A.C. 41464	:	
	:	SUPREME COURT
In the Matter of a Petition for a Common Law Writ of Habeas Corpus,	:	
	:	
	:	
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	STATE OF CONNECTICUT
Plaintiff,	:	
v.	:	
	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	September 26, 2019
Defendants.	:	

PETITION FOR CERTIFICATION

Plaintiff, the Nonhuman Rights Project, Inc. ("NhRP"), hereby seeks review of the Appellate Court decision, 192 Conn. App. 36, officially released August 20, 2019 ("Decision").

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the Appellate Court err in holding that the real party in interest, Minnie—an Asian elephant unlawfully detained by Defendants—must have standing in the first instance in order for Plaintiff 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?[1]

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

[1] The other two elephants named in this habeas corpus lawsuit, Karen and Beulah, have died while in the control of Defendants during the pendency of the appeals.

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 Plaintiff with an adequate opportunity to present, brief, and argue?

II. BASES FOR CERTIFICATION

This case is of great public importance as it concerns, as did *Jackson v. Bulloch*, 12 Conn. 38 (1837), whether an autonomous, self-determining, and otherwise exceedingly cognitively complex being—in *Jackson*, a human slave; here, an elephant—can legally be imprisoned for life, whether a third-party may employ The Great Writ of Habeas Corpus to test the legality of her imprisonment, and what meaning liberty and equality have in such cases. It also concerns the extent to which judicial decisions should be influenced by the rapidly mounting scientific evidence of the complex cognition and autonomy of elephants.

The Decision directly conflicts with *Jackson v. Bulloch* and other controlling Connecticut Supreme Court decisions, including *Connecticut Assn of Boards of Educ Inc v. Shedd*, 197 Conn. 554 (1985), *Maloney v. Pac*, 183 Conn. 313 (1981), *State v. Pierson*, 208 Conn. 683 (1988), *State v. Iban C*, 275 Conn. 624 (2005), and *Electrical Contractors Inc v. Department of Educ*, 303 Conn. 402 (2012).

III. SUMMARY OF THE CASE

On November 13, 2017, Plaintiff filed a Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") seeking a good faith extension or modification of the common law of habeas corpus on behalf of Beulah, Minnie, and Karen, three elephants alleged to be illegally detained by Defendants ("Commerford"). Plaintiff 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 December 26, 2017, the trial court declined to

issue the writ on the ground that Plaintiff lacked third-party standing under P.B. § 23-24(a)(1) as the NhRP failed to allege it had a "significant relationship" with the elephants, and on the alternate ground that the Petition was "wholly frivolous" under P.B. § 23-24(a)(2).

In its Decision, the Appellate Court affirmed only the trial court's decision that Plaintiff lacked standing, not on the basis the trial court reached—and which Plaintiff briefed on appeal—but because "the elephants, not being persons, lacked standing in the first instance." Decision at 41. The Appellate Court held that "the real party in interest for whom the 'next friend' seeks to advocate for, must have standing in the first instance." *Id*. at 42. It then determined the merits, without the benefit of briefing, by concluding that the elephants were not "persons" because they are "incapable of bearing duties and social responsibilities required by such social compact." *Id*. at 46.

IV. ARGUMENT

A. Fundamental public policy concerns compel granting certification.

Many parties seeking certification before this Court claim, as the NhRP does here, that their case is a matter of first impression, that the decision of courts below directly conflicts with this Court's decisions, and/or that the lower courts greatly departed from the accepted and usual course of judicial proceedings. Far less frequent are cases in which all of the above are true *and* most of the plaintiffs have perished before this Court could rule. And rarely does a case come before this Court that, *in addition*, implicates so many fundamental Connecticut public policy concerns. This is such a case.

In 1873, this Court decided the momentous habeas corpus case of *Jackson v. Bulloch*. There, this Court freed an enslaved woman named Nancy Jackson who was one

of just twenty-five slaves in Connecticut.[2] In the Decision, the Appellate Court completely ignored that *Jackson* established controlling precedent by permitting a stranger—the abolitionist and former slave, James Mars—to bring a third-party claim on her behalf, as Jackson, a slave, could not bring it herself. But just as *Jackson* was about far more than just Nancy Jackson or the other twenty-four Connecticut slaves, who constituted less than one part in ten thousand of Connecticut's citizenry—though their freedom was of the utmost importance to them—this case is about far more than just Minnie—though her freedom is of the utmost importance to her. *See* Bases for Certification, *supra*.

In Jackson v. Bulloch, this Court struck a blow for human freedom that we proudly recall nearly two centuries on.[3] This Court now has the opportunity to consider striking a blow for the freedom of nonhuman beings whose *unrebutted* extraordinarily cognitively complex and human-like cognition includes: autonomy; self-determination; self-awareness; use of specific calls and gestures to plan and "discuss" a course of action and to adjust and execute plans in a coordinated manner to avoid risk; empathy; theory of mind (awareness others have minds); extensive working and long-term memory that allows accumulation of social knowledge; the ability to act intentionally and in a goal-oriented manner and to detect goal directedness in others; imitation; engaging in true teaching; cooperation and coalition building; cooperative and innovative problem-solving; understanding causation; intentional communication, including vocalizations that convey knowledge and information in a manner

[2] https://connecticuthistory.org/jackson-v-bulloch-and-the-end-of-slavery-in-connecticut/.

[3] *Compare Miller v. Gaskine*, 11 Fla. 73, 78 (1864) ("There is no evil against which the policy of our laws is more pointedly directed than that of allowing slaves to have any other status than that of pure slavery.")

similar to humans; utilization of a wide variety of gestures, signals, and postures; and awareness of and response to death, including grieving.[4]

Minnie simply isn't human. As New York Court of Appeals Judge Eugene M. Fahey—the only American high court judge to opine on the merits of the arguments for nonhuman animal personhood—recently noted in a habeas corpus case involving the legal personhood of chimpanzees:

> The Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species... I agree with the principle that all human beings possess intrinsic dignity and value, and have [the]... privilege of habeas corpus... but, in elevating our species, we should not lower the status of other highly intelligent species. The better approach... is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human, but instead whether he or she has the right to liberty protected by habeas corpus.

Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054, 1057 (2018) ("*Tommy*") (Fahey, J., concurring).

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

With respect to chimpanzees, Judge Fahey observed that:

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[4] Plaintiff's Brief at 5-6.

> The 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*.

Tommy, 31 N.Y.3d at 1059 (emphasis added).

This was Judge Fahey's third vote on whether the Court of Appeals should hear the NhRP's appeal on behalf of a chimpanzee. Joining other distinguished judges who have publicly changed their minds,[5] Judge Fahey wrote:

> In the interval since we first denied leave to the Nonhuman Rights Project, I have struggled with whether this was the right decision … I continue to question whether the Court was right to deny leave in the first instance. 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.

Tommy, 31 N.Y.3d at 1059 (internal citation omitted).

The University of Missouri's "Famous Trials" website will soon release 24 lectures entitled "Liberty on Trial: The Stories Behind Legal Battles That Defined Freedom in America." Chapter 24 focuses on the work of the NhRP to attain fundamental legal rights

[5] *See, e.g*., *City of Erie v. Pap's A.M*., 529 U.S. 277, 316-317 (2000) (Souter, J, concurring); *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring); *Henslee v. Union Planters National Bank and Trust Co*., 335 U.S. 595, 600 (Frankfurther, J, dissenting); *Andrews v. Styrap*, 26 L.T.R. 704, 706 (Ex. 1872) (Bramwell, J.); Richard A. Posner, *Reflections on Judging* 84-85 (2013).

for autonomous and cognitively complex nonhuman animals. The legal battles that will come to define freedom in America with respect to beings such as Minnie have arrived at this Court. Their outcome, and the great principles upon which they rest, will affect not just nonhuman animals but millions upon millions of human beings as well as the reputation of Connecticut justice, as *Jackson* did. Regarding the profound issue of the right of an imprisoned elephant to the bodily liberty protected by habeas corpus, the time has come for this Court "to recognize its complexity and confront it." *Tommy*, 31 N.Y.3d at 1059.

B. Under *Jackson v. Bulloch*, the NhRP's next friend standing did not require Minnie to have standing "in the first instance."

The Appellate Court's conclusion that Plaintiff's standing depended upon the elephants having standing directly conflicts with *Jackson v. Bulloch.* Nancy Jackson was not part of the "social compact" noted in the 1st section of the Connecticut Bill of Rights and was not even part of the "people" secured from unreasonable searches or seizures by the 8th section of the Connecticut Bill of Rights. 12 Conn. at 42-43. Though *Jackson* has never been overruled or qualified[6] and has been cited by the Connecticut Supreme Court four times since just 1990,[7] the Appellate Court ignored it in its Decision. *See* Brief at 7.

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

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

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

actually be a slave.[8] In *Aves*, the great American judge Lemuel Shaw issued the writ of habeas corpus on behalf of a six-year old slave girl named Med whose next friend was the Boston Anti-Slavery Society.[9]

As slaves, Jackson, Somerset, and Med lacked standing to challenge the legality of their detention, but did so through next friends, a situation that would recur in New York.[10] *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).

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

"[T]he question of standing is *not an inquiry into the merits*." *Connecticut Assn of Boards of Educ Inc v. Shedd*, 197 Conn. at 557 n. 1 (emphasis added); *accord Maloney v. Pac*, 183 Conn. 313, 321 n.6 (1981); *State v. Pierson*, 208 Conn. 683, 687 (1988); *State v. Iban C*, 275 Conn. 624, 664 (2005). "[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 protected by habeas corpus is the issue that goes to the merits. Although this central issue was not on appeal, the Appellate Court concluded that elephants are not "persons" and thus improperly

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

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

[10] Plaintiff has obtained two habeas corpus orders to show cause on behalf of nonhuman animals in New York. *See The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015) and *The Nonhuman Rights Project, Inc., on Behalf of Happy, v. Breheny*, Index No. 1845164 (November 16, 2018).

resolved the question of standing by determining the merits.[11] *See Electrical Contractors Inc v. Dep't of Educ*, 303 Conn. 402, 438 n. 28 (2012) (refusing to consider claim because it "would involve consideration of the merits, rather than the issue of the plaintiffs' standing").

D. Minnie is already a legal person and the recognition of her right to bodily liberty does not turn on her capacity to bear duties and social responsibilities.

As the beneficiary of an *inter vivos* trust created under C.G.S.A. § 45a-489a, Minnie is by definition a legal person with rights as a beneficiary, notwithstanding her alleged inability to bear duties and responsibilities.[12] Similarly, the recognition of Minnie's right to bodily liberty does not turn on her capacity to bear "duties and social responsibilities required by [the] social compact." Decision at 46.

What Connecticut's "social compact" may or may not require is irrelevant. Nancy Jackson was ordered freed pursuant to common law habeas corpus, 12 Conn. at 54, notwithstanding that slaves were neither parties to Connecticut's "social compact" as set forth in the 1st section of the Bill of Rights[13] nor one of the "people" protected by the 8th section of the Bill of Rights. 12 Conn. at 43.

No Connecticut court has ever found the state's "social compact" conditions rights on the capacity to bear "duties and social responsibilities."[14] C.G.S.A. § 45a-489a bestows

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[11] During oral argument, this Court repeatedly inquired into the merits despite being repeatedly reminded that the central issue of elephant personhood was not on appeal. *See* Tr. 4/22/19 at 19-30.

[12] *See* RESTATEMENT (THIRD) OF TRUSTS § 43 Persons Who May Be Beneficiaries (2003); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); Kate McEvoy, "§ 2:16. Pet trusts," 20 CONN.PRAC., CONN.ELDER LAW § 2:16 (2014 ed.).

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

[14] The Appellate Court cited *Moore v. Ganim*, 233 Conn. 557, 598 (1995), Decision at 45-46, but the quoted passage discussed neither "duties" nor "responsibilities."

the rights of trust beneficiaries—and therefore legal personhood—upon nonhuman animals without any such requirement."[15] Judge Fahey recently and emphatically rejected the claim that the capacity to bear duties is even required for habeas corpus, *see Tommy*, 31 N.Y.3d at 1056-57, and Plaintiff is prepared to argue, should it ever get the opportunity, that such a requirement has never existed and would seriously undermine fundamental human rights.

The focus of Plaintiff's Brief was the trial court's conclusion that Plaintiff lacked standing because it "failed to allege a significant relationship with the elephants." Decision at 41. Any discussion in the Brief of personhood was in summary form and made without the benefit of a record generated by a lower court hearing, and did not focus on the relevance of the ability to bear duties on personhood. Since the merits of the petition were not on appeal, Plaintiff did not have a fair opportunity to address the Appellate Court's specific ground of affirmance in its brief or before the trial court.

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

CERTIFICATION

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

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APPENDIX

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NONHUMAN RIGHTS PROJECT, INC. *v.* R.W. COMMERFORD AND SONS, INC., ET AL.
(AC 41464)

Lavine, Keller and Elgo, Js.

Syllabus

The petitioner, N Co., filed a petition for 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. alleged that elephants are autonomous beings who live complex emotional, social and intellectual lives, and possess complex cognitive abilities that are sufficient for common-law personhood. N Co. challenged the respondents' detention of the elephants and sought the common-law right to bodily liberty for them, but did not challenge the conditions of their confinement or the respondents' treatment of them. The habeas court declined to issue a writ of habeas corpus pursuant to the applicable rule of practice (§ 23-24 [a] [1] and [2]). The court concluded that it lacked subject matter jurisdiction because N Co. lacked standing to bring the habeas petition on behalf of the elephants. The court also determined that N Co., which failed to allege that it possessed any relationship with the elephants, did not satisfy the prerequisites for establishing next friend standing, and that the petition was wholly frivolous on its face. On N Co.'s appeal to this court, *held*:

1. The habeas court properly concluded that it lacked subject matter jurisdiction over N Co.'s habeas petition and declined to issue a writ of habeas corpus; because the elephants, not being persons, lacked standing to file a habeas petition in the first instance, N Co. could not establish that it had next friend standing to file a petition for a writ of habeas corpus on behalf of the elephants, as the real party in interest for whom a next friend seeks to advocate must have standing, and there was no basis in law on which to conclude that an entity seeking next friend status may confer standing on an alleged party in interest.
2. The habeas court properly declined to issue a writ of habeas corpus, as elephants do not have standing to file a habeas petition, they have no legally protected interest that can be adversely affected, and they are incapable of bearing legal duties, submitting to societal responsibilities or being held legally accountable for failing to uphold those duties and responsibilities: there are profound implications for a court to conclude that an elephant, or any nonhuman animal, is entitled to assert a claim in a court of law, as there is a lack of authority for recognizing a nonhuman animal as a person for purposes of habeas corpus, which would upend this state's legal system, our habeas corpus jurisprudence contains no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics, there is no instance in our common law in

which a nonhuman animal or representative for it has been permitted to bring a lawsuit to vindicate the animal's own purported rights, and animals under Connecticut law, as in all other states, have generally been regarded as personal property; moreover, because an elephant is incapable of bearing duties and social responsibilities, as required under the social compact theory of article first, § 1, of the state constitution, and the legislature has statutorily (§ 52-466 [a]) authorized only a person to file an application for a writ of habeas corpus when the person claims to be illegally confined or deprived of liberty, and the term person has never been defined in our General Statutes as a nonhuman animal, this court would not disturb the common law concerning who may seek habeas relief in light of habeas corpus legislation, the lack of any indication that the General Assembly intended for habeas corpus relief to apply to nonhuman animals, and the lack of precedent recognizing that animals can possess their own legal rights.

Argued April 22—officially released August 20, 2019

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the court, *Bentivegna, J.*, rendered judgment declining to issue a writ of habeas corpus, from which the petitioner appealed to this court; thereafter, the court, *Bentivegna, J.*, denied the petitioner's motion to reargue and for leave to amend its petition, and issued an articulation of its decision. *Affirmed.*

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

Thomas R. Cherry filed a brief for Laurence H. Tribe as amicus curiae.

Thomas R. Cherry filed a brief for Justin Marceau et al. as amici curiae.

Mark A. Dubois filed a brief as amicus curiae.

Jessica S. Rubin filed a brief for The Philosophers as amici curiae.

Opinion

KELLER, J. The petitioner, Nonhuman Rights Project, Inc., appeals from the judgment of the habeas court declining[1] to issue a writ of habeas corpus that it sought on behalf of three elephants, Beulah, Minnie, and Karen (elephants), who are alleged to be confined by the named respondents, R.W. Commerford & Sons, Inc. (also known as the Commerford Zoo), and its president, William R. Commerford, at the Commerford Zoo in Goshen.[2] The petitioner argues that the court erred in (1) dismissing its petition for a writ of habeas corpus on the basis that it lacked standing, (2) denying its subsequent motion to amend the petition, and (3) dismissing the habeas petition on the alternative ground that it was "wholly frivolous." For the reasons discussed herein, we agree with the habeas court that the petitioner lacked standing.[3] Accordingly, we affirm the judgment of the habeas court.

On November 13, 2017, the petitioner filed a verified petition for a common-law writ of habeas corpus on behalf of the elephants pursuant to General Statutes § 52-466 et seq. and Practice Book § 23-21 et seq. 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,

[1] Although the habeas court stated in its memorandum of decision that it was dismissing the petition, it explicitly relied on Practice Book § 23-24 in doing so. Because that provision authorizes the habeas court to decline to issue the writ, we construe the court's disposition of the petition to be a decision to decline to "issue the writ." See *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 80 n.3, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

[2] The named respondents are not parties to the action. The petitioner alleged in its petition: "As this action is instituted ex parte pursuant to Practice Book § 23-23, respondents have not been served with this petition. The [petitioner] will promptly serve the petition upon the respondents upon the issuance of the writ or as otherwise directed by the court." (Emphasis omitted.)

[3] Given our resolution of the petitioner's first claim, we need not address the petitioner's other claims. See footnote 7 of this opinion.

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." (Internal quotation marks omitted.) The petitioner alleged that the named respondents are illegally confining the elephants.

The petition makes clear that it "challenges neither the conditions of [the elephants'] confinement nor [the] respondents' treatment of the elephants, but rather the fact of their detention itself . . . ." It is "not seeking any right other than the common-law right to bodily liberty" for the elephants. The petition states that determining "[w]ho 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 is for this court to decide." The petition further alleges that "[t]he 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."

On December 26, 2017, the habeas court issued a memorandum of decision. Therein, pursuant to Practice Book § 23-24 (a) (1),[4] it declined to issue a writ of habeas corpus because it concluded that the petitioner lacked

[4] Practice Book § 23-24 provides in relevant part: "(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:

standing to bring the petition on behalf of the elephants. The court concluded that the petitioner failed to satisfy next friend standing "[b]ecause the petitioner . . . failed to allege that it possesses any relationship with the elephants . . . ." (Emphasis omitted.) Additionally, pursuant to Practice Book § 23-24 (a) (2), the court declined to issue a writ for the elephants because it concluded that the petition was wholly frivolous on its face. On January 16, 2018, the petitioner filed a motion to reargue and for leave to amend its petition. The court denied those motions in a memorandum of decision dated February 27, 2018. This appeal followed.[5]

I

The petitioner first claims that the court erred in concluding that it lacked subject matter jurisdiction on the ground that the petitioner did not have standing to bring the petition on behalf of the elephants. It contends that "Connecticut law permits even strangers to file habeas corpus petitions on another's behalf," and neither § 52-466 (a) (2) nor Practice Book § 23-40 (a) limit who may bring a habeas corpus petition. It argues that although the "court correctly stated that '[o]utside the context of child custody, a petitioner deemed to be a "next friend" of a detainee has standing to bring a petition for [a] writ of habeas on the detainee's behalf,' "

"(1) the court lacks jurisdiction; [or]

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

As we explained in *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 82–83, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018), "Practice Book § 23-24 is intended to permit a habeas court to conduct a preliminary review of a petition prior to further adjudication of the writ to weed out those petitions the adjudication of which would be a waste of precious judicial resources either because the court lacks jurisdiction over it, the petition is wholly frivolous, or it seeks relief that the court simply cannot grant."

[5] After commencing this appeal, the petitioner filed with the habeas court a motion for articulation, which the court denied in part on May 23, 2018. The petitioner filed a motion for review with this court on June 5, 2018. On July 25, 2018, this court granted review but denied the relief requested by the petitioner.

the court erroneously relied on our Supreme Court's decision in *State* v. *Ross*, 272 Conn. 577, 597, 863 A.2d 654 (2005), which cited to *Whitmore* v. *Arkansas*, 495 U.S. 149, 163, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990), concluding that the petitioner could not serve as next friend to the elephants because it had failed to allege a "significant relationship" with the elephants. In the petitioner's view, Connecticut has neither adopted the second prong of the next friend test set forth in *Whitmore*, nor its dicta regarding "significant relationship."

We begin by setting forth our standard of review. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 127–28, 836 A.2d 414 (2003).

On the basis of our plenary review of the issue of standing in this case, we conclude that the trial court's determination that the petitioner lacked standing to file a petition for a writ of habeas corpus on behalf of the elephants was correct. We need not, however, reach the issue of whether the court correctly determined that the petitioner was required, and failed, to allege a significant relationship with the elephants because we conclude that the petitioner lacked standing for a more fundamental reason—the elephants, not being persons, lacked standing in the first instance.[6] We briefly explain.

[6] Although we resolve the legal issue of standing on a slightly different basis than that on which the habeas court relied, we nonetheless are satisfied that, in its appellate brief, the petitioner extensively has addressed the ground on which we rely. Indeed, the petitioner addresses in at least ten pages of its brief why the elephants, which it argues are autonomous beings, should be afforded personhood status for purposes of habeas corpus.

Next friend standing essentially allows a third party to advance a claim in court on behalf of another when the party in interest is unable to do so on his or her own. See *Phoebe G.* v. *Solnit*, 252 Conn. 68, 77, 743 A.2d 606 (1999) ("the general rule is that a next friend may not bring an action for a competent person"); see also *El Ameen Bey* v. *Stumpf*, 825 F. Supp. 2d 537, 559 (D. N.J. 2011) ("[u]nder the 'next friend' doctrine, standing is allowed to a third person so this third person [can] file and pursue a claim in court on behalf of someone who is unable to do so on his or her own"). The "next friend" does not himself become a party to the action in which he participates, but simply pursues the action on behalf of the real party in interest. See *State* v. *Ross*, supra, 272 Conn. 597 ("a person who seeks next friend status by the very nature of the proceeding will have no specific personal and legal interest in the matter"); see also *Whitmore* v. *Arkansas*, supra, 495 U.S. 163 ("[a] 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest"). Thus, it is apparent that the real party in interest for whom the "next friend" seeks to advocate for, must have standing in the first instance. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 603 (4th Cir. 2002) (noting that "a person who does not satisfy Article III's standing requirements may still proceed in federal court if he meets the criteria to serve as next friend of someone who does"). As we will discuss in part II of this opinion, we conclude that the elephants do not have standing to file a petition for a writ of habeas corpus. It follows inexorably that the petitioner cannot satisfy the prerequisites for establishing next friend standing, for there is no basis in law on which to conclude that an entity seeking next friend status may confer standing on an alleged party in inter-

est.[7] Accordingly, we conclude that the court properly determined that it lacked subject matter jurisdiction.

II

We explained in part I of this opinion that the petitioner could not establish next friend status without first demonstrating that the elephants had standing in the first instance. We now address why the elephants lack standing.

Our Supreme Court has long held that "[s]tanding 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

[7] Because we conclude that the petitioner cannot establish next friend standing on the ground that the elephants lacked standing in the first instance, we need not address whether the petitioner met the other two prerequisites our Supreme Court has said are necessary to establish next friend status. In *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 653, 659, 866 A.2d 542 (2005), our Supreme Court explained that it evaluated the evidence in the case according to the standards set forth in *Whitmore* v. *Arkansas*, supra, 495 U.S. 163–64, which establishes two prerequisites for demonstrating next friend status. In particular, our Supreme Court explained: "In *Whitmore* v. *Arkansas*, [supra, 149], the United States Supreme Court noted that, to establish next friend status, a person: (1) 'must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . . [and] must have some significant relationship with the real party in interest'; id., 163–64; and (2) 'must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.' Id., 163." *In re Application for Writ of Habeas Corpus by Dan Ross*, supra, 659–60 n.7.

As we explained in footnote 3 of this opinion, we need not address the petitioner's claims that the court erred (1) in denying its motion to amend its petition, and (2) dismissing the habeas petition for being wholly frivolous. Even had the petitioner been given the opportunity to amend its petition to add an allegation that the petitioner had a significant relationship with the elephants or that the elephants had no significant relationships to allege, such amendment would not have overcome the fact that the elephants lack standing in the first instance.

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.) *Gold* v. *Rowland*, 296 Conn. 186, 207, 994 A.2d 106 (2010).

Only a limited number of courts have addressed the issue of whether a nonhuman animal who allegedly has been injured has standing to bring a claim in a court of law. There are even fewer cases addressing whether a nonhuman animal can challenge its confinement by way of a petition for a writ a habeas corpus. The petitioner asserts that this case "turns on whether [the elephants] are 'persons' solely for the purpose of the common-law right to bodily liberty that is protected by the common law of habeas corpus." In its view, the elephants are entitled to a writ of habeas corpus as a matter of common-law liberty because the writ of habeas corpus is deeply rooted in our cherished ideas of individual autonomy and free choice. It essentially invites this court to expand existing common law. This case, however, is more than what the petitioner purports it to be. Not only would this case require us to recognize elephants as "persons" for purposes of habeas corpus, this recognition essentially would require us 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. At this juncture, we decline to make such sweeping pronouncements when there exists so little authority for doing so.

Our examination of our habeas corpus jurisprudence, which is in accord with the federal habeas statutes and English common law; see *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 815, 786 A.2d 1091 (2002); reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics. See *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, 124 App. Div. 3d 148, 150, 998 N.Y.S.2d 248 (2014) ("animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law"), leave to appeal denied, 26 N.Y.3d 902, 38 N.E.3d 828, 17 N.Y.S.3d 82 (2015). Further, a thorough review of our common law discloses no instance in which a nonhuman animal, or a representative for that animal, has been permitted to bring a lawsuit to vindicate the animal's own purported rights. Instead, animals under Connecticut law, as in all other states, have generally been regarded as personal property. See, e.g., *Griffin* v. *Fancher*, 127 Conn. 686, 688–89, 20 A.2d 95 (1941) (recognizing dogs as property and right of action against one who negligently kills or injures them, so long as dog was properly registered).

Although the lack of precedent in support of the petitioner's action is not necessarily dispositive of this claim, we note, as has another court in addressing a similar claim, that "ascription of rights has historically been connected with the imposition of societal obligations and duties." *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, supra, 124 App. Div. 3d 151. Indeed, article first, § 1, of the Connecticut constitution describes our constitution as a "social compact . . . ." Our Supreme Court has noted that "[t]he social compact theory posits that 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.' J. Locke, 'Two Treatises of Government,' book II (Hafner Library of Classics Ed. 1961) ¶ 123, p. 184; see also 1 Z. Swift, A System of the Laws of the State of Connecticut (1795) pp. 12–13." *Moore* v. *Ganim*, 233 Conn. 557, 598, 660 A.2d 742 (1995). One academic has also remarked: "Our society and government are based on the ideal of moral agents coming together to create a system of rules that entail both rights and duties. Being . . . subject to legal duties and bearing rights are foundations of our legal system because they are foundations of our entire form of government." R. Cupp, "Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals," 33 Pace Envtl. L. Rev. 517, 527 (2016). Despite the petitioner's asseverations for why the elephants should be afforded liberty rights, it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities required by such social compact.

Moreover, it would be remiss of this court not to acknowledge that "[a]lthough the writ of habeas corpus has a long common-law history, the legislature has enacted numerous statutes shaping its use . . . ." (Footnote omitted.) *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 565–66, 153 A.3d 1233 (2017). Our Supreme Court has stated that "statutes are a useful source of policy for common-law adjudication, particularly when there is a close relationship between the statutory and common-law subject matters. . . . Statutes are now central to the law in the courts, and judicial lawmaking must take statutes into account virtually all of the time . . . ." (Internal quotation marks omitted.) Id., 566, quoting *C & J Builders & Remodelers, LLC* v. *Geisenheimer*, 249 Conn. 415, 419–20, 733 A.2d 193 (1999).

Section 52-466, which governs the litigation of the writ as a civil matter, provides in relevant part: "(a) (1) An 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." (Emphasis added.) Thus, § 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. We have found no place in our General Statutes where the term "person" has ever been defined as a nonhuman animal.[8] See, e.g., General Statutes § 53a-3 (1) (" '[p]erson' means a human being, and, where appropriate, a public or private corporation, a limited liability company, an unincorporated association, a partnership, a government or a governmental instrumentality").

In light of both established habeas corpus legislation and the recent legislative activity in the field; see *Kaddah* v. *Commissioner of Correction*, supra, 324 Conn. 567–69; id., 566 (noting that "the legislature recently

[8] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

Black's Law Dictionary (11th Ed. 2019) defines "person" as "[a] human being," "[t]he living body of a human being," or as "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." Id., pp. 1378–79.

General Statutes § 1-1 (k) instructs: "The words 'person' and 'another' may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations."

We note that entities to which personhood has been ascribed by law are formed and governed for the benefit of human beings. See *People ex rel. Nonhuman Rights Project, Inc.* v. *Lavery*, supra, 124 App. Div. 3d 152 (noting that "[a]ssociations of human beings, such as corporations and municipal entities, may be considered legal persons, because they too bear legal duties in exchange for their legal rights").

engaged in comprehensive habeas reform"); which contain no indication that the General Assembly intended for habeas corpus relief to apply to nonhuman animals, in addition to the lack of precedent recognizing that animals can possess their own legal rights, we stay our hand as a matter of common law with respect to disturbing who can seek habeas corpus relief. See id., 568 ("given recent legislative activity in the field with no indication that the General Assembly intended to eliminate the use of the common-law habeas corpus remedy to vindicate the statutory right under [General Statutes] § 51-296 (a) . . . we stay our hand as a matter of common law with respect to disturbing the availability of that remedy").

There are profound implications for a court to conclude that an elephant, or any nonhuman animal for that matter, is entitled to assert a claim in a court of law. In the present case, we have little difficulty concluding 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. See *Gold* v. *Rowland*, supra, 296 Conn. 207 ("[a]ggrievement 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]). Accordingly, we conclude that the court properly declined to issue a writ of habeas corpus on standing grounds.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

[9] Our conclusion that the petitioner in this case lacks standing, however, does not restrict it, or others, from advocating for added protections for elephants or other nonhuman animals at the legislature. We acknowledge that elephants are magnificent animals who naturally develop social structures and exhibit emotional and intellectual capacities. They are deserving of humane treatment whether they exist in the wild or captivity. Our law

APPELLATE COURT

STATE OF CONNECTICUT

AC 41464

NONHUMAN RIGHTS PROJECT INC.

v.

R.W. COMMERFORD & SONS, INC., ET AL.

SEPTEMBER 12, 2019

O R D E R

THE MOTION OF THE PLAINTIFF-APPELLANT, FILED AUGUST 30, 2019, FOR RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **ORDERED** DENIED.

BY THE COURT,

/S/
SUSAN REEVE
DEPUTY CHIEF CLERK

NOTICE SENT: SEPTEMBER 12, 2019
COUNSEL OF RECORD
HON. JAMES M. BENTIVEGNA
CLERK, SUPERIOR COURT, LLI CV17 5009822 S

192411

LIST OF PARTIES TO APPEAL

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Juris No. 010032

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.

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

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

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

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

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

Petitioner,

-against-

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

Respondents.

TAB
~~[PROPOSED]~~ ORDER TO SHOW CAUSE

Index No.: 18-45164

TO THE ABOVE-NAMED RESPONDENTS:

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

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

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

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

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

It is THEREFORE:

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

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

Dated: 11/16, 2018
Albion, New York

Honorable Tracey A. Bannister

ENTER:

mere naked legal estate in a person, such an one could at law recover the title deeds against a person having the equitable interest.

Rule absolute,

Attorneys for the plaintiff, *Bower* and *Cotton*, 46, Chancery-lane, W.C., agents for *Gardner* and *Horner*, Manchester.

Attorneys for the defendant, *Clarke, Woodcock*, and *Ryland*, 14, Lincoln's-inn-fields, W.C., agents for *Clayton*, Ashton-under-Lyne.

Monday, April 22.

(Before KELLY, C.B., and MARTIN, BRAMWELL, and CLEASBY, BB.)

TAUBMAN *v.* THE PACIFIC STEAM NAVIGATION COMPANY.

Carriage by sea—Wilful act and default—Exemption of carrier from liability, under special contract.

A special contract, entered into between a shipowner and a passenger by sea, contained a provision that the shipowner would not be answerable for loss of baggage "under any circumstances whatsoever:"

Held, that such a stipulation covers the case of wilful default and misfeasance by the shipowner's servants.

Martin *v.* The Great Indian Peninsular Railway Company (17 *L. T. Rep. N. S.* 349; 37 *L. J.* 27, *Ex.*; *L. Rep.* 3 *Ex.* 9) *explained.*

THE plaintiff became a passenger on one of the defendants' vessels from Rio Janeiro to England. On taking his passage he signed a contract by which the company engaged to carry him and his luggage upon condition, among other things, that the company would not be answerable for loss of or damage to the luggage "under any circumstance whatsoever." On the voyage, the plaintiff's portmanteau was lost through the negligence of the defendant company's servants. The plaintiff brought an action for the loss of the portmanteau, averring in the declaration that the loss was occasioned by the wilful act and default of the defendants.

To this the defendants pleaded, setting out the terms of the contract.

Replication, that the defendants did not use proper skill and care, but were guilty of gross negligence and wilful default, and that, by reason of the said gross negligence and wilful default, the loss was occasioned, and demurrer to the plea.

Demurrer to the replication.

Garth, Q.C. with him *Morgan Howard* for the plaintiffs.—The act complained of is a wrongful act of the defendants' own doing, against the consequences of which no form of contract can protect them. The contract would protect the defendants in a case of ordinary negligence, but not in a case of wilful misfeasance or default. The courts have never held that a company could screen itself from liability in such cases, and it was to prevent such attempts that the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) was passed. He cited:

Peek v. The North Staffordshire Railway Company, in the House of Lords, 8 L. T. Rep. N. S. 768; 32 L. J. 241, Q. B.; 10 H. L. Cas. 743;

Story on Bailments, s. 549;

Martin v. The Great India Peninsular Railway Company, 17 L. T. Rep. N. S. 349; 37 L. J. 27, Ex.; L. Rep. 3 Ex. 9.

Cohen for the defendants was not called upon.

KELLY, C.B.—The defendants in this case are entitled to our judgment. It is only necessary to read the contract in order to decide this case. The defendants are not to be liable for the loss of luggage "under any circumstances." The "gross negligence" of the defendants' servants is a "circumstance;" so is "wilful default." If the act had been actually done by the shipowners, the act would have been a trespass, whatever the contract might be. But this is the act of the servants, and the action is really one for breach of contract. *Martin* v. *The Great Indian Peninsular Railway Company* is distinguishable, for there the freedom from liability only extended to the time during which the baggage was to be in the charge of the troops.

MARTIN, B.—I am of the same opinion, as far as I can see from the imperfect statement of facts we have before us. The defendants are not under the liabilities of common carriers, and they are free to make any terms they choose. Probably the words in the special contract were inserted for the very purpose of exempting the company from liability for the acts of their servants.

BRAMWELL, B.—I am of the same opinion. *Primâ facie*, the defendants are not liable, for the contract says they are not to be liable for the loss of baggage under "any circumstances." A loss has occurred under certain circumstances, and the plaintiffs are seeking to recover. Next, we must consider is there any implied exception? I am of opinion that there cannot be, for the parties could easily have expressed it; see the judgment of Maule, J., in *Borradaile* v. *Hunter* (5 M. & G. 639; 12 L. J. N.S. 225, C. P.) Then it is urged that in certain cases the Legislature have interfered. That, as far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament.

CLEASBY, B.—What is the meaning of the word "circumstances?" I find in Johnson's Dictionary that the word "circumstance," in a legal sense, means "one of the adjuncts of a fact, which makes it more or less criminal." Arguing from this definition of "circumstance" by analogy, I should think the words in the contract will cover the present case.

Attorneys for the plaintiffs, *Busby* and *Marsden*, 326, Oxford-street, Regent-circus, W.

Attorneys for the defendants, *Field, Roscoe*, and *Co.*, 36, Lincoln's-inn-fields, W.C.

Tuesday, May 7.

SECOND DIVISION OF THE COURT.

(Before MARTIN, BRAMWELL, and PIGOTT, BB.)

ANDREWS *v.* STYRAP.

The Medical Act (21 *&* 22 *Vict. c.* 90), *sect.* 40—*Title of "M.D."—"Wilfully and falsely" taking and using the same—Conviction for by justices under the above section—Evidence of the offence—Diploma of foreign university obtained by purchase only.*

A., a druggist, had attended a patient in the capacity of a medical man, and sent in to him a bill for such attendances, headed, "Mr. P. to Thomas Andrews, M.D." setting out a variety of charges for attendance and medicine, &c. He subse-

quently wrote a letter signed, "Thomas Andrews, M.D." threatening legal proceedings unless the bill were paid, and he gave a receipt for the bill when paid, signing it in the same way. There was a coloured lamp over his shop door, on three sides of which the words and letters "Thomas Andrews, M.D." were painted. It appeared that he had obtained by the payment of a sum of money a diploma of doctor of medicine from the University of Philadelphia in the United States, but that he had never been in America, or studied, or passed any examination, for such degree, and he was not registered under the Medical Act.

On appeal, from a conviction by justices under sect. 40 of the Medical Act (21 & 22 Vict. c. 90), for having unlawfully, wilfully, and falsely taken and used the name, title, description and addition of "M.D.," and "thereby implying that he was then registered under the Medical Act, whereas he was not so registered," &c., it was

Held by the Court of Exchequer (Martin, Bramwell, and Pigott, BB.) that the conviction was right, and must be affirmed.

THIS was an appeal from a decision of justices, convicting the defendant, upon an information laid before them under sect. 40 of the Medical Act (21 & 22 Vict. c. 90) for falsely, &c., taking and using the name and title of a physician and doctor of medicine, and it came before the court on a case stated by the justices under the 20 & 21 Vict. c. 43. It appeared from the case that at a petty sessions in and for the borough of Shrewsbury, on the 21st Dec. 1871, an information was laid by the respondent against the appellant, a druggist in the said borough, charging him with having, on the 25th Sept. 1871, within the said borough, *unlawfully, wilfully, and falsely* taken and used a name, title, addition, and description—to wit, "M.D.," meaning thereby "doctor of medicine," and thereby implying that he, the said appellant, was then registered under the Medical Act, whereas he was not so registered, he, the said appellant, not being a person who was actually practising in medicine in England before the 1st Aug. 1815, contrary, &c., and upon hearing the said parties, appellant and respondent respectively, by attorney and counsel, the matter was determined by the said justices, and the appellant was duly convicted before them of the said offence, and adjudged to pay the penalty of 20*l.*, including costs, to be levied in default of payment by distress and sale of his goods; and in default of sufficient distress he was to be imprisoned for two calendar months, unless the said penalty and costs were sooner paid.

The appellant being dissatisfied with the determination of the justices as erroneous in point of law, applied to them to state and sign the present case for the opinion of this court, from which it appeared that on the hearing it was proved and found as a fact that the appellant had attended a patient, the sister of one Thomas Parton, in the capacity of a medical man, and had, on the day named in the information, sent in to the said Thomas Parton a bill in the following terms:

Mr. Parton, Shrewsbury, 25th Sept. 1871.
To Thomas Andrews, M.D.
To professional attendance, medicines, &c., late Miss Parton £17 8 6

That on the 7th Nov. following, the appellant received 5*l.* on account of the said bill, and on the same day sent in to the said Thomas Parton another bill, headed in the same way.

Mr. Parton,
To Thomas Andrews, M.D.
To professional attendance, medicines, &c., as per items over £17 8 6

And then followed the several items of charge for medicines, attendance, journeys, &c., on the various days specified, from 26th April to 26th Aug. 1871. This bill was accompanied by the following letter from the appellant to Mr. Parton:

Sir,—Unless you settle balance of this account before Thursday week, I shall place it in the hands of my solicitor, without further notice. Yours, &c.,
T. ANDREWS, M.D.

The balance of the said account was paid on the following day by the said Thomas Parton, who received the following bill and receipt on the 9th Nov.:

Mr. Parton. Shrewsbury, 9th Nov. 1871.
To Thomas Andrews. M.D.
To professional attendance, medicines, &c., &c., Miss Parton.
Balance of account ... ... £12 8*s.* 6*d.*
9th Nov. 1871.
Settled, EDWYN ANDREWS.

It was further proved that the appellant had a lamp over the door of his shop at Shrewsbury, on three sides of which the words "Thos. Andrews, M.D.," were painted.

A book purporting to be the Medical Register for 1871, marked on the outside "By authority," was produced by the registrar of the County Court, and which he said had been issued to the court by authority for their guidance, and upon searching it the name of the appellant was not found there.

On the part of the appellant the above facts were not denied, except as to the words "unlawfully, wilfully, and falsely," and in support of the contention that the appellant did not "unlawfully, wilfully, and falsely," take and use the title of M.D., &c., (as charged in the information), a diploma of the American University of Philadelphia in the United States, dated 20th Feb. 1871, was put in. It was in Latin, and the following translation was handed in to the justices by the appellant.

To all to whom this present letter may reach.

The President Fellows and Professors of the American University of Philadelphia, founded by the laws of the Republic of Pennsylvania, give salutation. Inasmuch as in all universities, properly and legitimately constructed, either here or elsewhere in the world, it was a praiseworthy and ancient usage that men who have not less diligently than faithfully paid attention to literature, or to ingenuous arts, or to any liberal studies whatever, meanwhile conducting themselves uprightly and honourably, should be adorned with some distinguished honour, and raised to merited dignity; and since by the laws of our Republic we possess the fullest power of distinguishing and decorating with academical titles, and of advancing to degrees in sacred theology, in arts, and medicine, gentlemen well deserving of them, we therefore, furnished with this authority, and not unmindful of the ancient usage, have adjudged, and at a meeting of the Council have decreed, the eminent gentleman devoted to the highest pursuits, Thomas Andrews, about whose proficiency in medical science and honorable character we have sufficiently enquired and scrutinized, to be worthy and fitting to be honoured as a learned man in the highest degree of dignity; wherefore, with one accord, we have both elected and made him Doctor of Medicine, and have given and assigned to him all rights and privileges which belong to that degree. Now, all and singular these proceedings we in good faith notify unto you by the present letter fortified with our seal and the signature of the President of the University, this 20th day of the month of February, and in the year of our Lord 1871.

A seal, purporting to be the seal of the said university, was appended to this document, as were also several signatures, purporting to be the signatures of professors or officers thereof. A witness also proved that he held a similar diploma from the said university, and that he had been in America, and he testified to the authenticity and genuineness of the seal and the signatures appended to the appellant's diploma. He also said, on cross-examination, that a diploma could be obtained by an examination before examiners in England commissioned by the University of Philadelphia for that purpose. It was not alleged that the appellant had ever been in America, nor was any proof given that he had undergone any examination in order to obtain the diploma.

Upon these facts the justices came to the conclusion that the appellant had committed the offence charged in the information, and they duly convicted him thereof as aforesaid, and the question for this court is whether, upon the above facts, the justices were justified in coming to that conclusion, and so convicting the said appellant, or whether the fact of the appellant having obtained the above-mentioned diploma exonerated him from the charge made against him?

The following sections of the Medical Act (21 & 22 Vict. c. 90), which provides for the registration of duly qualified practitioners as therein specified, were referred to in the argument, and especially sect. 40, upon which the information is founded.

Sect. 31 empowers every person registered under the Act to practise medicine, or surgery, or medicine and surgery, as the case may be, according to his qualifications, in any part of the Queen's dominions, and to recover his reasonable charges with costs of suit, in any court of law; and by sect. 32, no person, after the 1st. Jan. 1859, shall be entitled to recover any charge in any court of law for medical or surgical advice, &c., or medicine prescribed and supplied, unless upon proof that he is registered under this Act.

Sect. 36 provides that, after 1st Jan. 1857, no person, unless registered under the Act, shall hold any appointment as physician, surgeon, or other medical officer, either in the military or naval service, or in emigrant or other vessels, or in any hospital, &c., not supported wholly by voluntary contributions, or in any lunatic asylum, &c., &c.

Sect. 40 enacts that any person who shall wilfully and falsely pretend to be, or take or use the name or title of, a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description, implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding 20*l.*

Huddleston, Q. C. (with him was *Bullen*), for the respondent, supported the conviction, and—following the course adopted in *Ellis* v. *Kelly* (3 L. T. Rep. N. S. 331; 30 L. J. 74, Ex., and 35, M. C.; 6 H. & N. 222) and *Jones* v. *Taylor* (28 L. J. 20, M. C.)—was called on by the court to begin.—He contended that the conviction was right, and that the justices, having found all the facts and come to a decision upon them, the court would not interfere with the conclusion at which they had arrived.

Ladd v. *Gould*, 1 L. T. Rep. N. S. 325.

R. Vaughan Williams, for the appellant, *contra*, urged that the diploma of the University of Philadelphia, which was an institution of high standing, and fully empowered to grant degrees, was a sufficient warrant for the appellant's use of the title of "M.D.," and saved him from coming within the operation of sect. 40 of the Medical Act. [PIGOTT, B.—The American University may be all that you say it is, but unfortunately this student has never been there.] It appears that the University is constantly in the habit of appointing examiners in other countries, and *non constat* that that was not done here. The fact of the Act of Parliament granting certain privileges to some persons, and imposing certain restrictions on others, by no means makes it unlawful to practise or to assume the title of "M.D." The Act only imposes certain liabilities or restrictions, as, for instance, by sect. 36, no unregistered person can hold certain medical offices there specified. If it be contended that the mere fact of practising as a "Doctor," without being registered, is an offence, the answer is in that section. The offence must be something more; a man must practise as a doctor with the object of obtaining the privilege conferred by the Act on registered individuals, or of avoiding or getting rid of the disabilities imposed upon non-registered persons. The mere fact of using the letters "M.D." after his name is no evidence of the offence, or of doing anything coming within the two last-mentioned heads. The case of *Ellis* v. *Kelly* (*ubi sup.*) is an authority that the merely appending "M.D." to one's name is no offence under the Act. In the present case it was done under a supposed right by virtue of the foreign diploma, and *Ellis* v. *Kelly* as well as *Pedgriffi* v. *Chevalier* (20 L. J. 225, M. C; 8 C. B., N. S., 246), show that that is no offence. The evidence in the present case is very similar to that in *Ellis* v. *Kelly*, and the remarks of the court there, and particularly those of Bramwell, B., that it is the doing the thing "wilfully and falsely" that constitutes the offence under the Act, which doing it under a supposed, even if it be a mistaken, right cannot be held to be, are very applicable here. The appellant here had a foreign diploma. [MARTIN, B.—It is no diploma at all, it is a mere pretence. BRAMWELL, B.—The matter does not appear to me now as it appears to have appeared to me then.] It is submitted that there is no evidence here of the appellant having done anything more than incorrectly or mistakenly used the title of "M. D." In this case it is an American degree, in *Ellis* v. *Kelly* it was a German one. *Pedgriff* v. *Chevallier* (*ubi sup.*), shows that the mere fact of a man's name not being in the medical register is not sufficient to warrant a conviction, for which purpose there must be evidence of wilful falsity, of which there is here an entire absence. To hold the appellant guilty of the offence would seriously affect hundreds of Scotch practitioners who are not registered under the Act.

MARTIN, B.—I believe we are all of opinion that the justices were perfectly right and thoroughly well warranted in the conclusion at which they arrived upon the facts before them in this case, and that, therefore, this conviction must be affirmed. It is plain to my mind that this is a

question of fact. There was ample evidence that this appellant *wilfully* (for he did it on purpose) and *falsely* (because he pretended thereby to be on an equal footing with any regularly bred and registered physician or M.D. in England) took, assumed, and used the title of "M.D.," under a diploma obtained by him from an American university, without any course of previous study or any examination, but simply on the payment of a sum of money, and which diploma, therefore, he must have known to be in fact utterly worthless and valueless as an indication of the possessor's merit, learning, and skill as a physician, or as giving him any of the privileges of a registered medical man. I am glad to hear from a learned gentleman now in court that the American Legislature have recently prohibited the granting of these degrees to persons on the payment of a sum of money only, and without a previous course of study and preliminary examination. The conviction must be affirmed.

BRAMWELL, B.—I entirely agree with all that has been said by my brother Martin.

PIGOTT, B.—I also concur in thinking that this conviction must be affirmed.

Judgment for the respondent, affirming the conviction, with costs.

Attorneys for the appellant, *Needham, Power*, and *Needham*, 1, New-inn, Strand, W.C., agents for *H. Morris*, Shrewsbury.

Attorney for the respondent, *E. F. Cooke*, 3, Serjeant's-inn, Chancery-lane, W.C., agent for *Chandler*, Shrewsbury.

Thursday, May 30.

BALDWIN *v.* CASELLA.

Mischievous dog—Action for bite by—Scienter—Knowledge of coachman having care of dog—Liability of master for—Direction to jury.

Where a carriage dog was kept, under the care of its owner's coachman, at the mews where the latter lived, and it was known to the coachman that the dog had, previously to the occasion in question, attacked and bitten persons in the mews, the owner of the dog, in an action by the plaintiff for compensation for injuries sustained by a bite of the dog, was held (by Martin, Bramwell, and Channell, BB.), to be bound by the coachman's knowledge of the dog's disposition, and such knowledge was held to be sufficient evidence of sciente on the part of the owner to render him liable in damages to the plaintiff in the action.

THIS was an action by the plaintiff, an infant of six years of age, by his father and next friend, to recover compensation in damages from the defendant for injuries sustained by the plaintiff through his having been bitten by a dog belonging to the defendant, under the following circumstances:

The plaint was originally brought in the County Court, but, under the provisions of the 19 & 20 Vict. c. 108, the defendant objected to having the action being tried in that court, and having deposited a sum of money in lieu of security for costs, all proceedings in the County Court were stayed, and the plaintiff then declared in this court against the defendant, for that he "wrongfully kept a dog of a fierce and mischievous nature, and the said dog, whilst the defendant so kept the same, attacked and bit the plaintiff, whereby the plaintiff was wounded, and so remained for a long time, and suffered great pain, and was otherwise injured. The defendant pleaded not guilty, and upon that plea issue was joined.

The facts as they appeared in evidence upon the trial of the action before Cleasby, B., at the Midsummer sittings at Westminster after last Easter Term, on the 24th May, were as follows:

The plaintiff, a child of six years of age, lived with his father, a gentleman's servant, in a mews at Kensington; and the defendant was a gentleman living in the neighbourhood, and having his stables, where his horses and carriages were kept, in the same mews at which the plaintiff and his father lived. The defendant was the owner of a dog, an ordinary black and white carriage dog, which he had kept, for some four or five years, at his stables in the mews under the care of his coachman, who lived there, and the dog was accustomed to run with the carriage. On the day in question, the 17th July, the plaintiff was playing in the mews when the dog attacked him, and bit him in the face. There was conflicting evidence as to whether or not the child was teazing the dog with a small stick which he had in his hand at the time he was bitten; but it was proved that on the previous 24th June the dog had jumped up at the child and, either with his teeth or his paws, had scratched the child's face, and that the child had said that when he met the dog again he would beat him. Upon that first occasion of the 24th June, the child's father complained to the defendant's coachman of the dog's having attacked his child, and requested the coachman to inform his master (the defendant) of the dog's having done so; but it appeared that the coachman did not inform his master of what had happened, and the latter was, up to the present occasion, entirely ignorant, in fact, of the dog having ever before bitten or attacked anybody. There was also a conflict of evidence as to the dog's temper and disposition. The witnesses for the plaintiff asserted that the dog was of a fierce and mischievous temper and had, on several previous occasions, attacked and bitten other persons, whereas the witnesses on the part of the defendant stated that the dog was quiet, good tempered, and inoffensive, and that the children of the defendant and of his coachman, and other children, were accustomed to play with him.

The defendant's counsel at the trial contended that there was no evidence of *scienter* on the part of the defendant, and therefore that there was no case to go to the jury against him. The plaintiff's counsel, on the other hand, cited and relied upon the cases of *Stiles* v. *The Cardiff Steam Navigation Company*, in the Queen's Bench (10 L. T. Rep. N.S. 844; 33 L. J. 310, Q.B), and *Gladman* v. *Johnson*, in the Common Pleas (15 L. T. Rep. N. S. 476; 36 L. J. 153, C.P.) The learned judge left the case to the jury with the following direction: "The defendant must knowingly have kept a mischievous dog. I think if the dog is left in the care and charge of a servant, and is kept on the premises under such circumstances as that such servant would know if the dog were a mischievous dog, such knowledge affects the master. If the coachman had sole charge of the dog, and knew it to be a dangerous dog, he ought to have told his master." The jury found a verdict for the plaintiff, with 10*l.* damages.

Pope, Q.C. (with him was *F. O. Crump*), for the

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.