P.S.C. __________
A.C. 42795
LLI-CV-18-5010773-S

In the Matter of a Petition for a Common Law Writ of Habeas Corpus,	:	SUPREME COURT
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN	:	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.	:	JUNE 3, 2020

PETITION FOR CERTIFICATION

Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), hereby seeks review of the Appellate Court decision, 197 Conn. App. 353, officially released May 19, 2020 ("Decision").

I. **QUESTIONS PRESENTED FOR REVIEW**

1. Did *Gilchrist v. Commissioner of Correction*, 334 Conn. 548 (2020) require the Appellate Court to reverse and remand this case to the trial court?

2. Does *Jackson v. Bulloch*, 12 Conn. 38 (1837) require this Court to reverse the Decision, overrule *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36 (2019) ("*Commerford I*"), and recognize that Petitioner has next friend standing to bring a petition for habeas corpus on behalf of the elephant Minnie?

3. Did the Appellate Court improperly conflate standing with the merits?

4. Did the Appellate Court err in requiring that Minnie's right to bodily liberty and, therefore, her legal personhood depend upon her capacity to bear duties and social responsibilities?

II. BASES FOR CERTIFICATION

This case is of great public importance because "[t]he issue [of] whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching." *Matter of Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) (Fahey, J., concurring) ("*Tommy*").

The Decision conflicts with *Gilchrist*. The Decision and the opinion upon which it is based, *Commerford I*, also conflict with this Court's seminal decision in *Jackson v. Bulloch*, as well as other decisions, including *Electrical Contractors, Inc. v. Dept. of Education*, 303 Conn. 402 (2012) ("*Electrical Contractors*"), *State v. Iban C.*, 275 Conn. 624 (2005), *State v. Pierson*, 208 Conn. 683 (1988), *Connecticut Assn. of Boards of Education, Inc. v. Shedd*, 197 Conn. 554 (1985) ("*Shedd*"), and *Maloney v. Pac*, 183 Conn. 313 (1981).

III. SUMMARY OF THE CASE

On November 13, 2017, Petitioner filed a Verified Petition for a Common Law Writ of Habeas Corpus ("Petition I") seeking a good faith extension or modification of the common law of habeas corpus on behalf of Beulah, Minnie, and Karen, three elephants alleged to be illegally detained by Defendants.[1] Petitioner sought only the recognition of the elephants' common law right to bodily liberty protected by habeas corpus and their immediate release from illegal detention. On Dec. 26, 2017, the trial court declined to issue the writ on the ground that Petitioner lacked standing under P.B. § 23-24 (a) (1) because Petitioner failed to allege that it had a "significant relationship" with the elephants, and on the alternative ground that Petition I was "wholly frivolous" under P.B. § 23-24 (a) (2).

[1] Karen and Beulah died during the pendency of this matter.

The Appellate Court affirmed the trial court's decision that Petitioner lacked standing because "the elephants, not being persons, lacked standing in the first instance," 192 Conn. App. at 41, as they are "incapable of bearing duties and social responsibilities required by [the Connecticut constitution's] social compact." Id. at 46. In so doing the court improperly conflated standing with the merits.[2]

On June 11, 2018, Petitioner filed a second petition on behalf of Beulah, Minnie, and Karen ("Petition II") requesting the same relief as Petition I. On Feb. 13, 2019, without having issued the writ, the trial court dismissed Petition II as successive under P.B. § 23-29 (3). On May 19, 2020, the Appellate Court affirmed the trial court's dismissal "on the alternative ground that the petitioner lacked standing," Decision, at 354, and specifically on the basis of *Commerford I*. Id., 360–63.

IV. <u>ARGUMENT</u>

1. *Gilchrist* required the Appellate Court to reverse and remand this case to the trial court.

In *Gilchrist*, this Court concluded that the Appellate Court erred in affirming the dismissal of the habeas petition for lack of jurisdiction under P.B. § 23-29 (1), as that dismissal was made prior to the issuance of the writ. 334 Conn. at 563. This Court held that P.B. § 23-29, in contrast to P.B. § 23-24, "contemplates the dismissal of a habeas petition after the writ has issued on any of the enumerated grounds." Id. at 561. The present case is indistinguishable from *Gilchrist.* As no writ was issued, the trial court could not dismiss Petition II under P.B. § 23-29 (3). Contrary to *Gilchrist*, however, the Appellate Court

[2] The merits were not argued in the trial court and the Appellate Court failed to place Petitioner on notice that it was considering determining the merits.

refused to reverse and remand the dismissal. Decision at 362 n.16.[3] It therefore ignored this Court's reminder that "it is important to employ the correct terminology and procedures when disposing of a writ of habeas corpus." *Gilchrist*, 344 Conn. at 563 n.12.

2. *Jackson v. Bulloch* requires this Court to reverse the Decision, overrule *Commerford I*, and recognize that Petitioner has next friend standing to bring a petition for habeas corpus on behalf of Minnie.

As neither Conn. Gen. Stat. § 52-466 nor P.B. § 23-22 restrict who may pursue a habeas corpus petition on behalf of an illegally detained "person," or one who is arguably a "person," Petitioner has next friend standing on behalf of Minnie. This has long been the common law of habeas corpus in every English-speaking common law jurisdiction, including Connecticut.[4]

---

[3] Petitioner notified the Appellate Court of *Gilchrist* following oral argument, Decision, at 362 n. 16, and argued that the trial court's dismissal under P.B. § 23-29 (3) was error. See Petitioner's Appellate Court Brief, pp. 5–15.

[4] "Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment," though a "mere stranger" is one who acts on behalf of a detainee who chooses not to seek the writ. Halsbury's Laws of England vol. 11 (4th Ed. 1976), pp. 783, 784 n.4. The "English Habeas Corpus Act of 1679 authorized [petitions] to be filed by 'any one on . . . behalf' of detained persons." *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990).

Connecticut's first habeas corpus statute was intended to render the common law of habeas corpus more perfect. See 1 Z. Swift, Digest of the Laws of the State of Connecticut (1822) p. 569. It incorporated the common law rule that the facts must be "verified by the affidavit of the person in whose favor the application is made, *or of any other person*," Gen. Stat. Title 47 sec. 2 (1821), which changed in Ch. 87 sec. 1269 (1887) to "verified by the affidavit of *any person*," and changed again in Ch. 308 sec. 850d (1937 supp.) to "verified by the affidavit of *the applicant for the writ alleging that he verily believes the person on*

In *Jackson*, this Court permitted James Mars, an abolitionist and former slave, to bring a habeas corpus petition on behalf of Nancy Jackson who, because she was a slave, lacked standing. See *Jackson*, 12 Conn. at 39; J. Mars, Life of James Mars, A Slave born and sold in Connecticut. Written by Himself (1864) p. 48. Slaves were neither (1) members of the "social compact" described in article first, §1, of the Connecticut constitution nor (2) one of the "people" secured from unreasonable searches and seizures protected by (what is now) article first, §7, of the Connecticut constitution. *Jackson*, 12 Conn. at 42–43. Jackson's status as a slave is directly analogous to Minnie's, while the status of Mars is directly analogous to that of the NhRP. *Jackson* has never been overruled or qualified.

Moreover, *Jackson* favorably cited *Somerset v. Stewart*, 1 Loftt 1 (K.B. 1772) and *Commonwealth v. Aves*, 35 Mass. 193 (1836). 12 Conn. at 41. In *Somerset*, which is part of Connecticut common law,[5] Lord Mansfield issued the writ of habeas corpus sought by Somerset's next friends, who were strangers, to determine if he could be a slave. *Somerset*,1 Loftt 1; see Steven M. Wise, Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery (Da Capo Press 2005) pp. 114–16. Similarly, in *Aves*, Chief Justice Lemuel Shaw issued the writ of habeas corpus on behalf of a six-year-old slave, Med, whose next friend was the Boston Female Anti-Slavery Society. See *Aves*, 35 Mass. 193, 206; L. Levy, The Law of the Commonwealth and Chief Justice Lemuel Shaw (Oxford University Press 1957) p. 63.

---

whose account such writ is sought is illegally confined or deprived of his liberty." (Emphases added.) This language is substantively identical to Gen. Stat. § 52-466(b). That is why no Connecticut appellate court has ever dismissed a habeas corpus petition for failing to allege a relationship between the next friend and the detainee.

[5] Connecticut adopted the English common law as it existed prior to 1776. See *State v. Courchesne*, 296 Conn. 622, 680 (2010).

As slaves, Jackson, Somerset, and Med all lacked standing to challenge the legality of their detention themselves but could do so through next friends, a situation that has repeatedly been followed in habeas corpus cases involving slaves, e.g., *Lemmon v. People*, 20 N.Y. 562 (1860) (habeas writ obtained for eight slaves); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (habeas writ obtained on behalf of slave), and nonhuman animals, e.g., *The Nonhuman Rights Project v. Breheny*, Docket No. 260441/19, 2020 WL 1670735, at *7 (N.Y. Sup. Ct. February 18, 2020) (Tuitt, J.) (under CPLR § 7002(a), NhRP had standing to bring habeas petition on behalf of imprisoned elephant); *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 905 (N.Y. Sup. Ct. 2015) (Jaffe, J.) ("*Stanley*") (same on behalf of two imprisoned chimpanzees).

Jackson cannot rationally coexist with the Decision and *Commerford I*. *Jackson* gives Petitioner next friend standing on behalf of Minnie; its standing does not depend on Minnie's standing. Accordingly, this Court must either follow *Jackson* and acknowledge that the NhRP, as did James Mars, has next friend standing to bring this habeas corpus petition, or overrule *Jackson*. But it should no longer ignore the conflict.

That Minnie is an elephant does not distinguish *Jackson*, since both she and Nancy Jackson possess the autonomy upon which the common law right to bodily liberty is grounded and which habeas corpus is intended to protect. Five of the world's most renowned experts on elephant cognition submitted *unrebutted* affidavits demonstrating that Minnie is an extraordinarily cognitively complex and autonomous being. See Petition II, paras. 90–100 (detailing the numerous complex cognitive abilities of elephants). Even the Appellate Court "acknowledge[d] that elephants are magnificent animals who naturally

develop social structures and exhibit emotional and intellectual capacities." *Commerford I*, 192 Conn. App. at 48 n.9.

In a recent habeas corpus case involving chimpanzees, Judge Eugene M. Fahey of the New York Court of Appeals—the only American high court judge thus far to opine on the merits of the arguments for the habeas corpus rights of autonomous nonhuman animals—criticized an intermediate appellate court's "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species." *Tommy*, 31 N.Y.3d at 1057. He noted:

> [t]he reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a "person" or relegated to the category of a "thing" amounts to a refusal to confront a manifest injustice. Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition. . . . [Chimpanzees] are autonomous, intelligent creatures. To solve this dilemma, we have to recognize its complexity and confront it.

Id. at 1059.

Thus, the momentous question squarely placed before this Court is whether Minnie's species, *standing alone*, presents a distinction with a legal difference, the way that race, religion, gender, sexual preference, national origin, and similar distinctions among humans once justified invidious discrimination against them, or whether her species, *standing alone*, is a distinction without a legal difference, the way that race, religion, gender, sexual preference, national origin, and similar distinctions among humans have become legally irrelevant in our more enlightened times.

This is the second opportunity this Court has had to vote on whether to consider Petitioner's appeal on behalf of an elephant. *Tommy* was Judge Fahey's third opportunity

to vote on whether the Court of Appeals should hear the NhRP's appeal on behalf of a chimpanzee: "In the interval since we first denied leave to the [NhRP], I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now [on a procedural ground], I continue to question whether the Court was right to deny leave in the first instance." *Tommy*, 31 N.Y.3d at 1059. He explained:

> The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing.

Id. The time has come for this Court to recognize the profound issue of Minnie's fundamental right to liberty protected by habeas corpus and confront it.

3. The Appellate Court improperly conflated standing with the merits.

"[T]he question of standing is *not an inquiry into the merits*." (Emphasis added.) *Shedd*, 197 Conn. at 557 n.1; accord *State v. Iban C.*, 275 Conn. at 664; *State v. Pierson*, 208 Conn. at 687; *Maloney v. Pac*, 183 Conn. at 321 n.6. "[S]tanding exists so that a party may attempt to vindicate 'arguably' protected interests." *Shedd*, 197 Conn. at 557 n.1.

Whether Minnie is a "person" entitled to the right to bodily liberty lies at the heart of the merits of Petition I and Petition II. Yet it was not an appellate issue in either *Commerford I* or the Decision. The Appellate Court's conclusion that elephants are not "persons" was made without the benefit of a record generated by a lower court hearing, and improperly conflated standing with the merits. See *Electrical Contractors*, 303 Conn. at 438 n.28 (refusing to consider claim because it "would involve consideration of the merits, rather than the issue of the plaintiffs' standing"). No other Connecticut appellate court has affirmed a dismissal on standing grounds by determining the merits.

4. **Minnie's right to bodily liberty and, therefore, her legal personhood do not depend upon her capacity to bear duties and social responsibilities.**

"[A] person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not . . . ." Black's Law Dictionary (11th Ed. 2019) (quoting J. Salmond, Jurisprudence [G. Williams ed., 10th Ed. 1947] p. 318). The recognition of Minnie's right to bodily liberty and, therefore, her legal personhood cannot depend on her capacity to bear "duties and social responsibilities required by [the Connecticut constitution's] social compact." *Commerford I*, 192 Conn. App. at 46.

First, what Connecticut's "social compact" may require is irrelevant in a habeas corpus case. In *Jackson*, a slave was ordered freed pursuant to common law habeas corpus notwithstanding that slaves were not members of the "social compact." 12 Conn. at 43. No Connecticut court has ever found that the "social compact" conditions the right to bodily liberty on the capacity to bear duties and social responsibilities.[6]

Second, the right to bodily liberty *cannot* depend on the capacity to bear duties and social responsibilities. Criticizing the New York decision on which *Commerford I* relied, Judge Fahey observed:

> Even if it is correct . . . that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child or a parent suffering from dementia.

(Citations omitted.) *Tommy*, 31 N.Y.3d at 1057.

---

[6] *Commerford I* cited *Moore v. Ganim*, 233 Conn. 557, 598 (1995), but the quoted passage discussed neither "duties" nor "responsibilities." See *Commerford I*, 192 Conn. App. at 45–46.

Third, as Professor John Gray noted, there may be "systems of law in which animals have legal rights" and are "legal persons." J. Gray, The Nature and Sources of the Law (R. Gray ed., 2d Ed. 1921) p. 43. Connecticut is already one of them: Gen. Stat. § 45a-489a bestowed trust beneficiary rights to nonhuman animals and therefore implicitly recognized them as legal persons. See CT S. Tran., 5/28/2009, p. 13, remarks of Senator (now Justice) Andrew J. McDonald ("creating a separate framework to deal with the situation of animals as beneficiaries of a trust"); Black's Law Dictionary (defining "beneficiary" as "esp., a person for whose benefit property is held in trust"); see also *Stanley*, 16 N.Y.S.3d 901 (referring to "[New York's] recognition of legal personhood for some nonhuman animals under [EPTL § 7-8.1]"); *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) ("it is common knowledge that personhood can and sometimes does attach to . . . animals" [citations omitted]).

As Minnie is the beneficiary of an *inter vivos* trust created by the NhRP under Gen. Stat. § 45a-489a (see Petition II, Ex. 1) she is already a legal person, notwithstanding her alleged inability to bear duties and social responsibilities.

Respectfully submitted,

NONHUMAN RIGHTS PROJECT, INC.
Petitioner-Appellant

By: /s/ Jessica Rubin (408854)
Jessica Rubin
Clinical Professor and Director
UConn Law School Animal Law Clinic
55 Elizabeth Street
Hartford, CT 06105
Tel.: (860) 995-6330
Email: Jessica.Rubin@uconn.edu

Admitted pro hac vice:
Steven M. Wise
President
Nonhuman Rights Project, Inc.
5195 NW 112th Terrace
Coral Springs, FL 33076
Tel: (954) 648-9864
Email: WiseBoston@aol.com

CERTIFICATION

Pursuant to Practice Book §§ 62-7 and 84-4, I hereby certify that the foregoing document does not contain any names or personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law, that it complies with all applicable rules of appellate procedure, and that a copy hereof was sent electronically, on June 3, 2020, to the non-appearing defendants:

R.W. Commerford & Sons
48 Torrington Rd.
Goshen, CT 06756
Tel.: (860) 491-3421
E-mail: commerfordzoo@yahoo.com

William R. Commerford
48 Torrington Rd.
Goshen, CT 06756
Tel.: (860) 491-3421
E-mail: commerfordzoo@yahoo.com

By: /s/ Jessica Rubin (408854)
Jessica Rubin

APPENDIX

TABLE OF CONTENTS

Page

May 19, 2020 Appellate Decision …………………………………………………………. A001

List of Parties to Appeal ……………………………………………………………………. A012

Connecticut Statutes

Conn. Stat. Title 47 (1821) ………………………………………………………………. A013

Conn. Stat. Chapter 87 (1887) …………………………………………………………….. A015

Conn. Stat. Chapter 308 (1937 Supp.) ………………………………………………… A017

Foreign Case

Somerset v. Stewart, 1 Loftt 1 (K.B. 1772) …………………………………………….. A020

Secondary Source

Halsbury's Laws of England vol. 11 (4th 1976), 783, 784 n.4 ……………………….. A033

NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD & SONS, INC., ET AL. (AC 42795)

Alvord, Bright and Beach, Js.

Syllabus

The petitioner, N Co., sought a writ of habeas corpus on behalf of three elephants that it alleged were being illegally confined by the named respondents, C Co., a zoo, and C Co.'s president, W. N Co. challenged the detention of the elephants, sought recognition of the elephants as "persons" recognized by the common law, and requested that the elephants be released. The habeas court dismissed the petition as successive in light of N Co.'s first petition against C Co. and W, which alleged essentially the same facts and sought the same relief. On appeal to this court, at which time only one of the three elephants remained alive, the petitioner claimed that the habeas court erred in dismissing its second petition as successive and that this court's decision on the first petition, which affirmed the habeas court's decision to decline to issue the writ, was incorrect. *Held* that the habeas court properly dismissed the present petition for a writ of habeas corpus, as the elephant, and consequently, N Co., lacked standing to file a petition for a writ of habeas corpus because the elephant had no legally protected interest that possibly could be adversely affected; the reasoning and the holding in the appellate decision on the first petition were clearly applicable to the present petition and controlled the resolution of this appeal, N Co. failed to present any material distinctions between the first appeal and the present appeal, our habeas corpus jurisprudence contained no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, our common law revealed no instances of a nonhuman animal permitted to bring an action to vindicate its purported rights, only a person, not an animal, whose custody is in question is authorized to file an application for a writ of habeas corpus, the term "person" in our General Statutes has never been defined as a nonhuman animal, and recent legislative activity regarding habeas corpus lacked any indication that the legislature intended habeas corpus relief to apply to nonhuman animals.

Argued January 8—officially released May 19, 2020

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the matter was transferred to the judicial district of Litchfield at Torrington and tried to the court, *Shaban*,

J.; judgment dismissing the petition, from which the petitioner appealed to this court. *Affirmed.*

Steven M. Wise, pro hac vice, with whom were *Barbara M. Schellenberg* and, on the brief, *David B. Zabel*, for the appellant (petitioner).

Opinion

ALVORD, J. The petitioner, Nonhuman Rights Project, Inc., appeals from the judgment of the habeas court dismissing its petition for a writ of habeas corpus that it sought on behalf of an elephant, Minnie,[1] who is alleged to be owned by the named respondents, R.W. Commerford & Sons, Inc. (also known as the Commerford Zoo), and its president, William R. Commerford.[2] The petitioner argues that the court improperly dismissed its petition for a writ of habeas corpus. We conclude that the court properly dismissed the petition on the alternative ground that the petitioner lacked standing.[3]

On November 13, 2017, the petitioner filed its first verified petition for a common-law writ of habeas corpus on behalf of three elephants; see footnote 1 of this opinion; pursuant to General Statutes § 52-466 et seq. and Practice Book § 23-21 et seq. (first petition). See *Nonhuman Rights Project, Inc.* v. *R.W. Commerford &*

[1] The petition originally was filed on behalf of three elephants: Beulah, who was in her "mid-forties"; Minnie, who has been owned by the named respondents since at least 1989; and Karen, who was in her "mid-thirties." The petitioner represented during oral argument before this court that Beulah and Karen have since died. Counsel for the petitioner stated that, although he believes that Karen died in March, 2019, he did not learn of her death at the time because he does not have access to the elephants.

[2] The named respondents are not parties to the action or to this appeal.

[3] Given our conclusion that the petitioner lacked standing, we need not address the petitioner's claims that the habeas court improperly (1) dismissed its petition for a writ of habeas corpus on the ground that it was successive pursuant to Practice Book § 23-29 (3) and (2) concluded that, even if it were not successive, it would be subject to dismissal pursuant to Practice Book § 23-29 (5).

Sons, Inc., 192 Conn. App. 36, 38, 216 A.3d 839 (*Commerford I*), cert. denied, 333 Conn. 920, 217 A.3d 635 (2019). "The petitioner alleged that it is a not-for-profit corporation with a mission of changing the common-law status of at least some nonhuman animals from mere things, which lack the capacity to possess any legal rights, to persons, who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them. . . . The petitioner alleged that the named respondents are illegally confining the elephants.

"The petition [made] clear that it challenge[d] neither the conditions of [the elephants'] confinement nor [the] respondents' treatment of the elephants, but rather the fact of their detention itself . . . . It [was] not seeking any right other than the common-law right to bodily liberty for the elephants. The petition state[d] that determining [who] is a person is the most important individual question that can come before a court, as the term person identifies those entities capable of possessing one or more legal rights. Only a person may invoke a common-law writ of habeas corpus, and the inclusion of elephants as persons for that purpose [was] for this court to decide. The petition further allege[d] that [the] expert affidavits submitted in support of [the] petition set forth the facts that demonstrate that elephants . . . are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives, and who possess those complex cognitive abilities sufficient for common-law personhood and the common-law right to bodily liberty protected by the common law of habeas corpus, as a matter of common-law liberty, equality, or both." (Internal quotation marks omitted.) Id., 38–39.

On December 26, 2017, the habeas court, *Bentivegna, J.*, declined to issue a writ of habeas corpus pursuant

to Practice Book § 23-24 (a) (1) and (2)[4] on the basis that the petitioner lacked standing to bring the petition on behalf of the elephants and that the petition was wholly frivolous on its face. Id., 39–40. The petitioner appealed to this court. *While the appeal to this court from the order of the habeas court declining to issue the writ with respect to its first petition was pending*, the petitioner filed the present petition for a writ of habeas corpus on June 11, 2018.[5] The petition again

[4] Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

[5] Despite alleging that the elephants were being detained by the named respondents in Goshen, which is located in the judicial district of Litchfield where the petitioner filed its first petition, the petitioner filed the present petition in the judicial district of Tolland. It was transferred by the court, sua sponte, to the judicial district of Litchfield.

When asked during oral argument before this court why the petition was filed in Tolland, the petitioner's counsel, who appeared pro hac vice, represented that he believed that the judges in Tolland would have a greater understanding of habeas corpus. The petitioner's counsel conceded that this constituted "judge shopping." He later stated that he was not looking for a judge that would rule in his favor but, rather, one that "worked in the area of habeas corpus day in and day out." Local counsel for the petitioner, Barbara M. Schellenberg, was asked during oral argument whether she was cognizant of the "judge shopping" occurring in the case, and she stated that she personally was not involved in the matter before the trial court.

Following oral argument, David B. Zabel, also local counsel for the petitioner, filed with this court a letter stating that pro hac vice counsel for the petitioner believed, at the time of the filing of the petition, that it would not be improper to file the petition in the judicial district of Tolland. Zabel agreed with that position, likening the filing of the petition in Tolland to "seeking to have a complex civil case transferred to the complex litigation docket in Connecticut to have it heard before a judge experienced in complex cases."

We strongly disagree that counsels' filing of the habeas petition in Tolland was proper. See General Statutes § 52-466 (a) (1) ("[a]n application for a writ of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty").

Furthermore, we are extremely troubled by counsels' implication that filing a second action that is virtually identical to the first action, which the

sought recognition of the elephants as "persons," within the meaning of the common law, in order to secure the elephants' common-law right to bodily liberty protected by habeas corpus. The petition requested release of the elephants from the alleged illegal confinement.

On February 13, 2019, the habeas court, *Shaban*, *J.*, issued a memorandum of decision dismissing the petition as successive under Practice Book § 23-29 (3), concluding that the petitioner, the named respondents, the subjects of the petition, the grounds asserted in the petition, and the relief sought by the petition were all the same as in the first petition.[6] It further concluded that, even if the petition were not successive, it would be subject to dismissal pursuant to Practice Book § 23-29 (5).[7] This appeal followed.[8]

On appeal, the petitioner claims that the habeas court erred in dismissing its petition.[9] After the petitioner filed its appellate brief in this appeal, this court released its decision in *Commerford I*, supra, 192 Conn. App. 36, which affirmed the habeas court's decision to decline to issue the writ with respect to the petitioner's first

petitioner lost, was justified because Judge Bentivegna did not have sufficient knowledge of or experience in habeas corpus matters when he ruled against the petitioner. Not only does such a suggestion unfairly impugn an experienced and capable judge, our system does not work that way. A litigant may not file a repetitive action just because it is unhappy with the ruling of the first judge. A disappointed litigant's remedy after losing in the trial court is to appeal to this court or to our Supreme Court, not to file a second action essentially asking one Superior Court judge to overrule another. This is not a novel concept.

[6] In dismissing the petition, the habeas court considered a motion filed by the petitioner seeking that the court rule promptly on its petition for a writ of habeas corpus and for oral argument to be held thereon.

[7] Practice Book § 23-29 (5) provides: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . any other legally sufficient ground for dismissal of the petition exists."

[8] The petitioner filed a motion to reargue, which was denied.

[9] "Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary." *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020).

petition. This court concluded in *Commerford I* that the petitioner could not satisfy the prerequisites for establishing next friend standing because the elephants lacked standing in the first instance. Id., 41. The elephants lacked standing to file a petition for a writ of habeas corpus because they lacked a legally protected interest that possibly could be adversely affected and, therefore, the habeas court properly declined to issue the writ on standing grounds. Id., 48. Following this court's decision in *Commerford I*, the petitioner filed a motion for reconsideration en banc,[10] which this court denied, and a petition for certification to appeal to our Supreme Court,[11] which also was denied.

[10] Therein, the petitioner argued that the decision conflicted with appellate precedent in four ways. "First, under *Jackson* v. *Bulloch*, [12 Conn. 38 (1837)], the [petitioner's] standing did not depend upon the elephants having standing. Second, under *Connecticut Assn. of Boards of Education, Inc.* v. *Shedd*, [197 Conn. 554, 557 n.1, 499 A.2d 797 (1985)], 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*, [168 Conn. App. 294, 308 n.8, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016)], the [petitioner] 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 [General Statutes §] 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*."

[11] In its petition for certification to appeal to our Supreme Court, the petitioner presented the following questions for review: "A. Did the Appellate Court err in holding that the real party in interest, Minnie—an Asian elephant unlawfully detained by [the named respondents]—must have standing in the first instance in order for [the petitioner] to have next friend standing to pursue a habeas corpus action on her behalf, where the action seeks a good faith extension or modification of the Connecticut common law of habeas corpus?

"B. Did the Appellate Court err when it resolved the question of Minnie's standing by determining the merits of the case?

"C. Did the Appellate Court err in determining that personhood requires the ability to bear duties and social responsibilities, an issue which neither the trial court nor the

Appellate Court provided [the petitioner] with an adequate opportunity to present, brief, and argue?" (Footnote omitted.)

The petitioner thereafter was granted permission to file a supplemental brief in this appeal. In its supplemental brief, the petitioner argued that "this court should disregard [*Commerford I*] as it is 'clearly wrong,' " presenting nine arguments in support of this claim.[12] "[A]s we often have stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-385* v. *Westport Dept. of Public Works*, 151 Conn. App. 477, 484 n.7, 95 A.3d 1178, cert. denied, 314 Conn. 930, 101 A.3d 274 (2014); see *State* v. *Joseph B.*, 187 Conn. App. 106, 125 n.14, 201 A.3d 1108, cert. denied, 331 Conn. 908, 202 A.3d 1023 (2019); see also Practice Book § 70-7.[13] At oral argument before this court, the peti-

[12] In its supplemental brief, the petitioner raised the following arguments: "this court erroneously conflated the question of [the petitioner's] standing with the merits when it determined that Minnie was not a 'person' for standing purposes"; "in conflict with *Jackson* v. *Bulloch*, [12 Conn. 38 (1837)] this court erroneously concluded that [the petitioner's] standing depended on Minnie having 'standing in the first instance' "; "the English and American common law of habeas corpus have long granted third parties standing to challenge a stranger's private detention"; "in conflict with *Jackson* [v. *Bulloch*, supra, 38] and Anglo-American jurisprudence, this court erroneously concluded that Minnie is not a 'person' because she is 'incapable of bearing duties and social responsibilities required by [the] social compact' "; "Minnie is already a 'person' as she has the right of a trust beneficiary under General Statutes § 45a-489a (a)"; (emphasis in original); "by asserting that the undefined term 'person' in General Statutes § 52-466 (a) (1) cannot apply to an animal . . . this court erroneously conflated 'person' with 'human being,' which are not synonymous"; "§ 52-466 and Practice Book § 23-21 et seq. are purely procedural and cannot determine the substantive scope of habeas corpus . . . [t]hus, it is irrelevant that judges or legislators may not have had elephants in mind when determining who was entitled to habeas corpus relief"; "Connecticut courts are 'charged with the ongoing responsibility to revisit our common-law doctrines when the need arises' "; and "allowing Minnie to seek habeas corpus relief would not 'require [this court] to upend this state's legal system to allow highly intelligent, if not all, nonhuman animals the right to bring suit in a court of law.' " (Emphasis in original.)

[13] Practice Book § 70-7 provides: "(a) Before a case is assigned for oral argument, the chief judge may order, on the motion of a party or sua sponte, that a case be heard en banc.

tioner's counsel recognized both that this court cannot overrule a decision of a prior panel and that it had not filed a request to have the present appeal heard en banc.[14] Accordingly, we decline the petitioner's request to revisit our precedent.

In accordance with our decision in *Commerford I*, we conclude that Minnie and, consequently, the petitioner, lack standing. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action . . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specially and injuriously affected by the decision. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Stec* v.

"(b) After argument but before decision, the entire court may order that the case be considered en banc with or without further oral argument or with or without supplemental briefs. The judges who did not hear oral argument shall have available to them the electronic recording or a transcript of the oral argument before participating in the decision.

"(c) After decision, the entire court may order, on the motion of a party pursuant to Section 71-5 or sua sponte, that reargument be heard en banc."

[14] Instead, when asked during oral argument before this court whether he was waiting to seek consideration en banc until after this court issued its decision stating that it could not reverse the ruling of the prior panel, the petitioner's counsel represented that he intended to file a motion for reconsideration en banc after this court issues its decision in this appeal.

Raymark Industries, Inc., 299 Conn. 346, 373–74, 10 A.3d 1 (2010).

In *Commerford I*, this court first examined our habeas corpus jurisprudence, which revealed "no indication that habeas corpus relief was ever intended to apply to a nonhuman animal," and our common law, which revealed no instances of nonhuman animals being permitted to bring a cause of action to "vindicate the animal's own purported rights." *Commerford I*, supra, 192 Conn. App. 45. It then discussed the social compact theory, pursuant to which "all individuals are born with certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange for the mutual preservation of their lives, liberties, and estates." (Internal quotation marks omitted.) Id., 45–46. It explained that elephants and other nonhuman animals are "incapable of bearing duties and social responsibilities required by such social compact." Id., 46.

Next, this court turned to our statutes, particularly § 52-466,[15] which shapes the use of a writ of habeas corpus. The court noted that "§ 52-466 (a) (1) unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus in the judicial district in which that *person* whose custody is in question is claimed to be illegally confined." (Emphasis in original.) Id., 47. It further stated that it "found no place in our General Statutes where the term 'person' has ever been defined as a nonhuman animal." Id. Noting recent legislative activity regarding habeas corpus, which lacked any indication that the legislature intended habeas corpus relief to apply to nonhuman animals, and the lack of case law holding that animals can possess their own legal rights, this court declined to disturb who can seek

[15] See footnote 5 of this opinion.

habeas corpus relief. It concluded that "the elephants —who are incapable of bearing legal duties, submitting to societal responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities—do not have standing to file a petition for a writ of habeas corpus because they have no legally protected interest that possibly can be adversely affected." Id., 48.

The petitioner has failed entirely to present any material distinctions between *Commerford I* and the present case. The reasoning and the holding in *Commerford I* are clearly applicable to the present case, and control the resolution of this appeal. We therefore conclude that Minnie and, consequently, the petitioner, lacked standing to file a petition for a writ of habeas corpus.[16]

[16] Following oral argument before this court, the petitioner submitted a notice of supplemental authority citing *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 223 A.3d 368 (2020), stating that it is significant because the habeas court dismissed the present petition pursuant to Practice Book § 23-29 (3) prior to issuing the writ.

In *Gilchrist*, our Supreme Court clarified the proper procedure to be used by the habeas court in its preliminary consideration of a petition for a writ of habeas corpus under Practice Book §§ 23-24 and 23-29. Id., 550. It summarized: "[W]hen a petition for a writ of habeas corpus alleging a claim of illegal confinement is submitted to the court, the following procedures should be followed. First, upon receipt of a habeas petition that is submitted under oath and is compliant with the requirements of Practice Book § 23-22; see Practice Book §§ 23-22 and 23-23; the judicial authority must review the petition to determine if it is patently defective because the court lacks jurisdiction, the petition is wholly frivolous on its face, or the relief sought is unavailable. Practice Book § 23-24 (a). If it is clear that any of those defects are present, then the judicial authority should issue an order declining to issue the writ, and the office of the clerk should return the petition to the petitioner explaining that the judicial authority has declined to issue the writ pursuant to § 23-24. Practice Book § 23-24 (a) and (b). If the judicial authority does not decline to issue the writ, then it must issue the writ, the effect of which will be to require the respondent to enter an appearance in the case and to proceed in accordance with applicable law. At the time the writ is issued, the court should also take action on any request for the appointment of counsel and any application for the waiver of filing fees and costs of service. See Practice Book §§ 23-25 and 23-26. After the writ has issued, all further proceedings should continue in accordance with the procedures set forth in our rules of practice, including Practice Book § 23-29." *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 562–63.

Because of the highly unique and unusual procedural history of the present case, we decline to assign error in the procedure followed by the court. First, we note that the petitioner improperly filed its petition in the judicial

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOHN VIVO III
(AC 42909)

Bright, Moll and Bear, Js.

Syllabus

The defendant, who had been previously convicted of the crimes of murder and assault in the first degree and whose sentence was enhanced pursuant to statute (§ 53-202k) for the commission of class A and B felonies with a firearm, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claimed that the trial court improperly concluded that it lacked jurisdiction to consider his motion because there was evidence that, in the course of the underlying shootings, he had used a weapon that was specifically exempted from the ambit of § 53-202k, and, therefore, his sentence enhancement pursuant to that statute was illegal. *Held* that the trial court properly dismissed the defendant's motion to correct an illegal sentence; for that court to have jurisdiction over that motion after the sentence had been executed, the sentencing proceeding, and not the proceedings leading to the conviction, had to be the subject of the attack, and the defendant's claim here, in essence, that the state did not present sufficient evidence to prove that § 53-202k was applicable, did not challenge the legality of his sentence or the sentence proceeding but, rather, the evidence that underpinned his conviction, and,

district of Tolland. The action was assigned a civil docket number in Tolland before being transferred to the appropriate judicial district. Once properly in the judicial district of Litchfield, the court held status conferences and received and heard oral argument on the petitioner's motion for order. Although that motion sought to have the court issue the writ; see Practice Book § 23-24; the court raised during oral argument the present petition's duplicity with the first petition. The petitioner's counsel did not object on the basis that consideration of that issue was improper because the court had not yet issued the writ pursuant to Practice Book § 23-24. Moreover, the record contains a status conference memorandum dated November 27, 2018, in which the petitioner argued that the present petition should not be dismissed under Practice Book § 23-29 (3).

Finally, even if we were to assign error in the procedural handling of the present action and to conclude that the court failed to issue the writ prior to its dismissal of the petition pursuant to Practice Book § 23-29, we note that the only remedy available to the petitioner, given the petitioner's lack of standing, would be for this court to remand the matter to the habeas court with direction to decline to issue the writ under Practice Book § 23-24 (a) (1) on the basis that the court lacked jurisdiction. See *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 563.

LIST OF PARTIES TO APPEAL

Plaintiff Nonhuman Rights Project, Inc.

Trial and Appellate Counsel:

Steven M. Wise (pro hac vice)
5195 NW 112th Terrace
Coral Springs, FL 33076
Tel: (954) 648-9864
E-mail: WiseBoston@aol.com

Jessica Rubin
Clinical Professor and Director
UConn Law School Animal Law Clinic
55 Elizabeth Street
Hartford, CT 06105
Tel: (860) 995-6330
Email: Jessica.Rubin@uconn.edu
Juris No. 408854

Defendants R.W. Commerford & Sons, Inc. a/k/a Commerford Zoo, and William R. Commerford, as President of R.W. Commerford & Sons, Inc.

Non-appearing parties.

HEINONLINE

Citation:
Public Statute Laws of the State of Connecticut as
Revised and Enacted by the General Assembly, in May
1821 (1821).

Content downloaded/printed from HeinOnline

Thu Mar 28 11:13:08 2019

-- Your use of this HeinOnline PDF indicates your
acceptance of HeinOnline's Terms and Conditions
of the license agreement available at
https://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

Use QR Code reader to send PDF
to your smartphone or tablet device

TITLE 47. *Habeas Corpus.*

An Act to provide for issuing the writ of Habeas Corpus.

SECT. 1. BE *it enacted by the Senate and House of Representatives, in General Assembly convened,* That any judge of the superior court, or the county court, when in session, or the chief judge thereof, when said court is not in session, shall have power to issue the writ of habeas corpus, and proceed thereon according to law: and when any trial shall be before a single judge, the court fee shall be two dollars, and when before a court in session, no fee shall be paid.

Who may issue the writ of habeas corpus.

Fee on trial.

SECT. 2. When application is made to such court or judge, for a writ of habeas corpus, and the facts are verified, by the affidavit of the person in whose favor the application is made, or of any other person, in which he or she alleges, that he or she verily believes the person on whose account such writ is prayed for, is illegally confined, or deprived of his lawful liberty, it shall be the duty of such court or judge, to grant a writ of habeas corpus, directed to some proper officer, to serve and return; who shall receive and make due service of the same, by putting into the hands of the person, who has the custody of the body of him or her, who is directed to be brought up on said writ, a true and attested copy of the same; and shall make immediate return of said writ, with his doings thereon, on pain of forfeiting fifty dollars, to the use of the person so held in custody, to be recovered by action on the case.

When and how to be issued.

How to be served.

SECT. 3. If any person, having the custody of the body of any one directed to be brought up, on a writ of habeas corpus, duly served, shall fail or neglect to bring up the body, according to the command in the writ; or shall refuse to accept the copy offered in service of the same; or shall, in any way, fraudulently avoid bringing up the body, according to the command in the writ; or, having brought up the body, shall neglect or refuse to make return of the cause of detaining such person, so held in custody; he shall be deemed guilty of a contempt of court, and may be punished, by said court or judge, by commitment, for such contempt, and shall also forfeit and pay to the person so held in custody, two hundred dollars.

Penalty for disobedience.

SECT. 4. When any facts contained in such return shall be contested, by the applicant, such court or judge may hear testimony, and examine and decide upon the truth,

Trial.

HEINONLINE

Citation:
General Statutes of Connecticut, Revision of 1887; in
Force January First, 1888 (1887).

Content downloaded/printed from HeinOnline

Thu Mar 28 11:02:13 2019

-- Your use of this HeinOnline PDF indicates your
acceptance of HeinOnline's Terms and Conditions
of the license agreement available at
https://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

Use QR Code reader to send PDF
to your smartphone or tablet device

Sec. 1268. If any judgment debt be taken by foreign attachment, the issue of execution on such judgment, or its levy, if already issued, shall be stayed during the continuance of the lien of such attachment; and the time during which such stay is continued shall be excluded in computing the time within which such execution must be levied in order to preserve any attachment lien created by or in the original suit. And in case any action shall be commenced or prosecuted in the name of the original creditor to recover any debt, or in the name of any person, claiming to be owner, to recover the value of any effects, while such debt or effects are under the lien of a foreign attachment, it shall be in the discretion of the court, if final judgment be rendered for the plaintiff, to allow costs to the defendant, to be deducted out of such debt, or out of the value of such effects, or to allow costs to the plaintiff, or to neither party.

G. S. 1875, 446, 466. Stay of execution against judgment debtor, who has been factorized.

CHAPTER LXXXVII.

Habeas Corpus.

SECTION
1269. Writ of habeas corpus.
1270. Refusal to obey writ or receive copy in service.

SECTION
1271. Hearing and judgment.
1272. Commitment for contempt.

Sec. 1269. Upon application to any Superior Court, Court of Common Pleas, or district court, or to any judge thereof in vacation, for a writ of *habeas corpus*, verified by the affidavit of any person, alleging that he verily believes the person, on whose account such writ is prayed for, to be illegally confined or deprived of his liberty, such court or judge shall grant the writ, returnable before such court or judge, and directed to some proper officer, to serve and return; who shall serve it by putting a true and attested copy of it into the hands of the person who has the custody of the body of him who is directed to be brought up on said writ; and if said officer fail to make immediate return of said writ, with his doings thereon, he shall pay fifty dollars to the person so held in custody.

G. S. 1875, 476. 7 Sp. Acts, 943. 1881, ch. 121. Writ of habeas corpus. 32 Conn., 588.

Sec. 1270. If any person, having the custody of the body of any one directed to be brought up on a writ of *habeas corpus* duly served, shall fail to bring up the body according to the command in the writ; or refuse to accept the copy of it offered in service; or, in any way, fraudulently avoid bringing up the body, according to such command, or, having brought up the body, shall not make return of the cause of detaining such person so held in custody, he shall be deemed guilty of a contempt of court, and may be punished therefor by said court or judge by commitment, and shall pay to the person so held in custody two hundred dollars.

G. S. 1875, 476. Rufusal to obey writ or receive copy in service.

Sec. 1271. When any statements contained in such return shall be contested, such court or judge may hear testimony, and examine and decide upon the truth, as well as the sufficiency of the return, and render such judgment as to law and justice shall appertain.

G. S. 1875, 476. Hearing and judgment. 33 Conn., 321.

HEINONLINE

Citation:
General Statutes of Connecticut: Revision of 1930
(1930).
Provided by:
NSU

Content downloaded/printed from HeinOnline

Thu Apr 4 15:37:11 2019

-- Your use of this HeinOnline PDF indicates your
acceptance of HeinOnline's Terms and Conditions
of the license agreement available at
https://heinonline.org/HOL/License

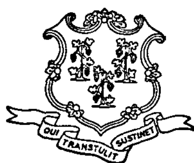
-- The search text of this PDF is generated from
uncorrected OCR text.

Use QR Code reader to send PDF
to your smartphone or tablet device

1937 SUPPLEMENT

TO THE

GENERAL STATUTES



State of Connecticut

JANUARY SESSION, 1937

SPECIAL SESSION, 1936

HARTFORD, CONN.
Published by the State
1937

CHAPTER 308.

Habeas Corpus.

⊕

S. 5893

Sec. 850d. Application. Service. Return. An application for a writ of habeas corpus may be made to the superior court or a court of common pleas in the county wherein the person whose custody is in question is claimed to be illegally confined or deprived of his liberty or, when such court shall not be actually in session, to a judge of the superior court residing, or at the time assigned to hold a session of such court, in such county or to a judge of the court of common pleas of such county. Such application shall be verified by the affidavit of the applicant for the writ alleging that he verily believes the person on whose account such writ is sought is illegally confined or deprived of his liberty. The writ shall be directed to some proper officer to serve and return, who shall serve the same by putting a true and attested copy of it into the hands of the person who has the custody of the body of him who is directed to be brought up on such writ; and, if such officer shall fail to make immediate return of such writ, with his doings thereon, he shall pay fifty dollars to the person so held in custody. If the application for such writ be made to a judge of the superior court, he may make the same returnable before any other judge of said court, the consent of such other judge being first obtained; and such other judge shall thereupon proceed with the matter with the same authority as though the application had been originally presented to him. If the application shall be made to a judge of any court while that court is holding a regular session at which the application might have been made, the judge may certify the proceedings into court and the case shall thereupon be entered upon the docket and proceeded with as though application had originally been made to the court.

Content downloaded/printed from HeinOnline

Mon Oct 14 12:24:44 2019

Citations:

Bluebook 20th ed.
English Reports Full Reprint Vol. 98 - King's Bench .

ALWD 6th ed.
English Reports Full Reprint Vol. 98 - King's Bench .

APA 6th ed.
English Reports Full Reprint Vol. 98 King's Bench. .

Chicago 7th ed.
English Reports Full Reprint Vol. 98 - King's Bench. , .

McGill Guide 9th ed.
, English Reports Full Reprint Vol. 98 - King's Bench (: .,)

MLA 8th ed.
English Reports Full Reprint Vol. 98 - King's Bench. , . HeinOnline.

OSCOLA 4th ed.
English Reports Full Reprint Vol. 98 - King's Bench. , .

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
Use QR Code reader to send PDF to your smartphone or tablet device

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.

HALSBURY'S

Laws of England

FOURTH EDITION

Volume 11

HALSBURY'S

Laws of England

FOURTH EDITION

LORD HAILSHAM OF ST. MARYLEBONE
Lord High Chancellor of Great Britain 1970–74

Volume 11

BUTTERWORTHS

LONDON 1976

KD 310
.H34
copy 3
Vol. 11

ENGLAND Butterworth & Co (Publishers) Ltd
88 Kingsway, London WC2B 6AB

AUSTRALIA Butterworths Pty Ltd
586 Pacific Highway, Chatswood, Sydney, NSW 2067
Also at Melbourne, Brisbane, Adelaide and Perth

CANADA Butterworth & Co (Canada) Ltd
2265 Midland Avenue, Scarborough, Toronto M1P 4S1

NEW ZEALAND Butterworths of New Zealand Ltd
26–28 Waring Taylor Street, Wellington 1

SOUTH AFRICA Butterworth & Co (South Africa) (Pty) Ltd
152–154 Gale Street, Durban

USA Butterworth & Co (Publishers) Inc
19 Cummings Park, Woburn, Boston, Mass 01801

FIRST EDITION

Published in 31 volumes between 1907 and 1917 under the Editorship of the Rt. Hon. the Earl of Halsbury, Lord High Chancellor of Great Britain, 1885–86, 1886–92 and 1895–1905

SECOND EDITION

Published in 37 volumes between 1931 and 1942 under the Editorship of the Rt. Hon. the Viscount Hailsham, Lord High Chancellor of Great Britain, 1928–29 and 1935–38

THIRD EDITION

Published in 43 volumes between 1952 and 1964 under the Editorship of the Rt. Hon. the Viscount Simonds, Lord High Chancellor of Great Britain, 1951–54

© Butterworth & Co (Publishers) Ltd 1976

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

ISBN (complete set, standard binding) 0 406 03400 1
(this volume, standard binding) 0 406 03411 7
(complete set, de luxe binding) 0 406 03520 2
(this volume, de luxe binding) 0 406 03531 8

Printed in Great Britain in Monotype Bembo (Series 270)
by Chapel River Press, Andover, Hants.

1474. Contempt of Parliament. A member of the House of Commons committed by the House for breach of privilege cannot obtain his discharge during the session by means of habeas corpus[1].

Where a person who is not a member is committed by the House of Commons[2], or by the House of Lords[3], for breach of privilege, the courts will not review the committal or grant a discharge on habeas corpus; for if the return shows that the committal was for contempt of either House, the courts have no power to investigate the alleged contempt[4].

A person committed for contempt by order of either House may be discharged on habeas corpus after a dissolution or prorogation of Parliament[5].

1 *Earl of Shaftsbury's Case* (1677) 1 Mod Rep 144; *Brass Crosby's Case* (1771) 2 Wm Bl 754; *Burdett v Abbot* (1811) 14 East 1 at 149, 161; on appeal (1817) 5 Dow 165, HL.
2 *Hobhouse's Case* (1820) 3 B & Ald 420.
3 *R v Flower* (1799) 8 Term Rep 314.
4 *Middlesex Sheriff's Case* (1840) 11 Ad & El 273 (in that case a writ of habeas corpus was granted requiring the Sergeant-at-Arms of the House of Commons to bring before the court two persons who had been committed by the House; the return showed that the Sergeant-at-Arms detained the prisoners on a warrant directed to him by the Speaker, which set out that the prisoners "having been guilty of a contempt and breach of the privileges of this House" were committed to the custody of the Sergeant-at-Arms; it was held that the warrant was not bad for omitting to state the grounds on which the parties had been adjudged guilty of contempt; that the Court of Queen's Bench could not inquire by affidavit into the merits of the commitment even if the case were within the Habeas Corpus Act 1816, although in affidavits on which the writ was issued it was sworn that the parties were in fact committed for executing process in obedience to rules of that court; and that the warrant was sufficiently certain). See also *Burdett v Abbott* (1811) 14 East 1; on appeal (1817) 5 Dow 165, HL; and para. 1468, ante, and para. 1495, post.
5 *Streeter's Case* (1654) Sty 415; *Earl of Shaftsbury's Case* (1677) 1 Mod Rep 144; *Middlesex Sheriff's Case* (1840) 11 Ad & El 273.

(ii) Procedure on Habeas Corpus

A. APPLICATION FOR THE WRIT

1475. Regulation of procedure. The procedure on an application for a writ of habeas corpus is governed principally by rules of court[1].

1 RSC Ord. 54. The Administration of Justice Act 1960 contains provisions governing the procedure on an application for habeas corpus (s. 14) and governing appeals in habeas corpus proceedings (s. 15); see paras. 1479, 1485, 1505, post.

1476. Who is entitled to apply for writ. The person illegally imprisoned or detained in confinement without legal justification is, both at common law and by statute[1], entitled to apply for a writ of habeas corpus, but it is not essential that the application should proceed directly from him.

Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment, and any person who is legally entitled to the custody of another may apply for the writ in order to regain that custody[2]. In any case where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reasons for its being made[3].

A mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him will not it seems be allowed to apply for habeas corpus[4].

1 See paras. 1457, 1458, ante.
2 See the Habeas Corpus Act 1679, s. 2. For examples of application made on behalf of detained persons, see *R v Brooke and Fladgate, Gregory's Case* (1766) 4 Burr 1991 (husband on behalf of wife); *Cobbett v Hudson* (1850) 15 QB 988 (wife on behalf of husband); *Ex parte Hinds* [1961] 1 All ER 707, [1961] 1 WLR 325, DC (wife on behalf of husband); *Re Thompson* (1860) 30 LJMC 19 (father on behalf of son); *Re Daley* (1860) 2 F & F 258 (application by sister of orphan girl under fourteen); cf. *R v Clarke* (1758) 1 Burr 606.
An application for the writ may be made by an agent or friend on behalf of a prisoner: see *Ashby v White* (1704) 14 State Tr 695 at 825, 4th Resolution, HL; but see notes 3, 4, infra.
In cases where the custody of children is in dispute the proper party to make the application for the writ is normally the parent or guardian who claims to be entitled to the custody, and it must be shown that the applicant prima facie possesses a legal right to the custody: see *Re Harper* [1895] 2 IR 571. Application may be made, however, by a local authority who has boarded out a child whom it received into its care in the exercise of statutory powers: see *Re AB (an infant)* [1954] 2 QB 385, [1954] 2 All ER 287, DC; *Re M (an infant)* [1961] Ch 81, [1961] 1 All ER 201; on appeal [1961] Ch 328, [1961] 1 All ER 788, CA.
3 See *Hottentot Venus' Case* (1810) 13 East 195; and *Re Ning Yi-Ching* (1939) 56 TLR 3.
4 In the absence of an affidavit showing that the person detained was unable to make the application, a mere stranger acting without authority was held not to be entitled to make an application for habeas corpus on behalf of a person who was alleged to be wrongfully detained as a person suffering from mental disorder: *Ex parte Child* (1854) 15 CB 238; see also *R v Clarke* (1762) 3 Burr 1362; *Re Carter* (1893) 95 LT Jo 37, DC. A mere stranger, it has been said, has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced as to be incapable of making one, may be brought up by habeas corpus to be discharged from restraint: *Ex parte Child*, supra, at 239 per Jervis CJ. However, in *Re Klimowicz* (1954) 31st July (unreported), the writ was granted, on the application of the Home Secretary, directed to the master of a Polish ship lying in the Thames on which a person seeking political asylum in the United Kingdom was being detained.

1477. Application by counsel. The application for a writ of habeas corpus, whether on motion to the court or at chambers, should be made by counsel, as the court will not as a rule allow an applicant to move in person[1]. In exceptional cases, however, applicants have been heard in person on the ground of extreme urgency[2].

1 See *Re Greene* (1941) 57 TLR 533, DC, in which Humphreys J, reading the ruling of the court said: "we think that no applicant for a writ of habeas corpus should be heard in person unless some sufficient ground is shown for a departure from established practice; and the mere fact that an applicant prefers to act as his own advocate should not be regarded as good ground". See also *Re Wring, Re Cook* [1960] 1 All ER 536n, [1960] 1 WLR 138, DC (a prisoner is not to be produced for the purpose of making an application in person unless the court so directs).
2 See *Re Newton* (1855) 16 CB 97 (where, although the court refused to hear a motion by a father for a writ on behalf of his son, it was stated by Jervis CJ that the judges did not lay down any inflexible rule, but merely held that in the particular circumstance it would be better for the motion to be made by counsel); *Cobbett v Hudson* (1850) 15 QB 988 (where a wife was allowed to move in person for habeas corpus on behalf of her husband, and Lord Campbell CJ pointed out "that great inconvenience might arise in cases where the liberty of the subject is in question from refusing to hear the wife or any person on behalf of the party under restraint"); *Re Hunt* [1959] 1 QB 378, [1959] 1 All ER 73, DC (applicant, who had been committed for contempt, permitted to appear in person); *Ex parte Hinds* [1961] 1 All ER 707, [1961] 1 WLR 325, DC (only in exceptional circumstances will the court allow a wife to apply for habeas corpus on behalf of her husband).

1478. To whom application is made. Subject to the exceptions referred to below, an application for a writ of habeas corpus ad subjiciendum[1] must be made in the first