CASE

OF

J. V. N. YATES;

DECIDED IN THE

SUPREME COURT OF NEW-YORK,

IN AUGUST TERM, 1809.

ON the second day of the last *February* term, *Emmet* moved for a *habeas corpus* to bring up the body of *John V. N. Yates*, a prisoner in the custody of the sheriff of *Albany*. The motion was grounded on sundry affidavits which were read.

The Court said, that as it was a matter of importance, they would take until the next day, at the opening of the court, to consider whether it was proper to grant the motion.

Emmet then prayed that the prisoner might be admitted to bail, in the mean time.

KENT, Ch. J. Until the party is actually before us, on a *habeas corpus*, we cannot admit to bail, and we do not think proper to allow the writ, without some consultation on the case.

The writ of *habeas corpus* having been allowed, on the following day, the prisoner was afterwards (*Thursday*, the 9th *February*) brought up, and the following return was made by the sheriff: That the prisoner was, on the 7th day of *February*, arrested by him, and in his custody, by virtue of an order of the court of chancery, made the 5th day of *December*, 1808, which states, that the court of chancery did, on the 20th day of *September* last, make another order, as follows, to wit: "Upon reading the order made in this matter on the 5th day of *September*, and the certificate of the sheriff, stating "that on the 12th *September*, he had arrested the defendant, and that by virtue of a writ of *habeas corpus*, Judge *Spencer* did, on the same day, discharge him, on the ground that the original cause of the caption was illegal, and that the taking and detaining him, for the same matter, 'was illegal and unwarrantable, and subversive of the liberties of the citizens;' that as the commitment for the mal-practice and contempt, before adjudged by the court to have been committed by the defendant, has not been remitted by the court, nor the said contempt purged, and the court deeming the discharge repugnant to the laws of this state, and void, *ordered* that the sheriff retake the defendant, and recommit him, for his contempt and mal-practice, as, in the attachment before issued, was commanded, there to remain, until the further order of the court;" and the sheriff having returned to the said order of the 20th *September*, that the defendant was not found, it is therefore *ordered*, that the sheriff retake the defendant, and recommit him for his contempt and mal-practice, &c. there to remain until the further order of the court."

The sheriff further certified, and returned to the *habeas corpus*, that the writ of attachment, referred to in

the foregoing order, was dated the 17th *August*, and is as follows : " whereas, in and by a certain order of the court, on the 13th *June*, in the matter of complaint of *Samuel Bacon* against the defendant, it is set forth, that upon reading the affidavits of *Samuel Bacon*, *Peter W. Yates*, and *Richard S. Treat*, and upon fully considering the subject-matter thereof, it appeared satisfactorily to the court, that the defendant, during the time he was a master of the court, had filed a bill of complaint with *Richard S. Treat*, one of the clerks, in behalf of *Samuel Bacon*, complainant, against *Henry Garretse* and *Charles Morris*, as defendants, and thereto subscribed the name of *Peter W. Yates*, one of the solicitors of this court, without the knowledge or consent of the said *Peter W. Yates*, and had acted as a solicitor in the said cause, in the prosecution thereof, in the name of the said *Peter W. Yates*, contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of this court ; it was therefore ordered by the court, among other things, that the defendant be committed, for his said mal-practice and contempt, to gaol, there to remain until the further order of the court ; therefore the court commanded the sheriff to attach the defendant, and convey him to gaol, there to remain until the further order of the court."

And the sheriff further certified, and returned, that the defendant was discharged, on a *habeas corpus*, by Mr. Justice *Spencer*, after being arrested on the said writ of attachment, on the 19th *August*, and the judge certified in his discharge, that, " it having been made satisfactorily to appear to him, that the said commitment was not for any contempt committed by the defendant, towards the said court, but that the same was for an

alleged mal-practice, on the part of the defendant, as a master in chancery, in using the name of *Peter W. Yates*, as a solicitor, in a certain cause, without his consent, and in violation of the 9th section of the act, concerning counsellors, attornies and solicitors,* &c. he was of opinion, that the commitment was illegal and unprecedented."

The sheriff further certified, and returned, that the order of the 5th *September* was as follows, to wit: "upon reading and filing the attachment aforesaid, and the return thereon, stating the discharge aforesaid, and due deliberation having been had thereon, and the court deeming the said discharge repugnant to the laws of the state, legally inoperative and void, it is *ordered* that the sheriff retake the defendant, and recommit him for his contempt and mal-practice, as in the said attachment he was commanded, there to remain until the further order of the court."

The sheriff further certified, and returned, that the defendant was taken on the said order, and again discharged by Mr. Justice *Spencer*, on a *habeas corpus*, on the 12th *September*, who certified, in his discharge, as follows, to wit: "it appearing that the defendant has been again taken and imprisoned, for the same matter and cause, whereon he was imprisoned, when discharged on *habeas corpus*, on the 19th *August*, I am of opinion, not only that the original cause of the caption of the defendant was illegal, but that the taking and detaining him on the said order was illegal and unwarrantable, and subversive of the liberties of the citizens;" and he therefore discharged him.

The sheriff also certified and returned, that, after the last discharge, by Mr. Justice *Spencer*, the order first

* 24 Sess. c. 32.

above mentioned, was received by him, by virtue of which order he took the defendant, on the 7th day of *February*, inst. and still detains him in his custody, &c.

After the return was read, the *Chief Justice* observed, that there were many matters stated by the sheriff, which related to proceedings prior to the commitment on which the prisoner was now brought up, by the *habeas corpus*, and it might be a question, whether the papers, as to such previous proceedings, were to be filed, or rejected as surplusage.

Emmet said, that as this was the return of the officer, the only question was, whether the return was sufficient. Leave is sometimes given to amend a return, but he thought no part of it could be struck out, or rejected as surplusage. Besides, as there was a reference in the last order of commitment to the previous proceedings, it was highly proper, if not necessary, to set out the whole proceedings in the return.

After some conversation, it was agreed, that the return should be filed as it stood, and the motion for the discharge of the prisoner be heard, on the merits, reserving the question as to striking out, or rejecting any part of the return, to be decided afterwards. The whole return was accordingly filed, and the counsel for the prisoner moved that he should be discharged.

Emmet. [*Champlin*(*a*) also argued in support of the motion.] I shall first examine the return as relates to

(*a*) It has not been thought requisite to give his argument separately; *Emmet* took a more extensive view of the subject, and, to avoid repetition, I have endeavoured to report the whole as one entire argument, and as fully as possible. *R.*

the last order of commitment only. It is bad, on the face of it. It is an *order*, not a *writ* or *warrant*. It is a mere rule of court, directed to an officer, who is not bound to obey it. An officer cannot take a person into custody, except by a *writ* issued by the court. In fact, this *order* refers to an original writ of attachment. Where there is an offence, in the face of the court, yet, if the offender goes out of court, before he is taken on an order, he can, afterwards, be taken only by writ.* The highest authority is requisite to deprive a person of his liberty. It must emanate from the court having cognisance of the offence. There can be no execution executed, except by *writ*. In no case will a mere *order* justify the retaking of a person, although the original taking was by writ; but there must be an *alias* writ, or writ of recaption. The first writ was returned, and so was *functus officio*. It could not be revived or renewed by an order; but a new writ was requisite to retake the prisoner.

Another objection is, that a person who had been discharged on a *habeas corpus*, has been taken into custody, a second time, for the same offence, in violation of the *habeas corpus* act.† This raises the question, how far Mr. Justice *Spencer* was authorised to investigate the ground of the commitment. There is some difference in the words used in our act, and in the *English habeas corpus* act.‡ The language of the former is, "if any person be imprisoned as aforesaid, in vacation time, it shall be lawful," &c. In the latter, the words are, "if any person shall be or stand committed or detained for any crime."—A bill having been brought into the *English* parliament, the opinion of the twelve judges was taken,

* *Jacob's Law Dictionary*, (*Attachment.*)

† 24 Sess. c. 65. 1 vol. *Laws*, 286. ‡ 31 *Car.* II. c. 2.

whether a judge, in vacation, could issue a *habeas corpus*, and they were of opinion that he could not, unless the party was committed *for a crime*. Our act, in reference, no doubt, to that decision, generalizes the law, omitting the words, "for any crime." What, then, is the operation of the *habeas corpus* act, on the power of a judge, in vacation? Most clearly, that of giving, except for the purpose of bailing a traitor or felon, to a single judge, in vacation, a power coextensive with that of this court, in term time. If, then, this court has the power now to inquire into the grounds of the commitment, it follows, that a judge, in vacation, has the same power. The exception is, "other than persons convict or in execution by legal process, or committed for treason or felony, plainly and specially expressed in the warrant of commitment." Who is to decide on the legality of the process? The judge. To prove that the discharge was improper, it must be shown, that Mr. *Yates* was confined by legal process. Then what was the process? If the last order of commitment, it is defective in not showing that the first process was legal; but it does not even set forth that process.

Then, will a discharge by this court, under a *habeas corpus*, prevent a person's being taken, and imprisoned a second time, for the same offence? The 5th section of the act declares, "That no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court wherein he is bound by recognisance to appear, or other court having jurisdiction of the cause." These words are explained by the 3d section, which directs the judge "to discharge the prisoner, on taking his recognisance, &c. for his appearance at the next court

where the offence is properly recognisable."—" Unless it shall appear to the judge, that such prisoner is detained upon a legal process out of some court having jurisdiction of criminal matters, or by some warrant under the hand and seal of a judge, or justice, for some matter or offence for which, by law, the prisoner is not bailable."

The only mode in which a person once discharged on a *habeas corpus*, can be again taken, is by the process of the court to whom the recognisance is returned, or by a court having criminal jurisdiction, or by a warrant under the hand and seal of a judge, or justice, for a matter or offence not bailable.

Whether the discharge by the judge was erroneous or not, can make no difference, if he had competent authority to discharge in the case. And a person once discharged by competent authority, can never be again taken, unless in the cases excepted in the act.

Another objection is to the generality of the terms of this commitment. It is for mal-practice, and contempt, without specifying in what the mal-practice and contempt consisted. A commitment for a contempt generally, or for treason or felony, is bad; for the court, on the return, are to judge whether there be a contempt, treason, or felony. In the *Earl of Shaftsbury's case** the same objection was made to the return to the *habeas corpus*, and though the court decided that they had no jurisdiction, yet they had no doubt that the return was illegal and bad. Sir *Thomas Jones* said, "such a return, made by an ordinary court of justice, would have been ill and uncertain; but that they ought not to judge of any law, custom or usage of parliament." All the cases where a general

* 1 *Mod.* 144. *Vaugh.* 14. 2 *Inst.* 52, 53. 55. 6 *Roll.* 218. *Moore*, 839.

return has been supported, have arisen under a commitment by order of parliament, and, where the court would not take upon themselves to know or decide on the law of parliament. But the rule on this subject applies to a commitment by the court of chancery. For this court has the power to inquire into and decide on commitments by the chancellor, who has equal power also to inquire into commitments by this court.* This is necessary, in order to preserve the liberties of the citizen. Unless the court, then, examine into the original attachment, referred to in the last order, we must avail ourselves of the objection to the generality of the return.

I shall now proceed to examine the original warrant of commitment, which, if it is not to be considered as a part of the return, may yet be taken into view, as matter *aliunde*, appearing from affidavits. There are three objections to this commitment, arising on the return.

1. That the matter laid to the prisoner's charge is a *crime*, prohibited by the statute, and, therefore, as such, is not at all cognisable in the court of chancery, which has no criminal jurisdiction; nor is it punishable any where by an attachment for a contempt.

2. That the conviction is founded upon evidence which the law does not hold sufficient to warrant a conviction, even for a contempt.

3. That the imprisonment being in *execution* on *conviction*, should be *definite* and *terminable*, either by effluxion of time, or on the doing of some act by the prisoner: and cannot be uncertain and indefinite, as until the further order of the *authority* inflicting it.

* *D. Groenvelt's* case, 1 Ld. *Raym.* 213.

1. In discussing the first objection, it is necessary, for the sake of the argument, to admit the truth of the facts ; but this admission is merely technical, because we are not, in this course of the proceedings, permitted to deny or disprove them.

By referring to the words of the order for the commitment, it will be seen, that there are many particular facts charged, the whole of which constitute *one offence*. After reciting the particulars, it is ordered, that the prisoner be committed " for the said mal-practice and contempt." The whole of the facts form *one mal-practice*, which, because it was a mal-practice, is also a contempt. For, on the face of the allegations, it is manifest, that nothing was done by the prisoner which, in itself, directly, was a contempt ; but it was so, collaterally, and only because it was a mal-practice. If the word " therefore" be inserted in the antecedent sentence, after the word " and," and before the words " in contempt," it will be seen that the contempt was no more than a matter of inference from the misconduct. This one offence, or mal-practice, is characterized, as being contrary to the statute, in wilful violation of his duty, as a master, and therefore, in contempt of the court ; and, as the circumstance which constituted the criminality intended to be punished, it is set forth that the prisoner did the acts, specified in the order, " during the time he was a master of the said court."

The facts alleged have no reference to any nonfeasance or misconduct in regard to acts which he was required and bound to perform, as *master*. The words, " in wilful violation of his duty as master," have, therefore, no truth, unless those acts were a violation of his duty, *because* they were contrary to the statute. The

result of the whole allegation is this : The prisoner, by doing certain acts, during the time he was a master of the court of chancery, was guilty of mal-practice, or an offence against the statute, and, therefore, in contempt of the authority of the court.

The 9th section of the statute* concerning counsellors, attornies and solicitors, prohibits masters from acting as counsellors or solicitors in any action or matter in the same court ; and the 6th section enacts, " That if any counsellor, attorney or solicitor, be guilty of any manner of deceit or collusion, or consenting thereto, whereby to deceive the court or the party, he shall be punished by fine and imprisonment."†

In consequence of its having been made an indictable offence, it ceased to be cognisable in the court of chancery, which has no criminal jurisdiction. That court can, undoubtedly, commit for contempts. It is its ordinary process for compelling appearance, answers, and obedience to its decrees.

In the case of *Crosby*,‡ Lord Ch. J. *De Grey*, when deciding in favour of the right of the house of commons to commit, and that the court could not interfere, says, " As for the case of the chancery committing for crimes, that is a different thing, because the chancery has no criminal jurisdiction." In truth, this objection is peculiarly applicable to that court where only one judge presides.

But in no court is a criminal matter, which is plainly and obviously the subject of indictment, punishable as a contempt, except a *rescue*, and a breach of the peace, *in*

* 24 Sess. c. 32. *Laws*, vol. 1. 219. † See 1 *Com. Dig. Attorney*, (A. 14.)

‡ 3 *Wils.* 188.

facie curiæ, both of which are direct contempts against the power of the court, in which the criminal matter is merged, if it may be so said, in the atrocity of the contempt.

There is no doubt that a party may be indicted as well as attached for a *rescue*. There are some anomalies relative to the cases of rescue, which it is not requisite to take notice of here. Suppose a rescue of a person in custody on a charge of felony, is the rescuer to be proceeded against by attachment? In civil cases there must be a return of the rescue before an attachment will issue.* A return of a rescue is a *conviction* on record, and no attachment can issue until a return, or conviction on record, which is not traversable.† In the case of *Rex* v. *Philips and others*,‡ it was decided, that as the return of a rescue amounted to a conviction, the attachment was in nature of an execution, or *capias pro fine*, and therefore the party could not be allowed to enter into recognisance, to answer interrogatories on such an attachment. A recognisance may be allowed, until the action of the party against the sheriff for a false return has been tried.

In the case of a contempt, *in facie curiæ*, the court is authorised, on its own view of the transaction, to make a record of conviction, and inflict a peculiar penalty, which a mere breach of the peace, in the same degree, would never warrant. So, for an indecent disturbance in the face of the court, it inflicts a fine and imprisonment, which the same disturbance, in any other place, would not justify. As in the case of the *King* v. *Stone*,§ when the jury had acquitted Mr. *Stone*, a person present threw

* *Sheather* v. *Holt*, 1 *Str.* 531. 6 *Mod.* 141. † 6 *Bac. Abr. Rescue*, (E. 3.) *Cases temp. Hardw.* 112. *Y. B. Hen.* VII. 21. pl. 5. ‡ *Barnes*, 429, 430.

§ 6 *Term Rep.* 530.

up his hat, and hallooed; he was taken into custody and fined 20 pounds. But cases of both these kinds have three characteristics; 1. They are direct contempts of the power of the court. 2. The enormity of the contempt merges the crime. 3. There is no necessity to establish the truth of the fact by the intervention of the jury. The loss of a trial by jury is no injury to the offender, for as there is no *accusation*, there can be no *plea*, or *denial* of the fact. The whole of the record is a *conviction*, on view, for matters of which the court have *judicial cognisance*, the highest certainty of the law.

Setting aside, however, those cases, principle, as well as authority, opposes the summary punishment by attachment, as for a constructive contempt, of indictable offences. In every case of such an offence, the accused is entitled to the intervention of a grand and petit jury, secured to him by the constitution, and laws of the land.

The constitution of the *United States*, (Art. 3. s. 2.) says, "the trial of all crimes, except in cases of impeachment, shall be by jury." The constitution of this state, (art. 41.) says, "Trial by jury, in all cases in which it hath heretofore been used in the colony of *New-York*, shall be established, and remain inviolate forever." And the act concerning the rights of the citizens of this state, declares, "that no citizen of this state shall be taken, or imprisoned, for any offence, upon *petition* or *suggestion*, unless it be by indictment, or presentment of good and lawful men of the same neighbourhood where such deeds be done, in due manner, or by due process of law."—Attachment is on a *suggestion*. (See 1 *Bac. Abr.* 282. *Attachment.* 1 *Com. Dig. Attachment.*) The clause in the act last cited, does not in-

terfere with convictions on view, or on return of a *rescue*, already mentioned, nor does this act prohibit attachments, except for *offences*. Besides, could the prisoner plead his imprisonment under this warrant, in bar of his being tried for the same offence by indictment? How had he the benefit of the 6th article of the amendment of the constitution of the *United States*, which says, *inter alia*, that in all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favour.

These, or similar reasons, have established the same principles in *England*. In *Hawk. P. C.* b. 2. c. 22. (vol. 3. pp. 280. 285.) the various cases are laid down in which jurors may be attached and fined, but in s. 21. and s. 22. certain cases are stated in which, he thinks, they may be fined, *unless an attaint lies against them;* and in s. 23. he says, "if a jury shall refuse to find an office for the king, upon full evidence, it hath been holden, that they may be fined, for that, in such case, they are not liable to an attaint." Now, an attaint is the ancient criminal mode of prosecuting a jury for certain misconduct, and the meaning of all those passages, taken together, is, that jurors may be attached for such misconduct as does not subject them to be proceeded against regularly, by criminal prosecution; but that they cannot be attached for such misbehaviour as renders them liable to be prosecuted criminally.

In the Gaoler of *Shrewsbury's* case,* an attachment was moved for against him, for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office; but the court refused to grant it, there being no precedent for that purpose; they, how-

* 1 *Stra.* 521.

ever, ordered him to show cause why there should not be an information. In an *anonymous* case, in the same book,* two people put in bail, in feigned names, and, because there were no such persons, they could not be prosecuted for personating bail, on the statute of *Jac.* I. c. 26. So the court ordered them and the attorney to be set in the pillory.

If we compare the act for regulating attornies, &c. with somewhat of a correspondent statute in *England*, it may lead to the opinion, that the *English* legislature were aware that the passing of such a law would take away the power of attaching, unless specially reserved. By the 22 *Geo.* II. c. 46. s. 2. if any attorney, or solicitor, should act as agent for a person not qualified, &c. "and complaint be made thereof, in a summary way, to the court from whence such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, then every such attorney, or solicitor, so offending, shall be struck off the roll," &c. "and upon such complaint and proof, the court may commit such unqualified person, so practising, to the prison of the said court, for a time not exceeding one year." Thus, in *England*, when the legislature interfered in a similar case, it expressly gave the power of proceeding summarily, and committing the unqualified person that practised; which our act does not.

Baron *Comyns*,† in mentioning what is not a contempt, lays it down, that an attachment will not be granted, where there is another remedy, unless that remedy be difficult to obtain. By this he undoubtedly means a civil remedy, where discretion may be exercised. As in the

* 1 *Stra.* 384.

† 1 *Com. Dig. Attachment*, (A. 3.)

case of *Hanslow and wife* v. *Roberts and others*,* a motion was made by *Chapple*, for an attachment against *Constable*, for acting as an attorney, without being sworn; and the court denied making any rule, as a penalty of 50 pounds was laid on the defendant, by act of parliament. And in *Stock* v. *Huggins and another*,† on a motion for an attachment in disobeying an award, the plaintiff having brought an action of debt on the award itself, the court refused to grant the attachment; for as the court would not deliver the party from the attachment, until he had paid the money, the plaintiff would have two remedies, at the same time, for the same purpose.

This principle prevents the case of *Oppenheim, qui tam*, v. *Harrison*,‡ and *Thistlethwaite's* case,§ from being applicable; for the acts, in those cases, would be indictable, under our statute, as a *deceit* practised to "deceive the court."

Again, where part of the act, or offence, is out of the jurisdiction of the court of chancery, the party cannot be proceeded against by attachment; but if the different facts stated in the *order*, as constituting the mal-practice complained of, could be separated, so as to consider each as independent of the others, still the same principle of law would apply, for each of them is indictable under the act: and if so split up, still the punishment is entire, and could it be pleaded in bar, when the chancellor had no jurisdiction? Where a conviction is bad in part, it is bad in *toto*, and the court will discharge a prisoner imprisoned under a judgment, part of which is illegal.¶

* *Barnes*, 27. † *Rep. temp. Hardw.* 106. ‡ *Burr.* 20.
§ 1 *Com. Dig.* 576. 594. (A. 2.) (*Kyd's* ed.) ¶ *Rex* v. *Collyer*, *Sayer*, 44.

2. The conviction is founded on the affidavits of *Samuel Bacon*, *P. W. Yates*, and *Richard S. Treat*, and on no other evidence. This is not the course of the court of chancery, nor of any court known to our constitution, nor is it the law in case of a contempt. A party accused has, in most cases, a right to contest a rule to show cause by his own affidavit. It is in the discretion of the court to issue an attachment or not ; but if an attachment issues, it is no more than *process* to bring in the party, to answer to the accusation. He is then either committed, or allowed to enter into recognisance to answer interrogatories, which must be exhibited in a certain time, and on which he is to be examined. This examination is referred to the proper officer, to report thereon whether the party be in contempt. In the courts of law, if the party denies the charge, he is discharged. In chancery, his oath may be contested by the accuser, but still he must be examined on interrogatories, and the master report him to be in contempt. He cannot be *judged*, until the interrogatories have been exhibited.* In the case of *Rex* v. *Edwards* and *Symonds*,† the court say, "the attachment is to bring them into court to answer to interrogatories to be exhibited. There is nothing to plead guilty to, until the interrogatories are filed : Neither are they in contempt until *reported* so. There is nothing appearing to the court, at present, whereupon to ground a judgment or fine, or any punishment." In that case the defendants had come in, and applied to be admitted to acknowledge the contempt.

* *Wyatt's Pract. Reg.* 135, 136. 1 *Bac. Abr.* 286. *Attachment*, (B). 4 *Bl. Com.* 286, 287. 2 *Burr.* 796, 797. † 4 *Burr.* 2106. 5 *Term Rep.* 362.

As the interrogatories are, therefore, essential, in every case, to the conviction, it should appear that they have been exhibited, and that the judgment of the court has been founded on a due consideration of them. It appears, by the return, that the conviction was on the affidavits which have been mentioned. Nothing is said of any interrogatories having been administered. But the court have power to examine into this fact, *aliunde*, for it does not falsify or contradict the return, but merely explains it. Though you cannot falsify a return, yet affidavits are allowable, as to any matters a knowledge of which would enable the court to decide, whether the prisoner ought to be remanded, bailed or discharged.*

3. The imprisonment in this case is in execution on conviction; and yet it is until the further order of the court. At first blush, this seems contrary to all principle. Commitments before judgment, might, perhaps, be allowed until further order, though even that is not legal; but after the extent of the crime is ascertained, justice and the rights of the citizen require that the sentence which the law pronounces, through the organ of the judge, should be definite and certain. This, most certainly, is an elementary truth in the ordinary cases of criminal jurisprudence.

Hawkins states what ought to be the conclusion of a commitment. The words "to be kept till further order," are sufficient, because they shall be intended of the order of law; "but a commitment till the person who makes it shall take further order, seems not to be good."† "The warrant, or mittimus, containing a lawful cause,

* 3 *Hawk. P. C.* 224. b. 2. c. 15. s. 79. *Str.* 1138. *Caldec.* 295. 5 *Mod.* 323. 454, 455. 2 *Jones*, 222. 1 *Sid.* 287, 288. 1 *Roll. Rep.* 337.

† 3 *Hawk. P. C.* 237. b. 2. c. 16. s. 18.

ought to have a lawful conclusion; viz. and him safely keep until he be delivered by law, &c. and not until the party committing doth further order."* In *Addis's* case,† this objection was taken. The gaoler returned to the *habeas corpus* " that *Addis* was committed to his custody, by warrant from the Lord Chancellor of *England*, for certain matters concerning the king, there to remain until the Lord Chancellor delivered him." *Hutton*, serjeant, objected to the return, as too general, not showing for what cause he was committed, and because he was to remain in confinement until delivered by the chancellor; and although for the first objection, if not for the other, the return was bad, yet the judges answered it was the first time that such objections had been taken, and they would, therefore, consider of the case, of which nothing further is heard.

In the case of *Seales* and others,‡ the same objection was renewed. *Grimstone*, objected to the return in that case, that it was ill to award to prison to remain until further order taken, which is utterly uncertain. A day was given until the octave of *St. Michael*, and in the mean time the prisoners were bailed, but we hear no more of the case. Again, in *Freeman's* case,§ both the objections which have been stated were made, and the king's counsel seemed to have abandoned it, and elected to proceed by indictment and information.

In *Parker's* case,¶ the commitment was " till further order," simply. The court held the return good in that point; but they agreed that a commitment until further order of the person committing, was not good; but until further order generally, is all one as by further order of law. This objection, indeed, seems to have been overruled in *Holt* and *Dighton's* case.** These men had

* 2 *Inst.* 591, 592. † *Cro. Jac.* 219. ‡ *Cro. Car.* 401. 557. § *Ibid.* 418. 579.
¶ 1 *Lev.* 230. ** 1 *Roll. Rep.* 415. 3 *Bulstr.* 48. 54.

been committed by the high commission court, and liberated once before on *habeas corpus*, with direction to repair to the high commission court, and make submission. They went accordingly, but refused to answer whether they were willing to take the sacrament kneeling, for which they were committed till the further order of the court. On a second *habeas corpus*, the court, probably, tired of them, not willing to embroil itself with the high commission court, and wishing to get rid of such incorrigible schismatics, refused to bail, or discharge, though this objection was made. Different reasons are assigned in *Rolle* and *Bulstrode*, but neither of them apply to this case. In *Rolle*, the judges say, " the high commission courts have jurisdiction of heresies and schisms, and, therefore, good jurisdiction, and we do not know whether this be not their customary mode of proceeding." In *Bulstrode*, Ch. J. *Coke* justifies it, because, he says, " many times the parties are committed, *donec* the business *discussus fuerit*."

As to the first reason, this court does know, and in this case, in this country, is bound not only to know the customary mode of proceeding in chancery, but to examine whether it be conformable to the settled rules established for securing personal liberty. The argument also implies that such a commitment would not be good, according to the rules of law with which the judges were acquainted. The second reason, (that it was a commitment, until the business should be discussed,) however bad, is inapplicable to the present case, where the business has been discussed, and the imprisonment is a punishment. Indeed, in most of the cases to be found, the commitment was on *mesne* process, but if it be bad on *mesne* process, *a fortiori*, it must be bad in execution. Allowing a court to commit

until the further order of the court, would give it the power of doing indirectly what it could not do directly. Such a sentence, or order, is indefinite and arbitrary.

Such sentences are, however, not without precedent. Most of the books of chancery practice mention the power of committing for contempt, during pleasure, which is tantamount to a commitment, until the further order of the court; and they all refer to the *Practical Register*,* as their authority. "For any direct and positive contempt, a party may not only be taken into custody but committed to the *Fleet*, during the pleasure of the court." The author speaks of direct and positive contempts, such as the present case is not; but in support of his position, he, in his turn, cites *West's Symbolography*, under the title of *Proceedings in Chancery*, s. 32.† The passage in *West* is this: "The proceeding in this court is by the said writs, and by orders, injunctions and decrees, which if the defendant resist, his punishment for this resistance, and for his contempt in not appearing, is imprisonment in the prison of the *Fleet*, *as is said*, during the Lord Chancellor or the Lord Keeper their pleasure, or until he will obey and perform the order and decree of the same court." Thus speaking only of the direct contempts against process, and, at the same time, expressing a doubt as to the imprisonment during pleasure; but, at any rate, coupling it with a limitation that would always enable a party, by his own act, to put an end to his imprisonment. *West*, for his authority, cites the *Year Books*,‡ but, on recurring to them, there is not a word to be found of imprisonment during pleasure, but only until the defendant shall do certain acts. In 37

* *Wyatt's Prac. Reg.* 134. † *West's Symb.* 2d part, 185. b. ‡ 37 *Hen.* VI. 13, 14. and 39 *Hen.* VI. 26.

Hen. VI. c. 14. it is laid down by *Prisot*, Ch. J. their power is to make the party deliver up an obligation, &c. and nothing more, except commit him to prison till he does it: and that is all the court can do; if the party will lie in prison, rather than give up the obligation, the other is without remedy.

The court of chancery, therefore, does not appear to have any peculiar power of committing during pleasure, or till its further order; but it may be said that the common law courts claim this power in the case of contempts. They do so; and this case must decide their powers, as well as that of the court of chancery; but if the opinion of *Blackstone** be correct, the mode of proceeding by attachment seems to have been derived to the courts of *K. B.* and *C. P.* through the medium of the court of equity, and it is important to inquire on what foundation it stood in that court. Indeed, the most learned lawyers have been embarrassed to give any colour of law to such a power in the courts of common law. Chief Baron *Gilbert*† derives the origin of commitment for contempt from the statute of *Westminster* 2. c. 39. which enables the sheriff, when the king's writs are resisted, to take the *posse comitatus*, and to chastise the offenders by imprisonment, from which they should not be delivered, without the special command of the king: and he says, that since the sheriff had that power, the judges who awarded such process must have the same authority to vindicate it. If that be the foundation of such authority, it can only extend, even in *England*, to contempt of process, as the *Practical Register* lays it down; and it cannot at all extend to this country, where sheriffs never had any such power. *Blackstone*‡ thinks the process of attachment, or power of summary

* 4 *Bl. Com.* 286. † *Gilb. Hist. Com. Pleas*, 25. ‡ 4 *Bl. Com.* 286.

punishment, must necessarily be as old as the courts of justice, and inseparable, by necessity, from them. As far as that necessity extends, I admit the doctrine ; but no necessity requires *imprisonment during pleasure*. If the offence be completed, its degree of enormity can be ascertained, and there can be no reason why its punishment should not also be ascertained. If the contempt consists in refusing to carry into execution what is required, the commitment may be *till the party perform it*. I am inclined to think, however, that the claim of imprisoning during pleasure, is derived from a source perfectly inapplicable to our form of government, the *royal prerogative*, that is, when it was, in early ages, paramount to the liberties of the people, and from the supposed presence of the king in his courts :—the illegality of the claim has remained unexplored, because the power has not been abused. I am confirmed in this opinion from the commitment by the house of lords, in the *Earl of Shaftsbury's* case,* which was, " during his majesty's pleasure, and the pleasure of the house."

[KENT, Ch. J. But is not every commitment at pleasure, or without limitation, always understood to be until submission, and is it not in the power of the party to put an end to his imprisonment by submission ?]

This power of arbitrary imprisonment is against the genius of our government, and the principles of civil liberty. There is no principle to support such a sentence, except necessity, and I have shown there can be no such necessity, for every possible end of justice, vindicatory and coercive, may be attained without it, and every case

* 1 *Mod.* 144.

of contempt provided for. There is nothing in the nature of an attachment to warrant such a vague and uncertain punishment. *Blackstone** justly classes them with summary convictions; but in what respect do summary convictions differ from more regular proceedings? In the *process* and the *proofs*. Their being summary renders them peculiarly serviceable, as ancillary to the courts; but the proceedings being finished, and the conviction once had, there is nothing in the nature of summary convictions to authorise a more informal or arbitrary, and, eventually, a severer and more oppressive sentence, than could be pronounced in the more regular and estimable course of proceeding.

In the present case, if for the same offence, after an indictment by a grand jury, and a trial by a petit jury, the prisoner had been found guilty, and the same sentence pronounced upon him, he might bring a writ of error, to set it aside. Why should he, then, be without any remedy against the same sentence, following on proceedings which the law and the community regard with more suspicion? And is it in the power of any court, at its option, for an indictable offence, to deprive the accused, without his consent and against his interest, of all those valuable privileges, the protection of a grand and petit jury, compulsory process for witnesses to testify in his favour, a certain and ascertained punishment, and the benefit of a court of error, or of any other mode of being relieved from a judgment which no court could by law be authorised to pronounce on the offence, if it had been made the subject of an indictment?

Cur. ad. vult.

The court taking time to advise, the prisoner was bailed to appear at the next term. At the last *May* term, at

* 4 *Bl. Com.* 283.

the desire of his counsel, the court deferred giving their opinion, until the present term, when the prisoner was further recognised to appear.

YATES, J. It is undoubtedly essential to the due administration of justice, that all courts should have power sufficient to enforce obedience to their own orders; hence the necessity of authorising them to punish contempts, a power resulting from the first principles of judicial establishments, in the constitutional exercise of which they ought to be protected.

How far this power has been constitutionally exercised, by the court of chancery, in the case now before us, is the subject of the present inquiry.

I shall not enter into a minute discussion as to the legality of the imprisonment of Mr. *Yates*, under the provisions contained in the fifth section of the act, entitled "an act to prevent unjust imprisonment by securing the benefit of the writ of *habeas corpus*," on the last order of the court of chancery, after a regular discharge by a judge. But the exercise of this power, I think, is not warranted by the exceptions stated in that statute, whereby the right of again imprisoning for the same offence is expressly prohibited, "unless by the legal order or process of the court wherein he is bound by recognisance to appear, or other court having jurisdiction of the cause;" clearly meaning such court wherein the prisoner may have been subsequently indicted or charged with a criminal offence. The act, consequently, cannot apply to the court of chancery which has no cognisance of such matters, more especially in this instance, where its own acts were implicated, and had been passed upon by a judge acting (in my view of the subject) under the express direc-

tions of a positive statute ; but as this last order expressly refers to the first commitment, I shall, for the purpose of a more satisfactory investigation, proceed to examine into the validity of the original attachment, appearing on the face of the return now before us.

In the attachment it is stated, that upon reading the affidavits of *Samuel Bacon*, *Peter W. Yates*, and *Richard S. Treat*, and upon fully considering the subject matter thereof, it satisfactorily appeared to the court of chancery, that *John V. N. Yates*, during the time he was a master of the said court, had filed a bill of complaint with *Richard S. Treat*, Esq. one of the clerks of the said court, in behalf of *Samuel Bacon*, as complainant, against *H. Garretse* and *C. Morris*, defendants, and thereto subscribed the name of *Peter W. Yates*, one of the solicitors of the said court, as solicitor, without the knowledge or consent of the said *Peter W. Yates*, contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of said court ; it was therefore ordered, by the said court, that the said *John V. N. Yates* be committed for his said mal-practice and contempt, to the common gaol of the city and county of *Albany*, &c.

Having thus the return before us, the first inquiry will be as to the nature of the offence of which Mr. *Yates* was convicted ; this can be ascertained only from the specification in the attachment.

I am inclined to think, if it had been generally for a contempt, no other court could legally interfere, although authorities have been adduced in support of a contrary doctrine.

In the present case, the court of chancery has stated the conviction to be for a breach of an existing statute,

and, consequently, for an indictable offence. After particularly mentioning the nature of this offence, the words in the commitment are, *contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the court ;* those allegations clearly indicate a violation of the statute only, the words in contempt of the authority of the court not entering into or composing the essence of the offence, but being merely words of aggravation ; according to the most consistent interpretation I can give to the attachment, which if correct, the result must be that the court of chancery have undertaken to punish for a crime, an offence against the statute, and, consequently, not within its jurisdiction. The proceedings against Mr. *Yates*, therefore, must be void, being *coram non judice*, and his discharge by the judge, when brought before him on the *habeas corpus*, was proper.

This is not the case of a court of a co-ordinate jurisdiction reviewing the act of its fellow, nor of an inferior controlling the acts of a superior jurisdiction. All courts, as I before stated, have a right to punish for contempts, but all courts have not a right to punish for crimes : the court of chancery is of this last description ; the process in this case was not within its jurisdiction, but went to punish for a violation of a statute ; and this is within the admission of Ld. Ch. J. *De Grey*, who explicitly declares, in the case of the *Lord Mayor of London*, " that if the chancery commits for crimes, it is a different thing from a commitment for contempt."

But admitting that, by the specification in the attachment, the court of chancery intended to include the infraction of the statute, and the contempt, it then follows, that both offences have entered into the measure of the

punishment inflicted, and that Mr. *Yates* stands committed for the mal-practice, in wilfully violating his duty as master contrary to the statute, on this summary conviction, without the benefit of a constitutional trial to test the verity of the charge ; and also for the contempt ; the indictable offence for an infraction of the statute being without, and the contempt within, the power of the court ;—a manifest inconsistency, yet the only explanation to be given to the specification in the attachment, different from the first construction which I have made.

It may be said that this court will not presume that the court of chancery contemplated the exercise of an illegal or usurped authority, and that, therefore, the specification of the crime as against the statute, ought not to be taken into view, but should be rejected as surplusage ; and that we ought to consider ourselves bound, from the high respectability of that court, to intend the punishment to be for the contempt only, and thus reconcile and determine the question of jurisdiction. To this I can never assent : in a question like the present, involving principles so highly interesting to the community, no other construction or interpretation, in my opinion, is admissible, than such a one as the entire specification of the offence in the attachment will warrant. A different doctrine, according to my view of the subject, might expose a citizen to be punished twice for the same offence, and in its consequences, in other respects, endanger the most important constitutional privileges. The prisoner ought therefore to be discharged.

Spencer, J. The consideration of this case involves questions of the utmost delicacy and importance. On the one hand are presented the conflicting opinions of

the chancellor and a judge of this court, on the other the personal rights of a citizen of the state, holding important and honourable offices under it. My situation renders the task of examining and pronouncing upon the question extremely irksome and unpleasant: but I have no choice; my station imposes the duty on me, and I will not shrink from its performance. It will be readily admitted that in reviewing a question which has been passed upon by one of the highest judicial characters in the state, a question, too, involving a right to exercise a jurisdiction claimed by that character, there ought to be a liberal courtesy; it should not, however, be indulged so far as to lead to a surrender of the prerogatives of another judicial department, nor to the demolition of personal liberty. With these impressions, I enter, reluctantly, on the questions now before the court. It is not, however, my purpose to examine the various points which have been raised; I shall consider only two of them.

1st. Whether the commitment of Mr. *Yates*, after he had been discharged upon *habeas corpus*, for the same cause, was a legal act? and,

2d. Whether he was originally committed for matter whereof the court of chancery had cognisance; and, if so, whether that commitment was legal?

1. The statute "to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*," requires of the judges of this court, in vacation, to allow the writ of *habeas corpus* to all persons in custody of a sheriff, gaoler or other person, "other than persons convict, or in execution by legal process, or committed for treason or felony, plainly and specially expressed in the warrant of commitment;" and it also requires of the judge to

" discharge the prisoner on taking his recognisance with sureties, for his appearance at the next court where the offence is properly cognisable," &c. " *Unless it shall appear* to such judge, that such prisoner is detained upon a legal process, out of some court having jurisdiction of criminal matters, or by some warrant under the hand and seal of a judge, or justice, for some matter or offence for which, by law, the prisoner is not bailable." It cannot be controverted that a judge of this court, in vacation, is, by virtue of this statute, clothed with all the power, in granting the writ and discharging from imprisonment, which the supreme court itself can exercise, in term time. In the cases excepted from the cognisance of a single judge, and where the offence is not bailable, the court itself would not discharge, unless in the single case of extreme illness of the prisoner, and where an enlargement was necessary to preserve his life. This appears to me so self-evident a proposition, as to stand in no need of arguments to enforce it.

It being, then, the duty of a judge of this court, in vacation, to grant the writ to all persons in custody, excepting to such as are convict, or in execution by legal process, who is to decide whether the person applying for the writ comes within the exception ? Undeniably, the judge ; for as he is to grant the writ to all others in custody, should any person applying for the allowance of a *habeas corpus*, be illegally convict, or in execution by illegal process, such person cannot be denied the benefits secured by the statute.

If cases were necessary to support a proposition deemed so clear, that of the *King* v. *Collyer* and *Capon** will be found in point. The defendants were

* *Sayer*, 44. 26 *Geo.* II.

convicted at a quarter sessions, upon an indictment for assaulting one *Smith*, and by the order of the court they were committed to prison, for the space of one month next ensuing, and to ask pardon, on their knees, of *Smith*, and to cause an account of the sentence to be printed in the *Daily Advertiser*, and not to be discharged until they had undergone such imprisonment, asked such pardon, and caused such account to be published, and, when discharged, to pay certain fees. The defendants were brought up, by *habeas corpus*, before the court of king's bench, and when the above facts appeared on the return to the writ, the defendants were discharged. The court said that every part of this judgment was illegal except the imprisonment, and it would be very hard that the defendants should continue in prison under the illegal parts of the judgment, until they could obtain a reversal of those parts upon a writ of error. It is to be remarked, that in the case cited, no pretence was made that the court of quarter sessions had no jurisdiction; the only ground on which the court of king's bench interposed, was, that the conviction itself was illegal.

If, then, a single judge of this court, in vacation, possesses the same power which the court in term possesses, here is a direct precedent for saying that a single judge, in vacation, has a right to judge of the legality of a conviction, and if he does adjudge it illegal, to discharge the person suffering imprisonment under it.

Mr. *Yates* having been committed by a process issuing from the court of chancery, wherein was set forth the offences of which he had been convicted, was discharged by me, on a *habeas corpus*, on the 19th of *August* last, in which discharge I judicially pronounced the conviction, and imprisonment under it, to be illegal. The court

of chancery again imprisoned him for the first offence, adjudging my discharge illegal, null and inoperative. He was a second time discharged by me, on the ground of the illegality of the first conviction, and on the further ground that he could not be reimprisoned for the same cause, and he is now a third time imprisoned for the same matter. It naturally occurs, whence the court of chancery acquired a jurisdiction to take cognisance of the legality of my adjudication upon Mr. *Yates's* conviction by that court. I think I have shown that I had cognisance of the legality of the conviction by the court of chancery; and, at present, it is utterly immaterial whether my adjudication was erroneous or not. I had a right to make that adjudication by virtue of the *habeas corpus* act. I am unacquainted with any law, or decision, which gives to the court of chancery a power to supervise the judgments of this court, or of one of its judges, in a case where a judge has a power co-extensive with that of the court, and to set aside such judgment as illegal, null and inoperative. It is true, the court of chancery can relieve after a judgment at law, but such relief can be for some matter only, extrinsic the judgment; it cannot reverse the judgment, but in all respects must consider it right, but for the extrinsic facts of which it presumes the court did not take cognisance. In my view of the subject, the power of the court of chancery was spent, so far forth as respects the infliction of any further punishment on Mr. *Yates* for the offence of which he had been convicted; it could interpose only by mitigating the punishment of imprisonment, which it had adjudged should continue till the further order of the court.

It seems to me a prostration of all principle, and a perfect anomaly in the law, that a subject upon the le-

gality of which, the legislature has authorised a judge of this court, in vacation, to adjudge and determine, and on which, in the exercise of this plenary power, he does adjudge and determine, that this judgment shall be liable to a review, and to be set aside, *in a summary manner*, as illegal, null and inoperative, by any other *forum* whatever. The legislature have conferred no power on any other court to reverse such decision, and the only mode in which, in other cases, judgments can be reversed, is by regular process in some superior court designated by law.

This case presents still greater incongruity; the same court whose conviction had been adjudged illegal, and after the matter had become *res judicata*, undertakes, of its own accord, and in a very concise manner, to reverse the judgment thus judicially pronounced, and to reinstate its own conviction. I cannot bring myself to believe that the *habeas corpus* act, which, at the epoch of its introduction in *England*, and ever since, has been revered as the bulwark of the constitution, the *magna charta* of personal rights, and which has been successfully exerted against commitments, even by the king in council, is liable to the construction which has been put upon it; a construction which would defeat and mow down those very rights, and that freedom from illegal personal restraints, which it was introduced to uphold and protect.

I therefore deny to the court of chancery, or any other court, the right to reimprison a person convicted, when the conviction has subsequently been declared illegal, and the party imprisoned has been set at large on *habeas corpus*. Arguments may be urged from the possible abuse of this power, and from the exercise of it by a single judge, against carrying the principles I have

advanced so far ; but it ought not to be forgotten that any other power, and that all delegated authority is liable to be abused ; but this is no reason against conferring it, nor against its exercise ; those who are guilty of abuses are amenable to their superiors.

I have hitherto proceeded on principles drawn from analogy between this and other cases of judicial decisions, and, I trust, have shown that the mode adopted by the court of chancery, in setting aside my decision, is altogether novel and incongruous, destitute of precedent, and dangerous, in the extreme, to the liberties of the citizens. I shall now proceed to show that the power exercised by the court of chancery is expressly forbidden by statute.

The 5th section of the *habeas corpus* act declares "that no person who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence, unless by the legal order or process of the court wherein he is bound by recognisance to appear, *or other court having jurisdiction of the cause.*" To arrive at a true construction of this section, it must be noticed that by the third section of the act, the judge, in discharging a prisoner, is required to take a recognisance for his appearance at the next court, where the offence is properly cognisable, *which* court, by the terms of the 5th section, may, by legal process or order, again imprison him, for the same offence ; and upon this obvious principle, that inasmuch as the prisoner, who was charged with an offence, had been enlarged, during the vacation of the court, when it came to sit, it was deemed fit to vest a discretion in the court, to recommit for the same offence, in order that the prisoner might be forthcoming to abide a trial. Such power was considered necessary

to attain the ends of criminal justice; and it can be exercised only in the manner, and for the purposes already mentioned. The court of chancery, I must presume, has considered the words "or other court having jurisdiction of the cause," as applicable to itself; and that having had jurisdiction of Mr. *Yates's cause*, it could reimprison him, notwithstanding his discharge upon *habeas corpus*. I cannot assent to the soundness of this construction, and if it be adopted, it appears to me, that the *habeas corpus* act, becomes almost, if not altogether, a dead letter. What, upon the principle assumed, would prevent a justice of the peace, who had committed a person for trial, from reimprisoning him? He has jurisdiction of the cause for the purpose of imprisoning; his power was no more spent by committing, than that of the court of chancery in the present case, by its conviction and subsequent commitment in execution. The justice had jurisdiction, and so had the court of chancery; in the one case it was exhausted and gone, by the commitment to stand trial; and in the other, by the conviction and commitment in execution.

The terms "or other court having jurisdiction of the cause," must be referred to the preceding member of the section, which, as I have before stated, relates to persons whom the judge, on enlarging upon *habeas corpus*, had bound by recognisance, to appear at the next court, where the offence is properly cognisable; and then that court at which he was bound to appear, or other court having jurisdiction of the *cause*, for which he was bound to appear, may imprison for the offence, upon the charge on which he had been set at large on *habeas corpus*. By adverting to our criminal system, the explication of this provision will appear very plainly. In every county of

the state, there are two courts of criminal jurisdiction; a court of *oyer* and *terminer* and gaol delivery, and a court of general sessions of the peace; the former has jurisdiction of offences, committed within the county for which it is held, of whatever degree; the latter of all offences, other than those affecting life, or imprisonment in the state prison for life. The judge in taking a recognisance, when he discharges on *habeas corpus*, is at liberty to bind the prisoner to appear at the one or the other of these courts, as he sees fit, having regard to the periods when they are to sit, and their right to take cognisance of the offence. If the prisoner is bound to appear at a court of general sessions, and it happens that a court of *oyer* and *terminer* is held in that county, prior to the time when the prisoner has been bound to appear, and it should also happen, that an indictment is presented to such court of *oyer* and *terminer*, against the person thus enlarged, then that court would gain jurisdiction *of the cause*, for which the prisoner was bound by recognisance to appear, and it might, having thus acquired jurisdiction, by legal process or order, commit the individual.

This appears to me the only natural exposition of the power given by the legislature, to commit persons once delivered on *habeas corpus*, for the same cause. But for what purpose did the court of chancery regain jurisdiction of Mr. *Yates's* cause, if it be not a perversion of terms, to call it a cause? Certainly, not for the purpose of investigating the guilt or innocence of the party, but merely to reverse a decision judicially interposed, under the notion that it had higher powers, than those conferred by the legislature, on a judge of this court. To support a construction, which appears to me to be so monstrous,

the words "or other court having jurisdiction of the cause," are to be insulated, without having reference to the subject just before presented, of a person bound by recognisance, which words evidently point to a person, whose guilt had not been ascertained, and who was yet to stand trial for the offence imputed to him. In the present case, the offence had been examined, and conviction had taken place, which must be considered illegal, because it had been so adjudged, unless indeed the committing court had a right to reverse it.

The legislature have not only forbidden the reimprisoning a person, set at large upon *habeas corpus*, for the same offence, with the exceptions, on which I have commented, but have superadded a penalty of 1,250 dollars, on any person who shall knowingly, contrary to the statute, recommit, or imprison the person set at large, for the same offence. It may be imagined that if the penalty has not been incurred in the present case, then the recommitment is valid and legal. I dissent from such a proposition; it by no means follows, that if the penalty has not attached, that therefore the recommitment is allowed by the statute. The force of such an argument must depend on this, that a court is not a person; and that a court cannot be responsible, *civiliter*, for its acts. In the case of a single magistrate's recommitting for the same offence, the act would be done under the semblance of a judicial authority, and it may as well be insisted that a magistrate would not be responsible. Without intending to express a decided opinion, whether the penalty has attached in the present case, I would observe, that there are cases, in which if a court shall presume to intermeddle, clearly without jurisdiction, the acts done under such usurped authority, are not the acts of a court, but of the persons

composing it, and they have been held personally responsible. My opinion on the first question I proposed to examine, is, that whether Mr. *Yates* was rightfully discharged or not, upon the *habeas corpus*, his reimprisonment for the same offence, was unwarranted by law, and he is now entitled to his discharge.

2. It is, in my view, immaterial to consider the propriety of my discharge, but the occasion seems to require some attention to it, and I shall, therefore, briefly review it. I humbly conceive that it can form no objection to the exercise of the power conferred by statute, that the deprivation of personal liberty which has intervened, comes from the court of chancery. If that court has illegally imprisoned a citizen, and it shall so appear to me, while I sustain the office I hold, I cannot withhold the exercise of those functions which the law has given me, in affording a remedy. An upright and an independent judge cannot balance between his personal inclination and his duty.

I shall now consider, 1st. For what offence Mr. *Yates* was committed; 2d. Whether if the conviction partakes of some matters cognisable by the court of chancery, and of some of which it has no jurisdiction, there was a just cause of deliverance on *habeas corpus*. In considering these points, I shall regard the attachment only, without admitting or denying the right of examining evidence *aliunde*. When Mr. *Yates* was brought before me, I examined collateral evidence, in conformity to what I understand to have been a very usual practice with the judges of this court. By examining *aliunde*, I do not mean the admission of evidence, contradicting the return, but explanatory of it. I forbear that examination on the present occasion, being satisfied that the

opinion of his honour the chancellor, delivered when the first attachment was awarded, will not materially aid in ascertaining the cause of the commitment.

The offence imputed to Mr. *Yates* is, *that during the time he was a master of thecourt of chancery*, he had filed a bill in a cause, and thereto subscribed the name of *Peter W. Yates* as solicitor, without his knowledge or consent, and had acted as a solicitor in his name, in the prosecution thereof, *contrary to the statute in such case made and provided, in wilful violation of his duty as master*, and in contempt of the authority of the court; and he was committed until further order, *for his said mal-practice and contempt.* It appears to me, that there are two distinct offences; 1st. For having filed a bill, in the name of a solicitor of the court, and as an aggravation thereto, having done so without his consent; and, 2d. That at the time when this act was done, Mr. *Yates* was a master in chancery, and that the act thus done was consequently contrary to the statute, and in wilful violation of his duty, as a master. For the first offence, the court could undoubtedly proceed as for a constructive contempt: with respect to the latter, in my opinion, the court had no jurisdiction.

There is no statute prohibiting the use of a solicitor's name, by another person, though there is a prohibition in the case of an attorney.* There is a statutory inhibition to a master of the court of chancery, against acting as solicitor in any action or matter in that court; hence there cannot remain a doubt that the violation of the statute ascribed to Mr. *Yates*, consists in his having filed the bill in the name of a solicitor, during the time he was master.

* 1 *vol. R. L.* 221. 24 sess. c. 32. s. 7.

It is an elementary principle, that where an act is done contrary to the provisions of a statute forbidding it, an indictment will lie, unless the legislature prescribes a specific forfeiture. I forbear to give my opinion whether the act done by Mr. *Yates*, exposed him to an indictment. The court of chancery has proceeded on the principle that he had violated the statute; if so, he certainly was indictable. What puts this matter beyond all controversy is, that Mr. *Yates* is committed "for his said mal-practice and contempt." This could not mean, that as solicitor of that court, he had been guilty of mal-practice, for it no where appears that he was a solicitor of the court; it can have reference to nothing else, than that as a master of the court, he had wilfully done an act contrary to the statute, and in wilful violation of his duty, because it was contrary to the statute. It follows, that the court of chancery has undertaken to punish a master of that court, whose commission is derived from the council of appointment, for his mal-practice, in violating a statute, for which, if the statute has been violated, there exists, in a court of competent jurisdiction only, a power of punishing the individual.

This leads to the inquiry, whether the court of chancery possess criminal jurisdiction. I believe it only necessary to state, that it has not that jurisdiction. The organization of that court, its proceeding according to the civil law, without the power of convening a grand or petit jury, renders its exercise of criminal jurisdiction incompatible with every idea of personal safety or liberty.

That relief can be afforded by *habeas corpus*, where the conviction contains some good and some bad matter,

the case of the *King* v. *Collyer* and *Capon*, already cited, shows. The only difference between that cause and this is, that here one of the grounds of conviction is out of the jurisdiction of the court, and there it had jurisdiction of the whole complaint, but made an illegal sentence. The effect on the individuals is the same in both cases; the one suffered for a matter of which the court had not cognisance, the other for an excess of authority in the judgment. But it cannot be intended, that the court of chancery, would have inflicted the same punishment for a constructive contempt only, which it would for a contempt, and also for a wilful violation of a statute by a public officer, contrary to his duty. That both matters entered into the judgment of the court, is manifest to my mind, because both are carefully recited, and he is committed for both. How then can they be separated, and the court of chancery be presumed to act on one, when it professes to act on both? It appears to me as absurd to uphold a conviction founded upon good and bad matter, when the punishment is awarded on both, as it would be to support a judgment at law, founded upon distinct matters, some of which were actionable, whilst others were not.

It has been intimated, that the court of chancery is a court of such high jurisdiction, that it was incompetent for a judge of this court either to intermeddle with its process, or question the legality of its proceedings. With all due deference for such an opinion, I cannot subscribe to it. In every case arising upon *habeas corpus*, it would seem to me, that the sole inquiry ought to be, is the prisoner legally or illegally in custody, and not what court committed him. I am warranted in this position, by the opinion of chief justice *Tilghman*, in

Olmstead's case; Mrs. *Sergeant* was brought before him on *habeas corpus*, and it was insisted by the counsel for *Olmstead*, that she was not entitled to her discharge, even if the judge was of opinion that the district court, by which she was committed, had no jurisdiction. He declared his opinion to be, that in the case supposed, he would have a right, and it would be his duty to discharge the prisoner.

On these principles, if the cause was before me, anew, and separated from the question of recommitment, I should pronounce the conviction bad, and that the prisoner was entitled to his discharge.

KENT, Ch. J. The return to the *habeas corpus* has imposed upon the court, the necessity of discussing and deciding some interesting questions. We are called to examine into the validity of the commitment of the court of chancery, into the authority of a judge of this court, to interfere, in vacation, upon *habeas corpus*, and to set aside such commitment. It is also made a question, whether the act of the judge, be not, at all events, conclusive upon the subject matter of the commitment. This inquiry is, in every view, important, and I shall endeavour to acquit myself of my public duty, by bestowing upon the case, a free, full and diligent investigation.

A preliminary question was raised, and reserved upon the argument, which must be disposed of, before we enter upon the consideration of the merits.

The sheriff returns, not only the order of the court of chancery, of the 5th of *December*, by virtue of which he took, and now holds the prisoner; but the order of the 5th of *September*, upon which the prisoner was retaken, after the first discharge by the judge, and also the attach-

ment of the 17th of *August*, upon which the prisoner was originally committed.

Unless the attachment is to be received as part of the return, we cannot examine into the legality of the original commitment, nor into the legality of the discharge of the prisoner by the judge. The counsel for the prisoner have contended, that the whole return ought to be received, as pertinent, and in order. The last order does not specify in what the contempt and mal-practice therein mentioned consisted, but it refers to the writ of attachment, as containing the true cause of the commitment. This order declares the discharge by the judge, to have been illegal and void, and it evidently considers, that the prisoner ought to be reclaimed, by virtue of the attachment, and that the recommitment is to be sustained upon the original process. If the discharge was null and void, this construction was correct, and the prisoner is in, as from the first commitment. The sheriff could not, then, return the true cause of the caption, and detention of the prisoner, without stating the attachment, as well as the subsequent orders; and I am accordingly of opinion, that the whole return ought to be received.

1. The first point raised by the counsel for the prisoner is, whether the discharge of the judge be not conclusive and final, so as to preclude the court of chancery from examining into the correctness of the discharge, and from recommitting the prisoner for the same cause.

The *habeas corpus* act, among the exceptions, states those of " persons convict, and in execution by legal process" as being entirely out of the purview of the third section, under the authority of which the *habeas corpus* was awarded. And if the prisoner, when he was

discharged, was a person answering to either of those descriptions, the judge had no authority to bail or discharge him, and he ought to have been immediately remanded. If such a prisoner should be discharged, the discharge cannot be binding or valid, for this would be placing power without law, upon the same foundation with power exercised according to law. A proceeding without jurisdiction, is void, and a mere nullity. The judge in this case, derived all his authority from the statute, and that does not apply, and of course does not make his discharge binding, if the prisoner came within one of the exceptions stated.

The 5th section of the act which prevents reimprisonment, for the same offences, of persons discharged upon *habeas carpus*, most evidently applies only to cases in which the writ and discharge were had, pursuant to the statute. And even this prohibition extends only to magistrates acting individually, in vacation, and does not extend to any *court* having jurisdiction of the cause of the commitment. Such courts are expressly excepted from the prohibition, and of course retain the same powers as before the passing of the statute. If, then, the attachment had in itself been so defective, as not to have been sufficient to have held the prisoner, the court of chancery might still have awarded a new and competent warrant of commitment, for the same cause, for which the first warrant issued, provided the case was one of which that court had jurisdiction.

In *Alphonso's* case, (3 *Bulstr.* 259.) the court of king's bench admitted that this might be done. He was committed by the college of physicians, for practising physic, and was brought into the king's bench, upon *habeas corpus;* and all the court held the return in-

sufficient, as no cause for the commitment was stated. But they agreed, that, " if they should discharge him, for the insufficiency of the return, then the college would presently take him again, and commit him, and then would amend their return, and make it better."

It was the decision of a majority of the judges who gave their opinions, to the house of lords, in 1757, on several questions relative to writs of *habeas corpus*, that at common law, and before the statute of 31 *Charles* II. no judge could regularly issue a writ of *habeas corpus*, in vacation; and even now, under the statute, the judge has no means to enforce obedience to the writ, but by referring the case to the court, out of which the process is supposed to issue. It would then be extremely incongruous and singular, if the act of a judge in vacation, which he has not authority to execute, was to have the force and effect of a final judgment, pronounced in the last resort, and conclude all other jurisdictions within the state. Such a power would be dangerous as well as unprecedented. A single judge of this court might, in that case, annul the decision of the rest of the court, by discharging, in vacation, a person committed by the judgment of the court. A power of this extent would ride over all the courts of the land, and become perfectly despotic, if it was not subject to review and correction. There is no trace of its existence, to be met with in the books, and the only colourable ground for the conclusiveness of the discharge of a prisoner, upon *habeas corpus*, is the provision contained in the 5th sec. of the *habeas corpus* act; and that provision, as we have seen, is limited to cases properly arising under the act, and in no respect extends to courts of competent jurisdiction.

There are numerous instances, in which the court of K. B. and some cases, in which the court of C. B. has,

upon *habeas corpus*, undertaken to examine, and decide upon the cause and the authority for the commitment by another court. But in all those cases, the *habeas corpus* was awarded by *the Court*, and returnable therein; and except, in a few anomalous cases, in the time of *James* I. and of which I shall take notice hereafter, the examination into the authority of the court to commit, arose upon commitments by some inferior court. (12. *Co. Chancey's* case. 1 *Roll. Rep.* 245. *Codde's* case. *Cro. Car.* 567. *Crawley's* case. 2 *Bulst.* 139. *Hodges* v. Mayor of *Liskarett*. *Styles*, 90. *Smith's* case. *Vaug.* 135. *Bushell's* case. 1 *Salk.* 348. *Bethell's* case. 1 Ld. *Raym.* 99. *Bracy's* case. 1 Ld. *Raym.* 213. *Groenvelt's* case. 1 Ld. *Raym.* 545. *King* v. *Chandler*. *Stra.* 794. *King* v. *Elwell*. *Sayer*, 44. *King* v. *Collyer* and *Capon*.) They were all cases of *habeas corpus*, at common law; and I apprehend, that there is not an instance in the *English* law, of a judge in vacation, undertaking to decide upon the legality of a commitment in execution, by the judgment of any court of record, and much less, of a court of the highest degree.

The powers granted by the *habeas corpus* act, to a judge in vacation, were never intended to apply in any such case, because, cases of that kind appear to be carefully excepted in the statute; and it was not requisite to include them, for the purpose of guarding against arbitrary and groundless imprisonment. The statute seems, with a studied precaution, to have declared that the powers granted to a judge in vacation time, were not to affect cases of imprisonment, under the authority of a competent court. In the first place, "*persons convict*, and *persons in execution by legal process*," are not to apply to a judge, for the allowance of a writ of *habeas*

corpus. In the second place, a judge is not to discharge the prisoner brought before him, if it appears that he is detained *upon any legal process, out of a court having jurisdiction of criminal matters.*" And lastly, if the prisoner be set at large, the prohibition to reimprison him, for the same offence, does not extend to any "*court having jurisdiction of the cause.*" It appears to me, to be unfit, and dangerous to the orderly administration of the law, for a single judge, in vacation, to be charged with a summary and plenary power of review of the judgments and executions of a regular court of justice. The abuse of the powers of the established courts, was never, in any period of our law, so grievous, as to require such a prompt control. And, perhaps, as much, and more danger was to be apprehended from the abuse of such a remedy, than from the abuse of the original power.

The uniform practice, under the statute of *Charles* II. appears to have coincided with the construction which I adopt; and which strikes my mind, as founded on the strongest principles. This settled practice ought to govern and conclude us; for our *habeas corpus* act is almost a literal transcript of the statute of *Charles*. The act of 1787 followed the *English* statute, *verbatim*, and the revised act of 1807, made only some slight abbreviations in the mode of expression, which cannot, without violence, be construed to alter, in the least degree, the sense and settled construction of the former act. That the " mere change of phraseology," in the revised laws, was not to work a change in the established interpretation, was the unanimous decision of the court for the correction of errors, in 1805, in the case of *Taylor* v. *Delancy*. (2 *Caines's* cases in error, 150, 151.)

There seems to be a degree of propriety and consistency in a superior court of appellate jurisdiction taking cognisance, upon the return of a writ of *habeas corpus*, of the legality of a judgment and commitment, in an inferior court: But for a single judge to possess such a power, to be exercised in vacation, in a summary manner, without argument of counsel, and upon the judgment and commitment of any and of every court in the state, would be an alarming innovation upon our judicial system.

If, therefore, upon the return of a writ of *habeas corpus*, awarded in vacation, it appears, that the prisoner stands committed, by the judgment of a court of record, or other court of competent authority, the judge is bound, immediately, to remand the prisoner; and he has no power to examine and decide, touching the legality of the judgment, or the jurisdiction of the court. These questions belong to the cognisance of this court, as possessing general appellate powers, and as having the supreme control of all inferior courts.

The relief granted upon *habeas corpus*, against defective convictions and commitments, is, in some respects, analogous to the relief obtained upon a writ of error. It is, in one respect, more desirable, because it is more prompt in relieving the prisoner from imprisonment, but, on the other hand, it leaves the order, or judgment of the court below, in full force, and only discharges the party from the present effect of it. Before *Bushell's* case, no person was ever delivered by *habeas corpus*, or without a writ of error, from commitments by a court of *oyer* and *terminer*; and, since that time, the courts will not, unless the judgment or commitment be manifestly bad in substance, relieve on *habeas corpus*, but put the party to his writ of error. (*Bethell's* case, 1 *Salk.* 348. and *King* v. *Collyer* and *Capon*, *Sayer*, 44.)

My opinion, on the first point raised in this case, accordingly is, that the discharge which took place in the vacation, was in no respect conclusive, either upon the court of chancery, or upon this court; and I am also of opinion, that, if the first commitment was good, the recommitment was equally lawful, for that the discharge was unauthorised and void, inasmuch as it was not in a case within the provision of the *habeas corpus* act, and because a judge in vacation, has no authority, either under the act, or without it, to review, and set aside, as illegal and void, a formal commitment and conviction, by a court of chancery.

I shall next proceed to examine the merits of the present application, as appearing upon that part of the return, which sets forth the original warrant of commitment, and as unconnected with any thing which took place subsequent to the first execution of the attachment. The case is now to be considered, as if this was the first writ of *habeas corpus*, which had been sued out by the prisoner.

The counsel for the prisoner, submitted to the court three objections to the legality of the original warrant of commitment, and they contended, that upon either of the grounds, the commitment was illegal, and that the prisoner ought to be discharged. I shall examine these several objections in their order.

1. It is said, that the matter laid to the charge of the defendant, was a misdemeanor prohibited by the statute, and not cognisable in chancery, and that the conviction and imprisonment were for that offence, and not for a contempt of the court.

The attachment recites a previous order of the court, in which it was declared, that the defendant, during the

time that he was a master, filed a bill in the name of one of the solicitors, and had acted as solicitor in the prosecution of the bill, in the name of the person, " contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the court." Here is a plain and specific statement of the cause of the commitment, and I feel no difficulty in saying, that it was a palpable case of contempt, of which the court had jurisdiction. That the court meant to proceed on the ground of the contempt, appears from the charge in the order, which amounts to a conviction for a contempt, and from the subsequent part of the order, directing the prisoner to be committed, " for his said mal-practice and contempt." I cannot perceive, in this order, any colour for the inference, that the court of chancery assumed a criminal jurisdiction, distinct from the jurisdiction which that court has over contempts. Why should the court have done it? The offence was, in itself, a contempt of that court. This point cannot well be controverted. For an officer in chancery to practise as a solicitor, in the name of another solicitor, was mal-practice and contempt; and to do it without the knowledge or consent of such other solicitor, was a more aggravated mal-practice and contempt, for it was a gross fraud. The order does, indeed, go on to say, that such conduct was " contrary to the statute in that case made and provided, and in wilful violation of his duty as master." And are those words to warrant the inference, that the court intended to depart from the exercise of its undoubted jurisdiction in the case of contempts, when it had a contempt fully before it, and to usurp the criminal jurisdiction of a court of law? Is such a conclusion necessary,

or even tolerable, when resting on such grounds, and applied to such a court? The inference would be very severe, and one which I could never indulge, even if the order stopped there. But when we connect this paragraph with the words which follow, "and in contempt of the authority of this court," and when we add the order thereon, that the party be committed, "for such mal-practice and contempt," the intention of the court appears to me to be manifest.

The statute, which the court is supposed to have alluded to, is the act entitled "*an act concerning counsellors, attorneys, and solicitors,*" which declares, that no master in chancery, shall act as solicitor in any action or matter in that court. A violation of this prohibition, by a master, may possibly be indictable, on the ground that every contempt of a statute is indictable, if no other punishment be prescribed. But an offence against this statute, may also be a contempt of the court, though indictable; and the court may punish the contempt. A great part of the contempts which may be committed against a court of justice, are indictable offences; such, for instance, as assaults committed in the presence of the court, resistance to its process, and libels upon the court or its suitors, in respect to matters pending before it. Because the offence is indictable, that circumstance does not, in any case, destroy the right of the court to proceed against the party for the contempt, provided the act complained of amounts to a contempt.

One *Habin* acted as an attorney in the K. B. in the name of a regular attorney of the court, without the authority of such attorney, and the court granted an attachment against him. (1 *Burr.* 20.) Yet *Habin* seems to have been as liable to indictment for that conduct, as the present defend-

ant ; for the statute of 2 *G.* II. c. 23. s. 1. which was then in force, had declared, that no person should be permitted to act as attorney, until admitted and enrolled in the court. It was as much a contempt of the court of chancery, for the master to have acted as solicitor, after the prohibition in the statute, (admitting him to have been a solicitor before he was master,) as it would have been for any individual without admission, to have acted as solicitor. *The statute suspended the authority of the previous license*, so long as he continued a master of the court ; and to act as solicitor, in defiance of the statute, was also acting against the will, and in contempt of the court.

Every illegal and unauthorised interference with the process or proceedings of a court, is clearly a contempt of such court, whether that illegality be created by statute, or be declared by the rules and practice of the court. This is a principle so well settled, as to become elementary. The court of chancery was therefore bound, in respect to its own character, and the rights of its suitors, to animadvert, as for a contempt, upon a master, or practising as solicitor, contrary to the statute ; because, as far as relates to the punishment for contempts, a court of chancery is as much a court of criminal jurisdiction, as any court of law.

The case stated in the return, was not an ordinary violation of a statute, of which the courts of common law have exclusive cognisance. It was a violation which carried with it, of necessity, the commission of a contempt. It was a violation of a law *relative to proceedings and practice in chancery*, and committed, upon the records, and in the very heart of the court, by one of its officers. This gave the court cognisance of the case, as a contempt. The con-

duct of the prisoner, as set forth in the order, was a fraud, practised upon a suitor of this court, and it was an abuse by practice, which tended to injustice, deceit and oppression.

"The law," says serjeant *Hawkins*, (b. 2. c. 22. s. 2. and 12.) gives all courts of record a kind of discretionary power over all abuses, by their own officers, in the administration or execution of justice, which bring a disgrace on the courts themselves, as not taking sufficient care to prevent them;" and he says, that the court may proceed by attachment not only against attorneys, sheriffs, &c. but against any other officer of the court, for any act of disobedience or injustice, that concerns the practice of the court. Lord Ch. Baron *Comyns* lays it down generally, that "an attorney, being an officer of the court, if he attempts any thing which he cannot, or ought not to do, it will be a contempt of the court, for which an attachment shall go." (*Tit. Attorney*, B. 13.)

The mal-practice of officers, if frequent or unpunished, reflects dishonour on the administration of justice, and creates among the people a disgust against the courts themselves. This is the true ground of that salutary and indispensable discretion, with which the courts are invested, of controlling and punishing all kinds of abuse, and lawless practice, in every officer belonging to their jurisdiction. If we were then to admit, as the counsel for the prisoner contended, that the prisoner was attached for violating the statute, I should be of opinion, that the attachment was proper, for the statute could not be violated, without involving in the breach of it, a contempt of the court, any more than a breach of the peace can be committed, in the presence

of a court, without including in the commission of it, a contempt of such court.

But it is clear, from the facts stated in the order, that the court of chancery did not convict the prisoner of a contempt on the principal point, that being master, he had acted as solicitor. If that had been the ground of the contempt, much of the detail in the order would have been omitted, as superfluous. The averment, that while he was master he had acted as solicitor, by filing the bill, would have been sufficient. But an offence, certainly not within the statute, is set forth, and that is subscribing the name of *Peter W. Yates* to the bill, without his knowledge or consent, and carrying on the cause in the name of *P. W. Yates*. This is the strong and prominent *gravamen* set forth in the order, and it is a grievance and contempt, which the statute did not reach. It was essential to the dignity of the court, and to the purity and regularity of its practice, that such conduct should be noticed and punished. The animadversion was indispensable.

I have hitherto considered the objection on the supposition, that the act of the prisoner did really amount to an indictable offence under the statute. The counsel argued the case on this assumption, and, indeed, without it, the objection which I have been considering, would at once fall to the ground. But I wish here to be understood, as not giving any decided opinion on this point. It will be time enough, when the question shall necessarily call for an opinion. The words of the statute are, that no *master shall act as solicitor* in any action; and strictly speaking, the prisoner did not act as solicitor, but he acted as agent for, and in the name of another solicitor. The statute had reference to acts done directly by a master,

in his own name as solicitor, and this intention is made evident by a recurrence to the act of the 20th *February*, 1787, where this prohibition is first to be found. The act intended to render that practice unlawful, which was lawful before. Practising in the name of another solicitor, was always mal-practice, and punished as such by the courts. It is a fraud practised both upon the solicitor and the court, and there is no need of a statute prohibition. If such conduct was within one of the mischiefs that the statute had in view, the power of the courts was adequate to meet and redress it. If the statute does in fact reach this case, it is so far a declaratory provision, and perfectly useless.

But if this court is to review the legality of the conviction in chancery, we ought, at least, to give the language of it a sound and liberal interpretation, and every reasonable intendment should be made in support of the jurisdiction of that court. This has grown into a settled maxim. In *Bethell's* case, (1 *Salk.* 348.) lord *Holt* and the other judges agreed, that the return was not regular or formal, but as it appeared that the prisoner was committed by a court having jurisdiction of the matter, he was remanded. Serjeant *Hawkins* (*B.* 2. c. 15. s. 73. 76.) lays it down as a general rule, that whenever the contrary does not plainly and expressly appear, it shall be presumed that the commitment was legal; and he adds, that the superior courts pay the highest regard to one another's proceedings, and will presume them to be agreeable to law, unless the contrary appear, or the case be very extraordinary. We are then bound to say, that if a competent authority be shown, no words of equivocal import in drawing up the order, can or ought to affect it. To set aside the conviction, as

coram non judice, because the order declares the act of the prisoner to be against the statute, and his duty as master, as well as in contempt of the court, would be to adopt a construction rigorous beyond example. *Utile per inutile non vitiatur.* In the case of *Huggonson*, a printer, (2 *Atk.* 469.) who was adjudged by lord *Hardwicke*, guilty of a contempt in publishing a defamatory libel upon certain persons who had made affidavits in chancery, the lord chancellor takes great pains to prove the paper a defamatory libel, or in other words, an indictable offence, and he concludes with declaring it also a contempt of his court, for which the party was committed, according to the common order of the court in such cases. I believe it was never supposed that lord *Hardwicke* usurped jurisdiction, and that his commitment was void, because he showed a paper to be a libel, as well as a contempt. Those words were thrown in, to denote the aggravation of the case, but the exercise of the power of the court was justly applied to the contempt, and not to the libel.

As to the manner of drawing up orders in chancery, his lordship observed, in the case of *Baker* v. *Hart*, (2 *Atk.* 489.) that he wished the orders of his court were framed with the same simplicity, as orders made by the courts of law. They usually contain a recital of the principal facts; and this habitual want of precision, in chancery orders, may account for some superfluous expressions in the present case, though the order of commitment for "mal-practice and contempt," was agreeable to the usual course. The word *mal-practice* is an appropriate term for a contempt committed by an attorney or solicitor, in abusing the practice of the court; and the most that can be said of the order before us, is, that it uses two words of synonymous import, to express the same idea.

The return then shows, evidently, that the proceeding and commitment in chancery, was for a contempt; and on this subject it may be useful to look into the *English* decisions.

Several cases arose in the time of *James* I. in which the court of K. B. discharged persons upon *habeas corpus*, who were committed by the court of chancery for contempts. In the cases of *Astwick* and *Apsley*, (*Moore*, 839, 840. 1 *Roll. Rep.* 192.) the cause and particulars of the contempt were not set forth, so as to enable the court of K. B. to exercise its *assumed* power, to judge of the sufficiency of the contempt, and this is said to have been the reason for the discharge in those cases. And therefore, in *Allen's* case, (*Moore*, 840.) as the cause of the contempt was given, viz. in not performing a certain decree, therein made, the prisoner was remanded. But even this did not satisfy in *Glanville's* case, (*Moore*, 838. 3 *Bulst.* 301. *Cro. Jac.* 343.) for there it appeared, by the return, that he was committed by the court of chancery, for breach of a decree, and yet he was discharged by the court of K. B. which held the decree illegal; and this decision led to an open struggle, between those courts for jurisdiction; for *Glanville* was afterwards committed by the court of chancery, for the same cause, and *again delivered by the* court of *K. B.*

Respecting the authority of these cases, Serjeant *Hawkins* (*B.* 2. c. 15. s. 76.) remarks, that as to the court of K. B. bailing persons, committed by the court of chancery, little is said in the books, except in the reign of *James* I. when lord *Coke*, was Ch. J. and when there was great heat and contest between those courts, and several persons committed by chancery, were bailed by the K. B. But he adds that he had not met with any late precedent of the kind,

and he intimates, that the long disuse of such proceedings had lessened the authority of those cases. In another place (2 *Bl. Rep.* 757.) they are called hasty decisions. They arose out of a violent contest, concerning which it has been uniformly admitted, that the court of K. B. was wrong; and that lord *Coke's* conduct, was not only erroneous, but intemperate. Those cases ought not, therefore, to be cited, as precedents, and especially since they are counteracted by the whole current of subsequent decisions.

In the very next reign, we find the court adopting different principles, and pursuing a more moderate course of conduct, and one more consistent with the privileges of other courts. This appears from *Chambers's* case, (*Cro. Car.* 168.) who was committed by the star chamber, for a contempt, and upon being brought into the K. B. on *habeas corpus*, he was remanded, and the court said, that "it was not the usage of that court, to deliver one committed by the decree of one of the courts of justice." In a subsequent case, in that reign, (*Cro. Car.* 579.) one *J. S.* who had been committed by the exchequer, for not paying a fine, was brought up by *habeas corpus*, and remanded, "because the commitment was by a judicial court."

In the case of the *earl of Shaftsbury*, (2 *St. Tri.* 615. 1 *Mod.* 144.) who was imprisoned by the house of lords, for "high contempts committed against it," and brought into the K. B. the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind, in

which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined, and more emphatically enforced, in the two subsequent cases of *The Queen* v. *Paty and others*, and of *The King* v. *Crosby*. In the first of those cases (2 Ld. *Raym*. 1105.) the majority of the court determined, that they had no jurisdiction over the case of a contempt adjudged in the house of commons, and they said that warrants of commitment, for a contempt both in chancery and the K. B. were short, without specifying particulars, and yet such warrants were suffered, for there was a difference between a commitment for a crime, and for a contempt.

In *Crosby's* case, (3 *Wils*. 188. 2 *Bl. Rep*. 754.) the language of the judges is singularly impressive. He was committed by the house of commons, for a breach of privilege, and brought up on *habeas corpus*. The point strictly before the court, and decided, was the same as in the preceding case, but the subject unavoidably led the judges into the consideration of adjudications for contempts committed in the courts of justice. Their clear exposition of the law, on this head, did not partake of the nature of *obiter dicta*, but they were solemn and deliberate opinions of the whole court, two of the judges of which have, perhaps, never been surpassed in their distinguished reputation for talents and learning. Lord Ch. J. *De Grey* observed that "when the house of commons adjudge any thing to be a contempt, or a breach of privilege, their adjudication was a conviction, and their commitment in consequence, was execution; and that no court could discharge, or bail a person that was in execution, by the judgment of any other court." "It was not the practice of the courts in ordinary cases,

to take cognisance of such executions, or of commitments of that kind, and there was no precedent of *Westminster Hall* interfering in such a case. That it was held in a case in the *Year Books*, that every court should determine of the privilege of that court. That if the court of C. B. should commit a person for a contempt, the court of K. B. would not inquire into the legality or particular cause of commitment, if a contempt was returned, for in this respect, the courts were co-ordinate. That the courts of K. B. and C. B. never discharged any person committed for contempt, in not answering in the court of chancery, if the return was for a contempt. That if the court of chancery, or the admiralty court, commit for a contempt, no other court discharges the persons committed. That in Ch. J. *Wilmot's* time, a person was brought by *habeas corpus* into C. B. who had been committed by the court of chancery of *Durham*, and that court being competent, and having jurisdiction, the man was remanded. That perhaps a contempt in the house of commons, in the chancery, in the C. B. and in the court of *Durham*, might be very different; and therefore every court must be sole judge of its own contempts. That if the C. B. could determine upon the contempts of any other court, so might the other courts of *Westminster Hall;* and what confusion would then ensue? Abuses may be made for which there is no remedy, but this was unavoidable; and it was better to leave some courts to the obligation of their oaths. That in the case of a commitment by the K. B. or C. B. there was no appeal. That if the courts should abuse their jurisdiction, it would be a public grievance, and redress must be sought from the legislature. That if the two houses of parliament also, as well as the courts of law,

should abuse the powers which the constitution has given them, it would be a public grievance. That the constitution had provided checks, to prevent its happening; it must be left at large; it was wise to leave it at large: some persons, some courts, must be trusted with discretionary powers; and though it is possible, it was in the highest degree improbable, that such abuses should ever happen."

Mr. justice *Blackstone* pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of parliament, and the courts of *Westminster Hall*, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof belonged exclusively, and without interfering, to each respective court. That infinite confusion and disorder would follow if every court of the *hall* should have power to examine the commitments of the other courts, for contempts. That the judgment and commitment of each respective court, as to contempts, must be final, and without control. It was a confidence that might, with perfect safety, be reposed in the judges, and the houses of parliament. That the objection as to abusive consequences, proved too much, because it was applicable to all courts of *dernier resort*, and general convenience must always outweigh partial inconvenience.

I have cited the opinions of these judges much at large, because I could not hope to improve upon the strength of their observations; and I entertain the most perfect conviction, that the law, as they declared it in this case, was well understood, and definitively established, as part of the common law of *England*, at the time of our revolution. Mr. justice *Grose*, many years afterwards,

(8 *Term Rep.* 335.) thought he did enough to prove the settlement of the law on this subject, by merely quoting this very able decision of lord Ch. J. *De Grey*.

2. But admitting that the prisoner was committed for a contempt, his counsel have contended that the conviction was bad, because it was not founded upon sufficient evidence, as it is not stated in the order, that the prisoner was examined upon interrogatories.

It does not appear upon the return, whether the prisoner was, or was not examined upon interrogatories. The order is silent as to that fact, and it is by inference only that the counsel can draw such a conclusion from the return. Assuming that the prisoner was not examined, and that this court was authorised to review the proceeding, I am not prepared to say that such an examination was indispensable. This would depend upon the usage and practice of the court, and it must rest upon sound discretion, in each particular case; for it is a settled rule in chancery, that if the defendant be examined on oath, touching a contempt, his denial is not conclusive, and the court will examine witnesses on both sides, and decide according to the weight of testimony. There is then no reason that the party charged in chancery with a contempt, should be entitled to claim as a matter of right, to purge himself upon oath, because such purgation is no acquittal, as it is at law. (4 *Bl. Com.* 284. *Doug.* 516.) But it is a decisive answer to this objection, that we have no authority to inquire upon this return into the proceedings in chancery, prior to the conviction. It is enough for us, that we see, on the face of the return, an adjudication or conviction for a contempt, and a commitment in pursuance of such conviction. By what means the court of chancery arrived to the adjudication,

we are not to inquire, for this court is not intrusted by the constitution, with the power of sustaining appeals from chancery. We can only act judicially upon the facts appearing upon the return. We have not the proceedings and evidence before us; and to sit here in judgment upon them, with only *ex parte* suggestions and arguments to guide us, would be extravagant. I disclaim any such power. We are bound to presume, that the prosecution for the contempt down to the conviction, was duly conducted; and I entertain a persuasion, from the character of the court, that if all the facts were fairly before us, they would demonstrate the moderation and regularity of the proceedings. It is sufficient for us here, that we see by the return, a conviction for a contempt, and a commitment by a court of competent authority.

3. The last objection taken to the sufficiency of the return is, that the prisoner was committed until the further order of the court.

It was admitted that this is the usual form of the order of commitment for a contempt in chancery, as well as in the courts of common law. If we are all in an error, upon this point, it is time that the practice was revised; but it would ill become this court, to discharge the prisoner, by reason of an exception which applies equally to the practice of this court, and which has been established in all the *English* courts, and in the two houses of parliament, from almost time immemorial.

The counsel for the prisoner traced the chancery practice, as laid down in the *Practical Register*, and in *West's Symbolography*, back to the period of the *Year Books*, to show that it had no foundation there. But it would be extremely unwise to overset an established

practice, and course of precedents, because such a remote origin cannot be shown. Our most valuable institutions could not endure so severe a test. The forms of administering justice, in all their practical details, have undergone essential changes, and vast improvements. The time of the *Year Books* was, even at *Westminster Hall*, a time of comparative ignorance, and barbarism; and if precedents from that infant period of our law, were admitted to control the cultivated jurisprudence of the present day, they would degrade, or at least tarnish the character which it now enjoys, in the maturity of its age, and the height of its prosperity.

The practice of commitments for contempts, during pleasure, prevails in the house of assembly of this state, (*Colony Journals*, v. 2. 510. and *State Journals for* 1796,) as well as in the house of commons in *Great Britain.* It has become too deep-rooted and inveterate a practice for us now to correct; and I am persuaded that there exist sound reasons for the universal adoption of it, and that it has not been found, upon experience, to be injurious to the liberty of the subject. The objection is, *at this time*, new. It was taken in the *earl of Shaftsbury's* case, and also in that of *The Queen* v. *Paty and others;* but in the latter case, though Ch. J. *Holt* objected to the sufficiency of the return, he took no notice of this objection; and Mr. Justice *Powys* said that a commitment during the pleasure of the house, was more favourable to the prisoner, and more for his benefit, than a commitment for a certain time, as it leaves to the house a power to discharge the prisoner upon his submission. He said that it was agreeable to the constant forms of commitment by the commons; and was conformable to the commitments by the K. B. which are implied to be du-

ring the pleasure of the court. (2 Ld. *Raym.* 1108.) If the time should be definite in the sentence, the court could not alter it, even upon the submission of the party; and it would operate rigorously upon him. The court would feel obliged to commit for a time adequate to make due reparation for the contempt, without any submission. It is the established course, in the courts of law and equity, and in the legislature, to receive the submission of the party, whenever he is ready to offer it, and on reasonable satisfaction made, to discharge him. The party offending ought to submit, and the form of the order is the most effectual way to ensure it. There is no such thing as an abuse of this power in modern times. The case probably is not to be found. An alarm cannot be excited at its existence, in the extent now laid down. It is given to the courts, only for their preservation, in order to enable them to repel insults, to protect suitors, to support their process, and to be an asylum from violence and oppression.

The judicial is, from its very constitution, the feeblest department in government. "*Des trois puissances*," says *Montesquieu*, "*dont nous avons parlé, celle de juger est en quelque façon nulle.*" (*L'Esprit des Loix, liv.* 11. *c.* 6.) It is so checked, and so controlled, that it cannot essentially abuse its powers. The tendency of the times, is rather to induce the courts to relax, than increase in the severity of their ancient discipline, to exercise their power over contempts with extreme moderation, and never to resort to it, but when urged by the most commanding necessity. Sound discretion must use, and apply the power we have been considering, and sound discretion is and must be confided to the highest

tribunals, on this subject. The trust is given to the courts, not for themselves, but for the public, who are deeply interested in the preservation of this power, in its accustomed vigour.

I am accordingly of opinion that the prisoner must be remanded.

VAN NESS, J. and THOMPSON, J. were of the same opinion.

The Court, thereupon, made the following order:

Ordered, that the said *John V. N. Yates* be remitted to the custody of the sheriff of the city and county of *Albany*, to remain in the same state in which he was, at the time of the issuing of the said writ of *habeas corpus*.

Motion denied.(*a*)

(*a*) The prisoner having been bailed to appear at this term, he was called, and not appearing, his recognisance was ordered to be estreated.

APPENDIX.

Having been furnished, since the foregoing case was printed, with copies of the proceedings in Chancery, in the case of Mr. *Yates*, prior to his being brought before the Supreme Court, on the last *habeas corpus*, it has been thought proper to subjoin them, by way of an appendix, so as to present a more full view of the whole case.

IN CHANCERY.

In the matter of complaint of *Samuel Bacon* against *John Van Ness Yates*, Esquire. } *Albany, ss.*

RICHARD S. TREAT, one of the clerks in the court of chancery, holding his office in the city of Albany, being duly sworn, maketh oath, that the bill of complaint filed in his office on the 29th day of *August*, 1806, wherein *Samuel Bacon* is complainant, and *Henry Garretse* and *Charles Morris* are defendants, and which purports to be signed by *Peter W. Yates*, as solicitor for the complainant, to the best of this deponent's recollection, was delivered to this deponent by *John V. N. Yates*, Esquire, one of the masters of the court of chancery, to be filed, and that the process of subpœna in the said suit was issued at the request of the said *John V. N. Yates*, at the time of the filing of the said bill, and the fees for the same paid by him; and this deponent further saith, that the certificate of the defendants' appearance was served on *John V. N. Yates*, as appears by this deponent's register, and that the attachment to compel the defendants' answers was delivered to the complainant at the request of *Abraham Van Vechten*, Esquire, and further this deponent says not.

RICHARD S. TREAT.

Sworn the 19th day of *April*, 1808, before
SANDERS LANSING,
Commissioner in Chancery.

SAMUEL BACON, of *Ballstown*, in *Saratoga* county, farmer, being duly sworn, deposeth and saith, that on or about the 28th day of *August*, 1806, in a conversation he, this deponent, had with *John V. N. Yates*, Esquire, one of the masters of this court, relating to a suit which he, this deponent, had against *Henry Garretse* and *John I. Vredenburgh*, in the supreme court of this state, the said *John V. N. Yates* recommended him, the deponent, to file a bill in chancery against the said *Henry Garretse* and *Charles Morris*, and offered to file it for this deponent; that this deponent thereupon observed, that he had heard a good report of *Abraham Van Vechten*, Esquire, and that he intended to get him to file a bill in the said court of chancery for him; that the said *John V.*

N. Yates answered, that he was a master in chancery, and that he, the said *John*, would draw a bill for this deponent; that the common allowance for drawing a bill was 25 dollars, but that he, the said *John*, would draw it for 15 dollars; that this deponent consenting, the said *John V. N. Yates* thereupon drew a draught of the said bill, while this deponent was with him in the office of the said *John V. N. Yates*, and after several amendments and corrections thereof, the said *John V. N. Yates* desired this deponent to call at the office of the said *John V. N. Yates* the next morning, which this deponent did; that after the said bill was finished, the said *John V N. Yates* mentioned that it would be well to have the registry of mortgages of the county of *Albany* examined, and that this deponent repaired to the clerk's office of the said county for that purpose, with the advice of the said *John V. N. Yates*; that upon this deponent's return to the office of the said *John V. N. Yates*, within an hour after he, this deponent, had left the said *John V. N. Yates* for the purpose of making the said examination, the said *John V. N. Yates* informed this deponent that he had filed the said bill and taken out a subpœna, which subpœna he, the said *John V. N. Yates*, then delivered to this deponent; that at the time of filing the said bill, this deponent did suppose, from the information of the said *John V. N. Yates*, that he, the said *John V. N. Yates*, could legally file the said bill, as one of the officers of the said court; that the deponent paid to the said *John V. N. Yates*, on the day the said bill was filed, 18 dollars, for his services in drawing and filing the said bill; that this deponent, in the space of about thirteen months after filing the said bill, applied to the said *John V. N. Yates*, or called at his office, for the purpose of being informed what progress had been made in the said suit, about twenty different times, and that upon such application, the said *John V. N. Yates* accounted for the delay of the prosecution of such suit by alleging various pretences; that this deponent, in consequence of such delays, became impatient, and went to employ the said *Abraham Van Vechten* to assist this deponent to get the said cause through this court, upon which the said *Abraham Van Vechten* directed this deponent to procure a copy of the bill filed in the said cause; that this deponent procured a copy of the said bill, and handed it to the said *Abraham Van Vechten*, who, after perusing the same, informed this deponent that the said bill was filed in *Peter W. Yates*, Esquire's, name, and mentioned that he, the said *Abraham Van Vechten*, could advocate the said cause as counsel for this deponent, but could not go forward as solicitor, with the said cause, without being authorised by the said *Peter W Yates*; that upon mentioning to the said *John V. N. Yates* the said conversation, and informing him that he had employed the said *Abraham Van Vechten*, the said *John V. N. Yates* went with this deponent to the said *Abraham Van Vechten*, and observed to him, that he had no doubt but that the said *Peter W. Yates* would give up the said suit to him, the said *Abraham Van Vechten*; that this deponent thereupon returned with the said *John V. N. Yates* to his office, in which he, the said *John V. N. Yates*, wrote a note to the said *Peter W. Yates*, which this deponent received from him and delivered to the said *Peter W Yates*; that this deponent received from the said *Peter W. Yates* an answer to the said note about nine o'clock in the evening of its date, which he put in his pocket, after the said *Peter W. Yates* had explained the substance thereof to this deponent, and had sealed it; that this deponent immediately thereupon returned to the office of the said *John V. N. Yates*, but did not obtain admission, no person appearing upon this deponent knocking at the door of the office of the said *John V. N. Yates*; that this deponent went home early the next morning, intend-

ing to return in a day or two, and then deliver the note ; that in the mean time the letter had been accidentally opened, in consequence, as this deponent believes, of another paper having got between it and the wafer before it dried ; that finding it open, he, this deponent, read it, and supposing the contents to be material to an explanation, he kept it, and that the letter hereunto annexed, on which this deponent has endorsed his name, is the same he so received from the said *Peter W. Yates ;* that about two or three weeks afterwards, he, this deponent, applied to the said *Peter W. Yates* to change the solicitor, to which the said *Peter W. Yates* consented, upon this deponent's paying him 12 dollars and 50 cents ; that this deponent paid the said *Peter W. Yates* 4 dollars, part thereof, and gave him a promissory note for 8 dollars and 50 cents, which he, this deponent, afterwards paid, and which sum was paid in consequence of such demand of the said *Peter W. Yates*, and farther this deponent saith not.

SAMUEL BACON.

Sworn the 23d day of *May*, 1808, in open court.

SANDERS LANSING,
Register.

DEAR SIR,

SAMUEL BACON just now delivered to me your note to me, relative to a bill which he says you filed for him against one *Morris* upwards of one year ago, and you request me to consent that Mr. *Van Vechten* shall in future proceed in his name, instead of mine, as solicitor. This, sir, is the first intimation I ever had of such a suit, and if my name has been put to the bill, it was without my knowledge or consent : I have not the title of such a cause in my register, and am a stranger to the merits of the cause and to the parties. Mr. *Bacon* informs me that you drew the bill and subscribed my name to it, and went with him to file it and take out subpœnas, and that he also paid you 19 dollars. You have never opened your lips to me on the subject, nor paid me a cent of the money. He says that he has been in town twenty times to urge you (supposing you to be a solicitor in that court) to proceed, and has lately employed Mr *Van Vechten* as counsel, and did not know until about one month ago, when he was last in Albany, that my name was to the bill as solicitor. This mysterious procedure must be cleared up to my satisfaction before I can consent to your request : I never did, nor ever will consent that any one shall practise in my name as solicitor, nor sanction such a procedure.

You say in your note that I put my name to the bill—I do not recollect such a circumstance, and am confident that you are mistaken ; and, from Mr. *Bacon's* account, you must have put my name to it.

It has been intimated to me some time ago, that several bills were filed with my name to them as solicitor, but not of my hand-writing ; I suppose this to be one of them ; I shall to-morrow apply to the two clerks to see if there be any more ; I hope not.

Yours,
P. W. YATES.

14th *September*, 1807.

P. S. You once told me that the chancellor had given you a rub for doing some certain business as solicitor. I hope that you have not, subsequent to that admonition, in this or any other case, acted counter to his admonition.

N. B. Would it not be advisable for you to call on me before I speak or write to *Van Vechten* on this subject, for as matters now stand, I cannot consent to his proceeding as solicitor either in my name or his own.

JOHN V. N. YATES.

(Indorsed) SAMUEL BACON.

SIR,

INTENDING to have called at your office, in consequence of receiving an order of the 22d of *April* last, relative to a complaint of *Samuel Bacon*, I had postponed any communication till then, but finding it necessary to proceed to the westward on business to-morrow, I have thought it proper to address to you a letter on the subject of that complaint.

I shall be very brief on this subject—the complaint itself has been dictated by motives neither honourable nor correct—my answer to it shall be short—I deny the charge it contains. The name of *Peter W. Yates* has never been used by me without his privity or consent. To this fact I am ready to testify; nor do I presume Mr. *Yates* himself will deny this fact, otherwise a letter which he wrote to me subsequent to my receiving your order of the 22d *April* last, and on the very subject of *Bacon's* suit, would have contained it, but it contains no imputation of the kind. Mr. *Yates* has frequently written me other letters, some of which I have preserved; whether his recollection as to *Bacon's* suit has failed him or not, I cannot undertake to say.

If this denial of a complaint (which appears to me as contemptible as it is malicious) should not be satisfactory, I am willing to give such further explanation of it as shall be requisite.

I am, Sir, respectfully,
Your most obedient and
Very humble servant,
J. V. N. YATES.

To Hon. JOHN LANSING, Jun. Esq.

Saturday evening.

Received *May* 23, 1808.

PETER W. YATES, solicitor and counsellor at law, a witness appearing and being sworn and examined by virtue of an order of this court, on the complaint of *Samuel Bacon* against *John V. N. Yates*, Esq. on the part and behalf of the complainant, deposes and says,

That on or about the 14th day of last *September*, one *Samuel Bacon*, of *Saratoga* county, called at this deponent's house, and delivered to him a letter from the said *John V. N. Yates*, which letter is hereto annexed, and being without date this deponent indorsed on it the day he received it, which was the 14th *September*, 1807. That the said *Samuel Bacon* at the same time declared to this deponent, that the said *John V. N. Yates* had, above a year ago, drawn and filed a bill in chancery for him against *Charles Morris* and *Henry Garretse*, for which he had paid him nineteen dollars; that he then supposed the said *John V. N. Yates* to be a solicitor and had a right to draw and file bills in chancery; that he had since come down twenty times to see the said *John V. N. Yates* and inquire into the state of the cause and urge him to proceed, but that he could seldom find him at home or see him, and when he did see him, obtained no satisfactory information; that he intended originally to have employed *Abraham Van Vechten* to draw and file said bill, and mentioned it to said *John V. N. Yates*, who replied that he could do it himself, to which the said *Samuel Bacon* was persuaded to consent; that on account of said *John V. N. Yates'* negligence in attending to the prosecution, he, said *Samuel Bacon*, had lately employed said *Van Vechten*, who had told him that he could not proceed, as this deponent's name was subscribed as solicitor to said bill, unless this deponent would consent to have a rule entered for the purpose. And this deponent further says, that he was surprised at the contents of the said

letter from the said *John V. N. Yates*, and particularly at the part wherein he asserts that this deponent had signed his name to the said bill, from which circumstance and the verbal information of the said *Samuel Bacon* the conduct of said *John V. N. Yates* appeared mysterious and extraordinary to this deponent, and therefore he declined giving his assent at that time and until he should receive further information and satisfaction, and this deponent thereupon, in presence of said *Samuel Bacon*, wrote and delivered to him a letter directed to the said *John V N. Yates*, which the said *Samuel Bacon* took and promised to deliver and afterwards call again on this deponent, and this deponent supposed the same was delivered to the said *John V. N. Yates* until lately, when he was informed that the same was filed in the register's office, annexed to the said *Samuel Bacon's* affidavit ; and this deponent further says, that the substance and matters of fact stated in said letter are true ; that some time in the month of *October* last the said *Samuel Bacon* came again to this deponent's house, when, upon his solicitation, this deponent at last consented to permit Mr. *Van Vechten* or any other solicitor to prosecute the said suit, and that for that purpose a rule of court might be entered; that this deponent would give his aid and advice as one of his counsel and assist at the hearing of the cause, if required, and received from the said complainant twelve dollars and fifty cents, part of which he then paid to this deponent and gave his note for the residue, which he has lately paid, and the said *Samuel Bacon* appeared to be and expressed himself satisfied with this deponent's conduct in the said several conversations and transactions. And this deponent further says, that he did, last fall, go to the office of *Richard S. Treat*, one of the clerks of this court, to see the said bill, and found his name thereto subscribed, as solicitor, but it is not of his hand-writing, nor did he ever verbally, or in writing authorise *John V. N Yates* to use or subscribe this deponent's name thereto, nor did he know of such a cause until the said 14th day of *September* last, and this deponent says that he never did authorise or permit the said *John V. N. Yates*, or any other solictor whatsoever, to use and practise in his name ; that the said *Richard S. Treat* at the same time showed to this deponent another bill, filed the 11th *April*, 1807, of *Cyrus D. Hart* against *Jacob Mancius*, to which this deponent's name was put, but that the same is not of this deponent's handwriting, nor did he ever authorise any person whatsoever to use or put his name thereto ; that it has been done without his knowledge or consent, nor did this deponent know of such a bill or cause, until shown to him as aforesaid, by the said *Richard S. Treat ;* that the said *Richard S. Treat* at the same time told this deponent, that a few days after the filing of a bill in a cause of *Joseph C. Yates* against the corporation of *Schenectady*, he told Mr. *Champlin* that he had made a blunder or mistake in filing said bill, when there was a remedy at common law, and that the said *Champlin* thereupon replied, he knew nothing of it, appeared uneasy and dissatisfied, and requested said *Treat* to file no more bills in his name, unless his own signature was to them or he should give special directions. That this deponent several times last winter called at the house and office of the said *John V N. Yates* for an explanation of his conduct, in using this deponent's name to bills in chancery without his knowledge or consent, but the said *John V. N. Yates* seemed to evade an interview ; but that the last time this deponent called on said *John V. N. Yates*, this deponent saw him in his door, and abruptly introduced the subject by asking him why he had used this deponent's name to chancery bills without his knowledge or consent? to which he replied,

that it was necessity, and thereupon he abruptly left this deponent and went off, and farther this deponent says not.

PETER W. YATES.

Sworn the 6th day of *June*, 1808, before me,
SANDERS LANSING,
commissioner in chancery.

DEAR SIR,

IN a cause against *Morris* you put your name as solicitor to the bill in chancery; the complainant having employed *Van Vechten*, he has since, without being apprised of your name being solicitor to the bill, appeared and proceeded as solicitor. Will you have the goodness to consent to this and future procedure in *Van Vechten's* name, in order to make it regular? Yours, &c.

J. V. N. YATES.

P. W. YATES, Esq. (14th *September*, 1807.)

SAMUEL BACON having preferred a complaint against *John Van Ness Yates*, Esq. one of the masters of this court, for that he the said *John Van Ness Yates*, being a master of this court, and not a solicitor thereof, had filed a bill of complaint in the name of the said *Samuel Bacon* against *Henry Garretse* and *Charles Morris*, to which he the said *John V. N. Yates* subscribed the name of *Peter W. Yates*, Esq. as one of the solicitors of this court, which subscription was without the privity or consent of the said *Peter W. Yates*, as he had assured the said *Samuel Bacon*, and it appearing by the affidavit of *Richard S. Treat*, Esq. one of the clerks of this court, and the inspection of such bill, that the said bill had been filed in his office by the said *John Van Ness Yates*, with the name of the said *Peter W. Yates* thereunto subscribed as solicitor, and it further appearing from the said affidavit, that process of subpœna in the said suit had been issued at the request of the said *John Van Ness Yates*. It is thereupon ordered, that *Monday* the twenty-third day of *May* next, at eleven o'clock in the forenoon, at the chancellor's dwelling-house, be assigned to hear, as well the said *Samuel Bacon* as the said *John Van Ness Yates*, on the subject matter of the said complaint: and it is further ordered, that the register cause a certified copy of this order to be served on the said *John Van Ness Yates*, and transmit another such copy thereof to the said *Samuel Bacon* without delay.

THIS day having been assigned, by the order of this court of the twenty-second day of *April* last, to hear as well the said complainant as the said *John Van Ness Yates*, Esq. relative to the subject matter of the said complaint, and the said *Samuel Bacon* appearing to prosecute his said complaint, and it appearing to the satisfaction of this court, by the within acknowledgment of the said *John Van Ness Yates*, which is filed, that a copy of the said order had been duly served on the said *John Van Ness Yates*, who did not appear, the said *Samuel Bacon* was admitted to make affidavit of the facts and circumstances respecting the said complaint, which affidavit was also read and filed, and upon motion of the said *Samuel Bacon*, that *Peter W. Yates*, Esq. might be examined as a witness to the subject matter of the said complaint: it is ordered, that the said *Peter W. Yates* attend at the chancellor's dwelling-house, for the purpose aforesaid, on *Monday* next at two o'clock in the forenoon.

At a Court of Chancery, &c. held, &c. the 13th May, 1808.

IT appearing by the written acknowledgment of *Peter W. Yates*, Esq. that a certified copy of the order of this court, requiring his attendance therein on this day, had been duly served on him, and he not having appeared according to the exigency of the said order; it is ordered that he appear in this court, at the chancellor's dwelling-house in the city of *Albany*, on the third day after the service of a certified copy of this order on him, at ten o'clock in the forenoon, for the purpose in the said order expressed, or show cause why an attachment should not issue against him.

At a Court, &c. held, &c. 13th June, 1808.

THE CHANCELLOR. On the 13th day of *April* last, in the evening, *Samuel Bacon* complained to me, that *John V. N. Yates*, Esq. one of the masters of this court, had undertaken to file a bill in this court, as solicitor for him, against *Henry Garretse* and *Charles Morris*; that he had accordingly filed the bill and subscribed the name of *Peter W. Yates*, Esq. one of the solicitors of this court to it; that he had exacted from him 18 dollars for that service, but could not be prevailed upon to prosecute the suit; that he had lately discovered that the whole was an imposition, and that a master was not entitled to practise in this court; that *P. W. Yates* had disavowed any knowledge of the suit, and related several circumstances respecting the conduct which had been observed by the said master, and offered to verify his allegations by oath. I informed the complainant that I would inquire respecting it, and appoint a day for his appearance, and that of the master, when he would have an opportunity of formally submitting his complaint for investigation, and that, in the mean time, I would apprize the master of his complaint. Having satisfied myself, by the examination of the papers in the clerk's office of Mr. *Treat*, of the existence of the suit indicated, of the bill which had been filed in it having been subscribed with the name of *Peter W. Yates*, and that he disavowed any knowledge of it, I wrote a note to the master on the 16th day of *April*, apprizing him of the complaint, and intimating my wish to see him on the subject, to which note

he sent me an answer on the same day, mentioning that he had employed *Peter W. Yates* in several chancery cases, and as far as he then recollected, this was one of the number; and added, as I shall see Mr. *Yates* in the course of to-day or to-morrow, I shall be more precise. Not having heard from him on the subject, on the 22d day of *April* an order was made requiring the complainant and the said master to attend on the 24th day of *May* then next, in this court. On that day, the master sent me a letter, dated on the 23d of *May*, which I shall now read; [here his honour read the letter of 23d *May*;] the complainant attended at the time appointed, and made the following affidavit; [here his honour read the affidavit of *Samuel Bacon*.] *Peter W. Yates* had been requested to attend, but declining to appear, an order was made for his attendance, at another day, in consequence of which he went before the register, as commissioner, in the recess of the court, and made the following affidavit; [here his honour read the affidavit.]

An affidavit has also been made by *Richard S. Treat*, Esq. one of the clerks of this court, which is in the following words: [here his honour read the affidavit.]

From these affidavits, collectively, it appears, 1. That the said *John V. N. Yates*, being a master of this court, during the time he was so master, practised as solicitor in the name of *Peter W. Yates*.

2. That he subscribed the name of *Peter W. Yates* to the bill filed by him for *Samuel Bacon* against *Charles Morris* and *Henry Garretse*, without the privity or consent of the said *Peter W. Yates*.

The statute* concerning counsellors, solicitors and attorneys, (4th section,) enacts, that no person shall be admitted solicitor, unless he be approved by the court for his good character and learning, and prescribes an oath for their honest and faithful demeanor; and the 6th section

* *Laws of New-York*, vol. 1. p. 221.

imposes certain pains and penalties, and among others, a punishment for mal-practice, by fine and imprisonment.

By the 9th section, the masters of this court, among other officers, are inhibited from acting as counsellors, attorneys or solicitors, in any action or matter in the same court.

In *England*, either from a reliance on the total incompatibility of the master's acting as solicitor, or from the improbability that an officer of that grade, entrusted with the exercise of a portion of the judicial powers of the court, would engage in a practice inconsistent with his duty, a rule calculated to repel the undue influence of persons connected with the masters' department, has been confined merely to the masters' clerks,* who are prohibited from acting as solicitors, under pain of commitment.

That all courts will and ought to protect their suitors against the acts and impositions of their own officers,† seems to be too well established upon general considerations of justice and policy, and upon the relation existing between them, as officers and suitors in the same court, to admit of a doubt.

The process of attachment for these and the like contempts, says Sir *William Blackstone*, in his *Commentaries*,‡ must necessarily be as ancient as the laws themselves, and he enumerates the different modes in which a contempt may be incurred, among which are those committed by inferior judges and magistrates, by acting unjustly, oppressively or irregularly, in administering those portions of justice which are entrusted to their distribution; for, as the king's superior courts have a general superintendance over all inferior jurisdictions, any corrupt or iniquitous practice of subordinate judges, are contempts of that superintending authority.

* *Wyatt*, 397. † *Brown's Chan. Rep.* 352. 2 *Ves.* jun. 203.
‡ 4 *Black. Comm.* 284. 1 *Har. C. P.* 200.

If it is a contempt towards the superior courts, so to conduct in subordinate courts, it forms a much stronger case, where the mal-practice occurs in the same court, by one of its officers.

The practice of the *English* courts of common law and of chancery, have not been dissimilar on this subject; and from a very early day in the history of the latter to its latest decisions,* we find the rule has been uniform, that where a counsel's hand was counterfeited, the bills were ordered to be dismissed. So in the K. B.† the proceedings were set aside for irregularity; and an attachment issued for using the name of an attorney without leave.

These cases seem to have been determined on the ground of an unwarranted obtrusion on the court, of acts and papers which could only be done or filed by its regular officers, from whom the evidence of adequate skill and integrity had been exacted, and an oath imposed for the faithful execution of the trust they were required to execute.

Here the master, who has never been admitted a solicitor, though from his official standing, legally competent to execute duties of a higher nature, assumes the character of solicitor, which, even if he had been regularly admitted, was suspended, the capacity of master disqualifying him from exercising its functions, as they are expressly interdicted by statute, and in this assumed character, counterfeits the signature of a solicitor of this court.

Practising as attorney in the room of another, subjects the person permitting it, and the person practising, to a pecuniary penalty.‡

By practising as solicitor, in the name of another, even with his consent, he acted irregularly; the doing it without his consent, and counterfeiting his name, was an ag-

* *Complete Soll.* 21. *Cary*, 89. 1 *Dick.* 68. † 1 *Burr.* 20.
‡ 1 *Burr.* 20. *Cary*, 89. *Comp. Soll.* 21. 1 *Dick.* 68.

gravation, and the relation in which he stands to the court and its suitors, by holding the respectable office of master, renders it a greater departure from correctness.

The bill in this case must be dismissed, and the master must pay the costs both of the prosecution and defence, if any have accrued in defending the suit. The masters, in common with the other officers of the court, are subject to its corrective power; and in cases similar to the present, where the purposes of justice require animadversion, beyond a verbal admonition, and remuneration of the party injured, commitment is usually resorted to.*

Upon mature reflection, it appears to me that a commitment is not only the appropriate, but an unavoidable measure on this occasion. A variety of considerations operate to impress this on my mind as the most disagreeable act of duty which I have been required to perform, since I have had the honour to preside in this court; but I owe it to the pure administration of justice, to the elevated principles which ought to regulate the decisions of this court, and to the protection of my fellow-citizens from oppression, in its worst possible form, sheltered by the garb of office, to mark the conduct which has been observed on this occasion, by the most pointed reprobation, and I must therefore order the commitment of the master.

There are intimations that this is not the only case in which bills have been filed under similar circumstances by him; these have occurred incidentally in the course of the present proceeding, but he has not been called upon to answer as to them.

As at present advised, and in ordinary, I should consider it proper to attend to those intimations, as having appeared verified by affidavit, and to put them in a train of investi-

* *Amb.* 305. *Barnardist.* 403.

gation ; for, as this court has no officer whose peculiar duty it is to prosecute, gross irregularities might otherwise obtain without any other mean of preventing than the spontaneous prosecution of the party injured, exposed to be diverted or suppressed, from the apprehensions, the interests or views of such party, without any attention to the general system of jurisprudence, or the public good. But every object essential to the general justice of the court is attained by the present order ; and hence, as no complaint has been made, I feel myself at perfect liberty to dispense with pursuing the inquiry respecting them.

At a Court, &c. held, &c. the 13*th June*, 1808.

UPON reading the affidavits of *Samuel Bacon*, *Peter W Yates* and *Richard S. Treat*, and upon fully considering the subject matters thereof, (the said *John V. N. Yates* not having appeared to answer the said complaint, although regularly required so to do,) it appearing satisfactorily to this court that the said *John V. N. Yates*, during the time he was a master of this court, had filed a bill of complaint with *Richard S. Treat*, Esq. one of the clerks of this court, on behalf of *Samuel Bacon* as complainant, against *Henry Garretse* and *Charles Morris* as defendants, and thereto subscribed the name of *Peter W. Yates*, one of the solicitors of this court, as solicitor, without the knowledge or consent of the said *Peter W. Yates*, and had acted as a solicitor in the said cause, in the prosecution thereof, in the name of the said *Peter W. Yates*, contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of this court : It is therefore ordered that the said bill be dismissed, and that the said *John V. N. Yates* pay all the costs accrued in the said suit. And it is further ordered, that the said *John V. N. Yates* be committed for his said mal-practice and contempt, to the common gaol of the city and county of *Albany*, there to remain until the further order of this court, and that *James Van Ingen*, Esq. one of the clerks of this court, forthwith cause an attachment to be made out and sealed, and delivered to the sheriff of the said city and county, pursuant to this order, and carry the same into effect.

A Copy.

SANDERS LANSING, Register.

JOHN V. N. YATES being duly sworn deposeth and saith, that some days subsequent to this deponent's writing his last note to his honour the chancellor, on the subject of the above complaint, this deponent, in a conversation with *Richard S Treat*, Esq. a clerk of this court, did understand that some future day had been or would be given this deponent, to be heard in the above complaint, and inasmuch as this deponent had a good defence against the said complaint, he did *most confidently* expect and believe that such day would be given him, and under this impression only did this deponent wait, in expectation of re-

ceiving notice of such day, or otherwise this deponent would have appeared to answer such complaint; and this deponent further saith, that this day (and not until after twelve o'clock at noon) did this deponent learn that any order had been made different from a postponement. And this deponent doth further say, that he hath a good and substantial defence to make against the said complaint, and doth expect and believe that he will show the same to be false and malicious.

J. V. N. YATES.

Sworn this 13th day of *June*, 1808.

SANDERS LANSING, commissioner in chancery.

To the honourable the court of chancery.

THE subscriber doth respectfully represent to this court, that being fully impressed with the opinion, that this court would have appointed a day for hearing him, in the matter of complaint of *Samuel Bacon* against him, and having also understood that such a day would be appointed, he did not attend court this day, in full expectation of receiving notice of such day, he therefore applies to be heard in the said matter, and that the rule taken this day be opened for the purpose, &c.

J. V. N. YATES.

At a Court, &c. held, &c. the 13th June, 1808.

UPON reading and filing the application of the said *John V. N. Yates*, setting forth that he being fully impressed with the opinion that this court would have appointed a day for hearing him, in the matter of complaint of *Samuel Bacon* against him, and having also understood that such a day would be appointed, he did not attend court this day in full expectation of receiving notice of such day, and therefore applying to be heard in the said matter, and that the rule taken this day be opened for the purpose, and also upon reading and filing his affidavit: It is ordered, that day be given him on his motion, till *Wednesday* next, at ten o'clock in the forenoon, at the chancellor's dwelling-house in the city of *Albany*, to show cause why the order made this day in the above matter, should be abrogated and avoided.

At a Court, &c. held, &c. the 15th June, 1808.

JOHN V. N. YATES, Esq. one of the masters of this court, appeared to show cause in the said matter why the first order in the above matter of the thirteenth day of *June* inst. should be avoided, and produced his affidavit, which having been read and filed, and he thereupon heard on his motion: It is ordered, that the order of the thirteenth day of *June* inst. to show cause as aforesaid, be enlarged to *Friday* next at ten o'clock in the forenoon, and at that time he be further heard on the subject matter of the said order, at the chancellor's dwelling-house in the city of *Albany*.

At a Court, &c. held, &c. the 17th June, 1808.

THE said *John V. N. Yates* having been heard by his counsel, Mr. *Champlin*, on the subject matter of the said complaint, and Mr. *Peter W. Yates*, who having heretofore made affidavit in the said matter, applying for leave to rebut certain facts stated in the affidavit of the said *John V. N. Yates*, by a supplementary affidavit by him to be made, thereupon ordered, on motion of Mr. *Champlin*, that farther day be given to the

said *John V. N. Yates*, to be heard on the subject matter of the said complaint, until *Monday* the twenty-fifth day of *July* next, at ten o'clock in the forenoon, at the chancellor's dwelling-house in the city of *Albany*.

At a Court, &c. held, &c. the 25th June, 1808.

MR. CHAMPLIN, counsel for the said *John V. N. Yates*, offering an affidavit of *Peter Fryer*, which having been read, and it appearing that it contained matter irrelevant to the defence of the said *John V. N. Yates*, the said matter was ordered to be expunged and a new affidavit to be made, omitting such irrelevant matter, and thereupon *Peter W. Yates*, who was charged in and by the said affidavit with having consented to permit the said *John Van Ness Yates* to act in his name as solicitor, and the said counsel for the said *John V. N Yates* agreed, that the said *Peter Fryer* should be examined in open court, as a witness on interrogatories, the said counsel stipulating to produce him for that purpose to-morrow morning, at the opening of the court; thereupon ordered, on motion of Mr. *Champlin*, that further time be given to the said *John V. N. Yates*, until to-morrow morning at ten o'clock, at the chancellor's dwelling-house in the city of *Albany*.

City and county of *Albany*, ss.

PETER FRYER, of the said city and county, being duly sworn, deposeth and saith, that he was a clerk in the office of *John V. N. Yates*, Esq. for about two years, and that during that time, *Peter W. Yates*, Esq. was in the habit of calling at the office of the said *John V. N. Yates* upon business at different times; that the said *John* (this deponent well recollects) did at sundry times employ the said *Peter W. Yates* in chancery business, as solicitor therein; and this deponent further saith, that he knows of the said *Peter W. Yates* having been employed by the said *John V. N. Yates*, particularly in the case of *John Jauncey* against some of his creditors, on a bill filed in chancery, and that the said *Peter W. Yates* became solicitor therein; and this deponent farther saith, that in the many conversations, which the said *Peter* had with the said *John*, relative to the business, he the said *Peter* suggested a wish to interest the said *John* in chancery proceedings, with him the said *Peter*, as partner, but he, this deponent, doth not know or believe that any such partnership was formed between the said *Peter* and the said *John*, and he, this deponent further says, that in the course of the conversation, between the said *Peter* and the said *John*, he the said *Peter* informed the said *John*, that in case he the said *John* was applied to at any time in chancery business, that he might use his, the said *Peter W. Yates's* name, as solicitor, only that he the said *John* should let the said *Peter* know thereof, in the course of his proceedings, so that he the said *Peter*, on receiving notice as solicitor, might not be at a loss.

PETER FRYER.

Sworn before me, this 29th day of *July*, 1808.

SEBASTIAN VISSCHER, master in chancery.

At a Court, &c. held, &c. the 26th July, 1808.

PETER FRYER, who was to be produced in open court to answer interrogatories, not appearing, thereupon, on motion of Mr. *Champlin*, counsel for the said *John V. N. Yates*, ordered that further day be given

to the said *John V. N. Yates*, until *Friday* next at ten o'clock in the forenoon, at the chancellor's dwelling-house in the city of *Albany*.

At a court, &c. held, &c. the 28th July, 1808.

ON motion of Mr. *Champlin* on behalf of *John V. N. Yates*, it is ordered that *John Jauncey* of the city of *Schenectady*, be examined before one of the masters of this court, in the city of *Schenectady*, touching the complaint of the said *Samuel Bacon*, now pending before this court, against the said *John V. N. Yates*, and that such examination be read on the hearing of the said complaint; provided that *Peter W. Yates* have notice of the said examination, so as to attend for the purpose of a cross-examination.

PETER FRYER having been sworn in open court, pursuant to the order of this court of the twenty-fifth day of *July* inst. thereupon, and upon examination in court, farther deposes and says, that he was a clerk in the office of *John V. N. Yates*, in the year one thousand eight hundred and three or four; that he does not recollect when he commenced his said clerkship, but a certificate respecting it was filed in the clerk's office of the supreme court; that on the twenty-third or twenty-fourth day of *December*, in the year one thousand eight hundred and four, there was a controversy between *Peter W. Yates* on the one part, and this deponent and *John V. N. Yates* on the other; that all the conversations alluded to in his former affidavit, were previous to the last mentioned period; that this deponent knew that the said *Peter W. Yates* was employed by *John V. N. Yates*, in the suit of *John Jauncey* against some of his creditors, in his former affidavit mentioned, from the circumstance of the said *John Van Ness Yates* sending one of his clerks (he thinks *Harmanus Wendell*, jun.) to the said *Peter W. Yates*, to inform him of the business in that suit, and with a message that he would either send the money for his fees or pay it himself, but does not know whether the message was delivered; that he does not recollect whether the said *Peter W. Yates* was to be counsel or solicitor; that he, this deponent, does not recollect where the said bill in the suit of *Jauncey* against his creditors was drawn, but remembers there was something said about it, which must have been at the time he was in the office of the said *John V. N. Yates*, as a clerk; that the original bill in the suit of *John Jauncey* and others against *William James* and *Harmanus H. Wendell*, now produced to him, is, to the best of this deponent's belief, indorsed in the hand-writing of the said *Peter W. Yates*, and subscribed by him; that this deponent does not recollect how often the said *Peter W. Yates* mentioned to the said *John Van Ness Yates*, that he wished to form a partnership with him, but that it was several times, though he does not recollect what answer the said *John Van Ness Yates* made thereto, if any; that he cannot say with certainty which of them made the said proposal, nor does he recollect the terms, or having heard any conversations respecting the partnership after the controversy aforesaid, or that the said *John Van Ness Yates* put the name of the said *Peter W. Yates* to any bill in chancery; that this deponent understood that the said *John Van Ness Yates* was to put the said *Peter W. Yates's* name to bills and give him notice before trial, but this deponent does not remember that any thing was said as to conducting the causes in the intermediate time; that this deponent recollects no notice having been given in any other suit than in the suit above mentioned; that the reason men-

tioned for the notice to be given to the said *Peter W. Yates*, in this deponent's former affidavit, must be that the said *Peter W. Yates* might know the situation of the suits ; that this deponent has no other reason for his belief that the said partnership was not formed, than that he had heard nothing respecting it.

PETER FRYER.

Taken in open court, the 29th day of *July*, 1808.

SANDERS LANSING, Register.

Interrogatories to be administered to *John Jauncey*, a witness produced, sworn and examined, on the part of *John Van Ness Yates*, touching a certain complaint against the said *John V. N. Yates* by *Samuel Bacon*, and now pending in the court of chancery.

First interrogatory. Did you or did you not, at any, and what time, consult with *John V. N. Yates* on the subject of certain executions issued against your property, and was it or was it not during the time of your confinement within the liberties of the gaol of *Albany* county ? Answer fully what you know as to this interrogatory.

Second. Did you or did you not, at that time, or at any other time, (and if yea, at what time,) lay before the said *John V. N. Yates* the facts, papers and documents in your possession, for his opinion and advice thereon, and whether there was any mode of preventing the sale of your property on said executions ? Answer fully.

Third. Was or was not your property at that time advertised for sale upon those executions ? Answer fully.

Fourth. Did or did not the said *John Van Ness Yates*, advise you to file a bill in chancery, in order to procure an injunction to stay the sale of your property upon said execution ? Answer fully

Fifth. Did or did not the said *John Van Ness Yates* draw such bill in chancery for you ? Answer.

Sixth. Before whom was you qualified and sworn to such bill ? Answer.

Seventh. Did or did not the said *John V. N. Yates* state to you the necessity of obtaining a solicitor to such bill ? Answer.

Eighth. Did or did not the said *John Van Ness Yates* advise or suggest to you to procure *Peter W. Yates* to become such solicitor ? Answer.

Ninth. Was or was not *Peter W. Yates* employed as such solicitor to said bill, in consequence of, and upon the suggestion of the said *John V. N. Yates*, and was or was not the said *Peter W. Yates* sent for and obtained by the said *John V. N. Yates ?* Answer fully all you know.

Tenth. Was or was not the said *John V. N. Yates* agent for you in said chancery business throughout, and was or was not any thing done by the said *Peter W. Yates* further than signing said bill ? Answer fully

Eleventh. Was or was not *Abraham Van Vechten*, Esq. afterwards obtained to appear for you before the chancellor, to procure the desired injunction ? Answer.

Twelfth. Was or was not such injunction obtained ? Answer.

Thirteenth. Did or did not the said *John V. N. Yates* serve or obtain the service of such injunction ? Answer what you know

Fourteenth. If there is any thing further that you know in the premises, answer fully.

Cross interrogatories on the part of *Peter W. Yates.*

I. Did you and when, send a letter or note to *Peter W. Yates*, informing him that you wished to see him at your lodgings at *Robert M'Clallen's*, to retain him as solicitor and counsel in some chancery cause, or what letter or note did you write to him on that subject? and in what year was it?

II. Did he *Peter W Yates* come and attend you accordingly, and was *John V. N. Yates* present, and what did you say to *Peter W. Yates* on that occasion?

III. Was or was not *John V. N. Yates* then busy drawing a bill in chancery for you, and did or did not *Peter W. Yates* peruse and amend the same?

IV. When perused and amended, did or did not *John V. N. Yates* copy or transcribe the same, and did not *Peter W. Yates* sign his name thereto?

V. Did you or not pay *Peter W. Yates* his fees for the same, and to what amount?

VI. Did not *John V. N. Yates* propose to subscribe *Peter W. Yates's* name to the bill, and if so, did not he object thereto, and declare that when fairly transcribed he would sign it himself?

VII. What sum or fees did you pay to *John V. N. Yates* at that or any other time or times for his services in said cause, and for what services? Mention them particularly.

Examination of *John Jauncey*, a witness produced, sworn and examined touching a certain matter of complaint, pending in the Court of Chancery, against *John V. N. Yates*, by *Samuel Bacon*, taken and subscribed this 28th day of *July*, 1808, before *William J. Teller*, Esq. a master of said Court of Chancery, by virtue and in pursuance of an order of the said Court of the 28th instant.

THE said *John Jauncey* being duly sworn and examined upon his oath, saith, in answer to the first interrogatory exhibited by the said *John V. N. Yates*, that the said *John V. N. Yates*, in the years 1804 or 5, was employed by him as his attorney to aid in the settlement of his affairs. About that time a difficulty occurred respecting the sale of real estate belonging to him and *Benjamin Hoyt*, and himself in his individual capacity predicated upon executions in the hands of the then sheriff, *Harmanus H. Wendell*; that he consulted with Mr. *John V. N. Yates* on this business, who advised him to file a bill against the sheriff and others, and procure an injunction to stop the sale of his property, which was then about to be sold by the said sheriff and others, which said bill *John V. N. Yates* drew accordingly. This happened while he was confined within the liberties of the *Albany* gaol.

2. That in answer to the second interrogatory, the said *John Jauncey* saith, that he furnished *John V. N. Yates* with all such circumstances relative to the said chancery business as he was possessed of at that time.

3. That in answer to the third interrogatory, the said *John Jauncey* saith, that at that time his property was advertised for sale upon the aforesaid executions.

4. That in answer to the fourth interrogatory, the said *John Jauncey* saith, that *John V. N. Yates's* advice was to file a bill, as the only mode to stop the sale of the property, and the only remedy he the said *John*

Jauncey had to bring the persons with whom he had the dispute to a settlement.

5. That in answer to the fifth interrogatory, the said *John Jauncey* saith, that *John V. N. Yates* drew a bill, but that on application to the chancellor on that bill, (to the best of his knowledge and recollection, the application for an injunction did not prevail.

6. That in answer to the sixth interrogatory, the said *John Jauncey* saith, that he does not recollect before whom he was qualified or sworn, but believes that to the second bill he was sworn before *Sebastian Vischer*, Esq.

7. That in answer to the seventh interrogatory, the said *John Jauncey* saith, that during or after drawing the first bill, *John V. N. Yates* told him a solicitor in chancery must be employed, and *Peter W. Yates* was recommended to him by the said *John V. N. Yates*.

8. That in answer to the eighth interrogatory, the said *John Jauncey* saith, that *John V. N. Yates* did advise him to procure *Peter W. Yates* as solicitor to said bill.

9. That in answer to the ninth interrogatory, the said *John Jauncey* saith, that *Peter W. Yates* was sent for, for the purpose as stated in his answer to the eighth interrogatory—but whether he *sent* for him or *John V. N. Yates*, he does not recollect.—*Peter W. Yates*, however, came to his lodgings and examined, amended and corrected and signed the first bill, as he believes.

10. That in answer to the tenth interrogatory, the said *John Jauncey* saith, that *John V. N. Yates* was at this time his agent in his chancery suits as well as other affairs; *Peter W. Yates* was at his lodgings several times on the business of the chancery suits, and aided therein with his advice.

11. That in answer to the eleventh interrogatory, the said *John Jauncey* saith, that *Abraham Van Vechten*, Esq. was employed by him to appear before the chancellor to procure the desired injunction.

12. That in answer to the twelfth interrogatory, the said *John Jauncey* saith, that an injunction was granted on the second bill, to the best of his recollection and belief.

13. That in answer to the thirteenth interrogatory, the said *John Jauncey* saith, that he does not know whether *John V. N. Yates* served or obtained the service of the injunction, because he could not leave the liberties of the gaol.

14. That in answer to the fourteenth interrogatory, the said *John Jauncey* saith, that *John V. N. Yates* charged him for drawing the bill, and necessary attendance, 12 dollars and 50 cents.

And the said *John Jauncey* on his cross-examination to the interrogatories exhibited on the part and in behalf of the said *Peter W. Yates*, further on his oath says :—

I. That in answer to the first cross interrogatory, the said *John Jauncey* saith, that *Peter W. Yates* perused, examined, corrected and amended the bill in chancery, drawn by *John V. N. Yates*; that *Peter W. Yates* was employed by him as solicitor on the recommendation of *John V. N. Yates*—but whether he sent for him, or *John V. N. Yates*, he does not recollect.

II. To the second cross interrogatory the said *John Jauncey* answers, that *Peter W. Yates* did come to his lodgings, and did examine and sign the bill; that *John V. N. Yates* might have been present and might not; that he thinks it probable, however, *John V. N. Yates* was present.

III. To the third cross interrogatory the said *John Jauncey* answers, that the application for an injunction on the first bill not having proved

successful, a second bill was directed to be drawn; that during the drawing of that bill, he believes *Peter W. Yates* was present part of the time.

IV. To the fourth cross interrogatory the said *John Jauncey* answers, that he believes the second bill was copied by *James Van Ingen*, *John V. N. Yates* and *Thomas Lothrop*, jun. which second bill, as far as he recollects, was also signed by *Peter W. Yates*; and that as the said bill is on file in the office of the said *James Van Ingen*, reference can thereto be had.

V. To the fifth cross interrogatory the said *John Jauncey* answers, that he paid *Peter W. Yates* for his services the sum he charged, but the exact amount he does not recollect.

VI. To the sixth cross interrogatory the said *John Jauncey* answers, and saith, that he did not hear any conversation as in the said interrogatory is stated.

VII. To the seventh cross interrogatory the said *John Jauncey* answers and saith, that he did pay *John V. N. Yates* for drawing the said bill and his necessary attendance to the suit, the sum of 12 dollars and 50 cents.

JOHN JAUNCEY.

Signed and sworn to the day and year above mentioned, before me,

WM. J. TELLER,
Master in Chancery.

State of *New-York*—In Chancery.

I certify the preceding to be a copy of the original deposition of *John Jauncey*, on file in my office, in the matter of complaint of *Samuel Bacon* against *John V. N. Yates*, Esquire. Dated the 17th day of *September*, 1808.

SANDERS LANSING, Register.

At a Court, &c. held, &c. the 29th July, 1808.

PETER FRYER having been produced by Mr. *Champlin*, counsel for the said *John V. N. Yates*, to be examined on interrogatories pursuant to an order heretofore entered for that purpose, and his deposition, by consent of *Peter W. Yates*, and of Mr. *Champlin*, counsel for the said *John V. N. Yates*, having been taken and reduced to writing and subscribed by the said *Peter Fryer*, and the deposition of *John Jauncey* having been produced by Mr. *Champlin*—ordered, that the said deposition be filed; and thereupon Mr. *Champlin*, counsel for the said *John V. N. Yates*, was heard on the subject matter of complaint of *Samuel Bacon* and the said *Peter W. Yates*, on the subject of the affidavit of the said *Peter Fryer*, so far as respected the consent attributed to the said *Peter W. Yates* to permit the said *John V. N. Yates* to make use of his name as solicitor.

August 8th, 1808.

THE CHANCELLOR. Since the order of the 13th day of *June* last, the master having made affidavit, that his omitting to attend on the day assigned to show cause, was owing to misapprehension on his part, an order was made giving

him till the 25th day of *July* last to show cause why the order made should be abrogated and avoided.

On that day his counsel produced an affidavit of *Peter Fryer* stating, among other things, that *Peter W. Yates* had consented to permit the master to practise in his name as solicitor; which was intended to discredit the affidavit made by *Peter W. Yates*, and to implicate him as a *particeps criminis* in the mal-practice complained of against the master.

This affidavit of *Peter Fryer*, containing a relation of a transaction between them, the master and *Peter W. Yates*, on the subject of business in the supreme court, which was held to be impertinent, it was ordered to be expunged and the affidavit to be recopied, omitting the impertinent matter.

On the ground of the affidavit of *Peter Fryer* tending to impute to *Peter W. Yates* improper practice on the subject matter of inquiry, he applied to be admitted to repel it, and moved that *Peter Fryer* might be ordered to attend for the purpose of answering interrogatories; upon which, by his consent and the consent of the master's counsel, an examination of *Peter Fryer* was ordered; the latter stipulating to produce him, as well to explain an ambiguity in his affidavit, as to be examined at large on the subject matter of the said complaint; and an order was made, in the terms moved for by the counsel for the master, to examine *John Jauncey* on the interrogatories, before one of the masters of this court.

On the 26th of *July* an affidavit of *Peter Fryer* was again produced, variant from the former, in other points than the impertinent matter, which being inconsistent with the order of the 25th, was rejected, and afterwards conformed to it. An adjournment was then had, at the instance of the master, to the 29th day of *July*, on which day the

affidavits of *Peter Fryer* and the other affidavits in this matter, and the deposition of *John Jauncey* were read, and the said *Peter Fryer* was examined in open court, and his deposition reduced to writing.

Though it was admitted on the part of the master, that his conduct was so far incorrect, as to expose him to a pecuniary remuneration to the party aggrieved, it was insisted that his remedy was to be sought at law; and that if it could be shown that the master had not used the name of *Peter W. Yates*, without his consent, it ought so far to operate in mitigation, as to induce the court to refrain from carrying its admonition to the length of a commitment.

This was the first point in argument, on which much stress was laid, and it was insisted that the affidavit of *Peter Fryer* ought to have a preponderating effect on the question.

I am totally averse to turn the party aggrieved to seek his remedy at law, if he is entitled to such remedy here, as it is compelling him to travel in a circuitous, instead of a direct route. There certainly are cases in which the court would leave the party to such resort, but this does not appear to me to be of that description; for though the nature of the jurisdiction to be exercised here must, of course, stop short of that complete indemnity which the verdict of a jury might give, I think it competent to remunerate him, to the amount of the ascertained damages, for which a measure is disclosed by the case.

The affidavit of the complainant *Samuel Bacon* puts the agency of *Peter W. Yates* in the filing of the bill, entirely out of the question, *as a fact in his knowledge.* Deceived by the similarity of surname, he declares that he did not know that the master was not a solicitor, until he applied to *A. Van Vechten.*

The master did not pretend, in his note of the 14th day of *September*, 1807, to have filed the bill, in consequence of

an authority from *Peter W. Yates*. On the contrary, he asserted *that Peter W. Yates put his name to it.* In the answer to that note, produced and sworn to by *Samuel Bacon*, he positively denies having consented to permit him to use his name. This denial cannot, however, be further regarded, than as corroborating the truth of his affidavit, by showing his consistency.

The deposition of *John Jauncey* shows that two bills were drawn in his suit, one of which has been produced; and is admitted by *P. W. Yates* to have been signed by him. He says that *John V. N. Yates* drew the first bill; that he recommended the deponent to employ *Peter W. Yates* as solicitor; that he accordingly employed and paid him, but that he is doubtful whether *John V. N. Yates* or himself made an application, in the first instance, to *Peter W. Yates;* that *John V. N. Yates* was originally introduced into the business, as agent generally of *John Jauncey*, without reference to suits in any particular court.

The affidavit of *Peter W. Yates*, upon his introduction as a witness by a special order, is positive; that he never gave permission to the master to use his name; the authority to use it, mentioned by *Peter Fryer*, is stated to have been given at least three years before the bill in this case was filed, and a circumstance is disclosed by him, which interrupted the good understanding between the master and *Peter W. Yates*, and which does not appear to have been since re-established; and in all this time, there is no evidence of the authority said to have been thus given.

The letter of the master, annexed to the affidavit of *Peter W. Yates*, does not pretend any such permission on authority. It contained an assertion, that *Peter W. Yates* himself had subscribed his name to the bill, which is now totally abandoned, it not being pretended that *P. W. Yates*

ever saw the bill till long after it was filed. These circumstances afford some corroboration of the truth of the statement made by *Peter W. Yates.*

The affidavit of *Peter Fryer*, and his deposition in court, furnish the grounds on which the master relies for his defence.

In his affidavit he swears positively, that *he well recollects* that the said *John V. N. Yates* did, *at sundry times*, employ the said *Peter W. Yates*, as solicitor, and particularly in *Jauncey's* case. In his deposition, he says, he recollects no case but that of *Jauncey;* and though in the former he deposed that *he knew* that *John V. N. Yates* employed *Peter W. Yates* in that suit; yet in his deposition he says, his knowledge respecting that transaction was collected from a message sent by the master to *Peter W. Yates*, which he did not know ever reached him.

The deposition of *John Jauncey* is, however, not opposed to this; he declares, that he knows not who made the first application to *Peter W. Yates* to employ him, whether the master or himself; and he discloses a circumstance which might, in the abstract, well account for the interference of the master, as he declares that the master was the general agent for his concerns.

Peter Fryer states positively, in his first affidavit, that *Peter W. Yates* several times offered to the master a partnership in chancery business, which he repeats in his deposition, and adds, that he does not know what answer the said *John V. N. Yates* gave to it, which is in pursuance of the same position, of the proposal having been made by *Peter W. Yates*—notwithstanding which, he explicitly declares, that he cannot say, with certainty, which of the said parties made such proposal.

This affidavit is, therefore, incongruous, in some parts, contradictory, in others, inconsistent with circumstances disclosed by it, and totally irreconcilable with that of *Peter W. Yates.*

The doctrines which apply to the relative weight of positive and negative evidence are of doubtful application to this case, as contended for on the part of the master. The affidavit of *Peter W. Yates* positively affirms, that he never gave any authority to *John V. N. Yates* to practise in his name, as solicitor. The reason given, in general, for preferring the affirmative to the negative is, that both may consist with each other; for that though the circumstance related by the affirmative witness is true, the other may be equally so, as the circumstance may have occurred without his attending to it or knowing any thing about it.*

Here, however, the circumstance intended to be established arose from the act of *Peter W. Yates.* His volition must have been exerted, and his intention expressed, so as not to bring it within the rule.

It was admitted that *Peter Fryer* was habitually intemperate. Habits of that kind are known to impair the intellectual powers; to blunt the senses; not unfrequently to destroy the memory; and vitiate it, by impressing it with imaginary and visionary traces, instead of those of the real transactions of life; and though the moral veracity may be retained, it loses an essential recommendation to credibility by the loss of a capacity of correct reminiscence.

I cannot, therefore, from the views I have thus detailed, on the subject, consider the testimony of these witnesses, as entitled to equal credit, and I have no doubt, as far as that affidavit can form a ground of extenuation, that the pre-

* *Gilb. Law of Evid.* 154.

ponderancy is strong against the credit of the affidavit of *Peter Fryer.*

In the course of the argument on the part of the master, it was intimated, that his non-appearance in consequence of the orders of this court, might, perhaps, have been construed into a species of contempt. This is, however, a misapprehension, excited by the manner of treating the subject. When the complaint was exhibited, the master had notice of it, and might have attended to repel it. He did not; but no other consequence to his disadvantage is to be deduced from that circumstance, than the deduction made, in all other judicial proceedings, that the man who abandons his defence has none to interpose; and having resumed it, he stands on the same ground, as to the effect of that defence, as he did before the order, now attempted to be got rid of, existed.

It has been urged, that to give this court jurisdiction, the acts charged to the master must either be—

1st. A direct contempt of the court:

2dly. Misconduct in his office, as master, by virtue of the office, or in pretence of such:

3dly. Against some positive institution, prohibiting the act as an offence of the court of chancery.

As to the 1st point—

No direct contempt assimilating it to the ordinary contempts of personal disrespect to the judges composing a court, or a contemptuous opposition to its process, is here attributed to the master. It is the legal inference of a contempt, deduced from a departure from the obvious rules of justice, and common honesty; and the doctrine of contempts can only be applied, as the source of the remedy, or correction. It is on that ground, that the master has not been called to answer on interrogatories, and that his affidavit was rejected, as inadmissible.

As to the 2d point—

The 9th section of the act relating to counsellors, solicitors and attorneys,* prohibits masters from acting as solicitors in chancery.

In this case, no act has been done by the master, as such. There is no evidence of his having mingled the exercise of any power he possessed as master, in the suit in which he is charged to have acted as solicitor. But, though that is the case, misfeasance may as well consist in doing an act wrongfully, which he was legally prohibited, as master, from doing, as in acting corruptly, in discharging his duty, as master.

But it has been urged, that to bring this case within the statute, it ought to have been shown, that the master was of the grade of solicitor; and, in support of this position, several cases were cited.

In the case of *Easten* v. *Southey*,† the plaintiff pleaded to an avowry in replevin, that the *locus in quo* having been lawfully possessed by *G. Saunders*, *as tenant at will*, was sown with wheat. On demurrer, one of the causes assigned was, that it is not sufficiently set forth, that *G. Saunders* was tenant at will to the defendant.

It was decided on the ground, that pleas must be construed according to common intent; and *Willes*, Ch. J. in giving the opinion of the court, observes, "A man must strain, indeed, to say, that this plea does not plainly intend, that *G. Saunders* was tenant at will."

The case of *Mead* v. *Robinson*‡ came up on a motion in arrest of judgment. The objection was, that it was not directly alleged in the plaintiff's declaration, that the defendant gave the money, charged to have been given as a

* *Laws of New-York*, 221. † *Willes*, 314. ‡ *Willes*, 422. 427.

bribe at an election for members of parliament, *for the purpose of bribing the elector to give his vote*, but only that he gave him that sum, "as a gift or reward *for his giving his vote*;" but the court overruled the objection.

Neither of these authorities tend to support the doctrine contended for, and that of *Cross* v. *Kaye** operates decidedly against it; the court holding that it was sufficient, for the purpose of sustaining the action against an attorney, on the statute of 25 *Geo.* III. c. 30. *that he acted as attorney.*

The acting as solicitor was intended to be restrained, to prevent improper practices, originating from mixing the incompatible functions of advocate, and the judicial and ministerial duties of a master; and the letter, as well as the spirit of the statute, certainly applies as forcibly to the total destitution of a right to practise as solicitor, as to a case in which, though there might originally have been a ground for exercising the functions of solicitor, the right of practising as such had been suspended.

I do not think that the distinction taken, that the word "*as*" is to be construed to identify the restraint with a person who would have been competent to act as solicitor, if his capacity as such had not been legally suspended, is well taken; as in my opinion, the acting in that capacity simply, while master, is sufficient to bring it within the purview of the statute. If so, it is not an offence *deduced from principle only*, as was contended, but in contravention of a positive law.

Devest this case of the circumstance that the person acting as solicitor, being a master of the court, and it is clearly within the case from *Burrow's Reports*.†

I still retain my opinion, that the master filed the bill in question, contrary to the provision of the statute.

* 6 *Term Rep.* 663. † 1 *Burr.* 20.

2dly. That he did it without the consent or privity of *Peter W. Yates:*

3dly. That he counterfeited his name to the bill; and,

4thly. That if he had obtained his consent, it would still have been gross mal-practice; and so thinking, I shall direct the order, permitting the master to show cause, to be discharged.

Though the commitment, I found upon consulting precedents, must be absolute, and without any precise limitation, I shall have no doubt that its duration ought to be contracted as much as a due attention to public justice will admit, as the first instance of the kind occurring in the state; but an application to terminate it can only be listened to, after the party injured has been fully remunerated.

It has been said, and urged with much earnestness, that a commitment will be a harsh measure; that its disgrace is always felt more exquisitely by men in honourable and respectable stations in society, than by those of inferior grade. It ought to be so; but the sensibility attributed to men of the superior grade, ought to operate as a powerful restraint, to deter them from acting improperly.

The court cannot yield to considerations of that kind, in a case circumstanced as this is; for, though it cannot detect all the hidden sources of public oppression, connected with the details of official duty, exacted from its numerous officers, it must vindicate the purity of the administration of that part of the commutative justice of the state intrusted to its distribution, whenever they are disclosed so as to become objects of its animadversion; and bear its testimony against them, at least by enforcing the sanctions heretofore established, on whomsoever they may fall. To act otherwise, would be to violate one of its most impressive duties.

The following order was thereupon entered

At a Court of Chancery, held for, &c. the 8th day of August, 1808.

DUE consideration having been had upon the subject matter of the said complaint, and the several proofs adduced respecting the said complaint and the defence of *John V. N. Yates*, it is ordered, that the order of the 13th day of *June* last, permitting the said *John V. N. Yates* to show cause why the order heretofore made on the said 13th day of *June* last, in the above matter, should be abrogated and avoided, be discharged.

At a Court, &c. held, &c. at, &c. the 22d day of August, 1808.

ORDERED, That the sheriff of the city and county of *Albany* return the attachment issued in this matter, by *Monday* next, and his doings by virtue thereof; and that the register cause a certified copy of this order to be forthwith served on the said sheriff.

The People of the state of New-York, *to the Sheriff of the city and county of* Albany, *greeting:*

WHEREAS, in and by a certain order, made before our chancellor of our said state, in our court of chancery, on the 13th day of *June* last past, in the matter of complaint of *Samuel Bacon* against *John V. N. Yates*, Esquire, it is set forth, that upon reading the affidavits of *Samuel Bacon*, *Peter W. Yates* and *Richard S. Treat*, and upon fully considering the subject matters thereof, it appearing satisfactorily to this court, that the said *John V. N. Yates*, during the time he was a master of the said court, had filed a bill of complaint with *Richard S. Treat*, Esquire, one of the clerks of the said court, on behalf of *Samuel Bacon*, as complainant, against *Henry Garretse* and *Charles Morris*, as defendants, and thereto subscribed the name of *Peter W. Yates*, one of the solicitors of the said court, as solicitor, without the knowledge or consent of the said *Peter W. Yates*, and had acted as solicitor in the said cause, in the prosecution thereof, in the name of the said *Peter W. Yates*, contrary to the statute in that case made and provided, in wilful violation of his duty as master, and in contempt of the authority of the said court; it was therefore ordered by our said court, amongst other things, that the said *John V. N. Yates* be committed, for his said malpractice and contempt, to the common gaol of the city and county of *Albany*, there to remain until the further order of our said court.—Now therefore we strictly enjoin and command you, that you attach the said *John V. N. Yates*, Esquire, and convey him to the common gaol of the city and county of *Albany*, there to remain, until the further order of our said court of chancery. Witness, the honourable *John Lansing*, jun. Esquire, chancellor of our said state, at the city of *Albany*, the seventeenth day of *August*, in the thirty-third year of our independence.

VAN INGEN, Clerk.

THE execution of the within writ appears by the annexed return.

S. SOUTHWICK, Sheriff.

IN obedience to the writ of attachment hereto annexed and to me directed and delivered, I do most humbly certify to the honourable the court of chancery of the state of *New-York*, that I did attach the said *John V. N. Yates* in the said writ named, and had him in my custody in

the common gaol of the city and county of *Albany* until the coming to me of the people's most gracious writ of *habeas corpus* to me directed and delivered, thereby commanding me to have the body of the said *John V. N. Yates* before the honourable *Ambrose Spencer*, Esquire, one of the justices of the supreme court of judicature of the state of *New-York*, before the said justice, immediately after the receipt of the said writ, at the dwelling-house of *Joshua B. Aldridge*, in the town of *Milton*, in the county of *Saratoga*, and which said writ of *habeas corpus* was allowed by the said justice; that thereupon, in obedience to the command of the said *habeas corpus*, I did bring the said *John V. N. Yates* before the said honourable *Ambrose Spencer*, Esquire, the justice named in the said writ of *habeas corpus*, according to the command of the said writ of *habeas corpus*, to wit, on the 19th day of *August*, instant, at the dwelling-house of the said *Joshua B. Aldridge*, in the town of *Milton*, in the county of *Saratoga* aforesaid, and that thereupon the said *Ambrose Spencer*, Esquire, the said justice, did direct and order the said *John V. N. Yates* to be set at large, which said order of the said justice is of the following tenor, that is to say:

"*In the matter of* John Van Ness Yates:

"THE said *John V. N. Yates* having been brought before me, at the house of *Joshua B. Aldridge*, in the town of *Milton*, in the county of *Saratoga*, in obedience to the writ of *habeas corpus*, by me allowed on the 18th instant, and the sheriff of the city and county of *Albany* having certified the cause of the caption and detention of the said *John V. N. Yates* to be a warrant of commitment issued out of the court of chancery of this state, a copy whereof is annexed to the said *habeas corpus*, and it having been made satisfactorily to appear to me, that the said commitment was not for any contempt committed by the said *John V. N. Yates* towards the said court of chancery, but that the same was for an alleged mal-practice on the part of the said *John V. N. Yates*, as a master in chancery, in using the name of *Peter W. Yates*, as a solicitor in a certain cause therein, without his consent, and in violation of the 9th section of the act relating to counsellors, solicitors and attorneys, and I, having duly considered the matters set forth in the said commitment, am of opinion, that the said commitment is illegal and unprecedented, and do therefore order the sheriff of the city and county of *Albany* to set at large the said *John V. N. Yates*. Given under my hand, this 19th day of *August*, 1808. AMBROSE SPENCER."

And that thereupon, I, the said sheriff, in obedience to the order aforesaid of the said honourable *Ambrose Spencer*, Esquire, the said justice, did, on the said 19th day of *August*, instant, set at large and discharge the said *John V. N. Yates*.—All which I do most humbly certify and return. S. SOUTHWICK, Sheriff.

On the 5th *September*, 1808, after the attachment and return had been read, the following opinion was delivered by

THE CHANCELLOR. That a *habeas corpus* is a proper remedy, in all cases of unlawful imprisonment; that the judicial officers, to whom is confided the important trust of

determining on the legality of imprisonments, are not to be restrained by the consideration, that such imprisonments are imposed by officers of co-ordinate, or superior grade, I am not disposed to deny; but the most liberal construction of their authority will circumscribe it by some limits which it is not legally competent to them to overleap.

A difference of opinion on subjects which seldom occur, which require the research and reflection of the most learned and distinguishing judges to determine correctly, cannot be considered as surprising. To decide, however, and to decide promptly, is frequently an impressive duty; and hence the distinction has been uniformly taken between decisions at *Nisi Prius*, and the opinions better digested, and adopted with more consideration and examination, at bar. The former being the impression of the moment, necessarily hasty, and frequently determined on general principles, from recollections perhaps not perfectly distinct; the latter, the result of deliberate investigation.

These remarks are dictated by the subject matter of the return, from which it appears that little time was afforded for deliberation; and as the collision of judicial opinions, in matters relating to personal liberty, are, from their object, particularly interesting, as in cases of interfering jurisdictions, they become embarrassing to the executive officers, I should certainly feel a strong disposition to acquiesce in the discharge, if I could have any possible doubt that the interference on this occasion had not been an improvident one; for the opinion given on the subject by Mr. Justice *Spencer*, has not so much weight with me as it would have had, if it had been formed upon mature reflection, and with a ready access to authorities, and not under circumstances probably less favourable to either, than at a circuit. But, thinking as I do, that the interference cannot be supported on any legal principles; convinced that if it can be sustain-

ed, it must destroy not only the corrective powers of this court, but those of the supreme court, subvert their authority, enable their officers to set them at defiance, and leave those officers to prey upon the community, without the restraints which all courts have not only a right, but which it is their duty to impose and enforce, I cannot yield an opinion which I am convinced, upon deliberate review, is legally correct, and which appears to me so clear, as almost to excite surprise, that a difference among the judiciary should exist respecting it. The courts of common law are limited in the exercise of their most important powers to their ordinary terms. During those terms, the judges may either collectively, or individually, compose a court; but in the vacation, they are insulated in the execution of their official duties; they respectively exercise certain portions of judicial powers, but they cannot form a supreme court. They are neither, in common parlance, nor in legal contemplation, a court. The flow of judicial powers immediately from the court as such, the issuing of process excepted, is suspended; and hence no one judge, nor even the whole of the judges united, can, in vacation, be considered as a supreme court; so that if the supreme court was co-ordinate with this court, with respect to matters of this kind, and legally competent to review and determine upon the proceedings of this court, in cases of contempt, it would not follow, that each of its judges possessed the same power, in vacation; but it would inevitably follow that this court, which is always open, could, at all times, and in all cases of contempt, re-examine those of the supreme court, and pronounce, merely on the return of the sheriff, that the orders for commitment by the supreme court were illegal, though those orders should be silent as to the precise nature of the contempt. This to me appears, from an examination of authorities, has never been the usage of the courts of *West-*

minster-Hall; nor has it, I believe, ever been attempted heretofore, and must be productive of infinite mischief, if it could be done.

In *Chauncey's* case,* the authority of the court was denied. In the case of the Earl of *Shaftsbury*, it was held that the return was ill; but the court determined that the earl should be remanded, on the ground that the house of lords had jurisdiction, and had adjudged the contempt.

In *Chambers's* case,† he was committed for a contempt in the star-chamber. The court of king's bench say, that to deliver one who is committed by one of the courts of justice, was not the usage of that court.

In an anonymous case,‡ it is laid down, that as a judicial court had committed, the K. B. would neither discharge nor bail.

In *Bethel's* case,§ it appeared, that the commitment was by a court having jurisdiction; but the return was informal, notwithstanding which the prisoner was remanded.

In the celebrated case of *Crosby*, lord mayor of *London*,** *De Grey*, chief justice, in giving the opinion of the court, goes fully into the doctrine of commitments for contempts. He lays it down as settled law, that if the commitment is made by those who have authority to commit, the court of king's bench cannot discharge, or bail the party committed, nor can they discharge or bail one committed on execution; that each of the courts of *Westminster* and the court of *Durham* are the sole judges of the contempts incurred in those courts. He adds, "as the court cannot go out of the return of the writ, how can we inquire into the truth of the fact as to the nature of the contempt? If we could determine upon the contempts of any other court, so might the courts of *Westminster-Hall*, and what confusion would then

* 12 *Rep.* 83. 9 *Jac.* I. † *Cro. Car.* 168. ‡ *Cro. Car.* 579.
§ 5 *Mod.* 23. 7 *Wm.* III. ** 3 *Wils.* 188.

ensue ?" In his reasoning relative to the house of commons, in which he attributes to them certain portions of judicial power, he observes, that when they adjudge any thing to be a contempt, or breach of privilege, their adjudication is a conviction, and their commitment, in consequence, an execution ; and concludes, that the court can do nothing when a person is in execution by the judgment of a court having competent jurisdiction, because the court was not a court of appeal ; and he alleges, that he had not found any case, where the courts have taken cognisance of such execution, or of commitments of this kind ; that there is no precedent of *Westminster-Hall* interfering in such a case.

In another part of his opinion, he says, "as for the chancery committing for crimes, that is a different thing, because the chancery has no criminal jurisdiction ; but if that court commits for contempts, the persons committed, will not be discharged by other courts." *Gould*, justice, concurred in this opinion, and observed, " that the cases produced respecting the high court of commission, &c. are not to the present purpose, because those courts had not a legal authority ; the resolution of the house of commons is an adjudication, and every court must judge of its own contempts."

Blackstone, and *Nares*, justices, also concurred: the former asks, " can any good man think of involving the judges in a contest with either house of parliament, or with one another?" If these cases, and several others* which might be cited, are applicable to the present, they prove conclusively, that none of the courts of *Westminster-Hall*, interfere with contempts adjudged in any of the others ; that they profess not to review each other's reasons for commitments for contempts ; that they consider them in the nature of execu-

* 2 *Term Rep.* 190. 4 *Term Rep.* 220. *March.* 52. 189. *Langham's* case, 3 *Rep. in Chan.* 41. 1 *Dick.* 61. 325. 1 *Bro. P. C.* 519. 1 *Rep. in Chan.* temp. *Finch.*

tions; and of course, that the court of chancery and the supreme court, the latter of which exercises the powers of the *English* court of K. B. common pleas, and exchequer, in this state, are neither authorised by legal principles, or precedents, to interfere in each other's commitments for contempts. If so, the ground which has been assumed in the present case, of a right of review of an adjudication of this court, by a single judge, in vacation, is still less tenable.

From the sheriff's return, it does not appear whether the *habeas corpus* which issued, was at common law, or under the statute ;* but at common law, the *habeas corpus ad subjiciendum* could not regularly issue from the king's bench, nor be returnable, but in term. From chancery, as the *officina brevium*, it always issued both in term, and vacation; but an original writ of that nature, must always have been returnable in term time.

The statute extends the power of issuing, and making the writ returnable before a judge, in vacation, as in the third section it enacts, that "if any person shall be imprisoned in vacation time, it shall be lawful for every such person, other than persons convict, or in execution by legal process, &c. to apply to the chancellor, or any judge of the supreme court," for a *habeas corpus ;* thus expressly excluding cases, in which the persons committed are convicted, or in execution, from the power conferred by the statute, on a judge in vacation.

What evidence was admitted on the return of the *habeas corpus* I know not; but if the reasons assigned for the discharge were collected from the attachment, the inference that the contempt was incurred exclusively by a violation of the 9th section of the act alluded to, is not warranted; for there is nothing in the attachment thus to limit it. If it was a conclusion from matter extrinsic, it would strongly

* *Hale's Pleas of the Crown*, 145. 147. 2 *Inst.* 52. 81. 290.

exemplify the solidity of the rule, which precludes a resort to it, for it is wholly, and truly unfounded, and indeed repugnant to the terms of the attachment.

Upon the whole, upon mature reflection, deeming the interference attempted such a one as it is my duty to resist, unfounded in law, and untenable in every view, in which I have been able to place the subject, I hold the discharge invalid, and shall, therefore, make an order again to commit the master, as he ought legally, to have remained in the custody of the sheriff, on the attachment.

An order was entered accordingly, in the following words:

At a Court, &c. held, &c. the 5th Sept. 1808.

UPON reading and filing the attachment issued in this matter, and the return of the sheriff of *Albany* thereto, by which it appears, that *John V. N. Yates*, Esquire, pursuant to the command of said attachment, having been arrested by the said sheriff of *Albany*, was thereupon discharged by virtue of an order made by the hon. *Ambrose Spencer*, Esq. one of the justices of the supreme court of this state, and due deliberation having been thereupon had, and the said court deeming the said discharge repugnant to the laws of this state, legally inoperative and void; It is therefore ordered, that the sheriff of *Albany* forthwith retake the body of the said *John V. N. Yates*, if he shall be found in his bailiwick, and recommit him to the common gaol of the city and county of *Albany*, for his contempt and mal-practice, as in the said attachment he was commanded, there to remain until the further order of this court, and that the said sheriff certify his doings, by virtue of this order, to this court on the second *Monday* of the next term.

A certified copy of the last order having been delivered to the sheriff of *Albany*, he did on the 19th day of the same month of *September*, certify to the court of chancery, in the following words:

"In obedience to an order of the honourable, the court of chancery of the 5th instant, and by me received this day, (a certified copy whereof is hereto annexed,) I do most humbly certify to the said court, that after the receipt of said order by me, to wit, on this 12th *September* instant, I did arrest the said *John V. N Yates*, and had him in my custody, until the coming to me of the people's most gracious writ of *habeas corpus*, allowed by the honourable *Ambrose Spencer*, Esq. one of the justices of the supreme court of this state; that by virtue of the command of the said *habeas corpus*, I did bring the said *John V. N.*

Yates before the said honourable *Ambrose Spencer*, Esq. who thereupon commanded, and required me to set at large the said *John V. N. Yates*, by virtue of an order issued by him, and which is in the following words and figures, to wit:

"In the matter of *John V. N. Yates.*

"The sheriff of the city and county of *Albany*, in obedience to a *habeas corpus* by me allowed this day, having made return, that the said, *John V. N. Yates* is detained in his custody, by virtue of a certain order, made by the court of chancery, and annexed to the said writ of *habeas corpus*; and it appearing thereby, that the said *John V. N. Yates* hath been again taken, and imprisoned, for the same matter and cause, whereon he was imprisoned, when discharged by me on a *habeas corpus*, on the 19th day of *August* last past, and for no other matter or cause whatsoever: Whereupon, on full and mature consideration had in the premises, I am of opinion, not only that the original cause of the caption of the said *John V. N. Yates* was illegal, but also, that the taking and detaining him, on the said order, annexed to the said writ, is illegal, and unwarrantable, and subversive of the liberties of the citizens of this state; and I do require and command the said sheriff, forthwith to discharge the said *John V. N. Yates* from his custody.

"Given under my hand, this 12th day of *September*, 1808.

"*Ambrose Spencer.*

"And I do further most humbly certify, that in obedience to the said order of discharge, of the said honourable *Ambrose Spencer*, Esq. and apprehending the penalty, prescribed in and by the 5th section of the act, entitled, "an act to prevent unjust imprisonment, by secu-"ring the benefit of the writ of *habeas corpus*, passed 24th *March*, "1801," I did discharge and set at liberty the said *John V. N. Yates.* All which I do most humbly certify, to the said honourable the court of chancery.

"The answer of *S. Southwick*, sheriff.

"Dated 12th *September*, 1808."

On the 20th day of the same month of *September*, the said order and certificate having been read, the CHANCELLOR gave his opinion, as follows:

This case again comes up on the sheriff of *Albany's* certificate, in obedience to the order, made for the recommitment of the master.

From that certificate it appears, that Mr. Justice *Spencer*, upon "full and mature consideration," has deliberately pronounced, that not only the original cause of the caption of the said *John V. N. Yates* was illegal, but the taking and detaining him, on the said order annexed, was "illegal, and unwarrantable, and subversive of the liberties of the citizens of this state;" and that he has reitera-

ted the order for his discharge, to which the sheriff has added, that in obedience to the order, "and apprehending the penalty, prescribed in the 5th section of the act, entitled, "an act to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*," he discharged and set him at liberty.

It would be an impotent attempt, to travel over the same ground, and to order a recommitment, if a judge of the supreme court can thus discharge; and it cannot subserve the purposes of justice, for this court to exert its powers on the subject, by a repetition of commitments, which will, in the present state of the contest which has arisen on this occasion, be followed by a repetition of discharges.

I have heretofore had occasion to express my conviction, that the interference of one of the justices of the supreme court, in a case in which a commitment has been adjudged by this court, for mal-practice and contempt, was neither warranted by law, nor the usages which had obtained in this state, and I still retain the same opinion.

It is one of the happy circumstances of our country, in which this state yields to none composing the *American* union, that all our rulers are accountable, in some mode or other, for their official conduct; that if the men who have been selected from the community at large, to dispense its justice, and enforce its laws, are capable of being warped by improper motives; if they pursue measures illegal, unwarrantable, and subversive of those liberties which it ought to constitute their pride to have been thought worthy to protect; it must be consoling to every friend of political liberty, to reflect, that they may be arrested in their illegal career, by the hand of that justice they have been appointed to administer, with the same effect, as the least considerable of their fellow-citizens. Responsible for the pure administration of the justice which is to flow from this court,

for the benefit of the people at large, my motives to enforce that justice become more impressive, from the high confidence legally reposed in it; and it would certainly ill accord with my sense of the sacred obligation under which I act, to shrink from a duty which I supposed necessary to vindicate the dignity of the laws, and to exemplify the salutary doctrine which pervades our whole system of jurisprudence, that to the powerful and feeble they are to be applied with an equal and impartial hand.

Upon my judicially determining that the interference of a single judge to obstruct the process and impede the justice of this court, was unwarranted; that his proceedings were *coram non judice;* it followed, as a necessary consequence, that his reiterating his interference might or might not, according to circumstances, be imputed to him as a contempt of this court, for though a judge acting in the sphere of his jurisdiction, cannot, unless actuated by corrupt motives, be impeached or questioned, it is otherwise, where such jurisdiction does not exist; he is then exposed to be treated as a contemner of the court with whose process he interferes.

The justices of the supreme court would without hesitation, and on the most correct legal principles, treat as a contempt, the interruption of their proceedings, by any judge of a court of common pleas, however honest his convictions might be, that he had a right to interfere; and there is no difference between that case and the present, if the principles I act upon are legally correct, excepting the superior trust, weight and importance attached to the station of a judge of the supreme court, and the superior legal discernment constitutionally attributed to him.

If such should be my duty, it requires a greater effort on my part to say, that I would make an order on Mr. Justice

Spencer, to show cause, why his illegal interference, should not be deemed a contempt, than actually to make such order.

Unless my judgment is convinced, I must, as far as I legally can, maintain a point, with which the proper regimen of this court is essentially connected; but it is certainly gratifying to me, that though I am strongly and clearly impressed, that my opinion is correct, I have it in my power, (without availing myself of my official superiority, derived from my acting judicially, as a court, against a judge acting extrajudicially, to enforce an observance of my construction of the law,) to leave it in a situation, in which it can receive the judicial determination of the court of which Mr. Justice *Spencer* is a member.

If the opinion of the justices of the supreme court collectively, is pronounced on this subject, though it will not form an authoritative rule for this court, it will be received with that deference, which the weight of the legal opinions of that tribunal so eminently merit; and if it should differ from mine, though their arguments should not convince my judgment, that I was mistaken, I shall certainly endeavour to give the question a complexion, as little favourable to future controversy as possible.

For this purpose, I shall again make an order for a recommitment; but it will be done in a manner which, while it precludes the interference of a single judge, may bring the question of the legality of the interference which has been attempted, before the justices of the supreme court, in term time, during which the powers of a single judge, unless that judge should constitute a court, as to the granting writs of *habeas corpus*, are suspended, as they must be allowed in open court.

It does not appear from the certificate of the sheriff, and it was not proper it should appear from it, unless it

had been expressed in the order of discharge, that any other reasons were given for the discharge, than that the taking of the master, and detaining him on the said order, was "illegal and unwarrantable, and subversive of the liberties of the citizens of this state;" terms too general and indefinite, from which to collect the reasons which governed the decision; but, as among the reasons formerly assigned, the commitment was deemed unprecedented, and hence the jurisdiction of this court in cases of this kind, denied, I cannot avoid making some remarks on that subject.

It appears that from the earliest history of the court of chancery,* it has committed for misdemeanors and mal-practice, as for contempts against its authority; and through all its progressive stages to the present day, that jurisdiction is marked by indelible lines, but treated throughout as a subject admitting of no doubt.

Hence we find† an attachment granted for putting in a demurrer, after applying to have the rule for pleading enlarged; that a solicitor was held to be in contempt for want of filing a bill; a commissioner, for permitting a defendant to escape; a person for terrifying a witness, abusing a party, or prejudicing mankind before the hearng of a cause, though the court was spoken of with great respect; for publishing an advertisement respecting the proceedings of the court; a solicitor for grossly neglecting his client's concerns; and it is said, for printing a brief clandestinely obtained; and, at common law, for neglecting to file a warrant of attorney.

* *Mosely*, 250. 8 *Co. Rep.* 119.

† *Cary*, 111. *Tothill*, 15. *Prac. in Chan. Unfolded*, 127. *Tothill*, 38. 2 *Atk.* 471. 2 *Dick.* 794. 2 *Vezey*, 520. *Barnardist. Rep. in Chan.* 403. 3 *Equity Cases Abridged*, 403. *Wyatt's P. R.* 140.

Several writers* on the practice of this court, who have been considered as authority on the subject of such practice, lay down the general doctrine, that it is a contempt to do any thing under colour or pretence of process or authority of the court, without such process or authority; that where a clerk or solicitor is in custody for ill practice, or other misdemeanor, &c. speaking of it as a thing of ordinary occurrence; that where a clerk in court or solicitor is committed, for mal-practice or misbehaviour in his known duty, the court will discharge him, upon a petition signed by him, wherein he must beg pardon, be sorry for his contempt, and pay costs. In all these cases, the commitments were for mal-practice, as a contempt for using the authority of the court unwarrantably, as for issuing a subpœna without filing a bill; for interfering unfairly, as intimidating a witness; abusing a party; prejudicing mankind; for a neglect of duty, as in the case of the solicitor who grossly neglected it; and for acting contrary to common honesty, as in the case of the person who clandestinely possessed himself of the brief of the opposite party and published it.

In the case, decided in the court of exchequer chamber, an attachment was granted for signing a counsel's name to the bill in equity without his consent.

In the present case the master was not a solicitor, but he acted as such; and thus, under colour of the authority of the court, which he had no right to use, he vexed the defendant, and deceived the complainant, obtaining from the latter, money for services of no value, and delaying

* *Digest of early cases, cites* 1 *B. P. C.* 519. *Bateman* v. *Conway.* *Bro. Abr.* 171. pl. 21. *Practical Register*, 99. *Wyatt's P. R.* 133. 138. 1 *Harris. Ch. Pr.* 200. As to courts of common law, see *The People* v. *Smith*, 2 *Cainés's Rep.* 221. *Sayer*, 51. 169. *Com. Dig.* tit. *Attachment.* (A. 3.)

his cause, under various pretences, from a consciousness that he was incapable to prosecute it.

The sheriff's certificate refers to the fifth section of the *habeas corpus* act; in this he has been ill-advised. His apprehensions could neither form a correct ground to direct his own official conduct, nor for that of this court. This court will do what the law requires from it, and its officers must obey at their peril.

That section had, however, been attended to, when the order for the recommitment was made. It inhibits the reimprisonment, for the same offence, of a person set at large by virtue of a *habeas corpus*, *unless by the legal order or process of a court having jurisdiction of the cause*. Having no doubt of the jurisdiction of this court, and being determined to maintain it, by every legal means in my power, I disregarded the provision, as totally inapplicable to the case.

In pursuance of this opinion, an order substantially similar to that of the 5th day of *September* was entered.

At a Court, &c. held, &c. the 20th Sept. 1808.

UPON reading the order made in this matter on the fifth day of *September* instant, and the certificate of the sheriff of *Albany*, in obedience thereto, by which it is certified that [as in the preceding certificate of the sheriff.]

And forasmuch as the commitment for the mal-practice and contempt, heretofore adjudged by this court to have been committed by the said *John V. N. Yates*, has not been remitted by this court, or the said contempt purged; and this court deem the discharge aforesaid, repugnant to the laws of this state, inoperative and void: It is therefore ordered, that the sheriff of *Albany*, forthwith retake the body of the said *John V. N. Yates*, if he shall be found in his bailiwick, and recommit him to the common gaol of the city and county of *Albany*, for his contempt and mal-practice, as in the attachment heretofore issued, in this matter, he was commanded, there to remain, until the further order of this court; and that the register cause a certified copy of this order to be served on the said sheriff, in the first week of the next term of the supreme court of judicature of this state, to the end, that the opinions of the justices of the said court may be taken, on the legality of the interference of that court, or any of its justices, in matters of mal-practice and contempt, adjudged by this court, before any further proceedings be had here in this matter, and that the said sheriff certify his doings, by virtue of this order, to this court, on the 28th day of *November* next.

At a Court, &c. held, &c. the 5th Dec. 1808.

Forasmuch as this court did, on the 20th day of *September* last, make an order in this matter, in the following words and figures—[As in the preceding order.] And a certified copy of the said order, having, in due time, been delivered to the sheriff of *Albany* to be executed in due form of law, and the sheriff having, on *Monday* last, made a return of the said order, that the defendant was not found in his bailiwick. Therefore it is ordered, that the sheriff of *Albany*, retake the body of the said *John V. N. Yates*, if he shall be found in his bailiwick, and recommit him to the common gaol of the city and county of *Albany*, for his contempt and mal-practice, as in the attachment heretofore issued, in this matter he was commanded, there to remain, until the further order of this court; and that the register cause a certified copy of this order to be served on the said sheriff, in the first week of the next term of the supreme court of judicature of this state, and that the said sheriff certify his doings, by virtue of this order, to this court, on the 20th day of *February* next.

THE END.