

FEDERAL HABEAS CORPUS.*

I.

1: This article is not intended to be an exhaustive digest of all decisions. It has long since become impossible to reconcile any long course of decision upon any subject; and the treatment is intended to be suggestive rather than complete.

2: The writ of habeas corpus is a remedial process, whereof the name and general incidents are derived from the common law.¹ The phrase "habeas corpus" is properly generic, and includes several species of writs.² These species fall naturally into two classes, viz: Ancillary and Independent.

Ancillary writs were (1) habeas corpus cum causa (sometimes called habeas corpus ad faciendum et recipiendum); (2) habeas corpus ad respondendum; (3) habeas corpus ad satisfaciendum, and (4) habeas corpus ad testificandum.³

The great (or Independent) writ was known as habeas corpus ad subjiciendum; and that writ is usually meant when the term "habeas corpus" without qualification is employed.⁴

The classification into Ancillary and Independent is not customary, but is here adopted for purposes of analysis. The writs termed Ancillary were all used to enable a court effectively to exercise its jurisdiction over a case brought or to be brought before it.⁵ They were, organically, procedural

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1. Ex parte Siebold, 100 U. S., 1. c. 375.

2. Ex parte Bollman, 4 Cranch, 1. c. 96.

3. Cf. ex parte Bollman, 4 Cranch, 1. c. 96; as to ad testificandum, see In re Thaw, 166 Fed. 71.

4. Ex parte Bollman, 4 Cranch, 1. c. 95.

5. Ex parte Bollman, 4 Cranch, 1. c. 96, et seq;

steps in that case; whereas the proceedings under the great writ constitute an independent action.⁶

3: The writ of habeas corpus (meaning habeas corpus ad subjiciendum) is a remedy given by the common law to vindicate the right of personal liberty.⁷ It was originally in the nature of a prerogative writ;⁸ but it is held that the proceedings upon application therefor constitute a *case* or *suit*,⁹ civil in character.¹⁰ As such, it must be implicit in the catalogue of jurisdiction laid down in Article 3 of the Constitution. The only other constitutional source possible would be the prohibition against suspension.¹¹ To treat this as the affirmative grant of power runs counter to the ordinary use of language,¹² and seems opposed to the theories underlying all judicial reasoning on the subject.

The objection to derivation of the writ solely from the grant of judicial power is that the judicial power is vested in *courts*, and not in *judges*;¹³ whereas, from the beginning of our system power to issue and determine the writ has been distinctly vested by statute in the judges as well as in the courts. Possible explanations for this anomaly are (1) the chamber and vacation powers of the judge, or (2) the (legislatively) implied perpetual session of the court for the purposes of the writ. As a matter of common law, chamber and vacation powers do not include the right of final adjudication of the case.¹⁴ The theory of implied perpetual session

6. *Ex parte Tom Tong*, 108 U. S., 1. c. 559; *Riddle v. Dyche*, 67 Co-op. Advance, 612.

7. *Ex parte Watkins*, 3 Pet., 1. c. 202.

8. *Ex parte Watkins*, 3 Pet., 1. c. 202; *In re Burrus*, 136 U. S., 1. c. 615.

9. *Ex parte Milligan*, 4 Wall., 1. c. 113; *ex parte Tom Tong*, 108 U. S., 1. c. 559; *Holmes v. Jennison*, 14 Pet., 1. c. 564, 567.

10. *Fisher v. Baker*, 203 U. S. 174; *ex parte Tom Tong*, 108 U. S. 556.

11. Article I, Section 9, U. S. Constitution.

12. *Ex parte Caldwell*, 138 Fed. 487.

13. Article III, Section 1, U. S. Constitution.

14. *Cf. State ex rel. v. Woodson*, 161 Mo. 444; but see *Carter v. Gear*, 197 U. S. 348.

makes the particular judge identical with the court, which is open to serious objection.¹⁵ The issue and determination of the writ are matters peculiarly judicial and essentially a part of that power.¹⁶ In view of the history of the writ, there is no reason why we should not frankly recognize the *judge* in this instance as the repository of judicial power. The habeas corpus of our fathers was that embalmed in the English Habeas Corpus Act.¹⁷ That Act resolved the doubt of the common law courts as to the power to issue and hear the writ in vacation¹⁸ by emphatically imposing that duty upon the judges in vacation as well as in term. The prohibition against suspension is broad enough to preserve the constant right to the writ then enjoyed in Great Britain. Certainly it was never intended that Congress must leave the writ utterly unavailable during the long vacations used by early federal courts. Constitutional history, coupled with the express prohibition, qualifies in this regard the grant of judicial power to the courts.

4: No court (or judge) of the United States can entertain an application for an independent writ of habeas corpus, unless jurisdiction so to do has been conferred by statute.¹⁹ Ancillary writs, as mere procedural steps in a case whereof jurisdiction has been conferred, probably need no express statutory authorization.²⁰ A general procedural statute,²¹

15. See *Carper v. Fitzgerald*, 121 U. S. 87; *Lambert v. Barrett*, 157 U. S. 697; *McKnight v. James*, 155 U. S. 685; *Harkrader v. Wadley*, 172 U. S., 1. c. 162; see, however, the somewhat extraordinary result in *ex parte Craig*, 68 Co-op. Advance, 124.

16. Cf. *ex parte Yerger*, 8 Wall., 1. c. 95.

17. Cf. *Slaughter-House Cases*, 16 Wall., 1. c. 114-115; *ex parte Yerger*, 8 Wall., 1. c. 95; *King v. McLean Asylum*, 64 Fed., 1. c. 342.

18. Cf. *Jenkes' Case*, 6 How. St. Tr., folio 1196.

19. *Ex parte Bollman*, 4 Cranch, 1. c. 94; *ex parte Parks*, 93 U. S., 1. c. 22; *Re Neagle*, 135 U. S., 1. c. 78.

20. Cf. *In re Burrus*, 136 U. S., 1. c. 607.

21. Judicial Code, §262.

however, exists, broad enough in language to include such ancillary writs; and there are some particular statutes which expressly provide therefor, although not by such a designation.²² Our statutes, really, to some extent confuse the distinction between ancillary and independent writ.

The general statutes granting jurisdiction to issue the writ of habeas corpus are exceedingly vague. In their present form²³ they read as follows:

“Sec. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.”

“Sec. 752. The several Justices and Judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.”

5: It is a truism, generally speaking, that federal jurisdiction postulates the presence in the case of either federal question or diversity of citizenship. The statutes just quoted are impliedly limited by this requirement. Indeed there is considerable doubt whether diversity of citizenship can found jurisdiction over the writ. If that doubt can be justified, it must be upon the ground that a proceeding in habeas corpus is not to be regarded as a mere suit *inter partes*, but as retaining its ancient prerogative character—as being an inquiry by the sovereign into an imprisonment of its subject, contrary to its laws. If regarded as a proceeding between parties—the claimant of liberty being deemed the plaintiff, and the person against whom the writ is sought, the defendant—diversity of citizenship is a valid foundation for the jurisdiction. The Supreme Court has declined to pass upon this question; taking the position, in the cases that have come before it, that, in any event, civil liberty is incalculable and

22. Judicial Code, §32; §33.

23. R. S. §§ 751 and 752.

the statutory amount conditioning federal jurisdiction was not involved.²⁴

Even if we should assume diversity of citizenship to be a proper basis generally, it is still doubtful whether the federal courts could be empowered, by means of the writ, to assume jurisdiction, as *parens patriae*, to determine the proper custody for those incapable or not *sui juris*, where some custody is confessedly necessary.²⁵

6: Practically, as the matter stands at present, the federal right to issue the writ is limited to cases of detention alleged to be contrary to federal law, including some cases under the law of nations.²⁶ A mere trespass by private persons upon the right of personal liberty ordinarily involves no federal question; so that the detention redressible must generally be by persons acting, or claiming colorably to act, under public authority.

7: For over forty years after the Government was formed, the federal writ of habeas corpus reached no prisoner in custody under the laws of a State except to require his attendance as a witness in the federal court.²⁷ The original Judiciary Act granted generally to specified courts and judges the power to issue the writ, "provided * * (it) * * shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."²⁸

24. Cf. *Matters v. Ryan*, 249 U. S. 375; *ex parte Burrus*, 136 U. S., 1. c. 596; *Barry v. Mercein*, 5 How., 1. c. 120.

25. Cf. *King v. McLean Asylum*, 64 Fed. 331; *New York Foundling Asylum v. Gatti*, 203 U. S. 429.

26. *Matters v. Ryan*, 249 U. S. 375; *Carper v. Caldwell*, 200 U. S. 293; *Storti v. Massachusetts*, 183 U. S., 1. c. 142; *ex parte Burrus*, 136 U. S. 586.

27. *Ex parte Dorr*, 3 How., 1. c. 105; *ex parte McCann*, F. C. 8679; *ex parte Cabrera*, 1 Wash., C. C. 232, F. C. 2278; for general history of federal writ, see *ex parte Yerger*, 8 Wall. 85; *ex parte Parks*, 93 U. S. 18; *Cunningham v. Neagle*, 135 U. S. 1; *ex parte Burrus*, 136 U. S. 586.

28. 1 Stat. at L. 81.

The asserted state right of Nullification was the occasion for the first enlargement in scope of the writ in 1833.²⁹

The second came in 1842, when the refusal of New York to release a British Agent charged with acts done under the purported authority of his government brought us to the verge of war.³⁰

The third and final extension was part of the policy of reconstruction in 1867.³¹

29. 4 Stat. at L. 634. "And be it further enacted, That either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree, or any judge or court thereof, anything in any act of Congress to the contrary notwithstanding."

30. 5 Stat. at L., 539: "Be it enacted . . . That either of the justices of the Supreme Court, . . . or judge of any District Court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof . . ."

31. 14 Stat. at L. 385: ". . . The several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of . . . liberty in violation of the Constitution, or of any law or treaty of the United States . . . The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty . . ."

S: Upon the compilation of the Revised Statutes, the original proviso and the three enlargements above listed were fused and combined into R. S. 753.³² That section is in the form of a limitation; but is composed, for the most part, of statutes which were sweeping grants of judicial authority. In the light of its history it *affirms* the power of the federal courts and judges to issue the writ in the excepted instances.

Unquestionably the *power* to issue now extends to every detention in jail or elsewhere, by state or other authority whatsoever, shown to be contrary to the constitution, laws or treaties of the United States.³³

The exercise of that *power* is limited (1) by regard for the inherited nature of the writ; and (2) by importing into the construction of the statutory *power* a theory of restrictive judicial discretion.

Because this *second* limitation is capable of fairly easy statement (although occasionally quite perplexing in practical application) we shall dispose of it first. It may be formulated as follows:

The writ of habeas corpus is in the nature of an *extraordinary* remedy; and even where the *power* to issue is plain,

32. R. S. 753: "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color or authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

33. *Whitten v. Tomlinson*, 160 U. S. 231; *ex parte McCardle*, 6 Wall. 318; *ex parte Burrus*, 136 U. S. 586; note, that an order or judgment of a federal court is assimilated by the language of the statute to a law; and the breadth given to the word "law" in the extraordinary case of *In re Neagle*, 135 U. S. 1.

if the wrongs or errors complained of are redressible by error or appeal, either to a higher executive tribunal or state or federal court, the court applied to should usually refuse the writ, in all cases save those of urgent and exceptional character.^{33a} This rule applies both before and after trial.³⁴ It is applicable both to federal³⁵ and state³⁶ proceedings. Urgent or exceptional instances have been grouped in the notes.^{36a}

33a. *Ex parte Royall*, 117 U. S. 241; *ex parte Fonda*, 117 U. S. 516; *re Duncan*, 139 U. S. 449; *re Wood*, 140 U. S. 278; *Cook v. Hart*, 146 U. S. 183; *re Frederick*, 149 U. S. 70; *New York v. Eno*, 155 U. S. 89; *re Chapman*, 156 U. S. 211; *re Belt*, 159 U. S. 95; *Whitten v. Tomlinson*, 160 U. S. 231; *Baker v. Grice*, 169 U. S. 284; *Tinsley v. Anderson*, 171 U. S., l. c. 104; *Flitts v. McGehee*, 172 U. S., l. c. 532; *Markuson v. Boucher*, 175 U. S. 184; *Davis v. Burke*, 179 U. S. 399; *Minnesota v. Brundage*, 180 U. S. 499; *U. S. v. Sing Tuck*, 194 U. S. 161, where writ denied because no appeal had been taken to Secretary of Treasury; *Riggins v. U. S.*, 199 U. S. 547; *re Lincoln*, 202 U. S. 178; *Urquhart v. Brown*, 205 U. S. 179; *ex parte Spencer*, 228 U. S. 652; *Frank v. Mangum*, 237 U. S., l. c. 328; *Jones v. Perkins*, 245 U. S. 390.

34. *Glasgow v. Moyer*, 225 U. S. 420; ordinarily refused before trial, see *Jones v. Perkins*, 245 U. S. 390; *Johnson v. Hoy*, 227 U. S. 245; *Riggins v. U. S.*, 199 U. S. 547; *Horner v. U. S.*, 143 U. S. 570.

35. *Re Chapman*, 156 U. S. 211; *Riggins v. U. S.*, 199 U. S. 547; *Jones v. Perkins*, 245 U. S. 390; *ex parte Mirzan*, 119 U. S. 584; *ex parte Lancaster*, 137 U. S. 393; *re Lincoln*, 202 U. S. 178.

36. See generally *Whitten v. Tomlinson*, 160 U. S. 231; *Baker v. Grice*, 169 U. S. 284; *Drury v. Lewis*, 200 U. S. 1; *Urquhart v. Brown*, 205 U. S. 179; and many of the other cases cited under note 33a, *supra*.

36a. Exceptional instances, not always clearly put upon a particular ground, see: *re Neagle*, 135 U. S. 1, where a deputy marshal in state custody, charged with homicide, committed while protecting a federal judge, was discharged; in *re Loney*, 134 U. S. 372, discharging a prisoner in state custody under a charge of which federal courts had exclusive jurisdiction; *Wildenhuss' Case*, 120 U. S., l. c. 17, where it is suggested foreign seaman, held for misconduct for which, under treaty, he was exclusively subject to consul, might have writ—case referred to as exceptional in *Whitten v. Tomlinson*, 160 U. S., l. c. 242; intimidation in *U. S. v. Rauscher*, 119 U. S., l. c. 431, that one, held for another crime than that on which extradition had, entitled to writ; Ticket agent, arrested under state statute which had been enjoined by federal court, *Hunter v. Wood*, 209 U. S. 205; see *Ohio v. Thomas*, 173 U. S. 276, where superintendent of U. S. institution arrested for serving butter substitute, authorized by federal law; *Boske v. Comin-*

9: Turning now to the first limitation, it is laid down generally by many cases that the writ reaches solely the question of *jurisdiction* or *authority*.³⁷ It does not at all concern itself with mere *errors* committed in the exercise of jurisdiction or authority—unless destructive thereof.³⁸ It is, emphatically, not a substitute for the writ of error.³⁹

Such, unquestionably, was the common law function of the writ. Under our system of constitutional law, our division of sovereignty between state and nation with the right of the latter, by its courts, authoritatively to determine national questions,—the foregoing formula, in its simple form, is hardly adequate to explain all the cases; as will hereafter appear.

Assuming, for the moment, its general validity, we may

gore, 177 U. S. 459, where U. S. collector was discharged from contempt proceedings, instituted to compel him to produce distillers' reports, contrary to federal regulations; re Nielsen, 131 U. S. 176, where face of record showed prisoner had before been convicted of same offense; see citations in *ex parte* Craig, 282 Fed., 1. c. 149.

See remarks of Court in *ex parte* Royall, 117 U. S. 241, frequently quoted.

The requirement of appeal or error is apparently sometimes overlooked. Cf. *Baender v. Barnett*, 255 U. S. 224; *Dillon v. Gloss*, 256 U. S. 368; *Matter of Gregory*, 219 U. S. 210; in all of which relief was refused, after full discussion of merits of contentions. It may be the court concluded to settle the questions involved.

37. Re *Chapman*, 156 U. S., 1. c. 215; re *Schneider*, 148 U. S. 162; re *Beit*, 159 U. S. 95; *ex parte* *Siebold*, 100 U. S., 1. c. 375; *Davis v. Beason*, 133 U. S. 333; re *Wight*, 134 U. S., 1. c. 148; *Dimmick v. Tompkins*, 194 U. S., 1. c. 552; in re *Frederich*, 149 U. S., 1. c. 76; *Harland v. McGourin*, 218 U. S., 1. c. 445; *Collins v. McDonald*, 258 U. S., 1. c. 418; *Valentina v. Mercer*, 201 U. S., 1. c. 138; *Collins v. Johnston*, 237 U. S., 1. c. 505; *ex parte* *Carl*, 106 U. S. 521; *ex parte* *Tyler*, 149 U. S., 1. c. 180; *Riggins v. U. S.*, 199 U. S., 1. c. 548; *ex parte* *Ulrich*, 43 Fed., 1. c. 663.

38. Cf. *McMicking v. Shields*, 238 U. S., 1. c. 106; *Frank v. Mangum*, 237 U. S., 1. c. 327; re *Lane*, 135 U. S., 1. c. 448.

39. *Glasgow v. Moyer*, 225 U. S., 1. c. 428; *Johnson v. Hoy*, 227 U. S. 245; *Harlan v. McGourin*, 218 U. S., 1. c. 445. A possible exception is noted in *ex parte* *Siebold*, 100 U. S. 371, where the issuing court is vested with appellate jurisdiction, and the error is apparent, but this is seldom, if ever, followed:

distinguish (1) the initial attachment of jurisdiction, and (2) the subsequent infection thereof by fundamental error. Therefore, to review proceedings by a federal writ of habeas corpus either (1) subject matter, person or *res* must have been removed from the field of jurisdiction by federal constitution, statute or treaty; or (2) jurisdiction over subject matter, person or *res*, having initially attached, must be destroyed by the violation of some provision of federal constitution, statute or treaty.

Authority, rather than jurisdiction, is properly predicable of officers and tribunals other than courts; but an analogous classification must be applicable to them.

Instances of the first class, where *initial* jurisdiction, (or authority) does not attach, and a federal court has *power* to issue the writ, are set forth in the note.⁴⁰

40. Detention under statutes contrary to paramount federal law, which can therefore confer no jurisdiction to punish for their violation: *ex parte Siebold*, 100 U. S. 371; *ex parte Yarborough*, 110 U. S. 651; *Fitts v. McGehee*, 172 U. S., 1. c. 532; *matter of Heff*, 197 U. S. 488; *in re Coy*, 127 U. S., 1. c. 758; *James v. Bowman*, 190 U. S. 127.

Commitment for contempt of injunction restraining commission of mere crime, or infringement of purely political rights, *ex parte Sawyer*, 124 U. S. 200. Detention of Indian for offense of which exclusive jurisdiction had been vested by treaty in tribal courts, *ex parte Mayfield*, 141 U. S. 107; *ex parte Kang-Gi-Shun-Ca*, 109 U. S. 556; detention by state for offense over which federal jurisdiction exclusive, *re Loney*, 134 U. S. 372; imprisonment of federal officer, under state process, for act done under federal law, *Cunningham v. Neagle*, 135 U. S. 1; detention under federal law repealed by admission of state, *ex parte Webb*, 225 U. S. 663; detention by state on one charge, after extradition on another, *Cosgrove v. Winney*, 174 U. S. 64; *ex parte Rauscher*, 119 U. S. 407; imprisonment, under sentence of court martial, of one never subject to military law, *ex parte Milligan*, 4 Wall. 1; Attempt by executive authority to deport one claiming to be citizen, *Ng Fung Cho v. White*, 259 U. S. 276; Imprisonment for contempt in refusing to give deposition after removal to federal court, *ex parte Fisk*, 113 U. S. 713; Trial by District Court, when jurisdiction exclusive in Territorial Court, *ex parte Gon-Shay-ee*, 130 U. S. 343; Contempt in violating mandamus granted without jurisdiction, *ex parte Rowland*, 104 U. S. 604; State statute invalid in attempting to punish managers of federal institution, *Ohio v. Thomas*, 173 U. S. 276.

Under the second class, we are called upon to distinguish between a mere *error* in the course of jurisdiction, and such a departure from federal rules governing the play and exercise of jurisdiction as to vitiate the result. The distinction seems one of degree and the tendency in latter times is strongly restrictive. Examples are appended.⁴¹

41. Attempted amendment of indictment by District Attorney, *ex parte Bain*, 121 U. S. 1; trial for infamous crime without indictment, *in re Sawyer*, 124 U. S. 200; without jury, *ex parte Wilson*, 114 U. S. 417; Domination of court and jury by mob, so as to render conviction automatic and mechanical, *Moore v. Dempsey*, 261 U. S. 86; Manifest unfairness in conduct of executive deportation hearing, by refusing to hear, or suppressing vital evidence, *Chin Yow v. U. S.*, 208 U. S. 8; *Kwock Jan Fat v. White*, 253 U. S. 454; refusal of commissioner in removal proceedings to hear evidence proving no offense in district to which removal sought, *Tinsley v. Treat*, 205 U. S. 20.

The following are instances of mere (or non-jurisdictional) error: Compelling prisoner to exhibit gait and carriage, or otherwise give evidence against himself, *Collins v. McDonald*, 258 U. S., 416; *re Moran*, 203 U. S. 96; Refusal to allow defendant statutory time to prepare defense, contrary to claimed due process of law, *McMicking v. Shields*, 238 U. S. 99; Exclusion of negroes from grand and petit juries, where no statute requires exclusion, *Wood v. Brush*, 140 U. S. 278; *Jugiro v. Brush*, 140 U. S. 291; Refusal of trial court to hear evidence offered to prove deliberate exclusion of negroes from juries, *Andrews v. Swartz*, 156 U. S. 272; Insufficiency of facts set forth in indictment to constitute any offense, *Dimmick v. Tompkins*, 194 U. S. 540; *Davis v. Beason*, 133 U. S. 333; *Bergeman v. Baeker*, 157 U. S. 655; *Kohl v. Lehlback*, 160 U. S. 293; *ex parte Yarborough*, 110 U. S. 651; Denial of process for defendant's witnesses, *ex parte Harding*, 120 U. S. 782; That the instrument charged to have been forged was incapable of forgery, under the statute, *ex parte Parks*, 93 U. S. 18; Exclusion of evidence by extradition commissioner, not amounting to denial of fair hearing, *Collins v. Loisel*, 259 U. S. 309; Cf. on this point, *McNamara v. Heinkel*, 226 U. S. 520; Failure to communicate any of trial proceedings to deaf and dumb defendant, *Felts v. Murphy*, 201 U. S. 123; Disqualification of some of grand jurors, *Kaizo v. Henry*, 211 U. S. 146; Smaller grand jury than required, where sufficient number concurred in indictment, *ex parte Wilson*, 140 U. S. 575; Order impaneling grand jury by circuit judge while without district, *Harlan v. McGourin*, 218 U. S. 442; Holding, on trial for second offense, former conviction, without jury, valid, *ex parte Belt*, 159 U. S. 95; Permitting incompetent or biased jurors, *re Schneider*, 148 U. S. 162; Indefiniteness of indictment, *ex parte Coy*, 127 U. S. 731; Variance between charge and proof, *Jugiro v. Brush*, 140 U. S. 291; Duplicity

10: Error in sentence (which belongs to our second class of subsequently vitiated initial jurisdiction) calls for special notice. The effect of a sentence that does not follow the law depends upon whether the legal and illegal portions are severable. If severable the valid portion supports the jurisdiction and no relief by habeas corpus can ordinarily be had until it is performed.⁴²

Where the variance from law is not quantitative, but is in nature and quality so that authorized and unauthorized portions are inseparable, the whole may be regarded as void and habeas corpus lies.⁴³ Even in such a case the prisoner does not necessarily go free, but, under the equitable procedure characteristic of the federal writ, the court may remit the prisoner to the prior tribunal for such further action by way of correcting the sentence as may be conformable with law.⁴⁴ If such sentence be amendable, the waste of valid proceedings prior to sentence is avoided.

11: Examining more critically the rule that would limit the reach of the writ to jurisdiction alone, we observe that the question of a court's jurisdiction may involve matter of law or matter of fact. If matter of fact, the facts may be

of indictment, failure of District Attorney to sign, *ex parte Lane*, 135 U. S. 443; Agreed facts insufficient to constitute crime, *re Gregory*, 219 U. S. 210; Failure of verdict, contrary to statutory requirements to specify degree of crime, *re Eckert*, 166 U. S. 481; Joinder in one indictment of charges, some exclusively federal and some state, *re Green*, 134 U. S. 377; Defects of form in indictment, *ex parte Clark*, 100 U. S. 399; Error in ruling plea of former jeopardy, *ex parte Bigelow*, 113 U. S. 328; Refusal to submit to jury lower degrees of offense charged, *Crossley v. California*, 168 U. S. 640.

42. *U. S. v. Pridgeon*, 153 U. S., 1. c. 62; *in re Swan*, 150 U. S., 1. c. 653; *in re Bonner*, 151 U. S. 242; *Harlan v. McGourin*, 218 U. S. 442; *U. S. v. Holtz*, 238 Fed. 81; *in re Welty*, 123 Fed. 122; *De Bara v. U. S.*, 99 Fed. 942.

43. *In re Mills*, 135 U. S. 263; *ex parte Lange*, 18 Wall. 163; *re Bonner*, 151 U. S. 242; *ex parte Medley*, 134 U. S. 160.

44. *Bryant v. U. S.*, 214 Fed. 51; *Price v. Zerbst*, 268 Fed. 72; *U. S. v. Carpenter*, 151 Fed. 214; *ex parte Peeke*, 144 Fed. 1016; *in re Bonner*, 151 U. S. 242.

(and usually are) *quasi*,—rather than *absolutely*, jurisdictional. If quasi-jurisdictional, the court trying the case must determine them and of necessity has jurisdiction so to do.⁴⁵

Yet in a celebrated case,⁴⁶ a deputy marshal, assigned to protect a federal judge, shot and killed one who had struck the judge and was about further to assault him. Upon complaint and affidavit, a state warrant for murder was issued and the marshal was arrested and detained for preliminary hearing; pending which, he was discharged by federal habeas corpus upon the ground that he was at the time engaged in the performance of a duty imposed by federal law and the homicide was a necessary part of that duty.

Whether that homicide was, under the circumstances, unnecessary and uncalled for, or was apparently indispensable for the performance of federal duty, was a question of fact. If of the former description, it was an offense punishable by the state, otherwise not. The state courts had *jurisdiction* (as the term is ordinarily employed) to determine that fact.

In another case,⁴⁷ an officer and soldiers were detailed to guard government property from theft. They shot and killed a supposed thief. Indictments were returned in a state court upon the theory (supported by conflicting evidence) that the deceased was shot after he had surrendered. The Supreme Court took as conceded the *power* to issue habeas corpus, but denied discharge under the doctrine of restrictive judicial discretion. The case was not sufficiently exceptional and the state court had jurisdiction to determine the facts.

That a federal court has *power*, in such cases, to examine into the facts on habeas corpus and to discharge from custody under pending state proceedings, is established by a number

45. See the very strong statements in *Toy Toy v. Hopkins*, 212 U. S. 542; also see *Maust v. Warden*, 283 Fed. 912.

46. *Cunningham v. Neagle*, 135 U. S. 1.

47. *United States ex rel. Drury v. Lewis*, 200 U. S. 1.

of cases decided by lower federal courts.⁴⁸ In most of these instances the state courts would seem to have had *jurisdiction* to determine the facts; notwithstanding which the federal court stepped in and decided the facts for itself. Therefore, it cannot be completely accurate to say that the federal writ reaches only *jurisdiction*, if the latter term be conceived from the standpoint of the court whose proceedings are under review. If we turn to cases where jurisdiction depends upon matter of law, (rather than of fact) the state courts have *jurisdiction* to pass upon and determine issues of law arising in the case whether the law be state or federal. Error in decision ought not to take away the jurisdiction to decide; and the erroneous decision of a federal question of law in a case does not render the judgment absolutely void.⁴⁹

In one of its franker moments,⁵⁰ the Supreme Court has intimated that in exceptional cases the writ is not confined to jurisdictional defects. Such a complete jettison of the frequently enunciated general rule may be avoided by stating that rule as follows: The issuing court has power to discharge under this revisory writ, if *in its opinion* (either as a matter of law or as a matter of admissible fact) the detention is, by reason of some federal inhibition, without jurisdiction. In that sense (that is, from the standpoint of the issuing federal court) it is still universally true that the writ reaches only jurisdiction or authority. How far evidence is *admissible*, with respect particularly to records, will be noted hereafter.

12: The language of the statute confers the same broad

48. *Ex parte Conway*, 48 Fed. 77; *ex parte Jenkins*, 2 Wall. Tr. 521; *ex parte Robinson*, 6 McLean, 355; *U. S. v. Jailer*, 2 Abb. (U. S.) 265; *re Ramsey*, 2 Flippin 451; *re Nell*, 8 Blatchford 156; *ex parte Bridges*, 2 Woods 428; *re Waite*, 81 Fed. 359; *re Fair*, 100 Fed. 149; *re Wulzen*, 235 Fed. 362; *re Lewis*, 83 Fed. 159; *Kelly v. Georgia*, 68 Fed. 52.

49. See *ex parte Ulrich*, 43 Fed., 1. c. 664; *Cf. Glasgow v. Moyer*, 225 U. S. 420.

50. *Henry v. Henkel*, 235 U. S. 219. Some of the lower federal courts take this same view. *Cf. ex parte Craig*, 282 Fed., 1. c. 149.

jurisdiction upon the Supreme Court to issue the writ as upon the District Courts. In so far as the issuance of the writ is to be regarded as an original suit or proceeding, the statute is limited by the constitutional enumeration of the cases in which the Supreme Court has original jurisdiction.⁵¹ That court has avoided, for the most part, this difficulty, by regarding the writ as essentially *appellate* in character, in all instances wherein it is sought to review the judicial decision of some inferior court or officer.⁵² This quasi-appellate jurisdiction by habeas corpus is curtailed by no statute other than the Habeas Corpus Act itself.⁵³ The court views, however, with a very jaundiced eye attempts in ordinary cases to over-leap the inferior tribunals and burden it with the administration of the writ.⁵⁴

As heretofore indicated, I think the jurisdiction of a justice is not identical with that of the Supreme Court: but he has an original jurisdiction not limited by the constitutional restriction applicable to the Supreme Court.⁵⁵ Where the case is quasi-appellate in character, he may make it returnable or adjourn it before the whole court for hearing and determination.⁵⁶ Save as an ancillary writ, neither the Circuit Courts of Appeals⁵⁷ nor (in spite of decisions to the contrary⁵⁸) their judges,⁵⁹ as such, have power to issue; and the

51. *Ex parte Hung Hang*, 108 U. S. 552; *ex parte Barry*, 2 How. 65; *ex parte Yerger*, 8 Wall. 85.

52. *Ex parte Yerger*, 8 Wall. 85; *ex parte Siebold*, 100 U. S., 1. c. 374-375; *ex parte Bollman*, 4 Cranch, 1. c. 101; *ex parte Metzger*, 5 How., 1. c. 189; *ex parte Hung Hang*, 108 U. S., 1. c. 553; *ex parte Watkins*, 7 Pet., 1. c. 572; *ex parte Milburn*, 9 Pet. 704.

53. *Ex parte Siebold*, 100 U. S. 371; *ex parte Yerger*, 8 Wall. 85.

54. *Ex parte Tracy*, 249 U. S. 551; *ex parte Mirzan*, 119 U. S. 584; *in re Huntington*, 137 U. S. 63; *ex parte Hudgings*, 249 U. S., 1. c. 379; *ex parte Terry*, 128 U. S., 1. c. 302.

55. *Ex parte Clarke*, 100 U. S. 399; *Cf. ex parte Kaine*, 14 How., 1. c. 131.

56. *Ibidem*; *cf. ex parte Curtis*, 106 U. S. 371.

57. *Whitney v. Dick*, 202 U. S. 132; *ex parte Craig*, 282 Fed. 138;

58. *Ex parte Lamar*, 274 Fed. 160.

59. *Craig v. Hecht*, 68 Co-op. Adv., 124; *ex parte Craig*, 282 Fed. 138.

same is necessarily true of the Court of Claims and the Court of Customs Appeals, and their respective judges.^{59a}

13: The application for the writ must be addressed to the court or judge within whose territorial jurisdiction the imprisonment has its situs.⁶⁰ Such application must be by verified petition in writing setting forth the facts of the detention, the authority claimed therefor (if known) and in whose custody the petitioner is detained.⁶¹ It should make plain on its face the want of jurisdiction or authority.⁶² Averments of fact must be clear, unambiguous and not in the form of legal conclusion.⁶³ If the detention is claimed to be illegal because of the invalidity or insufficiency of process or proceedings, copies thereof should be annexed or the essentials thereof set out in the body of the petition.⁶⁴ Where insufficiency of evidence is complained of, the same rule as to reciting the substance or attaching copies thereof applies.⁶⁵ Generally speaking, the pleading and procedure partake of an equitable, rather than a strict legal, nature. The right of amendment is liberally granted.⁶⁶ Where it appears from

59a. Because no statute granting the jurisdiction.

60. *Ex parte Gouyet*, 175 Fed., 1. c. 233; cf. *People v. Asylum*, 68 N. Y. Supp. 279; *U. S. v. Davis*, 5 Cranch (C. C.) 622; re *Boles*, 48 Fed. 75; *ex parte Young*, 50 Fed. 526.

61. R. S. 754.

62. For instances of petitions, see *ex parte Parks*, 93 U. S. 18; *Slocum v. Brush*, 140 U. S. 698; *ex parte Cross*, 146 U. S. 271; re *Schneider*, 148 U. S. 162; *Whitten v. Tomlinson*, 160 U. S. 231; *Harkrader v. Wadley*, 172 U. S. 148; *ex parte Baez*, 177 U. S. 378.

63. Invalidity of legal conclusions, see *Low Wah Suey v. Backus*, 225 U. S. 460; *Craemer v. Washington*, 168 U. S. 124; *Whitten v. Tomlinson*, 160 U. S. 231.

64. *Craemer v. Washington*, 168 U. S. 124; *Low Wah Suey v. Backus*, 225 U. S. 460; *Terlinden v. Ames*, 184 U. S., 1. c. 279; *Haw Moy v. North*, 183 Fed. 89.

65. *Terlinden v. Ames*, 184 U. S., 1. c. 279; *Hyde v. Shine*, 199 U. S., 1. c. 85.

66. R. S. 760; amendment of traverse, *ex parte Gilroy*, 257 Fed., 1. c. 111; *Haas v. Henkel*, 166 Fed., 1. c. 624; *Storti v. Massachusetts*, 183 U. S., 1. c. 143.

the face of the application that the prisoner must be remanded to original custody, the issuance of the writ is refused.⁶⁷ Sometimes, when in doubt or convenience requires, the court or judge will issue an order to show cause why the writ should not be issued; to which return is made (without production of the prisoner) and the writ is not granted or refused until, and as a part of, the final adjudication of the cause. Such is the ordinary practice of the Supreme Court.⁶⁸

14: If ordered issued upon the filing of the application, the writ is addressed to that person, in immediate custody of the prisoner, who has power to produce his body pursuant to the exigence of the writ.⁶⁹ The addressee of the writ is required by the statute to make due return⁷⁰ thereof within three days, unless the prisoner be detained beyond the distance of twenty miles; in which latter event, the time is enlarged according to distance.⁷¹ It does not appear to be usual for the writ to specify particularly the day and hour for return. The return must certify the true cause of the detention;⁷² and the body of the prisoner should be produced when it is made.⁷³ Demurrer to petition occurs occasionally.^{73a} Wilful failure to obey the command of the writ is

67. In re Boardman, 169 U. S., l. c. 43; in re Burrus, 136 U. S., l. c. 601; ex parte Terry, 128 U. S., l. c. 301; Frank v. Mangum, 237 U. S. 309; re Haskell, 52 Fed. 795; U. S. v. Ju Toy, 198 U. S. 253.

68. See, ex parte Yarbrough, 110 U. S. 651; ex parte Baez, 177 U. S. 378; ex parte Burrus, 136 U. S. 586; Horn v. Mitchell, 232 Fed. 819; see form of order to show cause, ex parte Henry, 123 U. S. 372.

69. R. S. 755; Wales v. Whitney, 114 U. S. 564.

70. R. S. 756; Seavey v. Seymour, 3 Cliff. 439.

71. R. S. 756.

72. R. S. 757.

73. R. S. 758; may be dispensed with, see re Medley, 134 U. S. 176; ex parte Baez, 177 U. S. 378.

73a. See, Moore v. Dempsey, 261 U. S. 86; Low Wah Suey v. Backus, 225 U. S. 460; Choy Gum v. Backus, 223 Fed. 491; Cf. in re Thaw, 166 Fed. 71.

a punishable contempt;⁷⁴ *semble*, either of court or judge as the case may be.

Upon return and production, and pending hearing and determination, the prisoner is in the power and subject to the control of the court or judge issuing the writ.⁷⁵ He is detained not under the original commitment, but under the writ of habeas corpus.⁷⁶ Until conclusion of that proceeding he may be bailed or remanded to the old, or remitted to some new, custody, subject to the order of the court or judge.⁷⁷

15: Unless required by local rule, the return need not be verified.⁷⁸ Until contradicted or impeached, it imports absolute verity.⁷⁹ Such clear and unambiguous averments in the application as are not controverted by the return, stand admitted.⁸⁰ Its denials should be specific and not general. Judging by the precedents, the petitioner may demur,⁸¹ or reply to the return.⁸² The reply may deny (specifically) all or portions of the return, or set forth such further facts as are material in explanation or avoidance.⁸³ It must be verified.⁸⁴ The statute fixes no time for filing demurrer or reply. Unless regulated by local rule, the time must be fixed by special order or general practice of the court.

74. *Ex parte Field*, 5 Blatchford, 63; as to judge, cf. *Barney v. Barney*, 6 D. C. 1.

75. *Barth v. Clise*, 12 Wall. 400; *ex parte Thaw*, 209 Fed., l. c. 75, *Stallings v. Shlain*, 253 U. S., l. c. 342.

76. *Ibidem*.

77. *Ibidem*; re *Kaine*, 14 How., l. c. 133.

78. *Crowley v. Christensen*, 137 U. S. 86; *Stretton v. Rudy*, 176 Fed. 730.

79. *Ibidem*.

80. *Whitten v. Tomlinson*, 160 U. S. 231; *U. S. v. McDonald*, 265 Fed. 754; *Stretton v. Rudy*, 176 Fed. 727.

81. *Crowley v. Christensen*, 137 U. S., l. c. 88, in re *Bloch*, 87 Fed., l. c. 982; re *Ah Toy*, 45 Fed., l. c. 795.

82. R. S. 760.

83. *Ibidem*; *ex parte Cuddy*, 131 U. S., l. c. 283.

84. R. S. 760; *Frank v. Mangum*, 237 U. S., l. c. 330.

Upon return of the writ, a day is set for the hearing of the cause; not exceeding five days thereafter, unless the petitioner asks a longer time.⁸⁵ If the demurrer to the return should be overruled, I suppose the court or judge might, at discretion, permit traverse by way of amendment.⁸⁶

16: "The court or justice or judge shall proceed in a summary way to *determine the facts of the case*, by hearing the testimony and arguments, and thereupon to dispose of the party *as law and justice require.*"⁸⁷

The foregoing statutory provision is taken from the law of 1867.⁸⁸

By "the facts of the case" must be meant such facts as are material under the writ; and these ought to be only such as (at least in the opinion of the issuing federal court) bear upon the question of jurisdiction or authority. What facts are to be deemed such must depend largely upon the character and object of the detention attacked.

As a matter of constitutional law the grant of judicial power is broad enough to include both appellate and original jurisdiction. Both kinds of jurisdiction (subject to the constitutional limitation of the original jurisdiction of the Supreme Court) may be vested in any federal court. Apart from whatever effect (in especial cases) may be given to the Seventh Amendment, limiting the review of facts found by juries in certain causes, I know of nothing in the constitution which prohibits Congress from modifying and enlarging the common law incidents of the writ of habeas corpus, so as to enable federal courts, in favor of liberty, to review the jurisdictional facts as found or recited by state or other tribunals in the proceedings attacked. In other words, the question

85. R. S. 759.

86. Cf. *Haas v. Henkel*, 166 Fed. 621.

87. R. S. 761.

88. 14 Stat. 385.

under this statute is not one of governmental power, but of interpretation.

The main difficulty, of course, would be in dealing with the judicial record of another court.

As a matter of pure logic, if such a record recites or implies a falsehood and the actual truth destroys jurisdiction, it is not entirely plain to me why that truth should not be shown as part of "the facts of the case" which the court is authorized by the statute to determine.

17: Undoubtedly there are grave objections to such a purely logical construction of the statutory language. The original Habeas Corpus Act in Great Britain was never so interpreted as to authorize the issuing court to go behind the record of any court of general jurisdiction. Our own reports have many times asserted, and repeatedly assumed in argument, that the writ is a mere collateral attack as against a judgment.⁸⁹ The dangers involved in summarily annulling, upon grounds of fact, the orderly and ordinary findings of courts and juries—in disregarding the usual appellate processes—advise a narrower interpretation, which is, moreover, supported by the language and reasoning of many decisions. On the other hand, the enactment of this new statutory provision was not meaningless. It must have been intended to change the existing law; and its passage renders doubtful as authority all the preceding cases. To hold that the expression or implication of the record attacked precludes any inquiry into facts *absolutely* jurisdictional is contrary to the rule of general jurisprudence. To leave the power with state tribunals, where federal rights are involved, to fix conclusively, by the expression or implication of their records, *quasi-jurisdictional* facts, would nullify the effectiveness of

89. *Ex parte Frederick*, 149 U. S. 70; *U. S. v. Pridgeon*, 153 U. S., 1. c. 59; *Andersen v. Treat*, 172 U. S., 1. c. 31; *re Cuddy*, 131 U. S., 1. c. 285; *Harlan v. McGourin*, 218 U. S., 1. c. 447; *Riddle v. Dyche*, 262 U. S., 1. c. 336.

the federal writs in all cases where such facts are involved in a judgment; and such a rule would make a ghastly joke of the general restrictive requirement of error or appeal before resorting to habeas corpus.

18: In a quite recent and very celebrated case,⁹⁰ the Supreme Court said that the effect of this statute was "to substitute for the bare legal review that seems to have been the limit of judicial authority under the common law practice * * * a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention and the court, upon determining the actual facts, is to "dispose of the party as law and justice require." * * * It results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States *into the very truth and substance of the causes* of his detention, although it may become necessary to *look behind and beyond the record* of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed against him." (Italics ours.)⁹¹

If such be the *power*, under this statute, of the federal courts in habeas corpus where a state court is concerned, I see no reason for declining similarly to interpret the statute where the record of a federal court is under review. Of course, in the latter case, the rule of restrictive judicial discretion would be more closely applied.

If the rule announced in the foregoing quotation is correct, then it seems to me to reinforce our conclusion that the question of *jurisdiction* is to be regarded (for purposes of the writ) from the standpoint of the issuing federal court; and, further, gravely to impair the oft-repeated statement that the writ is a form of collateral attack.

90. Frank v. Mangum, 237 U. S. 309.

91. Ibidem, l. c. 331.

19: Under that rule, I am unable to see any real or substantial distinction between what a judicial record expressly recites and what it by implication involves. The cases seem to make such a distinction. The last decision of the Supreme Court asserts that the Frank case was not meant "to abrogate the rule established by prior decisions, that the record may not be contradicted collaterally; *at least, where, as here, jurisdiction of the cause or parties is not involved.*"⁹²

One is almost tempted to retort that evidence that does not bear upon jurisdiction ought never to be material in a habeas corpus case; and that the qualification italicised amounts to a begging of the whole question.

The particular decision is interesting as an instance of the process of recession found necessary by the court. It holds, in effect, that if the record shows, in a felony case, a "good and lawful jury," whereas in truth it consisted of only five men, or two men, *either* the point is not *jurisdictional*, and cannot be reached by habeas corpus, or, if *jurisdictional*, the record to the contrary is conclusive.

The first alternative hardly squares with the expression of some earlier cases;⁹³ and the second, in view of the language of the statute, seems equally applicable in principle to all state cases.

It seems plain that the court feels bound to limit latitudinarian tendencies in the construction of the statute, and does not like to rest itself solely upon the principle of extraordinary remedy and restrictive judicial discretion.

20: From very early days, we find petitions for, and allowances of, *certiorari* as ancillary to the writ of habeas

92. Riddle v. Dyche, 262 U. S., l. c. 336; see also, in addition to Frank case, *ex parte Terry*, 128 U. S., l. c. 305; *re Cuddy*, 131 U. S. 280, l. c. 286; *In re Mayfield*, 141 U. S., l. c. 116; *In re Lennon*, 166 U. S., l. c. 553; *Harlan v. McGourin*, 218 U. S. 442; *re Savin*, 131 U. S., l. c. 276; *Givens v. Zerbst*, 255 U. S. 11.

93. *Callan v. Wilson*, 127 U. S. 540; *Thompson v. Utah*, 170 U. S. 343.

corpus, to bring up the record of the proceedings founding the imprisonment complained of.⁹⁴ The grant of *certiorari* is purely discretionary;⁹⁵ and for this reason (among others) it is imprudent to omit from the petition for habeas corpus the summary of evidence or recital of proceedings hereinabove referred to.⁹⁶ The award and return of the *certiorari* should not affect the general rule as to the reach and scope of habeas corpus, or convert the latter into a proceeding for the review of mere errors;⁹⁷ although there are occasional cases very difficult to explain, consistently with that rule.⁹⁸

The use of *certiorari* may frequently dispense with the taking of evidence, and so expedite the proceeding, by making the issue substantially one of law.

NOTE—The concluding installment of this article will be published in the November Issue.—Ed.

94. See *ex parte Bollman*, 4 Cranch 75; *ex parte Yarborough*, 110 U. S. 651; *ex parte Burford*, 3 Cranch, 448; *in re Kaine*, 14 How. 103; *Bessette v. Conkey Co.*, 194 U. S., 1. c. 336; *McNamara v. Henkel*, 226 U. S. 520; *Benson v. McMahon*, 127 U. S. 457; *ex parte Yerger*, 8 Wall. 85; *ex parte Lange*, 18 Wall. 163; *ex parte Harding*, 120 U. S. 782.

95. *Hyde v. Shine*, 199 U. S. 62.

96. *Ibidem*.

97. Many cases in which *certiorari* was granted repeat the rule confining the writ to jurisdiction; such, e. g., as *ex parte Lennon*, 166 U. S. 548; *ex parte Virginia*, 100 U. S. 339; *ex parte Harding*, 120 U. S. 782.

98. Cf. *in re Watts*, 190 U. S. 1.