PRIVILEGES OF THE PRESS.

ARGUMENT IN THE SHANKS CONTEMPT CASE.

A REVIEW OF THE PROCEEDINGS—THE APPEALS FROM THE DECISIONS OF JUDGES FANCHER AND TAPPAN.

W. F. G. Shanks, City Editor of THE TRIBUNE, was summoned before the Grand Jury of Kings County and asked who wrote a certain editorial article in THE TRIBUNE. He declined to give the name of the writer, and on motion of Winchester Britton, then District-Attorney of Kings County, he was committed to the Kings County Jail for contempt. On the following day Mr. Shanks was brought to New-York in custody of a deputy sheriff to testify in the case of Edward S. Stokes, then on trial for the killing of James Fisk, jr. Henry L. Clinton, and C. A. Runkle, applied to Judge Fancher for a writ of habeas corpus. This was granted. After a protracted hearing, Judge Fancher discharged Mr. Shanks on the ground that the commitment was void on its face. Subsequently Mr. Shanks, on behalf of THE TRIBUNE, made several charges before the Governor against Mr. Britton for his conduct in this case, in which he was accused of falsifying the Sheriff's return. The Governor appointed Judge Speir a Commissioner to take the testimony in relation to these and other charges. After Judge Speir made his report to the Governor counsel were heard in support of the charges and in defense of Mr. Britton. On Feb. 20 the Governor rendered his decision, removing Mr. Britton from office. The case, so far as related to the charges against Mr. Britton preferred by THE TRIBUNE, were prosecuted by Messrs. Clinton and Runkle. While the case was pending before the Governor, Mr. Britton caused an appeal from Judge Fancher's decision liberating Mr. Shanks to be taken to the General Term of the Supreme Court. The appeal came on in March last, and was argued by Mr. Britton on the part of the relator. Mr. Clinton was engaged in the trial of the celebrated Rollwagen will case, and as this occupied several months, he asked and obtained leave to submit his argument, sustaining the decision of Judge Fancher, at the May Term. The argument was submitted yesterday by Mr. Clinton to the General Term of the Supreme Court, and decision was reserved.

Meanwhile another phase of the case has attracted attention in Brooklyn. Judge McCue went before the Kings County Grand Jury to procure the indictment of the editor of THE TRIBUNE, and the writer of the article on which the alleged libel was based. Mr. Shanks was summoned before the Grand Jury, and refused to tell who was the writer of the article, as has already been stated, was imprisoned, and released on a writ of habeas corpus of Judge Fancher. The Grand Jury of Kings County indicted the editor of THE TRIBUNE. The libel suit was transferred to this county. Judge McCue then brought a civil suit for $100,000 against THE TRIBUNE, and this is now pending. In this proceeding another attempt was made to obtain Mr. Shanks's deposition as to the authorship of the article in question. C. A. Runkle, on behalf of Mr. Shanks, made a motion to vacate the order requiring him to give such deposition before the referee to whom the case was referred. Judge Tappan denied the motion. An appeal was taken to the General Term, which has recently affirmed Judge Tappan's decision. The prosecution moved that Mr. Shanks be committed for contempt in refusing to answer the questions before the referee. That motion has not been argued. It was to have been brought before Judge Barnard, but the matter has been adjourned by agreement to await the decision of the General Term. The case is now on the calendar for June, to be tried on its merits. The argument submitted yesterday by Messrs. Clinton and Runkle will be found below.

ARGUMENT OF HENRY L. CLINTON.

This case comes before the Court on writ certiorari, allowed at the instance of Winchester Britton, formerly District-Attorney of Kings County, to review the proceedings before Judge Fancher, on habeas corpus, which resulted in the discharge of Wm. F. G. Shanks, city editor of THE NEW-YORK TRIBUNE, who had been imprisoned for refusing to answer a certain question asked him by the Grand Jury of Kings County. The facts are briefly as follows:

On the 22d day of October, 1873, Mr. Shanks, in obedience to a subpena served upon him, attended as a witness before the Grand Jury of Kings County. THE TRIBUNE had assailed some of the officials in Brooklyn on charges of malfeasance and corruption. While Mr. Shanks was ready to impart any information in his possession, and to give the names of witnesses who could prove the truth of the facts charged in THE TRIBUNE, it was well known that his sense of duty and chivalrous devotion to the interests of his employers, and the paper with which he was connected, would prevent his disclosing the names of persons who had given confidential information to the editors of THE TRIBUNE, or who had written articles which that paper had published. An order to commit Mr. Shanks to jail was prepared beforehand by Winchester Britton, the District-Attorney. On the 22d of October, Shanks was brought before the Court of Oyer and Terminer on complaint of the Grand Jury that he would not answer a certain question. The following questions were put to him in open court:

Q. Do you know who wrote the article entitled the Brooklyn Ring "method," in the issue of Aug. 30, 1873? A. I do know.

Q. Who was it?

In response to this question he answered as follows:

I decline to answer the question, because I am instructed, as one of the editors of the paper, not to give the names of writers of articles published in it. It is one of the office regulations, and on the principle that the paper and not the editor is responsible. (Case, fols. 31-2.)

Mr. Shanks was not asked what witnesses could prove the facts stated in the article in question, nor was he asked in regard to any facts which would aid the authorities in any honest efforts to bring to justice those charged with malfeasance and corruption in office. It was not supposed that Mr. Shanks had any personal knowledge of the facts charged—that he had any information except such as was derived from hearsay. It was well known who was the editor of THE TRIBUNE, and who was responsible for the publication of the facts. Mr. Shanks did not have his counsel with him to put in legal form his answer to the question propounded. The trap is set; it is suddenly sprung by Mr. Britton; his order committing Shanks to jail is ready; it is immediately signed in Court—by all the members of the Court of Kings County Oyer and Terminer—and he is at once put in custody of an officer and taken to jail. He was thrust into a cell, and for one night made to breathe the prison atmosphere at the peril of his life, as he had just risen from a sick bed, after a confinement from lung fever, to obey the subpena of the Grand Jury. On the following morning (23d October) he was taken to New-York on a *habeas corpus ad testificandum*, to testify in the case of Stokes, then on trial for murder in the Oyer and Terminer. While here, his counsel, on a petition sworn to by one of them (Mr. Runkle), applied to Judge Fancher for a habeas corpus, which was granted, and made returnable before him at the Supreme Court Chambers at 2 o'clock p. m. of that day. The habeas corpus was served in New-York on Mr. Stillwell a deputy of the Sheriff of Kings County, who had Mr. Shanks in custody. At 2 o'clock p. m. of the 23, Mr. Stillwell appeared before Judge Fancher, "together with the said W. F. G. Shanks, whom he had in custody, and also George W. Lyon, esq., who appeared for the District-Attorney of Kings County and on behalf of the people; thereupon the said George W. Lyon did, for the said Sheriff, orally make return that said Sheriff held said W. F. G. Shanks under and by virtue of the paper hereto annexed, marked 'Exhibit A,' and also by virtue of a certain writ of *habeas corpus ad testificandum*, and the orders indorsed thereon, which is also hereto annexed, marked 'Attached to Exhibit A;' and said Lyon offered to reduce the said oral return to writing forthwith; but the counsel for the relator waived such written return until the next day. The matter was thereupon adjourned to the 24th day of October, 1873, and the prisoner was meantime committed to the custody of his counsel." (See Return of Judge Fancher, folios 17 and 18.) The commitment "Exhibit A" consigned Shanks to indefinite or perpetual imprisonment, as will be shown hereafter. The case was reported in the evening papers of New-York and Brooklyn that afternoon (Oct. 23). In those reports it was stated that Mr. Shanks's counsel claimed that the commitment was void on its face, for the reason that the imprisonment was not limited to 30 days, as the statute required. That Shanks's counsel claimed that the commitment was void on this ground must have been known to Mr. Britton; for after the habeas corpus proceedings before Judge Fancher had been adjourned to the next day (24th October), and Shanks had been committed to the custody of one of his counsel, and after the Deputy Sheriff, Stillwell, had returned to Brooklyn without his prisoner (Mr. Shanks), another and a totally different commitment, which limited the imprisonment to 30 days, was left by Mr. Britton himself with the Sheriff of Kings County. (Testimony of Walter Thorne, fols. 127 to 136, and testimony of Albert Daggett, fols. 148 to 152.) Upon the evidence on this subject, Judge Fancher found, as matter of fact, as follows: "The proof shows conclusively that the subsequent paper (Exhibit B, limiting the imprisonment to 30 days) was not delivered to the Sheriff until after the hearing on the habeas corpus case had commenced." (See Judge Fancher's opinion, fol. 309.) Mr. Britton left this commitment at the Sheriff's office between 3 and 4 o'clock in the afternoon of the 23d of October, and within half or three-quarters of an hour afterward, and before the Deputy Sheriff and Clerk, whose business it was to receive papers, had time to read it and mark on the back of it the time of its reception, Mr. Britton took it away. (See testimony, fols. 133-4.) On the following day (24th of October), at the time to which the proceedings before Judge Fancher had been adjourned, Mr. Britton himself appeared on behalf of the Sheriff. In regard to the proceedings on that day Judge Fancher, in his return to the certiorari, states as follows:

That on said last-mentioned day the said District Attorney (Winchester Britton) produced the written return of Aras G. Williams, Sheriff as aforesaid, which is hereto annexed, marked "No. 3," and asked leave to substitute the same with "Exhibit B," hereto annexed, in place of "Exhibit A," for the oral return made on the previous day; and leave being granted, and such return being substituted, the said Cornelius A. Runkle did traverse under oath the said return of the said Sheriff, which traverse is hereto annexed, marked "No. 4." (Folios 19 and 20.)

Exhibit B, which Mr. Britton produced as forming a part of the return of the Sheriff, limited the imprisonment to 30 days. The effect of substituting commitment B for commitment A would be to deprive Mr. Shanks of the principal point of law on which his counsel relied to obtain his discharge. At the time Mr. Britton produced commitment B, he knew that the Sheriff had never held Shanks under it for an hour or a minute. Mr. Britton knew that Mr. Shanks had not been restrained of his liberty by reason of any other commitment than Exhibit A, as will appear by the following extract from his (Mr. Britton's) evidence:

Q. Did not you know that the order (Exhibit A) had been used as a commitment at the County Jail? A. Yes.

Q. Or at prison? A. Certainly.

Q. And you knew that Mr. Shanks had been detained under that order as a commitment? A. Certainly.

Q. Up to the time he was brought over here [to New-York]? A. Certainly.

Q. And did not you know after he was brought over here, between that time and your return, that he did not return to Kings County? A. I did not know it; I presumed it. (Fols. 248 and 249.)

Mr. Britton must have known that the Sheriff, on the very day his return to the habeas corpus issued by Judge Fancher is dated, had returned to the *habeas corpus ad testificandum*; that he held Shanks in custody under commitment A. (Fols. 61 and 122-3.) Both returns of the Sheriff relate to the same imprisonment, to the same time, and to the same person, and are dated the same day. Had the Sheriff consented that commitment B be produced as a part of his return to the habeas corpus allowed by Judge Fancher, he would have exposed himself to the penalty prescribed by law for making a false return. These two contradictory returns by the Sheriff, had he been responsible for them—one averring in substance that he held Shanks under commitment A, and the other that he held him under commitment B—would have convicted him (the Sheriff) of gross fraud.

Upon the hearing before Judge Fancher, the fact very soon appeared, upon the testimony of Sheriff Williams himself, that he never authorized Mr. Britton to produce Exhibit B as a part of his return; that he signed the return intending to have the commitment marked Exhibit A produced before Judge Fancher, and that he (Sheriff Williams) never knew or heard of any other commitment. (See testimony of Sheriff Williams, fols. 103 to 111.) At the time Sheriff Williams signed the return to the habeas corpus allowed by Judge Fancher, Mr. Britton had in his hand commitment B, but did not show it to Sheriff Williams, or permit him to know of its existence. (See testimony of Mr. Britton, fols. 221 to 223, and 233-4.) This attempt at imposing upon Judge Fancher a false return was signally unsuccessful. It is not difficult to perceive what was the intention of Mr. Britton. The attempt, by the production of the wrong commitment, to secure the immediate imprisonment of Shanks did not succeed; Judge Fancher was not so easily imposed upon. The animus of Mr. Britton was unmistakeable. Before the Sheriff had taken the stand as a witness, the counsel for Shanks said:

We are advised that this commitment (Exhibit B) was put there [annexed to the Sheriff's return] without the knowledge of the Sheriff, and that he made the return upon the idea that the genuine commitment should be attached to it. To his amazement he finds another commitment here, and as a public officer of the Court, he is here to vindicate his dignity against the liberty which has been taken by the District-Attorney. (Fol. 98.)

In reply, Mr. Britton said: "The imputations of the counsel were unseemly and improper" (fol. 100). A few minutes afterward the Sheriff was sworn as a witness, and proved the facts stated by Shanks's counsel. With what intent Mr. Britton acted in falsifying the Sheriff's return is a matter of no small importance. Upon this subject every member of this court, who reads the evidence taken before Judge Fancher, will be likely to have a decided opinion. The Revised Statutes, 5th edition, p. 959, Section 25, provide as follows:

SEC. 25. Every person who, with intent to defraud, shall falsely alter, destroy, corrupt, or falsify * * * the return of any officer, court, or tribunal, to any process of any court, shall, upon conviction, be adjudged guilty of forgery in the second degree.

Had Judge Fancher, while holding Special Term, allowed the writ of habeas corpus, and made it returnable at the Special Term of the Supreme Court, this statutory provision would have been applicable to the case, if Mr. Britton, "with intent to defraud," had altered or falsified the return of Sheriff Williams in the particulars specified. Judge Fancher, however, was sitting at Chambers when he allowed the writ, and made it returnable before him at Chambers instead of the Special Term. For this reason the section of the statute above quoted does not apply. The following statutory provision is important in this connection:

SEC. 33. "Every person who, with intent to injure or defraud, shall" alter "any instrument or writing being or purporting to be * * * * any certificate, order or allowance by any competent court or officer * * * * * by which * * * * any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree." 3 Revised Statutes, p. 951, section 33, 5th edition.

The return of Sheriff Williams was a "writing" * * * "purporting to be" a "certificate" by an "officer." If Mr. Britton, knowing that Mr. Shanks was never held under the commitment which limited the term of imprisonment to thirty days, upon obtaining permission from the Sheriff to annex to his return the proper commitment substituted in its place, without the authority of the Sheriff, either direct or implied, a totally different commitment, namely, the one which limited the imprisonment to thirty days; and his object in so doing was to "injure or defraud" Mr. Shanks "in his person or property," then a case of guilt would be established under this section of the Revised Statutes. If Mr. Britton intentionally and deliberately annexed to the return the wrong commitment, there can be no doubt on the evidence that his motive was "to injure" Mr. Shanks, in the language of the statute, "in his person;" in other words, to cause him to be incarcerated in the common jail of the County of Kings, and in that way restrained of his liberty. The commitment known as Exhibit B was never authorized by the Kings County Oyer and Terminer. Mr. Britton testified that this paper was signed by Judge Gilbert on the 22d of October, after the Court of Oyer and Terminer had adjourned, and the side justices had gone (fols. 209 to 212). Mr. Britton says the side justices signed Exhibit B, out of court the next morning (fols. 213 and 214). The Kings County Oyer and Terminer had at no time adjudged that Shanks should be imprisoned for a period not exceeding 30 days. That Court had gone through the form of convicting Shanks for contempt; the judgment of the Court had been embodied in what the Revised Statutes call "the order or warrant of commitment." The record of conviction was made up by Mr. Britton himself on the evening of the 22d of October (Shanks having then been in jail under commitment A since 12 or 1 o'clock of that day), and on the morning of the 23d signed by Judge Gilbert and the side justices at the request of Mr. Britton (fols. 213 and 214). This record of conviction is in harmony with the decision or judgment of the Court previously rendered. The record of conviction showed that the Court had rendered no decision or judgment limiting the imprisonment to 30 days. This was a vital point; it was of the very essence of the judgment. Although in some parts Mr. Britton's testimony is extremely evasive, on this point it is explicit. He testified as follows:

Q. Was there one word in the record of conviction about the imprisonment continuing not to exceed thirty days? A. No, Sir; there was not (fol. 265).

Mr. Britton testified that he filed the record of conviction "at about ten minutes after 10" on the morning of the 23d of October (fol. 217). When the record of conviction was signed and filed, the proceedings before the Kings County Oyer and Terminer were ended. That Court had nothing more to do—and could do no more in the case—except in the event of a certiorari to the Supreme Court to make a proper return to the writ. The Kings County Oyer and Terminer, as a court, never had anything to do with commitment B, limiting the term of imprisonment to thirty days. That commitment was never in any way before the Kings County Oyer and Terminer. It was signed out of court. The judgment embodied in this commitment was one the Oyer and Terminer never rendered. Whatever power the Court possessed when in session to amend, modify, or reverse its own order or judgment, clearly the members of the Court, when the Court was not in session, had no power to amend or modify the judgment rendered by the Court while in session; they certainly had no power to render an entirely different judgment. Apart from these legal considerations, Mr. Britton knew that the Court had rendered no judgment or decision that Shanks should be imprisoned for a period not exceeding 30 days. He drew the record of conviction; he filed it; and this record shows that the Court made no such decision. What ulterior designs Mr. Britton had in view in obtaining the signature of the judges to commitment B, may be inferred from circumstances. This commitment was signed the same time as the record of conviction (fol. 214). Within less than an hour Mr. Britton filed the record of conviction (fol. 217). He made no use of commitment B until after the hearing on the habeas corpus proceedings before Judge Fancher had commenced. This Judge Fancher found as a matter of fact (see his opinion, fol. 309). Mr. Britton testified that he left this paper at the Sheriff's office on the morning of the 23d. Judge Fancher found that Mr. Britton's evidence in this respect was not true; and that the evidence of the Sheriff's deputies, who testified that the paper was not left with the Sheriff until the afternoon of that day between 3 and 4 o'clock, was true. Mr. Britton in his evidence sought to make it appear that, at the time he produced before Judge Fancher commitment B, with the Sheriff's return, he did not know that it was claimed that commitment A was void because the imprisonment was indefinite and unlimited. That this point was raised by Shanks's counsel was matter of notoriety in New-York and Brooklyn on the afternoon of the 23d; it was stated in the evening papers of both cities. It is not very probable that Mr. Britton would shut his ears to information of this kind, which was accessible to the whole public. Mr. Britton admitted that on the morning of the 24th, at 8 o'clock (an hour or more before Sheriff Williams signed the return, and several hours before Mr. Britton produced commitment B before Judge Fancher), he read in *The New-York Herald* the entire report of the proceedings of the previous day before Judge Fancher (fols. 254 to 257). A verbatim copy of commitment A appears in *The Herald* report; after which it proceeds as follows:

Judge Fancher asked to hear the last of the order of commitment read over again.

"It makes the imprisonment perpetual," observed Mr. Clinton, after the reading. "I see it does;" answered Judge Fancher. "And the law prescribes in such cases," continued Mr. Clinton, "that the extent of punishment shall be either a fine of $250 or imprisonment for thirty days. It will be seen, therefore, that the commitment is void on its face."

From this report, and from the fact that Judge Fancher had previously (in what is known as the dueling case) decided that a commitment like the one in question was void on its face, it would have been very natural for Mr. Britton to suppose that, unless another commitment were substituted (for Exhibit A), Shanks would be discharged. The scheme concocted under these circumstances to palm off on Judge Fancher another and a different commitment than the one on which Shanks had been restrained of his liberty was eminently unsuccessful. The attention of the Court is invoked to the following points of law:

FIRST POINT.

The various sections of the Revised Statutes relating to contempts, should, like all penal statutes, be strictly construed.

Dwarris, in his work on Statutes, p. 634, says:

Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.

This author (pp. 634-5) very correctly observes:

A penal law, then, shall not be extended by equity; that is, things which do not come within the words, shall not be brought within it by construction. The law of England does not allow of constructive offenses, or of arbitrary punishments. No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and the letter of the statute imposing such penalty. "If these rules are violated," said Best, Chief-Justice, in the case of Fletcher agt. Lord Londes, "the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws."

In Elam agt. Ransom, 21 Geo. 139, the Court, per Bruning, J., says:

The common law leans toward that construction of all statutes which is in favor of personal liberty; not that which is against personal liberty.

In Lair agt. Killmer, 1 Dutch., 522, the court, per Ch. J. Green, says: "In defining the crime and the punishment, penal statutes are to be taken strictly and literally. A penal law cannot be extended by construction. The act constituting the offense must be both within the spirit and the letter of the statute." A penalty cannot be created by implication. Jones agt. Estis, 2 Johns. 380. In this case the Court says: "A penalty cannot be raised by implication, but must be expressly created and imposed." The rule was well stated by Hosmer, Ch. J., in Daggett agt. State, 4th Conn., 60, that "such statutes [penal] are to be expounded strictly against an offender, and liberally in his favor." In the matter of Watson, 5 Lansing, 469, Potter, J., says, "Presumptions are in favor of liberty."

In construing statutory provisions upon the subject of contempts, Mr. Britton has sought to wrench a meaning from them not at all in accordance with their letter and spirit. Although we have invoked the rule of construction applicable to all penal statutes, yet, without regard to that rule, I shall show that if effect be given to the meaning of the provisions of the Revised Statutes on the subject of contempts, the decision of Judge Fancher was correct; that he could have made no other or different decision without being guilty of a violation of judicial duty.

SECOND POINT.

The commitment was void on its face, for the reason that it imposed on Mr. Shanks an illegal punishment.

The Court of Oyer and Terminer of Kings County had no power to impose an indefinite or perpetual term of imprisonment. The attention of the Court is invited to the following provisions of the Revised Statutes, which accurately define and limit the powers of Courts of Record upon proceedings for criminal contempts:

SEC. 8. Every Court of Record shall have power to punish as for a criminal contempt persons guilty of either of the following acts, and no others:

* * * * * * * * * * *

5. The contumacious and unlawful refusal of any person to be sworn as a witness, and when so sworn, the like refusal to answer any legal and proper interrogatory.

SEC. 9. Punishments for contempts may be by fine, or by imprisonment in the jail of the county where the court may be sitting, or both in the discretion of the court; but the fine shall in no case exceed the sum of $250, nor the imprisonment 30 days; and where any person shall be committed to prison for the non-payment of any such fine, h shall be discharged at the expiration of 30 days.

SEC. 10. Contempts committed in the immediate view and presence of the court may be punished summarily; in other cases the party charged shall be notified of the accusation and have a reasonable time to make his defense.

SEC. 11. Whenever any person shall be committed for any contempt specified in this article, the particular circumstances of his offense shall be set forth in the order or warrant of commitment.

SEC. 12. Nothing contained in the preceding sections shall be construed to extend to any proceeding against parties or officers, as for a contempt, for the purpose of enforcing any civil right or remedy. (3 R. S., 469-470, Secs. 8, 9, 10, 11, 12, 5th Ed.)

These sections are found in Part 3, Chapter 3, of Title 2, of the Revised Statutes, relating to "General provisions concerning Courts of Record, and the powers and duties of certain judicial officers." It is conceded that an order, if properly drawn, will operate as a commitment, and possess as much legal efficiency as a formal commitment. This elementary principle is recognized by all the authorities, and by the Revised Statutes, which, as above shown, speak of an "order or warrant of commitment" as practically, and to all intents and purposes, one and the same. The Kings County Oyer and Terminer convicted Mr. Shanks of a "criminal contempt" under the eighth section above cited (see commitment under which he was imprisoned, fols. 48 to 53). The offense described in the commitment is that stated in the fifth subdivisions of Section 8, above quoted. The commitment states the offense of Mr. Shanks substantially in the very language of Subdivision 5. It states that the "interrogatory" was "legal and proper," and that his refusal to answer was "contumacious and unlawful." The Kings County Oyer and Terminer having convicted Mr. Shanks under the 8th section, proceeded to impose upon him an illegal punishment. That part of the commitment (or order which was used as a commitment) directing the infliction of the punishment for the "criminal contempt" was in the following words:

The Court doth hereby adjudge the said W. F. G. Shanks, by reason of the premises aforesaid, guilty of a criminal contempt of court, and doth further order and adjudge that the said W. F. G. Shanks, for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the common jail of the county for the term until he may answer the question propounded to him which he has refused to answer. (Fol. 52-3.)

The punishment, and the only punishment, which the Kings County Oyer and Terminer could inflict upon one convicted as was Shanks, under the 8th section, is specifically defined by the very next section, namely, Section 9, above set forth. The latter section expressly forbids the Court to commit to prison for any longer term than 30 days. The 9th section is the only one which defines the power of the Court with reference to the punishment. It may be both fine and imprisonment, or either, in the discretion of the Court. If the punishment be a fine, the specific sum must be stated; if the punishment be imprisonment, the term or length of the imprisonment must be named in the commitment. There is no more authority under the provisions of the Revised Statutes applicable to this case, for making the term of imprisonment perpetual or indefinite, than for making the amount of the fine indefinite. If the Kings County Oyer and Terminer had adjudged that for the contempt of which they had convicted Shanks he should pay a fine, without naming a specific sum, will it be contended that such a judgment could be enforced? Clearly not, because under the ninth section the Court is required, if the punishment be a fine, to name a definite sum, not exceeding $250. In the same way and by the same section, the Court, if they imprison, are directed to specify a definite term of imprisonment, not exceeding 30 days. If the punishment for a "criminal contempt" be the payment of a fine, and there is no specification of the amount, the judgment would be void; and the party guilty of the contempt could not be compelled to pay any fine, even to the extent of a dollar. On the same principle, if the punishment be imprisonment, but no definite term of imprisonment is named, such a judgment cannot be enforced, for the reason that it is absolutely void. A commitment defective in this particular is absolutely void. This is a plain case, where the court (Kings County Oyer and Terminer) adjudged—or attempted to adjudge—a party guilty of a "criminal contempt," and imposed imprisonment as a punishment. It is not a case "where the misconduct complained of consists in the omission to perform some act or duty which it is yet in the power of the defendant to perform," in which case the statute says "he shall be imprisoned only until he shall have performed such act or duty."—(3 R. S., 853, sec. 23, 5th Ed.)

That the Kings County Oyer and Terminer condemned Shanks to suffer imprisonment, as punishment for his offense, appears—*First:* By the form of the commitment above quoted; it is, as above shown, in the very language of the provisions of the Revised Statutes cited. *Second:* The form followed is the commitment in the case of Hackley (24 N. Y., 76). Mr. Britton attempted to follow this form word for word. Except in regard to the name of the party, the name of the Court, the description of the subject of offense (which will be considered under a subsequent point) under investigation by the Grand Jury, the commitment in Shanks's case follows the form in Hackley's case word for word, with only this difference—the imprisonment in Hackley's case was limited to 30 days, and in Shanks's case it was indefinite or perpetual. By the form of the commitment, it is adjudged, in each case, that the party shall be punished for his offense; the only difference being that in the one case the punishment was legal, and in the other it was illegal. In the matter of Watson, 5 Lansing, 470, Judge Potter shows very clearly that where the Court adjudged a party guilty of a "criminal contempt," they cannot fine or imprison except as authorized by the ninth section above quoted, by which the imprisonment must be limited to 30 days. In that case Judge Potter shows the way some confusion has arisen in the reported cases, by reason of proper attention not having been paid to the distinction between the two classes of contempts recognized by the Revised Statutes; namely, *First:* "Criminal Contempts," and *Second:* "Proceedings as for Contempts to enforce civil remedies," &c. The distinction between these two classes of contempts, and the statutory provisions applicable to each, will be more particularly considered in a subsequent point. The fact that the offense (if there were any) of which Shanks was declared to be guilty, was that of a "criminal contempt," of itself furnishes conclusive proof that Section 9, limiting the imprisonment to 30 days, applies to his case. Mr. Britton, in his brief, submitted to this Court, says: That Shanks was "detained upon a 'criminal charge,' to wit, a criminal contempt. It is so declared by 3 R. S. (5th Ed.), p. 470, sec. 8, sub. 5. It is also declared to be a misdemeanor, 3 R. S. (5th Ed.), p 973, sec. 14." The commitment, in express words, alleges that Shanks was convicted of criminal contempt. The language is: "The Court doth hereby adjudge the said W. F. G. Shanks guilty of a criminal contempt" (fol. 32). The section to which Mr. Britton refers, to show that the "criminal contempt" exposed Shanks to indictment for "misdemeanor," is as follows:

Every person who shall be guilty of any criminal contempt, enumerated in the second title of the third chapter of the third part of the Revised Statutes, shall be liable to indictment therefor as a misdemeanor, and upon conviction shall be punished as hereinafter prescribed. (3 R. S. 973, sec. 14, 5th Ed.)

No contempt is a "criminal contempt" unless it comes within this section. The reference contained in this section is to those sections already quoted, including Section 9, which defines and limits the powers of the Court in regard to imposing as punishment a fine of not more than $250, and imprisonment not exceeding 30 days. This section, making a criminal contempt indictable and punishable as a misdemeanor, proves beyond question that Section 9, so defining the punishment when the party is adjudged guilty, not on a trial upon indictment, but by the Court, does apply to cases like the one at bar. That the punishment (indefinite or perpetual imprisonment) imposed on Shanks by the Kings County Oyer and Terminer, was illegal, is clearly shown by Judge Fancher in his opinion. If the punishment were illegal, it necessarily follows that the commitment directing that Shanks should undergo that punishment was void. Judge Fancher says:

The Court had in this matter authority to commit for "a term not exceeding 30 days." It had no jurisdiction to order an unlawful commitment. Suppose the Court had ordered the petitioner to be confined in a prison for 30 years. Would it be contended that relief could not be had on habeas corpus from such an unlawful commitment? There is no difference in principle between the case supposed and the case under consideration. A commitment for an indefinite time is not authorized by law, and the Court has no jurisdiction to make it. (Fols. 297-8.)

The doctrine of Judge Fancher has been indorsed very recently by the Supreme Court of the United States. In the case of Lange, who had been sentenced to undergo punishment in excess of that permitted by law—he was discharged upon habeas corpus—Mr. Justice Miller, in delivering the opinion of the Court, says:

It is no answer to this to say that the Court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the Court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hanged, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason be void.

THIRD POINT.

The commitment under which Mr. Shanks was committed was fatally defective, not in mere form, but in substance, and for that reason he was properly discharged by Judge Fancher.

I have shown under Point II. that the punishment imposed for "criminal contempt" was an illegal one. This was not the case of a commitment defective in form. The defect was a fatal one, because it did not in any way relate to form. Suppose a party was convicted in the General Sessions, or in the Oyer and Terminer, of a misdemeanor, and the Court should sentence him, as for a felony, for example, to the State Prison for 10 years, would any one contend that the defect was one of form instead of substance? The cases cited on Mr. Britton's Points, showing that in certain cases, for errors in matters of mere form, parties shall not be discharged on habeas corpus, have no relevancy to this case. If the commitment be defective in mere form, a judge or court would not discharge on habeas corpus; but if a commitment be an illegal one, then it is the right of the party to be discharged. The distinction is clearly and well stated in Judge Fancher's opinion in this case. He says (fols. 306 and 307):

There is a wide difference between an informal commitment and an illegal commitment. The former, if it be one which a court could make for a contempt plainly charged, is sufficient, though in some form or part it be defective; for example, where it is not directed to any officer. But the latter, which on its face is shown to be illegal, is insufficient; for example, where it is directed by a civil court to a military officer, or enjoins a perpetual or indefinite imprisonment.

Hence the Court is always particular, where it imposes imprisonment as a punishment for contempt, that the length of the imprisonment be stated in the commitment. In the matter of Percy, 2 Daly, 530, the party was committed to the County Jail for thirty days for contemptuous conduct in the view and presence of the Court. In the case of Peo. agt. Hackley, 24 N. Y., 74, the term of imprisonment specified was thirty days. Where the sentence imposed is an illegal one, the courts have held it to be void. If a commitment is not "according to law," a party is entitled to be discharged. See opinion of Judge Fancher and authorities cited by him (folios 296 to 311.) Judge Fancher had not the power to remand Mr. Shanks, under the following section of the habeas corpus act:

If it appear that the party has been legally committed for any criminal offense, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense, although the commitment be irregular, the Court or officer before whom such party shall be brought shall proceed to let such party to bail, if the case be bailable and good bail be offered; or, if not, shall forthwith remand such party. 3 R. S., 888, Sec. 58 (5th Ed.)

This section on its face does not apply to a case of contempt like that of Shanks. It only applies to one who has been charged but not tried for a criminal offense; it applies where one has been committed by a magistrate, for the purpose of sending the case to the Grand Jury, so that in the event of an indictment he can be tried by a petit jury. It does not apply to a case where the Court has attempted summarily to adjudge one guilty of contempt, and he is undergoing the punishment which the Court has adjudged him to suffer. In the cases referred to in this section it is the duty of the Judge, upon the hearing on the habeas corpus, if the commitment be defective in matter of form only, and the proofs show the party guilty, to make out a proper commitment and remand him. The Judges who have power to issue a habeas corpus are clothed with the authority of magistrates. In the case of Shanks, Judge Fancher had no power to make out a new commitment. The defect in the commitment was one which he could not amend or in any way remedy. The defect was such that it was past the power of any Judge or Court to remedy it at the time the matter was before Judge Fancher. If the Kings County Oyer and Terminer made a void commitment—rendered a void judgment—clearly Judge Fancher could not do otherwise than discharge Shanks, in pursuance of the following section of the habeas corpus act:

If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such Court or officer shall discharge such party from the custody or restraint under which he is held. 3 R. S., 887, Sec. 54 (5th Ed.)

Where upon regular trials, according to the course of the common law, the Court upon conviction pronounced the wrong judgment (or a different judgment from that which the law allows,) such judgment is absolutely void, and the party is entitled to be discharged. In King agt. Bourne, 7 Ad. and E., 58, the wrong sentence having been pronounced, the Court unanimously held that the prisoners were entitled to judgment of reversal and to be wholly discharged. In O'Leary agt. People, 4 Park., 187, the prisoner, contrary to law, was sentenced as for a felony. The Court held that the sentence was void, and that the prisoner should be discharged. In the following cases the courts have held that if the sentence or judgment pronounced be illegal, it is absolutely void, and the prisoner should be discharged: Shepherd agt. Commonwealth, 43 Mass. (2 Metcf.), 419. People agt. Taylor, 3 Denio, 97. This would still be the case in this State but for a comparatively recent statute, which empowers the appellate Court, in case the wrong sentence be pronounced, after a trial by jury, to send the case back with instructions to the inferior Court to render a proper judgment. This statute, of course, has no reference to proceedings on habeas corpus. In the case of Ratzky agt. People, 29 N. Y., 132, Davies, J., said:

The judgment in this case was pronounced on the assumption that the prisoner was to be punished according to the Act of 1862. We think this view of the law was erroneous and must be reversed. It would follow from these considerations and the authority of the case of the People agt. Shepherd (25 N. Y., 406) that, a wrong judgment having been pronounced, although the trial and conviction were regular, this prisoner could not be subjected to another trial, and would be entitled to his discharge. That would unquestionably be so but for the act of April 24, 1863. * * * In the present case, that Act became operative before the judgment and sentence were pronounced and given, and before the writ of error was prosecuted to this Court. * * * But for the authority conferred upon this Court by this statute, it would have had no power, upon the reversal of the judgment of the Supreme Court, either to pronounce the appropriate judgment or remit the record to the Oyer and Terminer to give such judgment. This is well settled by authority.

These authorities certainly show that where a wrong sentence or judgment is pronounced by the Court, the defect is not a matter of form but of substance. If the punishment imposed be illegal, the judgment is absolutely void. The defect is a fatal one, and cannot be remedied, unless the Legislature pass a statute to provide for such cases. As the commitment under which Shanks was held was absolutely void, Judge Fancher could not do otherwise than discharge him.

FOURTH POINT.

The statutory provision permitting courts in certain cases, after adjudging a party guilty of contempt, to imprison him until he shall perform a particular act or discharge some particular duty, has no application to this case.

Upon this point Mr. Britton quotes 3 R. S., 853, section 23 (5th Ed.), but he leaves out that part of the section (23) which shows on its face that it can have no possible application to this case. I will quote the whole section. It is as follows:

SEC. 23. When the misconduct complained of consists in the omission to perform some act or duty which it is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty, *and paid such fine as shall be imposed, and the costs and expenses of the proceedings.*

Mr. Britton, in citing this section, omitted the portion in italics. The next section is as follows:

SEC. 24. In such case the order and process of commitment shall specify the act or duty to be performed, and the amount of the fine and expenses to be paid.

It is apparent on the face of these sections that they have no possible application to this case. These sections are found in Part III, Chap. 8, Title xiii, of the Revised Statutes, providing for "Proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions." The proceedings in relation to contempt, to enforce civil remedies, have nothing to do with the punishment to be inflicted for criminal contempt, under the provisions of the Revised Statutes cited under Point II. For the purpose of showing that Section 23 (of 3 R. S., 853, 5th Ed.) applies to this case, Mr. Britton professes to quote Section 16 (of 3 R. S., 1027-8 of the 5th Ed.) In this instance, in citing this section, he leaves out a very material part. The whole section is as follows:

SEC. 16. *The proceedings prescribed by law in civil cases, in respect to the impaneling of juries, the keeping them together, and the manner of rendering their verdict, shall be had upon trials of indictments,* and the provisions of law in civil cases, relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths, and affirmations, and proceedings as for contempts to enforce the remedies and protect the rights of parties, shall extend to trials and other proceedings on indictments, so far as they may be in their nature applicable thereto, subject to the provisions contained in any Statute.

Mr. Britton, in quoting this section, omitted the portion in italics. That this section has no application to the present case is apparent on the face of it. It is provided by this section that the "proceedings as for contempts to enforce the remedies and protect the rights of parties" shall extend to proceedings on indictments, first, "so far as they may be in their nature applicable," and second, "subject to the provisions contained in any statute." The statutory provision in relation to contempts to enforce the rights of parties in civil cases that permits the Court to imprison a party until he performs some particular act and forbids a continuance of his imprisonment after he has performed the act can have no possible application to the present case. By the sections of the Revised Statutes, quoted under Point II, every Court of Record has the power in case of criminal contempt, like that of which Mr. Shanks was convicted, to fine to the extent of $250 and imprison for a period of not exceeding thirty days. This power is given in express words to any Court of Record. If the section in question were applicable to this case the power to impose a fine of $250 and imprison for thirty days would be taken away. If setting the Court at defiance and refusing to answer a question which the Court rules to be proper is, in the language of this section, a mere "omission to perform some act or duty which it is yet in the power of the defendant to perform," then the Court could only keep such party in custody until he should answer the question; for the section expressly provides that in such a case the person "shall be imprisoned only until he shall have performed such act or duty." If this were the law, a witness could refuse to answer a question, be committed to custody for two or three hours, then answer the question; and refuse to answer the next question, be committed again, remain in custody for several hours, then come into Court and offer to answer, and continue to repeat the process—so that a month's time of the Court might be occupied in the examination of a witness, when half an hour would be sufficient, if he obeyed the instructions of the Court, and answered the questions which the Court decided to be proper. A construction which would hold this section applicable to this case would practically nullify and abolish the statutory provisions cited under point II. Again, the provisions under discussion, contained in Section 16, shall be "subject to the provisions contained in any statute." So that by the very terms of Section 16, it cannot apply to this case; for this case is specifically provided for by "the provisions contained in 'another' statute," namely Section 9, p. 470 of 3 R. S. (5th Ed.), quoted under Point II, which in so many words gives the Court power to fine to the extent of $250, and to imprison for a term not exceeding thirty days. The construction contended for by Mr. Britton would virtually abolish Section 9, and substantially take away from the Court the power it now possesses to imprison a contumacious witness for contempt for a definite period not exceeding thirty days. The distinction between the two classes of contempts is very clearly pointed out by Potter, J., in the matter of Watson, 5 Lansing, 479. He says:

Now there are two classes of contempts recognized in the statutes, the punishment prescribed for each class of which is different; but the confounding of the manner of punishment of which is the occasion of all the apparent conflict that appears in the reported cases. These two classes of contempt are: first, criminal contempts, described 2 Revised Statutes, 278, marginal page, section 10 [5th Ed., 3 R. S., 470], and the punishment of which and the extent of which are therein prescribed and limited; and second, proceedings as for contempts to enforce civil remedies, and protect the rights of parties in civil cases. 2 R. S., 534, 535. (5th Ed., 3 R. S., 849, 850.)

When Justice Potter speaks of the punishment for "criminal contempts," which are "therein prescribed and limited," he refers to the section which for criminal contempt limits the punishment to a fine not exceeding $250 and imprisonment for not over thirty days. Mr. Britton contends "that had the order [or commitment] provided for imprisonment for a specific time, it would have been in violation of 3 R. S., 853, Sec. 23," which provides that:

Where the misconduct complained of consists in the omission to perform some act or duty which it is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty.

If this construction be correct, then the commitment in Hackley's case (which the Court of Appeals decided to be good), that consigned him to imprisonment for thirty days, would have been void. Sec. 16, p. 1,028 of 3d R. S. (5th Ed.), cited by Mr. Britton, applies to an "omission to perform some act or duty" which the party can remedy of his own motion—by his own act—without the aid of the Court. For example, in the case of People vs. Nevins, 1 Hill, 154, the Court ordered an attorney to be committed until he should pay over money collected for his clients and the costs and expenses of the commitment. This section applies in case a party refuses or omits to comply with an order of the Court that he execute a deed or other paper. It would be absurd to suppose that this section applied to a criminal contempt for not answering a question put by a grand juror. A party imprisoned for such an offense could not of his own motion "perform" the "act or duty" for the non-performance of which he was imprisoned. Of his own motion he could not get out of jail to go to the Grand Jury room; if he did he could not of his own motion get into the Grand Jury room to testify. The Grand Jury sit in secret, with closed doors. It is not as in the case of a witness who refuses to testify upon an actual trial, which by law is public. The witness, if at liberty, can go into Court and offer to testify. In the case at bar, the party by the commitment was to be locked up in jail until he should testify before a Grand Jury. Suppose the Grand Jury had adjourned for two or three days—Shanks could not convene them in order that he might answer the question propounded to him. Suppose they were in session; Shanks, locked up in jail, could not of his own motion go to them, nor could he procure their attendance upon him in jail. Of his own motion—as matter of right—he could not even send the Grand Jury word that he was willing to testify. Of his own motion—as matter of right—he could not take the first step toward going before the Grand Jury to answer the question. By the construction of this section contended for by Mr. Britton, it would be in the power of a District-Attorney to confine a witness in jail, cause the jailor to permit none of his friends to see him, permit no messages to be sent from him or to him, and prevent the possibility of his performing the "act or duty" in question. Such a construction would place it in the power of a District-Attorney to prevent the possibility of the party complying with the decision of the Court, in regard to testifying, and thus prolong his imprisonment indefinitely. With such arbitrary and despotic power sanctioned by the Courts, it would have been impossible without resorting to violence and mob-law to break down either the Tammany Ring or the Brooklyn Ring.

Whether Justices of the Peace in the country have power to imprison a contumacious witness until he shall answer the questions propounded to him, has no relevancy to this case. A contumacious witness, if he got at liberty, could manage to go before the Justice who holds his Court in public and testify. It is a very different thing from getting before a Grand Jury sitting in secret, and with doors locked. Apart from this consideration, Courts of Record like the Kings County Oyer and Terminer derive their sole power to commit and punish for contempt a contumacious witness from the provision of the Revised Statutes quoted under Point II, which in express words forbid any imprisonment except it be for a definite time, not exceeding thirty days. These statutory provisions do not apply to Justices of the Peace; they are expressly limited to "Courts of Record." If Justices of the Peace possess any power to commit to prison for an indefinite time, and until a witness shall answer, the power must be derived from some special statute, which has no application to Courts of Record. The position substantially taken by Mr. Britton in his "Points," that if the commitment were defective in the particular in question, it should not avail Mr. Shanks, because, if the Court erred, it was in the power of the Sheriff to correct the error, although somewhat novel, is bad law. Mr. Britton, after quoting Section 9, p. 470, of 3 R. S., expressly prohibiting imprisonment for more than thirty days, says:

There is no requirement here (that is, in section 9) that the limitation shall be inserted in the commitment: "The imprisonment shall not exceed 30 days." In other words, at the expiration of 30 days, the prisoner shall be set free. This would be the duty of the Sheriff under this statute, and in case of refusal, the Court will discharge on habeas corpus.

Mr. Britton's notion is very uncomplimentary to the learned and able Court of Kings County Oyer and Terminer. His argument proceeds on the idea that the Sheriff is constituted a court of dernier resort—an impromptu Court of Appeals—to correct the errors and reform the process of the Court. A sailor, on one occasion, in attempting to read the shipping advertisements, held his newspaper upside down. He remarked that "there must have been a terrible storm at sea." Mr. Britton seems to have got his law wrong side up.

FIFTH POINT.

The commitment (or order used as a commitment) is void, for the reason that it sets forth no offense on the part of Mr. Shanks.

As shown under Point II., Section 8 (3 R. S., pp. 469 and 470), gives Courts of Record power to punish as for a criminal contempt persons guilty of certain acts, among which is the unlawful and contumacious refusal of a witness to answer a legal and proper interrogatory. Section 9 limits the punishment to a fine of not more than $250 and imprisonment not exceeding thirty days.

Section 11 provides that "Whenever any person shall be committed for any contempt specified in this article, the particular circumstances of his offense shall be set forth in the order or warrant of commitment."

By Section 55 (3 R. S., p. 887, 5th Ed.), it is provided that upon a party being brought up on habeas corpus, that

It shall be the duty of such Court or officer forthwith to remand such party if it shall appear that he is detained in custody.

* * * * * * * *

3. For any contempt specially and plainly charged in the commitment by some Court or officer or body having authority to commit for the contempt so charged; and, 4. That the time during which such party may be legally detained has not expired.

Under these statutory provisions, it is certainly clear that the commitment should set forth an offense. In order that the judge, before whom a party is brought on habeas corpus, may determine whether he should be discharged or remanded, it is provided that "the particular circumstances of his offense shall be set forth in the order or warrant of commitment." This provision was intended as a proper safeguard of personal liberty; the object was to enable a court or judge, upon habeas corpus, to determine whether the act or conduct charged as constituting the contempt was such that the offense of "criminal contempt" could be predicated upon it. Denio, J., in People agt. Hackley, 24 N. Y., 77-8, says:

The habeas corpus act moreover declares that where the detention of the party seeking to be discharged by habeas corpus appears to be for any contempt plainly and specially charged in the commitment ordered by a court of competent jurisdiction, he shall be remanded to the custody in which he was found. But this rule is, of course, subject to the qualification, that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the offender really committed the act charged will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent, according to the circumstances.

In Shanks's case there are no "equivocal acts"—such, for instance, as disrespectful and disorderly conduct in the immediate view and presence of the Court. The only offense attempted to be charged is that of respectfully declining to answer a particular question. If, upon the facts set forth in the commitment, no "criminal contempt" can be predicated upon that refusal, then there is no "contempt specially and plainly charged in the commitment;" and "the particular circumstances set forth in the order or warrant of commitment" constitute no offense at all; and on that ground Shanks was entitled to his discharge. If, in the language of Judge Denio, the refusal "to answer the question propounded to him was only an assertion of a right," no contempt can, by legal possibility, be predicated on his refusal. Unless it appeared to the Kings County Oyer or Terminer that the question propounded related to a matter or complaint, of which the Grand Jury had cognizance or jurisdiction to inquire into, the Court had no right or authority to direct the witness to answer. The Court could not assume that the question related to a matter of which the Grand Jury had jurisdiction. The contempt here is not like that of which a witness might be guilty by refusing to answer a question in the progress of a trial conducted before the Court. In such case the Court has the means of determining whether the question propounded is "legal and proper." In this case the Kings County Oyer and Terminer had no means whatever of determining whether the question propounded to Shanks related to a matter of which the Grand Jury had jurisdiction. The only means of knowledge on this subject possessed by the Kings County Oyer and Terminer are set forth in the commitment. The Court acted upon a specific complaint of the Grand Jury (fols. 49 to 54). The Grand Jury sit in secret, and the Court is not presumed to know what transpires before them, except as their action is officially brought to the notice of the Court. By this complaint of the Grand Jury made to the Court (and set forth in the commitment) it does not appear that the question Shanks was required to answer related to any offense alleged to have been committed in the County of Kings, or in the State of New-York, or even in the United States. All that appeared on the subject was that the Grand Jury had before them "a matter of libel alleged to have been published of and concerning Alexander McCue." In this complaint to the Court the Grand Jury do not represent that the offense was alleged to have been committed in the County of Kings. For aught that appears, the inquiry may have related to some offense committed in Kamtschatka or in the Fiji Islands.

In the case of People agt. Hackley, the commitment set forth that the question propounded to the witness related to "a certain matter and complaint pending before such Grand Jury, whereof they had cognizance, against certain Aldermen and members of the Common Council of the City of New-York, for feloniously receiving a gift of money under an agreement that their votes should be influenced thereby in a matter then pending before said Aldermen and members of the Common Council." Had not the commitment set forth that the inquiry related to an offense alleged to have been committed in the County of New-York, Hackley would have been entitled to his discharge upon habeas corpus. In the case of Hackley, 21 How., 103, it was held in the case of a witness committed for contempt, in not answering a question propounded by a Grand Jury, that the commitment must show on its face that the Grand Jury was properly organized, and that the matter pending before that body was one of which they had jurisdiction. Unless the commitment in the case at bar shows on its face that the subject under investigation, respecting which the question was propounded to Shanks, related to an offense (of libel) alleged to have been committed in the County of Kings, it does not appear that the question related to a matter of which that body had jurisdiction. A more fatal defect in any commitment could not be suggested. The fatal omission is of that which alone would give the Grand Jury of Kings County jurisdiction. The fact that the Grand Jury in their complaint assert (impliedly) that the question asked Shanks related to "a certain matter and complaint pending before such Grand Jury, whereof they have cognizance," goes for nothing. It was for the Oyer and Terminer, after the proper and necessary facts to show jurisdiction had been officially communicated by the Grand Jury, to determine the question as to jurisdiction. The remark cited by Mr. Britton of Judge Daly in the case of Percy, 2 Daly, 533, that "where the order is one which the Court have authority to make, all jurisdictional steps and all matters of regularity are to be presumed," has no application to this case.

SIXTH POINT.

The habeas corpus *ad testificandum*, with the order thereon, gave Judge Fancher no right or authority to remand Mr. Shanks to imprisonment.

It was the duty of Judge Fancher to render his decision upon the facts appearing before him. He was compelled to give judgment upon certain issues of fact presented by the pleadings, namely, the return by the Sheriff and the traverse of the relator. (See return of Sheriff to habeas corpus of Judge Fancher, fols. 43 to 46, and traverse of relator, fols. 72 to 79.) The Sheriff's return alleges that he holds Shanks by virtue of a commitment issued to him by the Kings County Oyer and Terminer. He adds, "which said commitment I now produce." The commitment produced was Exhibit "B" (fols. 62 to 69), limiting the imprisonment to 30 days. This was the commitment under which Shanks had never been held at all. With respect to this paper, Judge Fancher in his decision says: "The proof shows conclusively that the subsequent paper (Exhibit B) was not delivered to the Sheriff until after the hearing on the habeas corpus had commenced" (fol. 309). The Sheriff's return then alleged that Shanks was taken to New-York on a habeas corpus *ad testificandum* issued to him (that is, to the Sheriff of Kings County), and that he thereupon sent him to New-York in custody of one of his deputies, and that "while held by said officer in said city, under the said commitment produced by me" (Sheriff of Kings County), the habeas corpus issued by Judge Fancher was served. No habeas corpus *ad testificandum* was issued to the Sheriff of Kings County, nor was Shanks brought to New-York upon any habeas corpus *ad testificandum* issued to the Sheriff of Kings County. There was a habeas corpus *ad testificandum* issued to "the keeper of the Raymond-st. jail" (fol. 56). The traverse of the relator denied all the allegations of the Sheriff's return (fols. 72 to 79). Thus it will be perceived that the existence of any such habeas corpus *ad testificandum* as that described in the return of the Sheriff was denied. No such habeas corpus *ad testificandum* was put in evidence by either side before Judge Fancher, for the reason that none such ever existed. The only habeas corpus *ad testificandum* put in evidence was one directed to "The keeper of the Raymond-st. Jail" (fol. 56). There is no law which recognizes any such institution as the "Raymond-st. Jail." There is no such official known to the law as the "Keeper of the Raymond-st. Jail." Upon the trial of the issues of fact before Judge Fancher on the habeas corpus proceedings, the only habeas corpus *ad testificandum* put in evidence was that set forth at fols. 56 to 60. Mr. Britton produced that one before Judge Fancher for the purpose of supporting the allegations in the Sheriff's return; yet the paper had no such effect—it was a totally different paper from that described in the Sheriff's return. Although admitted in evidence, it proved nothing, except that Shanks was never in custody upon any legal habeas corpus *ad testificandum*, and could not be sent back to imprisonment by reason of any such paper. The error committed was in the first instance by the lawyer who drew the habeas corpus *ad testificandum*, in directing it to a non-existent official described as the keeper of a jail, which in law did not exist. It was quite natural for the presiding Justice of the Oyer and Terminer of New-York, after Shanks had testified in the Stokes case, to indorse in the usual way the "remand" on the writ, to "the keeper of the jail within named" (fol. 60). The fact that, by reason of the error of the lawyer who drew the habeas corpus *ad testificandum*, Shanks was remanded to a prison—or jail—which in law did not exist, to the custody of an official whom the law regarded as a myth, was of itself sufficient reason why Shanks could not be further deprived of his liberty. Apart from this fatal defect in the habeas corpus *ad testificandum*, it is susceptible of legal demonstration that the law gives no power to a Court to remand back to imprisonment one taken from jail, where he is undergoing imprisonment ordered by the Court (not upon a trial after indictment) for contempt of court. The authority for remanding back to imprisonment one who is brought up on habeas corpus *ad testificandum*, is the following: It is provided by Section 5 of 3 R. S., p. 877 (5th Ed.), that:

SEC. 5. Whenever any person shall be in execution on any civil process, or committed on any criminal charge, a writ of habeas corpus may be issued to bring the body of such prisoner before any court to testify, or to answer [illegible] upon the writ that the prisoner is charged in the execution, or committed as aforesaid, he shall be returned [illegible] order or commitment [illegible] mitted to the prison from which he was taken.

It makes no difference whether the contempt of which it is claimed Shanks had been adjudged guilty might hereafter subject Shanks to an arrest by the warrant of a committing magistrate, or upon an indictment being found preliminary to a trial before a jury. In such event, should he hereafter be so arrested and confined in prison, before taking his trial by a jury, he might then be said to be committed on a "criminal charge." It is true that one may be indicted for a criminal contempt, as already shown in pursuance of Section 14, page 973, of 3 R. S., 5th Ed. In order to subject Shanks to the liability of being remanded to prison, in any event it must be returned upon the writ that he is "charged in execution or committed as aforesaid;" that is, "on any criminal charge." In order that the presiding Justice of the Oyer and Terminer have jurisdiction to send Shanks to prison, it must appear that this be "returned upon the writ" by the officer having him in charge, and who produced him at the New-York Oyer and Terminer upon the habeas corpus *ad testificandum*. Neither of these things appear. The return on the writ does not show that Shanks is held upon any "criminal charge." The return of the Sheriff of Kings County is that Shanks is held "by virtue of a commitment issued by the Hon. J. W. Gilbert, which commitment is hereto annexed." There was no commitment by the Hon. J. W. Gilbert thereto annexed. The commitment thereto annexed was one which made the imprisonment of Shanks perpetual. The commitment thereto annexed, not only did not charge, but did not show that he was committed on a criminal charge. It did not show that he was committed for an alleged contempt. Even had the commitment been regular and limited the imprisonment to thirty days, there would then have been no authority for remanding Shanks. The law provides no way of getting a party who has testified back to prison, unless it can be done by the 5th section above quoted. That section makes no provision for returning to prison any one who is committed for a contempt under the circumstances upon which Shanks was imprisoned. The order on the habeas corpus *ad testificandum* remanding Shanks was void:

First: Because Shanks was not in execution on any civil process, nor on any criminal charge.

Second: The Sheriff did not so indorse upon the writ.

Third: Shanks was remanded to the custody of an official and a jail not known to the law, namely: "The Raymond-st. Jail." There is no such official, nor is there any such jail known to the law.

The commitment under which it was attempted to hold Shanks in imprisonment in Kings County being void for the reasons already stated, the order "remand" upon the habeas corpus *ad testificandum* could not in any way make the imprisonment upon the void commitment legal. If the commitment under which Shanks was held in Kings County was absolutely void, then it was the imperative duty of Judge Fancher to discharge him, even though the habeas corpus *ad testificandum* had not contained any of the fatal defects already pointed out.

SEVENTH POINT.

The point made by Mr. Britton, that Judge Fancher, sitting at Chambers, had no authority to bring the prisoner before him, by virtue of the writ of habeas corpus granted by him, returnable before himself, there being at that time a Court of Oyer and Terminer in session in the County of Kings, is untenable.

The following is the section of the Revised Statutes referred to:

After the Court of Oyer and Terminer shall commence its sittings in any county, no prisoner detained in the common jail of any such county, or under the custody of the Sheriff thereof, shall be brought upon any writ of habeas corpus which shall have been issued by such Court of Oyer and Terminer, or shall be made returnable before it. 3 R. S. 549, 2 R. S. 1,060, Sec. 57.

This point is clearly and conclusively answered by Judge Fancher in his opinion. He says:

It is objected that the writ should have been made returnable in the Oyer and Terminer, which was then in session. The statute under which the objection is made (3 R. S., 5th Ed., p. 1,066, Sec. 27) is not applicable [illegible] ... It is further objected that the writ should have been returnable before some court or officer in Kings County. [illegible] Section 38, formerly Section 24 of the Habeas Corpus act (3 R. S., 5th Ed., p. 884) [illegible] Special and General Term of the Supreme Court [illegible] (See People agt. Hanna, 3 How. Pr. Rep. 39; People agt. Cooper, 8 Tu., 288; People agt. Tolmey, 60 Barbour Rep., 446-487.)

EIGHTH POINT.

The attempt made by Mr. Britton to discuss the merits of this case was singularly unfortunate.

In his printed brief he seeks to show that the effect of sustaining Judge Fancher's decision will be disastrous to this community—to society generally—in short, to the dearest interests of the civilized world. With reference to the discharge of Shanks in this case, and the decision of Judge Fancher, Mr. Britton says:

It strikes a blow at the very foundations of society; it practically abolishes grand juries, and establishes universal immunity from crime. It has no parallel.

He further says:

If the rules of the [TRIBUNE] office may enable the concealment of one crime, it may of all. If for libel, it may for murder; and if a newspaper office may make such rules, so may any other business establishment [illegible]

There is such a curious mixture of mythical facts and direful forebodings that it is difficult to determine what construction to put on Mr. Britton's language. He says the Grand Jury, in their exploring expedition, were eager to discover "the name of the writer," because they presumed "that from him of all others" "the facts, if they exist, may be obtained." It was notorious that Mr. Shanks was ready and anxious to give the names of witnesses. It was well known that the facts were not within his personal knowledge; that the facts published in THE TRIBUNE could not be proved by those connected with the paper, because information, however correct, derived from others, cannot be given in evidence, for the reason that the law rejects it as "hearsay." Mr. Britton argues as though the object of the inquiry was to ascertain as to the truth of the facts charged, and bring to justice those who had been guilty of dereliction of official duty. Yet both in the genuine and wrong commitments (Exhibits A and B, fols. 30 and 50) alleged that the subject before the Grand Jury, about which Shanks was interrogated, related to "the matter of a libel alleged to have been published of and concerning Alexander McCue." The object of the proceeding before the Grand Jury, according to the record before this Court, was to vindicate Alexander McCue. If he had been libeled, it was only necessary to call as witness Mr. McCue himself. When a charge is pending before a Grand Jury, it is not customary to call witnesses for the defense, and put them through a course of compulsory examination. It is very rare that a District-Attorney subpenas witnesses on behalf of the defense. This is the only instance in which a District-Attorney has compelled a witness for the defense to go before a Grand Jury, and then sent him to jail because he would not furnish evidence to convict. Cases are brought before the Grand Jury by the action of the District-Attorney. He is the official adviser of the Grand Jury. In this case he [illegible] body a charge of libel upon Alexander McCue, and by the process of subpena he drags Shanks from his sick room, not to prove the charge, but to disprove it, and then, because he would not disprove the charge—in other words, according to Mr. Britton's version, because Shanks does not aid in the defense, and thus frustrate the charge, the only effect of which would be to prevent the commission of the offense of libel—Mr. Britton sends Shanks to jail; and the effect of liberating him upon habeas corpus, he says, is to "strike a blow at the very foundations of society." It is to be regretted that such a "society" to which he alludes, and which has already been shaken to "the very foundations," is the Brooklyn Ring. And if the effect of Judge Fancher's decision has been to "strike a blow at the very foundations of society," the tax-payers and all honest citizens, who desire to put an end to "universal immunity for crime," will not go into deep mourning. Mr. Britton closes his pathetic appeal on this subject as follows:

Every citizen, in whatever sphere of life, is deeply interested in resisting this revolutionary claim, while by this witness [Shanks] of a right at his pleasure to protect and screen the criminal.

We are not disposed to deny that the effect produced by the efforts of THE TRIBUNE in the cause of Reform—in the warfare it has waged against the Brooklyn Ring—has been of a character that may be called "revolutionary." Its claim that delinquent officials should be expelled from office and their places filled [illegible] have been a "revolutionary claim." "Every citizen, in whatever sphere of life," from the Governor of the State to the humblest individual, has been "deeply interested" in pushing on to a successful conclusion this "revolutionary" work. One thing is clear: that if Mr. Shanks, or any one connected with THE TRIBUNE, has, according to the language of Mr. Britton, "a right at his pleasure to protect and screen the criminal," it has not been the "pleasure" or inclination of any one connected with that paper to do so—or attempt to do so—in any way to "screen the criminal." On the contrary, there are those who have had occasion to know that a stern sense of duty has impelled THE TRIBUNE to [illegible] in the opposite direction.

Mr. Britton's experience in this case has not been fortunate; he has lost his equanimity. The consequences of a falsification of the Sheriff's return have not been pleasant. There are so many points of law bearing on this case [illegible] It is safe to assume that the forebodings of Mr. Britton [illegible] the great interests of society, good government, of civilization, will survive the effect of this Court affirming the righteous decision of a righteous Judge.