the laws of England, submit it chearfully to the judgment of this honourable Court: and hope as much honour to your Lordships from the exclusion of this new slavery, as our ancestors obtained by the abolition of the old.

Mr. Alleyne.—Though it may seem presumption in me to offer any remarks, after the elaborate discourse but now delivered, yet I hope the indulgence of the Court; and shall confine my observations to some few points, not included by Mr. Hargrave. 'Tis well known to your Lordships, that much has been asserted by the ancient philosophers and civilians, in defence of the principles of slavery: Aristotle has particularly enlarged on that subject. An observation still it is, of one of the most able, most ingenious, most convincing writers of modern times, whom I need not hesitate, on this occasion, to prefer to Aristotle, the great Montesquieu, that Aristotle, on this subject, reasoned very unlike the philosopher. He draws his precedents from barbarous ages and nations, and then deduces maxims from them, for the contemplation and practice of civilized times and countries. If a man who in battle has had his enemy's throat at his sword's point, spares him, and says therefore he has power over his life and liberty, is this true? By whatever duty he was bound to spare him in battle, (which he always is, when he can with safety) by the same he obliges himself to spare the life of the captive, and restore his liberty as soon as possible, consistent with those considerations from whence he was authorised to spare him at first; the same indispensible duty operates throughout. As a contract: in all contracts there must be power on one side to give, on the other to receive; and a competent consideration. Now, what power can there be in any man to dispose of all the rights vested by nature and society in him and his descendants? He cannot consent to part with them, without ceasing to be a man; for they immediately flow from, and are essential to, his condition as such: they cannot be taken from him, for they are not his, as a citizen or a member of society merely; and are not to be resigned to a power inferior to that which gave them. With respect to consideration, what shall be adequate? As a speculative point, slavery may a little differ in its appearance, and the relation of master and slave, with the obligations on the part of the slave, may be conceived; and merely in this view, might be thought to take effect in all places alike; as natural relations always do. But slavery is not a natural, 'tis a municipal relation; an institution therefore confined to certain places, and necessarily dropt by passage into a country where such municipal regulations do not subsist. The negro making choice of his habitation here, has subjected himself to the penalties, and is therefore entitled to the protection of our laws. One remarkable case seems to require being mentioned: some Spanish criminals having escaped from execution, were set free in France. [Lord Mansfield.—Note the distinction in the case: in this case, [7] France was not bound to judge by the municipal laws of Spain; nor was to take cognizance of the offences supposed against that law.] There has been started an objection, that a company having been established by our Government for the trade of slaves, it were unjust to deprive them here.—No: the Government incorporated

them with such powers as individuals had used by custom, the only title on which that trade subsisted; I conceive, that had never extended, nor could extend, to slaves brought hither; it was not enlarged at all by the incorporation of that company, as to the nature or limits of its authority. 'Tis said, let slaves know they are all free as soon as they arrive here, they will flock over in vast numbers, over-run this country, and desolate the plantations. There are too strong penalties by which they will be kept in; nor are the persons who convey them over much induced to attempt it; the despicable condition in which negroes have the misfortune to be considered, effectually prevents their importation in any considerable degree. Ought we not, on our part, to guard and preserve that liberty by which we are distinguished by all the earth! to be jealous of whatever measure has a tendency to diminish the veneration due to the first of blessings? The horrid cruelties, scarce credible in recital, perpetrated in America, might, by the allowance of slaves amongst us, be introduced here. Could your Lordship, could any liberal and ingenuous temper indure, in the fields bordering on this city, to see a wretch bound for some trivial offence to a tree, torn and agonizing beneath the scourge? Such objects might by time become familiar, become unheeded by this nation; exercised, as they are now, to far different sentiments, may those sentiments never be extinct! the feelings of humanity! the generous sallies of free minds! May such principles never be corrupted by the mixture of slavish customs! Nor can I believe, we shall suffer any individual living here to want that liberty, whose effects are glory and happiness to the public and every individual.

Mr. Wallace.—The question has been stated, whether the right can be supported here; or, if it can, whether a course of proceedings at law be not necessary to give effect to the right? 'Tis found in three quarters of the globe, and in part of the fourth. In Asia the whole people; in Africa and America far the greater part; in Europe great numbers of the Russians and Polanders. As to captivity in war, the Christian princes have been used to give life to the prisoners; and it took rise probably in the Crusades, when they gave them life, and sometimes franchised them, to enlist under the standard of the Cross, against the Mahometans. The right of a conqueror was absolute in Europe, and is in Africa. The natives are brought from Africa to the West Indies; purchase is made there, not because of positive law, but there being no law against it. It cannot be in consideration by this or any other Court, to see, whether the [8] West India regulations are the best possible; such as they are, while they continue in force as laws, they must be adhered to. As to England, not permitting slavery, there is no law against it; nor do I find any attempt has been made to prove the existence of one. Villenage itself has all but the name. Though the dissolution of monasteries, amongst other material alterations, did occasion the decay of that tenure, slaves could breathe in England: for villains were in this country, and were mere slaves, in Elizabeth. Sheppard's Abridgment, afterwards, says they were worn out in his time. [Lord Mansfield mentions an assertion, but does not recollect the author, that two only were in England in the time of Charles the 2d, at the time of the abolition of tenures.] In the cases cited, the two first directly affirm an action of trover, an action appropriated to mere common chattels. Lord Holt's opinion, is a mere dictum, a decision unsupported by precedent. And if it be objected, that a proper action could not be brought, 'tis a known and allowed practice in mercantile transactions, if the cause arises abroad, to lay it within the kingdom: therefore the contract in Virginia might be laid to be in London, and would not be traversable. With respect to the other cases, the particular mode of action was alone objected to; had it been an action per quod servitium amisit, for the loss of service, the Court would have allowed it. The Court called the person, for the recovery of whom it was brought, a slavish servant, in *Chamberlayne's case*. Lord Hardwicke, and the afterwards Lord Chief Justice Talbot, then Attorney and Solicitor-General, pronounced a slave not free by coming into England. 'Tis necessary the masters should bring them over; for they cannot trust the whites, either with the stores or the navigating the vessel. Therefore, the benefit taken on the Habeas Corpus Act ought to be allowed.

Lord Mansfield observes, the case alluded to was upon a petition in Lincoln's Inn Hall after dinner; probably, therefore, might not, as he believes the contrary is not usual at that hour, be taken with much accuracy. The principal matter was then, on the earnest solicitation of many merchants, to know, whether a slave was freed by being made a Christian? And it was resolved, not. 'Tis remarkable, tho' the English took

infinite pains before to prevent their slaves being made Christians, that they might not be freed, the French suggested they must bring their's into France, (when the edict of 1706 was petitioned for,) to make them Christians. He said, the distinction was difficult as to slavery, which could not be resumed after emancipation, and yet the condition of slavery, in its full extent, could not be tolerated here. Much consideration was necessary, to define how far the point should be carried. The Court must consider the great detriment to proprietors, there being so great a number in the ports of this kingdom, that many thousands of pounds would be lost to the owners, by setting them free. (A gentleman observed, no great danger; for in a whole fleet, usually, there would not be six slaves.) As to France, the case stated decides no [9] farther than that kingdom; and there freedom was claimed, because the slave had not been registered in the port where he entered, conformably to the edict of 1706. Might not a slave as well be freed by going out of Virginia to the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient? A statute by the Legislature, to subject the West India property to payment of debts, I hope, will be thought some proof; another Act devests the African Company of their slaves, and vests them in the West India Company: I say, I hope, these are proofs the law has interfered for the maintenance of the trade in slaves, and the transferring of slavery. As for want of application properly to a Court of Justice; a common servant may be corrected here by his master's private authority. Habeas corpus acknowledges a right to seize persons by force employed to serve abroad. A right of compulsion there must be, or the master will be under the ridiculous necessity of neglecting his proper business, by staying here to have their service, or must be quite deprived of those slaves he has been obliged to bring over. The case, as to service for life was not allowed, merely for want of a deed to pass it.

The Court approved Mr. Alleyne's opinion of the distinction, how far municipal laws were to be regarded: instanced the right of marriage; which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various; and advised, if the merchants thought it so necessary, to apply to Parliament, who could make laws.

Adjourned till that day se'night.

Mr. Dunning.—'Tis incumbent on me to justify Captain Knowles's detainer of the negro; this will be effected, by proving a right in Mr. Stewart; even a supposed one: for till the matter was determined, it were somewhat unaccountable that a negro should depart his service, and put the means out of his power of trying that right to effect, by a flight out of the kingdom. I will explain what appears to me the foundation of Mr. Stewart's claim. Before the writ of habeas corpus issued in the present case, there was, and there still is, a great number of slaves in Africa, (from whence the American plantations are supplied) who are saleable, and in fact sold. Under all these descriptions is James Somerset. Mr. Stewart brought him over to England; purposing to return to Jamaica, the negro chose to depart the service, and was stopt and detained by Captain Knowles, 'till his master should set sail and take him away to be sold in Jamaica. The gentlemen on the other side, to whom I impute no blame, but on the other hand much commendation, have advanced many ingenious propositions; part of which are undeniably true, and part (as is usual in compositions of ingenuity) very disputable. 'Tis my misfortune [10] to address an audience, the greater part of which, I fear, are prejudiced the other way. But wishes, I am well convinced, will never enter into your Lordships minds, to influence the determination of the point: this cause must be what in fact and law it is: it's fate, I trust, therefore, depends on fixt invariable rules, resulting by law from the nature of the case. For myself, I would not be understood to intimate a wish in favour of slavery, by any means; nor on the other side, to be supposed maintainer of an opinion contrary to my own judgment. I am bound by duty to maintain those arguments which are most useful to Captain Knowles, as far as is consistent with truth; and if his conduct has been agreeable to the laws throughout, I am under a farther indispensable duty to support it. I ask no other attention than may naturally result from the importance of the question: less than this I have no reason to expect; more, I neither demand nor wish to have allowed. Many alarming apprehensions have been entertained of the consequence of the decision, either way. About 14,000 slaves, from the most exact intelligence I am able to procure are at present here; and some little time past,

166,914 in Jamaica; there are, besides, a number of wild negroes in the woods. The computed value of a negro in those parts 50l. a head. In the other islands I cannot state with the same accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almost brings over a great number; and will, be the decision on which side it may. Most negroes who have money (and that description I believe will include nearly all) make interest with the common sailors to be carried hitherto. There are negroes not falling under the proper denomination of any yet mentioned, descendants of the original slaves, the aborigines, if I may call them so; these have gradually acquired a natural attachment to their country and situation; in all insurrections they side with their masters: otherwise, the vast disproportion of the negroes to the whites, (not less probably than that of 100 to one) would have been fatal in it's consequences. There are very strong and particular grounds of apprehension, if the relation in which they stand to their masters is utterly to be dissolved on the instant of their coming into England. Slavery, say the gentlemen, is an odious thing; the name is: and the reality; if it were as one has defined, and the rest supposed it. If it were necessary to the idea and the existence of James Somerset, that his master, even here, might kill, nay, might eat him, might sell living or dead, might make him and his descendants property alienable, and thus transmissible to posterity; this, how high soever my ideas may be of the duty of my profession, is what I should decline pretty much to defend or assert, for any purpose, seriously; I should only speak of it to testify my contempt and abhorrence. But this is what at present I am not at all concerned in; unless Captain Knowles, or Mr. Stewart, have killed or eat him. Freedom has been asserted as a natural right, and therefore unalienable and unrestrainable; there is perhaps no branch of this right, but in some [11] at all times, and in all places at different times, has been restrained: nor could society otherwise be conceived to exist. For the great benefit of the public and individuals, natural liberty, which consists in doing what one likes, is altered to the doing what one ought. The gentlemen who have spoke with so much zeal, have supposed different ways by which slavery commences; but have omitted one, and rightly; for it would have given a more favourable idea of the nature of that power against which they combate. We are apt (and great authorities support this way of speaking) to call those nations universally, whose internal policy we are ignorant of, barbarians; (thus the Greeks, particularly, stiled many nations, whose customs, generally considered, were far more justifiable and commendable than their own:) unfortunately, from calling them barbarians, we are apt to think them so, and draw conclusions accordingly. There are slaves in Africa by captivity in war, but the number far from great; the country is divided into many small, some great territories, who do, in their wars with one another, use this custom. There are of these people, men who have a sense of the right and value of freedom; but who imagine that offences against society are punishable justly by the severe law of servitude. For crimes against property, a considerable addition is made to the number of slaves. They have a process by which the quantity of the debt is ascertained; and if all the property of the debtor in goods and chattels is insufficient, he who has thus dissipated all he has besides, is deemed property himself; the proper officer (sheriff we may call him) seizes the insolvent, and disposes of him as a slave. We don't contend under which of these the unfortunate man in question is; but his condition was that of servitude in Africa; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the British Legislature confirm this condition; and thus he was a slave both in law and fact. I do not aim at proving these points; not because they want evidence, but because they have not been controverted, to my recollection, and are, I think, incapable of denial. Mr. Stewart, with this right, crossed the Atlantic, and was not to have the satisfaction of discovering, till after his arrival in this country, that all relation between him and the negro, as master and servant, was to be matter of controversy, and of long legal disquisition. A few words may be proper, concerning the Russian slave, and the proceedings of the House of Commons on that case. 'Tis not absurd in the idea, as quoted, nor improbable as matter of fact; the expression has a kind of absurdity. I think, without any prejudice to Mr. Stewart, or the merits of this cause, I may admit the utmost possible to be desired, as far as the case of that slave goes. The master and slave were both, (or should have been at least) on their coming here, new

creatures. Russian slavery, and even the subordination amongst themselves, in the degree they use it, is not here to be tolerated. Mr. Alleyne justly observes, the municipal [12] regulations of one country are not binding on another; but does the relation cease where the modes of creating it, the degrees in which it subsists, vary? I have not heard, nor, I fancy, is there any intention to affirm, the relation of master and servant ceases here? I understand the municipal relations differ in different colonies, according to humanity, and otherwise. A distinction was endeavoured to be established between natural and municipal relations; but the natural relations are not those only which attend the person of the man, political do so too; with which the municipal are most closely connected: municipal laws, strictly, are those confined to a particular place; political, are those in which the municipal laws of many States may and do concur. The relation of husband and wife, I think myself warranted in questioning, as a natural relation: does it subsist for life; or to answer the natural purposes which may reasonably be supposed often to terminate sooner? Yet this is one of those relations which follow a man every where. If only natural relations had that property, the effect would be very limited indeed. In fact, the municipal laws are principally employed in determining the manner by which relations are created; and which manner varies in various countries, and in the same country at different periods; the political relation itself continuing usually unchanged by the change of place. There is but one form at present with us, by which the relation of husband and wife can be constituted; there was a time when otherwise: I need not say other nations have their own modes, for that and other ends of society. Contract is not the only means, on the other hand, of producing the relation of master and servant; the magistrates are empowered to oblige persons under certain circumstances to serve. Let me take notice, neither the air of England is too pure for a slave to breathe in, nor the laws of England have rejected servitude. Villenage in this country is said to be worn out; the propriety of the expression strikes me a little. Are the laws not existing by which it was created? A matter of more curiosity than use, it is, to enquire when that set of people ceased. The Statute of Tenures did not however abolish villenage in gross; it left persons of that condition in the same state as before; if their descendants are all dead, the gentlemen are right to say the subject of those laws is gone, but not the law; if the subject revives, the law will lead the subject. If the Statute of Charles the 2d ever be repealed, the law of villenage revives in it's full force. If my learned brother, the serjeant, or the other gentlemen who argued on the supposed subject of freedom, will go thro' an operation my reading assures me will be sufficient for that purpose, I shall claim them as property. I won't, I assure them, make a rigorous use of my power; I will neither sell them, eat them, nor part with them. It would be a great surprize, and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither, must take care of his carriage, his horse, and himself, in whatever method he might have the luck to [13] invent. He must find his way to London on foot. He tells his servant, Do this; the servant replies, Before I do it, I think fit to inform you, sir, the first step on this happy land sets all men on a perfect level; you are just as much obliged to obey my commands. Thus neither superior, or inferior, both go without their dinner. We should find singular comfort, on entering the limits of a foreign country, to be thus at once devested of all attendance and all accommodation. The gentlemen have collected more reading than I have leisure to collect, or industry (I must own) if I had leisure: very laudable pains have been taken, and very ingenious, in collecting the sentiments of other countries, which I shall not much regard, as affecting the point or jurisdiction of this Court. In Holland, so far from perfect freedom, (I speak from knowledge) there are, who without being conscious of contract, have for offences perpetual labour imposed, and death the condition annext to non-performance. Either all the different ranks must be allowed natural, which is not readily conceived, or there are political ones, which cease not on change of soil. But in what manner is the negro to be treated? How far lawful to detain him? My footman, according to my agreement, is obliged to attend me from this city; or he is not; if no condition, that he shall not be obliged to attend, from hence he is obliged, and no injury done.

A servant of a sheriff, by the command of his master, laid hand gently on another servant of his master, and brought him before his master, who himself compelled the servant to his duty; an action of assault and battery, and false imprisonment, was brought; and the principal question was, on demurrer, whether the master could

command the servant, tho' he might have justified his taking of the servant by his own hands? The convenience of the public is far better provided for, by this private authority of the master, than if the lawfulness of the command were liable to be litigated every time a servant thought fit to be negligent or troublesome.

Is there a doubt, but a negro might interpose in the defence of a master, or a master in defence of a negro? If to all purposes of advantage, mutuality requires the rule to extend to those of disadvantage. 'Tis said, as not formed by contract, no restraint can be placed by contract. Which ever way it was formed, the consequences, good or ill, follow from the relation, not the manner of producing it. I may observe, there is an establishment, by which magistrates compel idle or dissolute persons, of various ranks and denominations, to serve. In the case of apprentices bound out by the parish, neither the trade is left to the choice of those who are to serve, nor the consent of parties necessary; no contract therefore is made in the former instance, none in the latter; the duty remains the same. The case of contract for life quoted from the Year-Books, was recognized as valid; the solemnity only of an instru-[14]-ment judged requisite. Your Lordships, (this variety of service, with diverse other sorts, existing by law here,) have the opinion of classing him amongst those servants which he most resembles in condition: therefore, (it seems to me) are by law authorised to enforce a service for life in the slave, that being a part of his situation before his coming hither; which, as not incompatible, but agreeing with our laws, may justly subsist here: I think, I might say, must necessarily subsist, as a consequence of a previous right in Mr. Stewart, which our institutions not dissolving, confirm. I don't insist on all the consequences of villenage; enough is established for our cause, by supporting the continuance of the service. Much has been endeavoured, to raise a distinction, as to the lawfulness of the negro's commencing slave, from the difficulty or impossibility of discovery by what means, under what authority, he became such. This, I apprehend, if a curious search were made, not utterly inexplicable; nor the legality of his original servitude difficult to be proved. But to what end? Our Legislature, where it finds a relation existing, supports it in all suitable consequences, without using to enquire how it commenced. A man enlists for no specified time; the contract in construction of law, is for a year: the Legislature, when once the man is enlisted, interposes annually to continue him in the service, as long as the public has need of him. In times of public danger he is forced into the service; the laws from thence forward find him a soldier, make him liable to all the burthen, confer all the rights (if any rights there are of that state) and enforce all penalties of neglect of any duty in that profession, as much and as absolutely, as if by contract he had so disposed of himself. If the Court see a necessity of entering into the large field of argument, as to right of the unfortunate man, and service appears to them deducible from a discussion of that nature to him, I neither doubt they will, nor wish they should not. As to the purpose of Mr. Stewart and Captain Knowles, my argument does not require trover should lie, as for recovering of property, nor trespass: a form of action there is, the writ per quod servitium amisit, for loss of service, which the Court would have recognized; if they allowed the means of suing a right, they allowed the right. The opinion cited, to prove the negroes free on coming hither, only declares them not saleable; does not take away their service. I would say, before I conclude, not for the sake of the Court, of the audience; the matter now in question, interests the zeal for freedom of no person, if truly considered; it being only, whether I must apply to a Court of Justice, (in a case, where if the servant was an Englishman I might use my private authority to enforce the performance of the service, according to it's nature,) or may, without force or outrage, take my servant myself, or by another. I hope, therefore, I shall not suffer in the opinion of those whose honest passions are fired at the name of slavery. I hope I have not transgressed my duty to humanity; nor doubt I your Lordships discharge of yours to justice.

[15] Serjeant Davy.—My learned friend has thought proper to consider the question in the beginning of his speech, as of great importance: 'tis indeed so; but not for those reasons principally assigned by him. I apprehend, my Lord, the honour of England, the honour of the laws of every Englishman, here or abroad, is now concerned. He observes, the number of 14,000 or 15,000; if so, high time to put an end to the practice; more especially, since they must be sent back as slaves, tho' servants here. The increase of such inhabitants, not interested in the prosperity of

a country, is very pernicious; in an island, which can, as such, not extend its limits, nor consequently maintain more than a certain number of inhabitants, dangerous in excess. Money from foreign trade (or any other means) is not the wealth of a nation; nor conduces any thing to support it, any farther than the produce of the earth will answer the demand of necessaries. In that case money enriches the inhabitants, as being the common representative of those necessaries; but this representation is merely imaginary and useless, if the encrease of people exceeds the annual stock of provisions requisite for their subsistence. Thus, foreign superfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a State, still worse. Mr. Dunning availed himself of a wrong interpretation of the word natural: it was not used in the sense in which he thought fit to understand that expression; 'twas used as moral, which no laws can supercede. All contracts, I do not venture to assert are of a moral nature; but I know not any law to confirm an immoral contract, and execute it. The contract of marriage is a moral contract, established for moral purposes, enforcing moral obligations; the right of taking property by descent, the legitimacy of children; (who in France are considered legitimate, tho' born before the marriage, in England not:) these, and many other consequences, flow from the marriage properly solemnized; are governed by the municipal laws of that particular State, under whose institutions the contracting and disposing parties live as subjects; and by whose established forms they submit the relation to be regulated, so far as its consequences, not concerning the moral obligation, are interested. In the case of *Thorn and Watkins*, in which your Lordship was counsel, determined before Lord Hardwicke, a man died in England, with effects in Scotland; having a brother of the whole, and a sister of the half blood: the latter, by the laws of Scotland could not take. The brother applies for administration to take the whole estate, real and personal, into his own hands, for his own use; the sister files a bill in Chancery. The then Mr. Attorney-General puts in answer for the defendant; and affirms, the estate, as being in Scotland, and descending from a Scotchman, should be governed by that law. Lord Hardwicke over-ruled the objection against the sister's taking; declared there was no pretence for it; and spoke thus, to this effect, and nearly in the following [16] words—Suppose a foreigner has effects in our stocks, and dies abroad; they must be distributed according to the laws, not of the place where his effects were, but of that to which as a subject he belonged at the time of his death. All relations governed by municipal laws, must be so far dependent on them, that if the parties change their country the municipal laws give way, if contradictory to the political regulations of that other country. In the case of master and slave, being no moral obligation, but founded on principles, and supported by practice, utterly foreign to the laws and customs of this country, the law cannot recognize such relation. The arguments founded on municipal regulations, considered in their proper nature, have been treated so fully, so learnedly, and ably, as scarce to leave any room for observations on that subject: any thing I could offer to enforce, would rather appear to weaken the proposition, compared with the strength and propriety with which that subject has already been explained and urged. I am not concerned to dispute, the negro may contract to serve; nor deny the relation between them, while he continues under his original proprietor's roof and protection. 'Tis remarkable, in all Dyer, for I have caused a search to be made as far as the 4th of Henry 8th, there is not one instance of a man's being held a villain who denied himself to be one; nor can I find a confession of villenage in those times. [Lord Mansfield, the last confession of villenage extant, is in the 19th of Henry the 6th.] If the Court would acknowledge the relation of master and servant, it certainly would not allow the most exceptionable part of slavery; that of being obliged to remove, at the will of the master, from the protection of this land of liberty, to a country where there are no laws; or hard laws to insult him. It will not permit slavery suspended for a while, suspended during the pleasure of the master. The instance of master and servant commencing without contract; and that of apprentices against the will of the parties, (the letter found in it's consequences exceedingly pernicious;) both these are provided by special statutes of our own municipal law. If made in France, or any where but here, they would not have been binding here. To punish not even a criminal for offences against the laws of another country; to set free a galley-slave, who is a slave by his crime; and make a slave of a negro, who is one, by his complexion; is a cruelty and absurdity that I trust will never take place here: such as

if promulged, would make England a disgrace to all the nations under earth: for the reducing a man, guiltless of any offence against the laws, to the condition of slavery, the worst and most abject state, Mr. Dunning has mentioned, what he is pleased to term philosophical and moral grounds, I think, or something to that effect, of slavery; and would not by any means have us think disrespectfully of those nations, whom we mistakenly call barbarians, merely for carrying on that trade: for my part, we may be warranted, I believe, in affirming the morality or propriety of the practice does not enter their heads; [17] they make slaves of whom they think fit. For the air of England; I think, however, it has been gradually purifying ever since the reign of Elizabeth. Mr. Dunning seems to have discovered so much, as he finds it changes a slave into a servant; tho' unhappily, he does not think it of efficacy enough to prevent that pestilent disease reviving, the instant the poor man is obliged to quit (voluntarily quits, and legally, it seems we ought to say,) this happy country. However, it has been asserted, and is now repeated by me, this air is too pure for a slave to breathe in: I trust, I shall not quit this Court without certain conviction of the truth of that assertion.

Lord Mansfield.—The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica. In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: in which the difficulty will be principally from the inconvenience on both sides. Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate. On the other hand, should we think the coercive power cannot be exercised: 'tis now about fifty years since the opinion given by two of the greatest men of their own or any times, (since which no contract has been brought to trial, between the masters and slaves;) the service performed by the slaves without wages, is a clear indication they did not think themselves free by coming hither. The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens. There is a case in Hobart, (*Coventry and Woodfall,*) where a man had contracted to go as a mariner: but the now case will not come within that decision. Mr. Stewart advances no claim on contract; he rests his whole demand on a right to the negro as slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica. If the parties will have judgment, fiat justitia, ruat cœlum, let justice be done whatever be the consequence. 50l. a head may not be a high price; then a loss follows to the proprietors of above 700,000l. sterling. How would the law stand with respect to their settlement; their wages? [18] How many actions for any slight coercion by the master? We cannot in any of these points direct the law; the law must rule us. In these particulars, it may be matter of weighty consideration, what provisions are made or set by law. Mr. Stewart may end the question, by discharging or giving freedom to the negro. I did think at first to put the matter to a more solemn way of argument: but if my brothers agree, there seems no occasion. I do not imagine, after the point has been discussed on both sides so extremely well, any new light could be thrown on the subject. If the parties chuse to refer it to the Common Pleas, they can give them that satisfaction whenever they think fit. An application to Parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future. The Court is greatly obliged to the gentlemen of the Bar who have spoke on the subject; and by whose care and abilities so much has been effected, that the rule of decision will be reduced to a very easy compass. I cannot omit to express particular happiness in seeing young men, just called to the Bar, have been able so much to profit by their reading. I think it right the matter should stand over; and if we are called on for a decision, proper notice shall be given.

Trinity Term, June 22, 1772.

Lord Mansfield.—On the part of Somerset, the case which we gave notice should be decided this day, the Court now proceeds to give its opinion. I shall recite the return to the writ of habeas corpus, as the ground of our determination; omitting only words of form. The captain of the ship on board of which the negro was taken, makes his return to the writ in terms signifying that there have been, and still are, slaves to a great number in Africa; and that the trade in them is authorized by the laws and opinions of Virginia and Jamaica; that they are goods and chattels; and, as such, saleable and sold. That James Somerset, is a negro of Africa, and long before the return of the King's writ was brought to be sold, and was sold to Charles Stewart, Esq. then in Jamaica, and has not been manumitted since; that Mr. Stewart, having occasion to transact business, came over hither, with an intention to return; and brought Somerset, to attend and abide with him, and to carry him back as soon as the business should be transacted. That such intention has been, and still continues; and that the negro did remain till the time of his departure, in the service of his master Mr. Stewart, and quitted it without his consent; and thereupon, before the return of the King's writ, the said Charles Stewart did commit the slave on board the "Ann and Mary," to save custody, to be kept till he should set sail, and then to be taken with him to Jamaica, and there sold as a slave. And this is the cause why he, Captain Knowles, who was then and now is, commander of the above vessel, then and now lying in the river of [19] Thames, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the Court. We pay all due attention to the opinion of Sir Philip Yorke, and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters, for all the legal consequences of slaves coming over to this kingdom or being baptized, recognized by Lord Hardwicke, sitting as Chancellor on the 19th of October 1749, that trover would lie: that a notion had prevailed, if a negro came over, or became a Christian, he was emancipated, but no ground in law; that he and Lord Talbot, when Attorney and Solicitor-General, were of opinion, that no such claim for freedom was valid; that tho' the Statute of Tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open Court. We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first,) before all the Judges, as is usual, for obvious reasons, on a return to a habeas corpus; the only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

PITT *against* HARBIN.

Mrs. Harbin devised to her four nieces, and on the death of any of them without issue, the whole should go to the survivor or survivors; but if any of her said nieces died, having child or children, then the share to go to such child or children; if all died without issue, then the whole to her nephew.

Catherine Pitt, one of the nieces, married G. Pitt, and had issue W. and G. Both died in the life of the mother; G. Pitt left issue Eliz. and G. grand-children of C. the three other nieces died without issue, one in 1712, C. in 1745, and another in 1759, and F. in 1765. The will was made in 1705.

[20] On the death of F. the grand-children of C. claim the whole. On the other hand, the representatives of Mrs. Harbin say, that nothing but the single share which C. took by survivorship goes to the grand-children of C.

CERTIFICATION

I hereby certify that: a copy of the foregoing has been delivered electronically on the date hereof to each other counsel of record and the non-appearing defendants; counsels' and defendants' names, addresses, e-mail addresses and telephone numbers are listed below; the foregoing has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the foregoing complies with all applicable rules of appellate procedure.

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