The Legal News.

Vol. I. JULY 20, 1878. No. 29.

JUDICIAL LIABILITY.

The case of *Lange* v. *Benedict*, a report of which appears in the present issue, is interesting as a very recent re-examination of the law concerning judges and their liability for judicial acts. Lange had been convicted of an offence for which the punishment prescribed by statute was $200 fine or one year's imprisonment. The defendant, Judge Benedict, presiding at the court, sentenced him to both the fine and imprisonment. Lange paid the fine, and then applied by writ of *habeas corpus* for release from imprisonment. This was a perfectly reasonable and natural course, and it might seem that even the judge who had made the blunder could not find anything in it to object to. But the writ being returned before him while yet holding the term of the court at which the conviction was had, Judge Benedict set aside the former sentence, and re-sentenced the plaintiff to one year's imprisonment. The case was carried to the Supreme Court of the United States, by which the Judge's act was declared to have been without authority of law, and the release of Lange was ordered. By this time the latter seems to have become angry at the treatment to which he had been subjected, and he brought an action against the Judge, setting up the facts of the case, alleging that the act of the Judge was wilful and without authority, and claiming damages for false imprisonment. At the outset his pretensions appear to have met with some favor, for the defendant having demurred to the action, on the ground that he was not liable for the consequences of any act done by him as a judge of a court of general jurisdiction, the demurrer was overruled at Special Term. At the General Term, however, this judgment was reversed and the demurrer sustained, and the N. Y. Court of Appeals, by the judgment reported elsewhere, has affirmed this decision. A judge is, therefore, held to be absolved from the consequences of illegal acts, even wilfully done, and it will be seen by the authorities cited in the judgment that the doctrine is not new.

It will be noticed that the plaintiff did not allege malice on the part of the Judge. Such an allegation, however, under the ruling of the Court, would not prevent the declaration from being demurrable, and we can see no great difference in substance between an illegal act wilfully done, *i. e.*, a wilful abuse of the powers of the court, and an illegal act done with malicious intent. Our contemporary the *Albany Law Journal*, remarks: "Perhaps such a rule is necessary to secure independence to the judiciary; but it would seem that a person injured by a gross abuse of judicial power, such as the act committed by defendant was, should not be remediless." This is true. Under our system, however, the remedy is clear. The terrors of a public impeachment are at the command of the oppressed, and are quite sufficient to make the most obstinate judge listen to reason. But happily the occasion for such a remedy will seldom arise, and certainly it is one which should not be adopted without grave cause.

EVIDENCE OF EXPERTS AS TO FOREIGN LAW.

English judges, in the more recent cases, have looked with some jealousy upon the evidence of experts upon questions of foreign law. One of the leading authorities on the subject is *The Sussex Peerage case*, 11 C. & F. 85, where the House of Lords permitted the late Cardinal Wiseman, as a Roman Catholic bishop and coadjutor to a vicar apostolic in this country, to give evidence as to the matrimonial law of Rome. Lord Langdale based his decision on this ground: "He is engaged in the performance of responsible public duties, and connected with them; and in order to discharge them properly he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a judge." In *Van Donckt* v. *Thelluson*, 8 C. B. 812, the Court of Common Pleas allowed the law of Belgium as to a promissory note payable in that country to be proved by a London hotel-keeper, who was a native of Belgium, and had formerly carried on business at Brussels as a merchant and stockbroker. Mr. Justice Maule observed: "Applying one's common sense to the matter, why should not persons who may reasonably be supposed to be ac-

quainted with the subject (though they have not filled any official appointment, such as judge, or advocate, or solicitor) be deemed competent to speak upon it? * * * All persons, I think, who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required." On the other hand, in *Bristow* v. *Sequeville*, 5 Ex. 275, the Court of Exchequer refused to allow the law of Prussia as to a question of stamp duty to be proved by a witness who had merely studied that law at the University of Leipsic. Mr. Baron Alderson inquired why, if the evidence were admissible, "may not a Frenchman, who has read books relating to Chinese law, prove what the law of China is." This decision was followed not long ago by Sir James Hannen (*In the Goods of Bonelli*, 24 W. R. 255; L. R., 1 P. D. 69), who refused to decide a question of the testamentary law of Italy upon the affidavit of a gentleman who described himself as a "certified special pleader" and "familiar with Italian law," there being nothing to show that his familiarity with the Italian law was obtained otherwise than by studying it in this country. And the same judge gave a similar decision last week in *Cartwright* v. *Cartwright and Anderson*, an undefended divorce suit, the marriage between the parties having been celebrated at Montreal. In order to prove the validity of the marriage according to the law of Canada, the counsel for the petitioner called Mr. Bompas, Q.C., who deposed that he was familiar with Canadian law, having practiced for many years in Canadian appeals before the Judicial Committee of the Privy Council, which is the final Court of Appeal for the Dominion of Canada. Sir J. Hannen declined to admit Mr. Bompas' evidence or to hold that an English barrister by practicing before the Privy Council becomes an expert as to any system of law in respect of which the Privy Council may be the final Court of Appeal.—*Solicitors' Journal.*

LEASE, VOID OR VOIDABLE.—In *Davenport* v. *The Queen*, (London L.T., Feb. 9, 1878, p. 727), *Held*, That a clause in a lease declaring that it shall be void upon a breach of conditions by the lessee, means that it is voidable only at the option of the lessor, even if the condition was imposed by statute.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

MASSÉ v. HOCHELAGA MUTUAL INSURANCE CO.

Insurance Policy—Condition—Waiver.

A condition in a policy of a mutual fire insurance company provided that in case any promissory note for the first payment on any deposit note should remain unpaid for 30 days after it was due, the policy should be void as to claims occurring before payment. *Held*, that the company, accepting a note for such first payment, but acknowledging receipt by the policy as for cash paid, waived the condition.

JOHNSON, J. This is an action to recover the amount of a loss by fire on the 15th August, 1877, under a policy of insurance for three years from the 10th March, upon an engine lathe in a building described in the policy. The plaintiff alleges the execution of the policy, the giving of his deposit note for $79.24, and the payment of the first assessment on it amounting to $11.89. Then he alleges the fire, and destruction of the thing insured, and notice of loss. The defendants plead, besides the general issue, two pleas. By the first, they set up the 19th condition of the policy, which provides that in case any promissory note for the first payment on any deposit note shall remain unpaid for thirty days after it is due, the policy shall be void as affects all claims for loss occurring during the time of such non-payment, subject, however, to revival after payment; that the plaintiff gave his deposit note for $79.24, as alleged, on which a first payment of $12.05 ought to have been made when the policy issued; but instead of paying that sum in money, the plaintiff gave his note at thirty days, which became due on 12th of April, and remained due at the time of the fire, which was on the 15th of August. Second, the defendants set up the 12th condition of the policy, by which notice of fire and proof of loss are to be made within 30 days after a fire; and they also set up the Provincial Statute of Quebec, 40 Vic. c. 72, sec. 28, which provides for such notice and proofs of claim, and obliges the company within 30 days afterwards to ascertain and determine the amount of loss, and notify the claimant of their determination by a prepaid and registered letter, and makes the amount of loss payable in three months after the receipt

of the proofs; and they say the plaintiff violated both conditions, and also the Statute. The plaintiff makes two special answers: first, that these conditions are no part of the policy, not being in the body of it, but only printed on the back; and that the receipt for the deposit note of $79, and for the first assessment $11.89, are conclusive, and a waiver of the condition. By his second special answer he says that the note for $12.05 was in fact paid on the 15th September, and the risk thereby revived. I am clear that these conditions are part of the contract. The application for insurance makes them so. There is warning given by an express reference to them on the printed endorsement, and the plaintiff, as a member of a mutual company, and both insured and insurer, uses these conditions towards other members, and must be held to them himself.

As to the non-payment of the note given for the 1st assessment, can the Plaintiff prove the note at all in the face of the policy by which this corporation under its seal acknowledges that the Plaintiff "has deposited in the hands of the "directors of the Company his note on demand "for $79.42, of which the sum of $11.89 has "been paid to the directors," and further, in the face of their interim receipt that the Plaintiff "has given a deposit note for $79.24, and "made a cash payment thereon of $11.89."

The evidence was taken under reserve of objection made at the time, and on looking at the case now, I feel no hesitation in ruling out the evidence on that subject. The point is not now, under this first special answer, as to the effect of this 19th condition if it could be legally proved that a promissory note had been given, and was overdue and unpaid at the time of the fire; but whether, when the Defendants themselves acknowledge in writing that the payment was in cash, they can be allowed to prove the reverse of what they have admitted in the contract. The effect of a payment by note is one thing: It may be an absolute payment in certain cases, or it may be defeated by the happening of the condition, *i. e.*, non-payment at maturity: That question is very nicely treated in Benjamin on Sales. c.2, Book IV, on payment and tender; but what I am concerned with now is whether this corporation, confessing under its seal that it has received payment, can be allowed to prove that it has not; and it would be against all principle to allow that it can. On this point I would merely refer to the collection of authority in Sansum's digest, page 900 et seq., where it will be seen that the point has been over and over again decided in accordance with the Plaintiff's first special answer. Therefore the question raised by the second special answer of the Plaintiff made without waiver of the first, that this note had been paid on the 15th of September, whereby the risk revived, is not reached. There is no violation of the condition No. 19, because the Defendants have waived it by express admission in the contract, which prevents the proof of it.

There remains therefore the question of notice and proof of loss under the twelfth condition. Upon this point I am against the Plaintiff. The notice and proofs required by that condition have not, in my opinion, been given as the parties agreed that they should be given. Notice of loss was to have been given "forthwith" in writing. The only thing in the nature of notice in this case was what is contained in the two papers produced by the Defendants as Exhibits 1 and 2. They are notices by a Mr. Babcock acting, as he says, in his own interest, and in that of the Plaintiff. They were not delivered forthwith—nor even within thirty days. As to proofs of loss, the insured was required to make them within the 30 days—so that the Company could exercise its right within the time, and in the manner stated in the 28th section of the act. The assured seems to have sworn to his loss by attorney: That is to say he never swore to it at all, for his attorney could surely not make oath to facts known only to the principal. Then a Mr. Annett swears to the value; but not the destruction of the thing insured. The object of such a condition, which is evidently to put the insurer in a position, within a reasonable time, to judge of the facts, is obviously frustrated, if this can be held to be a compliance with it. There must be fair play on both sides.

Action dismissed.

Lambe, for the plaintiff.

Lunn & Co., for the defendants.

WILLIAMS v. MONTRAIT.

Discontinuance—Costs—Attorney's Right to proceed for.

Held, that an attorney *ad litem* has a right to continue the suit for the recovery of his costs, though his

client has agreed to discontinue the case without costs —more particularly in a suit by a wife against her husband, when the settlement was obviously made by the defendant with the intention of depriving the attorney of his costs.

JOHNSON, J. By an agreement executed before notary between the parties to this case on the 30th November last, the plaintiff discontinued her action without costs. The defendant now comes before the Court and asks for *acte* of this discontinuance, and of his consent to its terms. There has been no notice to the plaintiff's attorneys of this arrangement, and they cannot be bound by it. Their right is to continue the proceedings for the recovery of their costs, and it was obviously for the purpose of defeating this right that the arrangement was made between the parties without notice to the attorneys. On the general question of the right of parties to transact to the prejudice of the attorneys of record, there is a most unsatisfactory conflict of decisions. I have gone through all the cases; but there is none that goes the length of saying that in a case where the defendant was certainly about to be condemned to pay costs, he can in a clandestine manner get the plaintiff (who is his own wife) to absolve him, and then apply that arrangement so as to oust the attorneys who had fought her battle. On the contrary, while the general question seems pretty evenly balanced in all these decisions, there is a case that stands out from the others as authority that where there is anything exceptional in the defendant's motives, as there clearly was here, he cannot get the benefit of an outside arrangement of this kind to the injury of the attorney. It is the case of *Richards* v. *Ritchie*, 6 L.C.R., p. 98, in the strongest way condemnatory of the defendant's conduct. The action there was actually dismissed because the plaintiff had been got to sign an admission that he had no ground of action, nevertheless the defendant was condemned to pay the costs. After all, costs are a matter of discretion with the Court, and on the whole, after reading the defendant's deposition, I can come to no other conclusion than to refuse his motion, and the other party asking costs, I grant *acte* of the discontinuance upon payment by defendant of the costs of the action.

Macmaster & Co. for plaintiff.
Judah & Co. for defendant.

RHEAUME v. CAILLE ET VIR.

Obligation by Wife for Husband's Debt.

Held, that an obligation made by a wife to repay money advanced for her husband's use is an absolute nullity, and even a representation by the wife to the lender, that the money was for herself, does not affect the case.

JOHNSON, J. The action is against a married woman, *séparée*, to recover $1,452.84, principal and interest of four obligations made by her, with her husband's authority, in favor of the Plaintiff. The plea is that the money was not for her benefit, but solely and exclusively for the benefit of her husband who is the Plaintiff's brother. It appears clearly that all this money was paid by the Plaintiff either to the Defendant's husband, or to his creditors directly or indirectly, part of it being devoted to pay a composition he had made with them. The defendant's obligation to repay this money is contrary to law,—and this applies to the whole amount, and not merely to part, as was contended for the plaintiff. It was said that the defendant had herself represented to the lender that the money was for herself: but that is nothing: It is not an *obligation naturelle*; but a *fraude à la loi et à l'ordre public*. See Marcadé, art. 1235, No. 670, vol. 4, p. 513. The well known case of Buckley & Brunelle, and the authorities cited in that case are directly in point. The action must, in my opinion, be dismissed with costs.

Longpré & Co., for plaintiff.
Jetté & Co., for defendant.

CADIEUX v. CANADIAN MUTUAL FIRE INS. CO.

Saisie-Arrêt—Concurrent Writs.

Held, that A., on a judgment against B., has a right to issue a *saisie-arrêt* in the hands of C., notwithstanding the fact that *saisie-arrêts* have been previously placed in the hands of B. by creditors of A.

JOHNSON, J. The plaintiff issued a writ of *saisie-arrêt* after judgment in the hands of Larin and some sixty others. The defendants come in and contest the right of the plaintiff to issue the writ; and they want to urge the transfer by the plaintiff to his brother of a part of the claim he had against the company. They also urge the issuing of three *saisie-arrêts* in their hands by creditors of the plaintiff. All this appears to me to have nothing to do with the plaintiff's right to issue his writ, and to

get the evidence of the garnishees as to whether they have anything in their hands belonging to the defendants. It may have something to do with the question as to whom the money is to go to when we find out whether there is any. The parties made no proof before me as to the identity of the plaintiff in this case with the debtor whose money was seized in the defendant's hands in the other cases, and as far as I can see, if the parties are the same as those mentioned in the papers filed, one of the *saisies* in the defendant's hands was discontinued and the declaration made in the two others was never contested, so that there would appear to be very little ground for contesting at all; but certainly nothing to prevent the issuing of the writ, or the garnishees' obedience to it.

Contestation dismissed with costs.

Longpré & Co. for plaintiff.

Lunn & Co. for defendant.

LIABILITY OF JUDGE FOR ERRONEOUS SENTENCE TO IMPRISONMENT.

NEW YORK COURT OF APPEALS, MARCH 19, 1878.

LANGE v. BENEDICT.

Defendant was United States district judge, and plaintiff was tried at a Circuit Court held by him upon an indictment for embezzling mail bags. The jury found plaintiff guilty, aad that the value of the mail bags was less than $25. The penalty prescribed in such case was a fine of $200 or imprisonment for one year. Defendant, as judge, sentenced plaintiff to pay a fine of $200 and be imprisoned for one year. Plaintiff was imprisoned five days and he paid the sum of $200 to the clerk of the court as a fine, and the same was paid by the clerk to the government. Plaintiff procured a writ of *habeas corpus* which was returned before defendant, who was holding the same term of court at which plaintiff was sentenced. Defendant, upon the return, vacated and set aside the sentence, and as a part of the same judicial act and order, passed judgment anew on plaintiff and re-sentenced him to be imprisoned for the term of one year, and plaintiff was imprisoned. Under proceeding taken by plaintiff for that purpose, to which defendant was not a party, the re-sentence of plaintiff was set aside by the Supreme Court of the United States as being without authority of law. In an action for imprisonment under the re-sentence, brought by plaintiff against defendant, *held*, that the act of defendant was done by him as a judge, and he was protected by his judicial character from the action brought by plaintiff.

FOLGER, J. The plaintiff has brought an action against the defendant for false imprisonment and detention in prison. He alleges that it was wrongful and wilful, without just cause or provocation. He does not allege that it was malicious or corrupt. The complaint in the action sets out the facts *in extenso*, upon which the plaintiff relies. To this the defendant has demurred, stating three causes of demurrer; but the one cause relied upon is that the complaint does not state facts sufficient to constitute a cause of action. It is well, therefore, to state with some particularity the facts which are alleged, or are conceded.

In October, 1873, the defendant was judge of the District Court, for the United States, of the Eastern District of New York. As such, by virtue of an act of Congress, he presided at and held the Circuit Court of the United States for the Southern District of New York, for the October Term of that year.

The plaintiff was at that time arraigned upon an indictment of twelve counts, the general purport of which was that he had stolen, embezzled, or appropriated to his own use certain mail bags, the property of the United States, of the value of $25; he was tried upon the indictment; the verdict of the jury was, generally, that the plaintiff was guilty, and that the value of the mail bags was less than $25.

He was indicted under an act of Congress which declared the offence and affixed the punishment. By that act, if the value of the mail bags taken was found to be less than $25, the punishment for the offence was a fine of $200, or imprisonment for one year.

The defendant, sitting as such judge, and holding that court at that term, passed judgment upon the plaintiff and sentenced him to pay a fine of $200 and to be imprisoned for one year.

It is manifest that the punishment thus imposed was more than that affixed to the offence by the act of Congress.

The plaintiff paid to the clerk of the United States Circuit Court, intending it in full payment of the fine so imposed, the sum of $200. This was done on the 4th day of November, 1873, and during the same term of the court, and the clerk made certificate that that sum was then on deposit in the registry of that court.

The clerk paid the money into the office of the Assistant Treasurer of the United States in New York city, in that circuit, to the credit of the Treasurer of the United States, as the fine thus imposed.

There is no direct allegation in the complaint that the plaintiff was imprisoned under that sentence. There is an allegation that during the same term of that court a writ of *habeas corpus* was granted and returned into that court in which the imprisonment of the plaintiff was made to appear. It may be taken as conceded, however, that the plaintiff was actually in prison for the space of five days after the pronouncing of that sentence and before further proceedings were had. At the same term of that court, the defendant sitting and holding that court, and as the judge thereof, on the return of that writ, vacated and set aside the sentence above set forth, and at the same time, and as a part of the same judicial act and order, passed judgment anew upon the plaintiff, and resentenced him to be imprisoned for the term of one year. Under this action of the defendant the plaintiff was imprisoned, which is the alleged wrongful imprisonment and detention of him by the defendant. Judicial proceedings were afterwards had on behalf of the plaintiff, the end of which was that the Supreme Court of the United States adjudged the resentence above stated to have been pronounced without authority, and discharged the plaintiff from his imprisonment. It does not appear that the defendant was a party to the proceedings in the Supreme Court, or was heard or represented there.

On this state of facts the plaintiff insists that the defendant is liable to him in damages.

The defendant claims that the facts show, that all which he did he did as a United States judge, and that the judicial character in which he acted protects him from personal responsibility.

In our judgment the question between the parties is brought to what, in words at least, is a very narrow issue. Did the defendant impose the second sentence as a judge; or, although he was at the moment, of right, on the bench, and authorized and empowered to exercise the functions of a judge, was the act of resentencing the plaintiff so entirely without jurisdiction, or so beyond, or in excess of, the jurisdiction which he then had as a judge, as that it was an arbitrary and unlawful act of a private person? A narrow issue, but not to be easily determined to the satisfaction of a cautious inquirer.

The plaintiff makes a preliminary point, that inasmuch as the complaint avers that the defendant wrongfully and wilfully and without jurisdiction falsely imprisoned the plaintiff; that, therefore, as a technical rule of pleading, the demurrer having admitted the allegations of the complaint, there must be judgment for the plaintiff. But the complaint does not rest satisfied with that general allegation. It rests the general allegation upon the special circumstances afterward set forth in it, and which are made up of all, or nearly all, the facts which we have above recited. So we have to consider them as well as the general allegation, and to treat the general allegation as no broader or more effectual than the special circumstances upon which the complaint rests it.

There are not many topics in the law which have received more discussion or consideration than that of the liability of a person holding a judicial, or *quasi* judicial office, to an action at law for an act done by him while at the same time exercising his office. The principles which should govern such action are, therefore, well settled. The difficulty in satisfactorily disposing of a particular case is not in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case do lie. The general rule, which applies to all such cases, and which is to be observed in this, has been in olden time stated thus: Such as are by law made judges of another shall not be criminally accused, or made liable to an action for what they do as judges; to which the Year Books (43 Edw. III, 9; 9 Edw. IV, 3) are cited in *Floyd* v. *Baker*, 12 Coke, 26. The converse statement of it is also ancient; where there is no jurisdiction at all, there is no judge, the proceeding is as nothing. *Perkins* v. *Proctor*, 2 Wils. 382-4, citing the *Marshalsea case*, 10 Coke, 65-76, which says: "Where he has no jurisdiction, *non est judex*." It has been stated thus, also: No action will lie against a judge acting in a judicial capacity for any errors he may commit in a matter within his jurisdiction. *Gwynn* v. *Pool*, Lutw. 937-1160. It has been, in modern days, carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly. *Bradley* v. *Fisher*, 13 Wall. 351.

It is to be seen that in these different modes of stating the principle there abides a qualification. To be free from liability for the act, it must have been done as judge, in his judicial capacity, it must have been a judicial act. So it always remains to be determined, when is an act done as judge in a judicial capacity.

And this is the difficulty which has most often been found in the use of this rule, and which is present here: to determine when the facts exist which call into play that qualification. For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a bystander to be stricken off, and be obeyed, he would be liable. Thus, a person in the office of judge of the Ecclesiastical Court in England, excommunicated one for refusing to obey an order made by him, that he become guardian *ad litem* for an infant son; and though the order was made in a matter then lawfully before the court for adjudication, and of which he, as judge, had jurisdiction, he was held liable to an action. *Beaurain* v. *Sir William Scott*, 3 Campb. 388. He had not, as judge, jurisdiction of the person to whom he addressed the order. On the other hand, one rightfully holding a court for the trial of a criminal action, fined and imprisoned a juror, for that he did not bring in a verdict of guilty, against one on trial for an offence, after the court had directed the jury that such a verdict was according to the law and the facts. The juror was discharged from his imprisonment on *habeas corpus* brought in his behalf; and it was held that the act of fining and imprisoning him was unlawful, inasmuch as there was no allegation of corruption, or like bad conduct against the juror. The juror then brought action against him who sat as judge and made the order for the fine and imprisonment, but took nothing thereby; for it was held that the judge acted judicially, as judge, as he had jurisdiction of the person of the juror, and jurisdiction of the subject-matter, to wit: the matter of punishing jurors for misbehavior as such; and that his judgment, that the facts of the case warranted him in inflicting punishment, was a judicial error to be avoided and set aside in due course of legal proceedings, for which, however, he was not personally liable. *Hammond* v. *Howell*, *Recorder of London*, 2 Mod. 218; *Bushell's Case*, Vaughan, 135. So, a judge of Oyer and Terminer was protected from indictment, when he had made entry of record that some were indicted for felony before him, whereas, in fact, they were indicted for trespass only. 12 Coke, 25.

Thus it appears that the test is not alone that the act is done while having, on the judicial character and capacity; nor yet is it alone that the act is not lawful.

We have seen, too, that the test is not, that the act was in excess of jurisdiction, or alleged to have been done with malice and corruptly; for even if it is such an act, it does not render liable the doer of the act, if he be a judge of a court of general or superior authority. *Bradley* v. *Fisher*, *supra*.

We think it clear that there is no liability to civil action if the act was done, "in a matter within his jurisdiction," to use the words of *Gwynn* v. *Pool*, *supra*. Those words mean, that when the person assumed to do the act as judge, he had judicial jurisdiction of the person acted upon, and of the subject-matter as to which it was done. Jurisdiction of the person is when the citizen acted upon is before the judge, either constructively or in fact, by reason of the service upon him of some process known to the law, and which has been duly issued and executed. What is meant by jurisdiction of the subject-matter we have had occasion to consider lately in *Hunt* v. *Hunt*, decided 29th January, 1878. It is not confined within the particular facts which must be shown before a court or a judge to make out a specific and immediate cause of action; it is as extensive as the general or abstract question which falls within the power of the tribunal or officer to act concerning. Our idea will be illustrated by a reference to *Groenwelt* v *Burwell*, 1 Ld. Raym. 454. There the defendants, as censors of a college of physicians, had imposed punishment on the plaintiff for what they adjudged was mal-practice by him. He brought his action. They pleaded the character of the college, giving them power to make by-laws for the government of all practitioners in medicine in London; and to overlook them, and to examine their medicines and prescriptions, and to punish mal-practice by fine and imprisonment; that they had, in the exercise of that power,

adjudged the plaintiff guilty of *mala praxis*, and fined him £20 and ordered him imprisoned twelve months, *nisi*, etc. It was held that the defendants had "jurisdiction over the person of the plaintiff inasmuch as he practiced medicine in London; and over the subject-matter, to wit: *the unskilful administration of physic.*" That is the language of Holt, C. J., in that case. And, because the defendants had power to hear and punish, and to fine and imprison, it was held that they were judges of record, and because judges, not liable for the act of fining and imprisoning. See, also, *Ackerly* v. *Parkinson*, 3 Maule & Selw. 411. It is the general abstract thing which is the subject-matter. The power to inquire and adjudge whether the facts of each particular case make that case a part of an instance of that general thing; that power is jurisdiction of the subject-matter. Thus in *Hammond* v. *Howell*, *supra*, the defendant was saved from liability to civil action, inasmuch as he had as judge jurisdiction of the subject-matter, of punishing jurors for a misdemeanor upon the panel. He made an error in deciding that the facts of that case made an instance of that subject-matter. But the jurors were within his jurisdiction of their persons; and he had jurisdiction of the subject matter, and his error was a judicial error, an act done *quatenus* judge, not an act done as Howell the private person, though it was an act contrary to law, grievous and offensive upon the citizen.

The inquiry then, at this stage of our consideration of the case, is this: Whether the defendant, sitting upon the bench of the Circuit Court, and being on that occasion *de jure et de facto* the Circuit Court, and having, as such, jurisdiction of all persons by law within the power of that court, and jurisdiction of all subject-matters within its cognizance, whether he had jurisdiction of the person of the plaintiff, and of any subject-matter wherefrom he had authority to hear and adjudge, whether the facts in the case of the plaintiff, as then presented to him, fell within any of those subject-matters. It is not the inquiry whether the act then done, as the act of the court, was erroneous and illegal; that is but another form of saying, whether it could or could not be lawfully done, as a court by the person then sitting as the judge thereof. It is whether that court then had the judicial power to consider and pass upon the facts presented, and to determine and adjudge that such an act, based upon them, would be lawful or unlawful.

That the defendant, as that court, had jurisdiction of the person of the plaintiff is manifest. He was before it on a return to a writ of *habeas corpus* sued out by him, and was produced in court by the marshal, to whom the writ was sent. He was in the custody of law, upon a judgment and sentence of that court; the validity of which he was questioning, and seeking from that court a vacating and annulling thereof. At least, until the order for vacating it was made, the plaintiff was lawfully within the power of the court.

That court also had jurisdiction of the subject-matter. It might, by law, indict and try persons charged with stealing and appropriating mail-bags; it might pass sentence upon them, when duly convicted, of fine or imprisonment, during the same term of the court, at which one sentence had been imposed; it might vacate it or modify it as law or justice would require. *Ex parte Lange*, 18 Wall. 163. If it had imposed a sentence greater than that prescribed by law, it could vacate it and inflict one in accord with the law; if no part of the invalid sentence imposed had been executed, it could vacate it and inflict one different in kind or degree. Id.; *Miller* v. *Finkle*, 1 Park. Cr. 374, and cases cited there. In England it has been held that at the same term the judgment might be altered, and by reason of subsequent conduct of the convicted person, the punishment be increased (*Reg.* v. *Fitzgerald*, 1 Salk. 401); and another sentence has been given after a portion of the former one had been suffered. *Rex* v. *Price*, 6 East, 323. The judgment, as expressed in the prevailing opinion in *Ex parte Lange*, *supra*, is not in accord with those two cases, and we cite them without expression of approval or otherwise. This was the subject-matter, the general matter, then before the court. The particular matter, or question, presented was the sentence of fine and imprisonment passed upon the plaintiff; was it erroneous and unlawful in that it went beyond the limit of the law, he having been some days in imprisonment under it, and having paid a sum of money equal in amount to the fine to the clerk of the court, who in turn had paid it to an officer of the United States Government;

was it lawful to vacate the sentence if in excess of the law; if that sentence should be vacated, was it lawful, under the facts of the case, to impose another sentence which should be in accord with the statute; did all these things present a case for the exercise of power, by virtue of the jurisdiction over the subject-matter? The court, we have seen, had the jurisdiction last-named; did it not also have jurisdiction to adjudicate upon that state of facts? If it did have it, and did adjudicate erroneously, was it not a judicial error, to be relieved from by such writ as would bring it up for review, rather than a wrong done personally to be answered for in a civil action? Is not the person who filled the office of judge, and by his presence on the bench, made that court, free from liability for that adjudication, though the act done by him was erroneous and unauthorized by law?

It was held by this court in *Roderigas* v. *East River Savings Bank*, 63 N. Y. 460, that where general jurisdiction is given to a court of any subject, and that jurisdiction in any particular case depends upon facts which must be brought before that court for its determination upon the evidence, and where it is required to act upon such evidence, its decision upon the question of jurisdiction is conclusive until reversed, so far as to protect its officers and all other innocent persons who act upon it. How does it differ when general jurisdiction is thus given, and depends upon the legal conclusion from a conceded state of facts, and when the court is required to act thereon and draw a conclusion therefrom? Is not the adjudication of that court conclusive until reversed, so as to protect? Is not the act of adjudication, and the judgment given thereon, an act done with jurisdiction, hence, a judicial act; an act done as a judge, or as a court? In *Howell's case*, *supra*, there was no disputed question of fact. It was upon a conceded state of facts that he acted. He erred in his judgment of the effect in law of those facts, yet it was deemed a judicial error.

It is true that the United States Supreme Court, upon a certain state of facts before it, and in a proceeding by *certiorari*, to which this defendant was not a party, and in which he was not heard by that court, reached the conclusion that the second sentence of the Circuit Court was pronounced without authority, and discharged the plaintiff from his imprisonment thereunder. *Ex parte Lange*, *supra*. In the prevailing opinion given in the case are repeated expressions to the effect that the power of the Circuit Court to punish, further than the first sentence, was gone; that its power to punish for that offence was at an end when the first sentence was inflicted and the plaintiff had paid the $200 and lain in prison five days; that its power was exhausted; that its further exercise was prohibited; that the power to render any further judgment did not exist; that its authority was ended.

It is claimed from these expressions that the force of the decision in that case is, that the defendant in pronouncing the second sentence upon the plaintiff did not act as a judge. It is plausible to say, that if an act sought to be defended as a judicial act has been pronounced without authority and void, it could not have been done judicially. But we have yet to learn that the eminent court which used that language in adjudging upon the case made upon that writ would hold that the defendant did not act as a judge in pronouncing the judgment, which was deemed without power to sustain it. The opinion also says: "A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions between void and voidable judgments are very nice, and they may fall under the one class or the other, *as they are regarded for different purposes.*" We do not think that learned court would disregard the reasoning of *Howell's case*, *supra*, and others like unto it. Yet in *Bushell's case*, *supra*, he was discharged on *habeas corpus*, on the ground that Howell, as judge, had no power or authority to fine or imprison him for the cause set up; it was called "a wrongful commitment;" 1 Mod. 184; as contrasted with "an erroneous judgment; 12 Mod. 381, 392; and yet, when *Howell* was called to answer in a civil action for the act, it was held that, though without authority, it was judicial. In *Bushell's case*, 1 Mod. 119, Hale, C. J., said: "The *habeas corpus* and the writ of error, though it doth make the judgment void, doth not make the awarding of the process void to that purpose," *i. e.*, of an action against the judge; "and the matter was done in a court of justice," he continued. So is the comment upon that case, *Yates* v. *Lansing*, 5 Johns. *290; "it had the jurisdiction of the

cause because it had power to punish a misdemeanor in a juror, though in the case before the court the recorder made an erroneous judgment in considering the act of the juror as amounting to a misdemeanor, when in fact it was no misdemeanor. 2 Mod. 218.

So in *Ackerly* v. *Parkinson, supra*, the defendant was held protected, though the citation issued by him was considered as a nullity, on the ground that the court had a general jurisdiction over the subject-matter.

Let it be conceded, at this point, that the law is now declared, that the act of the defendant was without authority and was void; yet it was not so plain, as then to have been beyond the realm of judicial discussion, deliberation and consideration, as is apparent from the fact that four judges, other than the defendant, acting as judges, have agreed with him in his view of the law.

He was in fact sitting in the place of justice; he was at the very time of the act a court; he was bound by his duty to the public, and to the plaintiff, to pass, as such, upon the question growing out of the facts presented to him, and as a court to adjudge whether a case had arisen in which it was the demand of the law, that on the vacating of the unlawful and erroneous sentence or judgment of the court, another sentence or judgment could be pronounced upon the plaintiff. So to adjudge was a judicial act done as a judge, as a court; though the adjudication was erroneous, and the act based upon it was without authority and void. Where jurisdiction over the subject is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in those particulars the validity of his judgment may depend. *Ackerly* v. *Parkinson, supra*. For such an act a person acting as judge therein is not liable to civil or criminal action. The power to decide protects, though the decision be erroneous. See *Garnett* v. *Farrand*, 6 B. & C. 611.

There is another view of this case. It is certain that the defendant, as the Circuit Court, had at first jurisdiction of the plaintiff, and jurisdiction of the cause and of the proceedings. That jurisdiction continued to and including the pronouncing of the first sentence; nay, until and including the giving of the order vacating that sentence. If it be admitted that, at the instant of the utterance of that order, jurisdiction ceased, as is claimed by the plaintiff, on the strength of the opinion in *Ex parte Lange, supra*, as commented upon; *Ex parte Parks*, 93 U. S. 18, and that all subsequent to that was *coram non judice* and void; still it was so, not that the court never had jurisdiction, but that the last act was in excess of its jurisdiction. Thus in the opinion, *Ex parte Lange, supra*, p. 165, it was said that the facts very fairly raised the question whether the Circuit Court, in the sentence which it pronounced, and under which the prisoner was held, had not exceeded its powers. See, also page 174. We think that the whole effect of the opinion is, not that the court had no jurisdiction, no power over the prisoner and the case, but that it had no authority to impose further punishment; "all further exercise of it, in that direction, was forbidden," p. 178. What is an act in excess of judicial authority is shown by *Clarke* v. *May*, 2 Gray, 410. There, a justice of the peace, having jurisdiction of a case, summoned a person to appear before him as a witness therein. That person disobeyed. The case was tried and ended. Thereafter the justice issued process to punish for contempt the person summoned as a witness. He was arrested, fined, and not paying, was committed. It was held that the power to punish for contempt was incidental to the power to try the main case; that when the latter was ended, jurisdiction had ceased, and the power to punish for contempt no longer existed, and that the proceedings had to that end were in excess of jurisdiction, and the justice was liable. And the distinction between a case where the magistrate acts with no jurisdiction at all, and one where his act is beyond or in excess of his jurisdiction, is shown by the case last cited, and that of *Piper* v. *Pearson*, in the same volume, page 120.

This act of the defendant was then one in excess of or beyond the jurisdiction of the court.

And though, when courts of special and limited jurisdiction exceed their powers, the whole proceeding is *coram non judice* and void, and all concerned are liable, this has never been carried so far as to justify an action against a judge of a superior court, or one of

general jurisdiction, for an act done by him in a judicial capacity. *Yates* v. *Lansing, supra; Bradley* v. *Fisher, supra; Randall* v. *Brigham*, 7 Wall. 523. In the last cited case it is said of judges of superior courts: They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, they are done maliciously or corruptly. Pages 536, 537; and in the other cases a distinction is observed and insisted upon, between excess of jurisdiction and a clear absence of all jurisdiction over the subject-matter. And to the same effect is this: "For English judges, when they act *wholly without* jurisdiction * * * have no privilege." Per Parke, B, *Calder* v. *Holket*, 3 Moore's P. C. C. 28, 75.

Now it may be conceded that the Circuit Court is not a court of general jurisdiction; that in a sense it is a court of limited and special jurisdiction, *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173, inasmuch as it must look to the acts of Congress for the powers conferred. But it is not an inferior court. It is not subordinate to all other courts, in the same line of judicial function. It is of intermediate jurisdiction between the inferior and Supreme Courts. It is a court of record; one having attributes, and exercising functions independently of the person of the magistrate designated generally to hold it. Per Shaw, C. J. *Ex parte Gladhill*, 8 Metc. 168, 170. It proceeds according to the course of common law; it has power to render final judgments and decrees which find the persons and things before it, conclusively, in criminal as well as civil cases, unless revised on error or appeal. *Grignon's Lessee* v. *Astor*, 2 How. (U.S.) 341. See *Ex parte Tobias Watkins*, 3 Peters, 193. "Many cases are to be found wherein it is stated generally that when an inferior court exceeds its jurisdiction, its proceedings are entirely void and afford no protection to the court, the party, or the officer who executes its process. I apprehend that it should be qualified when the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause." Per Marcy, J., *Sessacool* v. *Boughton*, 5 Wend. 172. How much more so, when the court is not inferior.

There are analogies in the law. Take the case of a removal of a cause from a State court to the Circuit Court of the United States. When the party petitioning for a removal has presented his papers in due form and sufficiency to the State court, and has in all respects complied with the terms of the act of Congress, the State court cannot refuse. Though it does, all subsequent proceedings in it are *coram non judice*. See *Fisk* v. *U. P. R. R. Co.*, 6 Blatchf. 362; *Matthews* v. *Leyall*, 6 McLean, 13. Though the judge of the State court has a legal discretion to exercise as to the right of removal (*Ladd* v. *Tudor*, 3 Woodb. & M. 325), if the facts entitle to a removal, it may not be withheld; and when they are shown it is the duty of the State court to proceeed no further; each step after that is *coram non judice*. *Gordon* v. *Longest*, 16 Peters, 101. Yet, in case a judge did, in the honest exercise of his judgment, refuse a removal and proceed with the case in the State court, would it be contended that he was liable in a civil action? He had jurisdiction of the cause originally. That jurisdiction had ceased. His further acts were beyond or in excess of his jurisdiction.

A plea of title put in a court of a justice of the peace in accordance with statute ousts it of jurisdiction. That court had jurisdiction of the cause originally, and the power to pass upon the sufficiency of the plea and accompanying papers. If it should err, and hold that jurisdiction had not been taken away, when it had, would the magistrate be liable in a civil action—always allowing for the difference in that that court is of limited and special jurisdiction. See *Striker* v. *Mott*, 6 Wend. 465.

For these reasons we are of the opinion that defendant is protected by his judicial character from the action brought by the plaintiff.

We have not gone into a written consideration of all the matters urged by the learned and zealous counsel for the plaintiff in the very elaborate and exhaustive brief and printed argument. We have read them with great interest and benefit. To follow them in an opinion, and to comment upon all the cases cited and positions taken, would be to write a treatise upon this subject. That would be no good reason why they should not be followed and discussed, if the requirements of the case demanded it. The case turns upon a question more easily stated than it is determined—was the act of the defendant done as a judge?

Our best reflection upon it, aided by the reasonings and conclusions of many more cases than we have cited, has brought us to the conclusion, that as he had jurisdiction of the person and of the subject-matter, and as his act was not without the inception of jurisdiction, but was one no more than in excess of, or beyond jurisdiction, the act was judicial.

We are not unmindful of the considerations of the protection of the liberty of the person, and the staying of a tendency to arbitrary exercise of power, urged with so much eloquence by the learned and accomplished counsel for the appellant. Nor are we of the mind of the court in 2 Mod. 218, 220, that: "These are mighty words in sound, but nothing to the matter." They are to the matter, and not out of place in such a discussion as this. Nor have we been disposed to outweigh those considerations with that other class, which set forth the need of judicial independence and of its freedom from vexation on account of official action, and of the interest that the public have therein. See *Bradley* v. *Fisher*, *supra*; *Taafe* v. *Downs*, in note to *Calder* v. *Halket*, 3 Moore's P. C. C. 28, 41, 51, 52.

These are not antagonistic principles; they are simply countervailing. Like all other rules which act in the affairs of men, preponderance may not be fondly given to one to the disregard of the other; each should have its due weight yielded to it, for thus only is a safe equipoise reached.

We have arrived at our decision upon what we hold to be long and well-established principles, applied to the peculiar facts of this interesting case.

The judgment of the General Term should be affirmed. All concur.

—*Sprague* v. *W. U. Tel. Co.*, p. 200: A failure to send a telegraph message at all is not a "mistake or delay in delivery or non-delivery," within the meaning of the usual stipulation in blanks for telegraph messages. *Devlin* v. *O'Neil*, p. 305: A sale of goods to be disposed of by the vendee at retail if conditional, is fraudulent and void as to creditors of vendee. *Leviness* v. *Post*, p. 321: A blacksmith was held liable for the unskilfulness in shoeing a horse, of his servant, who was not employed to shoe horses, but who undertook the work.—[From *Daly's Reports*, C. P. N. Y.

GENERAL NOTES.

PRESCRIPTION OF PROMISSORY NOTES.—In *Schindel* v. *Gates*, 46 Md. 604, it is held that the payment, by the principal in a joint and several promissory note, of the interest from year to year will prevent the statute of limitations from attaching to the note in favor of the surety. In the State of Maryland, the rule on this subject, as laid down in *Ellicott* v. *Nichols*, 7 Gill, 86, is accepted as the law, which the court says is not to be questioned in the absence of legislation to the contrary. It is not, however, the general rule. There are, in regard to the power of one joint maker of a note to deprive the other of the defence of the statute, three distinct and irreconcileable theories: (1) That there is such a power and it exists indefinitely. (2) That there is no such power. (3) That there is such a power, but it ends when the term prescribed by the statute has elapsed. The first theory was at one time adopted in England (*Channell* v. *Ditchburn*, 5 M. & W. 494; *Goddard* v. *Ingram*, 3 G. & Dav. 46), in Massachusetts (*White* v. *Hale*, 3 Pick. 392), in Maine in New Hampshire, and in New York, but it has been of late years done away with by statute, or by the decisions of the courts. The second theory is the one in favor at the present time in most of the States and in the Federal courts. *Bell* v. *Morrison*, 1 Pet. 351; *Exeter Bank* v. *Sullivan*, 6 N. H. 124; *Palmer* v. *Dodge*, 4 Ohio St. 21; *Coleman* v. *Fobes*, 22 Penn. St. 156; *Levy* v. *Cadit*, 17 S. & R. 126; *Searigh* v. *Craighead*, 1 Penn. 135; *Bush* v. *Stowell*, 71 Penn. St. 208; *Van Keuren* v. *Parmalee*, 2 N. Y. 523; *People* v. *Slite*, 39 Barb. 634; *Shoemaker* v. *Benedict*, 11 N. Y. 176; *Winchell* v. *Hicks*, 18 Id. 558. The third doctrine is adopted in Maryland and some other States. *Ellicot Nichols*, *supra*; *Newman McComas*, 43 Md. 70; *Emmons* v. *Overton*, 18 B. Monroe, 643; *Walton* v. *Robinson*, 6 Iredell, 341. The second theory appears to be the more equitable one and the one most in accordance with the prevailing view in regard to the statute of limitations, which is that it is a beneficial statute and one of repose on which a defendant has a right to rely with the same confidence as on any other statute, and that its force should be extended rather than restricted. Ang. on Lim. 283; *Shoemaker* v. *Benedict supra*; *Green* v. *Johnson*, 3 G & J. 394; *Fisher* v. *Hamden*, Paine, 61.—*Alb. L. J.*