No. 12831

Supreme Court of Illinois

People ex-rel.

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vs.

Barr.

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20 - 2[illegible]

The People &c. Et. al.

vs

Jas. G. Barr

20 P.D.

1859

1284

State of Illinois
County of Kane
City of Aurora

Supreme Court April
Term. A.D. 1859.

Application for Mandamus

The Prospect Relation
Jehiel A Montgomery
vs
James G Bacon

This Affidavit first being
sworn deposes that the
matters presented by this case
as stated is in good faith
about a matter in actual controversy
between the parties thereto and that the
opinion of this Court is not sought for
or with any other design than to adjudi-
-cate and settle the law in relation to the
matter in actual controversy between
the parties to this application and to said
entitled Cause.

Subscribed and sworn to
before me a Notary Public
in and for the County of
Kane in the State of Illinois
this 9th day of May AD 1859
Witness my hand and notarial
Seal the same day.

Jehiel A. Montgomery

Jas H Bunk
Notary Public

5 12 831-11

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The People ex rel Montgomery

vs

Barr

Filed May 11. 1857

LaLelaud

Clerk

In the Supreme Court
State of Illinois ss.

The People ex rel. Isaiah H. Montgomery
vs
James G. Barr } Mo for Mandamus

James G. Barr the Defendant in the above case states to the Court that he has no interest in the above case further than to perform his duty in accordance with the laws of this State, and that his duties and powers may be legally defined.

During the two years and upwards that said Court has existed many writs of Execution and Bill have been issued from said Court to other Counties and large interests have accrued under the same, and this Defendant at the time supposed that he was performing a legal duty in so doing. But a recent decision of one of the Circuit Courts of this State has denied the power of this class of Courts to send their process beyond the County in which they are established, which doctrine if true,

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renders the Clerk liable as a trespasser in so doing and ~~subjects him~~ to the payment of heavy damages and costs.

Such decision being at least prima facia the law of the land must be reversed. This defendant has deemed it his duty to refuse to issue the writ as asked by the petitioner in this cause until his powers and duties are fully settled by this honorable Court.

James G. Bass
Defendant

IN THE SUPREME COURT.

STATE OF ILLINOIS, ss.

To the Honorable the Justices of the Supreme Court of the State of Illinois, at a Term thereof, began and holden at Ottawa, in the 3d Grand Division on the first Tuesday after the third Monday of April, A. D. 1859:

Your petitioner, Jehial H. Montgomery, of the County of Kane, in the State of Illinois, respectively represents unto your Honors, that Lyman E. Montgomery, on the 23d day of September, A. D. 1858, in vacation after the June Term of the Court of Common Pleas of the City of Aurora A. D. 1858, by confession before Hon. A. C. Gibson, Judge of the Court of Common Pleas of the City of Aurora, did revover a judgment against Robert Jones and Peter Jones, for the sum of Three Hundred and Forty-One Dollars and Sixty-Five Cents, besides costs in the Court of Common Pleas of the City of Aurora. And your petitioner avers and states that said judgment was regularly and legally obtained, and now remains in full force and effect, and unsatisfied. He further shows that an execution has issued to the Sheriff of Kane County to serve, and has been returned by said Sheriff, no property found and unsatisfied.

And your petitioner would further show that the defendants have property in the County of Kendall, liable to execution.

And your petitioner would further show that he is now the owner of said judgment, the same having been assigned to him by the plaintiff in said judgment.

Your petitioner would further show, that on the 4th day of May, A. D. 1859, he went to the office of the Clerk of the Court of Common Pleas of said City of Aurora, and requested him to issue an execution upon said judgment, directed to the Sheriff of Kendall County, State of Illinois, against the goods and chattels, lands and tenements of said defendants in said judgement. The said James G. Barr, Clerk of said Court then and there refused to issue said execution directed to the Sheriff of Kendall County, alledging as his reason for so refusing, that he had no authority by law to send an execution out of the County of Kane. By reason of which refusal of said James G. Barr, Clerk, as aforesaid, to issue said execution as aforesaid, your petitioner is prevented from having satisfaction of the said judgment, as he is lawfully and justly entitled to have of the property of the said Robert Jones and Peter Jones, in said County of Kendall.

Wherefore, your petitioner prays your Honors to grant a writ of mandamus under the seal of this Court, directed to the said James G. Barr, Clerk, as aforesaid, commanding him as such Clerk, forthwith to issue an execution against the lands and tenements, goods and chattels of the said Robert Jones and Peter Jones, in the usual form of *Fieri Facias* directed to the Sheriff of Kendall County, in said State, to be by him executed in due form of law. And as in duty bound will ever pray.

JEHIAL H. MONTGOMERY,

By R. G. MONTONY, his Attorney.

SUPREME COURT, APRIL TERM, A. D. 1859.

The People *ex. relatione.*
Jehial H. Montgomery,
vs.
James G. Barr.

In the above entitled case, the parties agree that the facts stated in the foregoing petition are correctly stated, and that the same are truly and correctly stated, and shall be taken and considered by the Court, the same as if they were returned by said Barr to an alternative mandamus.

It is agreed that all informalities shall be waived, and if in the opinion of this Court the Law authorizes an execution to be issued to a foreign County, a final order shall be made and a peremptory mandamus shall issue

JAMES G. BARR,
Def't & Clerk.

R. G. MONTONY, Att'y for Petitioner.

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People ex rel. vs Barr

Pltff's Bill of Exc't

Filed May 11. 1859

L. Leland

Clerk

IN THE SUPREME COURT.

April Term, A. D. 1859.

The People ex rel Jehial H. Montgomery vs. James G. Barr

PL'FF'S BRIEF AND ARGUMENT.

1st. The provisions of the law creating the Court of Common Pleas of the City of Aurora, approved Feb. 11th, 1857, Session Laws of A. D. 1857, Private Laws page 375, are as follows:— Section 1st Constitutes a Court called the "'Court of Common "Pleas of the City of Aurora,' and shall have concurrent juris- "diction within the City of Aurora with the Circuit Court in all "civil and criminal cases, except in cases of treason and murder, "and the rules of practice of said Court shall conform as near as "may be to the rules of practice in the Circuit Court of Kane "County." The same section also provides "the Judge and "Clerk thereof shall respectively have the like power, authority and "jurisdiction, and perform the like duties as the Circuit Court, "and the Judge and Clerk thereof, in relation to all matters, suits, "prosecutions and proceedings within the City of Aurora."— Sec. 4 of the same act provides as follows, "The process of "said Court shall be tested in the name of the Clerk thereof, and "be issued and executed in the same manner as process from the "Circuit Court of said County of Kane, and all orders, judgments "and decrees of said Court shall be a lien upon real and personal "estate, and shall be enforced and collected in the same manner "as orders, judgments and decrees rendered in the Circuit Court." The General Laws in relation to City Courts, passed Feb. 15th, 1855, see session laws of A. D. 1855, page 148, gives those courts concurrent jurisdiction with the Circuit Courts of the respective counties in which they are located, and the practise is that of the Circuit Court also. They are inferior to the Circuit Court in respect to trial of cases for treason and murder. In their territory they have the jurisdiction, practise and powers of the Circuit Courts, excepting treason and murder. Their powers are general, and as ample over matters in their jurisdiction as Circuit Courts. In the act creating the Court of Common Pleas of the City of Aurora, its orders, judgments and decrees can be enforced and collected in the same manner as rendered in the Circuit Court.— In respect to the judgment of Montgomery vs. Jones et al., the Court has the practice, and is clothed with the jurisdiction, and can enforce and collect its judgments in the same manner as the

Circuit Court. The circuit Court of Kane county can collect its judgments and enforce them by sending their executions to any county in this state. Why then cannot the court of Common Pleas do the same thing? And the clerk refuses to issue an execution to collect our judgment, we ask for a mandamus to compel him.

2d. The court, though an inferior court, it is at the same time a court of general jurisdiction, nothing can be taken against its jurisdiction by intendment. Vance et al. vs. Funk et. al., 2 Scammon 263; also Beaubien vs. Brinkerhoof, 2d Scammon 272.

3d. It is a court at common law, of general jurisdiction. It has power to adjudicate and enforce its adjudications in the same manner as the Circuit court. It has adjudicated, and gave a judgment which is conceeded to be legal and regular, upon its face no objection is made. It has the same powers to collect its judgment which the Circuit court of Kane county possesses.—Now is it not great injustice to deny the party its writ to collect its judgment in the only manner which is efficacious to the party, and the only manner in which it can be collected, unless by compelling the party to sue his judgment over again, thereby increasing costs, and creating delays, and perhaps entailing a loss of his debt.

Sec. 4. The court of Common Pleas of the city of Aurora is a Superior court in the common law sense of the term—but an inferior court according to the language of the Constitution of this State, and according to the language of the act creating the court for the city of Aurora. See Section 1, Chapter 8, of private laws, 1857, page 375. Courts not of record are denominated inferior courts, because if their proceedings are questioned in the Superior courts, they must specially show that they acted within their jurisdiction. See 2d Scammon, Beaubien vs. Brinckerhoff. 269. The court of Common Pleas is a court of general jurisdiction in relation to all civil suits, which of course includes all suits at law and in equity. And also as to criminal matters the jurisdiction may be said to be general—with two exceptions, treason and murder. But the Circuit court, at least before the new Constitution, had not jurisdiction in *all* criminal cases, that is original jurisdiction. For in cases of assault, assault and battery, and affrays, justices of the peace had *exclusive original* jurisdiction; still no one ever doubted, nevertheless, that the court for that reason was not a court of general jurisdiction in the common law sense of that term; and that it was not entitled to all the presumptions granted to Superior Courts. This court is declared by the same act, Sec. 1st of Chapter 8, to be a court of record. By the 3d section of Chapter 8 of same act, the court shall have a seal, and has a clerk. At common law courts are divided into superior and inferior courts, or courts of record and those not of

record. A material distinction prevails between these two classes of courts in relation to the mode of stating their jurisdiction. In relation to superior courts of record, the law is that nothing shall be intended to be out of the jurisdiction of the Superior court but that which specially appears to be so. On the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alledged. See 2d Scammon 273. This shows that the court of Common Pleas of the city of Aurora is a court of record at common law, and therefore entitled to all the intendments and presumptions that belong to Superior courts. But it does not follow because a court cannot try *all* cases *whatever*, it is not *therefore* a court of general jurisdiction. The Circuit courts can try only such cases as arise within the county in which the court is held; so while it has a general jurisdiction to try all cases arising in the county, it can try none that arise beyond it. So it is with the court of Common Pleas of the city of Aurora: it can try all cases, except treason and murder, arising within the city, but no cases that arise beyond its limits. Of course in all matters or suits in law or equity, in which the venue is transitory and not local, the cause of action is regarded in contemplation of law to have arisen in the county in the Circuit court of which the suit is brought, or in the city, if the suit is brough in the court of Common Pleas. Because in all actions where the venue is transitory, the cause of action in fiction of law follows the person. Therefore in all transitory actions where the Plaintiff commences a suit in any particular Court he in legal contemplation is there present in Court, and the cause of action attends him therein though it *actually* arose or had its beginning in a foreign County, State or Country. And the Court has the jurisdiction, so far as the subject matter is concerned, to try the case and may try the same, if the Court has the power to send its process to where the defendant may be found, to give him the proper notice, so as to get jurisdiction of the person of Defendant. 13, Ill. 447–8; Brewster et. al., vs. Scarborough 2, Scam., 280.

Sec. 5th. According to the 1st section of chapter 8 of the act creating this Court, it shall have concurrent jurisdiction within the city of Aurora with the circuit Court in *all civil* and *criminal cases*, except in cases of treason and murder. It is clear, then, that this language has reference to the jurisdiction of the said Court in relation to the *subject matters* of the suits that may be tried before it, and not to the jurisdiction of the person of the plaintiff or defendant. Therefore, we find no limitation or restrictions in this section, nor in any part of the act, upon the powers of the Court to get jurisdiction either of the plaintiff or defendant in any case. Then we must look to other parts of the act in relation to the power of the Court, and to the territoria limits so far as getting jurisdiction of the person of the plaintiff

or defendant, or of sending process, mesne or final, to a foreign county. By the same section the rules of practice of the Court of Common Pleas shall conform as near as may be to the rules of practice in the Circuit Court of Kane County, except as otherwise provided in the act. It is the practice of the Circuit Court of Kane County to send summons, executions and other process, both mesne and final, to foreign counties. Then why has not the Court of Common Pleas the same rules of practice in this particular. To send process to a foreign county is but a *rule* of practice that is a *law* of *practice*. In the same section we find this language: "Said Court, and the Judge and the Clerk thereof, shall, respectively, have the *like power, authority and jurisdiction* and perform the *like duties* as the Circuit Court and the Judge and Clerk thereof, in relation to all matters, suits, prosecutions and proceedings within the city of Aurora, so far as the same are not otherwise limited by this act." The words, "*all matters, suits, prosecutions and proceedings*," do include and are intended to include all things that may be done in relation to the *commencement* of any suit (the subject matter of which the Court has jurisdiction) the *trial* and the *enforcement* of the judgment therein. About this, there cannot be any doubt. So it includes the issuing of final execution as well as the taking of any other step in the progress of the case.

Sec. 6th. It is conceded that the Clerk of the Circuit Court of Kane *has the power* to send an execution to a foreign county; then the Clerk of the Court of Common Pleas *must* have the *power* to do *likewise*, or else he has *not* the like power. If this judgment had been rendered in the Kane Circuit Court, the Clerk could send the execution to Kendall. Now, if the Clerk of the Court of Common Pleas cannot do the same, then he has not the like power. And there is nothing in the act restraining the general force of these words.

Sec. 7th. Again, by the fourth section of the same chapter of the said act, there is this language: "The process of said Court shall be tested in the name of the Clerk thereof, and be issued and executed in the same manner as process from the Circuit Court of said County of Kane." To issue from the Circuit of Kane County, a *fieri facias* to the Sheriff of Kendall County, and he executes it by selling property, is the exercise of a particular power. If the same judgment were in the Court of Common Pleas instead of being in the Circuit Court of Kane, and the Clerk of the Common Pleas issues a *fieri feaias* to the Sheriff of Kendall County, and he eexcutes it by selling property, then this would be the exercise of the same particular power; or, in other words, both executions would then be *issued* and *executed in the same manner*.

Sec. 8. The same section, 4, also says: "And all orders

judgments and decress of said Court shall be lien upon real and personal estate, and shall be enforced and collected in the same manner as orders, judgments and decrees rendered in the Circuit Court." Can it be said the judgment in this case is enforced and collected in the same manner it could be if it was in the Circuit Court, if you hold the Clerk of the Court of Common Pleas has no power under the law to send the execution to the Sheriff of Kendall County, and the Sheriff has no power to levy by virtue of it, on the property of the defendants and sell the same to satisfy it? When it is admitted, if the judgment had been rendered in Kane Circuit, the Clerk of that Court could have issued and the Sheriff of Kendall could collect the same off the property of the defendant. The power of the Court and Clerk of this Court must be just as ample to carry out the powers with which it is clothed, as the Circuit. If it can try all civil and criminal cases that may arise in the city, then it must have every incidental power that the Circuit Court would have to try the same, if they were tried in the Circuit Court.

Sec 9th. And in this view of the case there is nothing that conflicts with the constitution or the act giving this Court jurisdiction in the city concurrent with the Circuit. While this Court can try only such suits and matters which arise in the city as the Circuit Court can try only such matters as may arise in the county, yet, as to the jurisdiction of the person of the plaintiff or defendant, and the enforcement of its orders, decrees and judgments, it is no more confined to the limits of the City, than the Circuit is confined to the limits of the county. If this is not so, then the Sheriff of Kane County cannot collect any of the judgments rendered in this Court beyond the limits of the City, nor can any process be served beyond the city limits. Section one says that the Court shall have *concurrent* jurisdiction in the City in all civil and criminal cases except murder and treason, with the Circuit court of Kane. This would seem *per se* to give the Court of Common Pleas the same power in every respect as to the issuing of process to a foreign county, either mesne or final, as if the case was tried in the Kane Circuit. See the seperate opinion of Caton J, in the case of Kenney et ux. *vs.* Grier, 13 Ill. 451.

Sec. 10th. The Courts should give a liberal and natural construction to the act creating this Court, instead of an illiberal, unnatural and restricted or strained construction. These Courts ought to meet with liberal support in the construction of their powers, for they are of great accommodation and utility to the people of the cities, saving much expense in collections and litigations. And they would be greatly limited in their usefulness, if they have not the power to send their process beyond the limits of the City or the County. We ask the court to issue a mandamus according to the prayer of the petition in this case.

R. G. MONTONY, Counsel for relator.

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The People Respt
Montgomery & Burr

Cliffs. Brief & Argt

Filed May 11. 1859

L. Leland
Clerk

IN THE SUPREME COURT.

STATE OF ILLINOIS, ss.

To the Honorable the Justices of the Supreme Court of the State of Illinois, at a Term thereof, began and holden at Ottawa, in the 3d Grand Division on the first Tuesday after the third Monday of April, A. D. 1859:

Your petitioner, Jehial H. Montgomery, of the County of Kane, in the State of Illinois, respectively represents unto your Honors, that Lyman E. Montgomery, on the 23d day of September, A. D. 1858, in vacation after the June Term of the Court of Common Pleas of the City of Aurora A. D. 1858, by confession before Hon. A. C. Gibson, Judge of the Court of Common Pleas of the City of Aurora, did revover a judgment against Robert Jones and Peter Jones, for the sum of Three Hundred and Forty-One Dollars and Sixty-Five Cents, besides costs in the Court of Common Pleas of the City of Aurora. And your petitioner avers and states that said judgment was regularly and legally obtained, and now remains in full force and effect, and unsatisfied. He further shows that an execution has issued to the Sheriff of Kane County to serve, and has been returned by said Sheriff, no property found and unsatisfied.

And your petitioner would further show that the defendants have property in the County of Kendall, liable to execution.

And your petitioner would further show that he is now the owner of said judgment, the same having been assigned to him by the plaintiff in said judgment.

Your petitioner would further show, that on the 4th day of May, A. D. 1859, he went to the office of the Clerk of the Court of Common Pleas of said City of Aurora, and requested him to issue an execution upon said judgment, directed to the Sheriff of Kendall County, State of Illinois, against the goods and chattels, lands and tenements of said defendants in said judgement. The said James G. Barr, Clerk of said Court then and there refused to issue said execution directed to the Sheriff of Kendall County, alledging as his reason for so refusing, that he had no authority by law to send an execution out of the County of Kane. By reason of which refusal of said James G. Barr, Clerk, as aforesaid, to issue said execution as aforesaid, your petitioner is prevented from having satisfaction of the said judgment, as he is lawfully and justly entitled to have of the property of the said Robert Jones and Peter Jones, in said County of Kendall.

Wherefore, your petitioner prays your Honors to grant a writ of mandamus under the seal of this Court, directed to the said James G. Barr, Clerk, as aforesaid, commanding him as such Clerk, forthwith to issue an execution against the lands and tenements, goods and chattels of the said Robert Jones and Peter Jones, in the usual form of *Fieri Facias* directed to the Sheriff of Kendall County, in said State, to be by him executed in due form of law. And as in duty bound will ever pray.

JEHIAL H. MONTGOMERY,

By R. G. MONTONY, his Attorney.

SUPREME COURT, APRIL TERM, A. D. 1859.

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James G. Barr.

In the above entitled case, the parties agree that the facts stated in the foregoing petition are correctly stated, and that the same are truly and correctly stated, and shall be taken and considered by the Court, the same as if they were returned by said Barr to an alternative mandamus.

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Def't & Clerk.

R. G. MONTONY, Att'y for Petitioner.

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Republic ex. rel. v. Bass

Pltffs. Brief & argt.

Petition for Mandamus.

Filed May 11, 1839
L. Leland
Clk

IN THE SUPREME COURT

April Term, A. D. 1859.

The People ex rel Jehial H. Montgomery vs. James G. Barr

PL'FF'S BRIEF AND ARGUMENT.

1st. The provisions of the law creating the Court of Common Pleas of the City of Aurora, approved Feb. 11th, 1857, Session Laws of A. D. 1857, Private Laws page 375, are as follows:— Section 1st Constitutes a Court called the "'Court of Common "Pleas of the City of Aurora,' and shall have concurrent juris- "diction within the City of Aurora with the Circuit Court in all "civil and criminal cases, except in cases of treason and murder, "and the rules of practice of said Court shall conform as near as "may be to the rules of practice in the Circuit Court of Kane "County." The same section also provides "the Judge and "Clerk thereof shall respectively have the like power, authority and "jurisdiction, and perform the like duties as the Circuit Court, "and the Judge and Clerk thereof, in relation to all matters, suits, "prosecutions and proceedings within the City of Aurora."— Sec. 4 of the same act provides as follows, "The process of "said Court shall be tested in the name of the Clerk thereof, and "be issued and executed in the same manner as process from the "Circuit Court of said County of Kane, and all orders, judgments "and decrees of said Court shall be a lien upon real and personal "estate, and shall be enforced and collected in the same manner "as orders, judgments and decrees rendered in the Circuit Court." The General Laws in relation to City Courts, passed Feb. 15th, 1855, see session laws of A. D. 1855, page 148, gives those courts concurrent jurisdiction with the Circuit Courts of the respective counties in which they are located, and the practise is that of the Circuit Court also. They are inferior to the Circuit Court in respect to trial of cases for treason and murder. In their territory they have the jurisdiction, practise and powers of the Circuit Courts, excepting treason and murder. Their powers are general, and as ample over matters in their jurisdiction as Circuit Courts. In the act creating the Court of Common Pleas of the City of Aurora, its orders, judgments and decrees can be enforced and collected in the same manner as rendered in the Circuit Court.— In respect to the judgment of Montgomery vs. Jones et al., the Court has the practice, and is clothed with the jurisdiction, and can enforce and collect its judgments in the same manner as the

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3d. It is a court at common law, of general jurisdiction. It has power to adjudicate and enforce its adjudications in the same manner as the Circuit court. It has adjudicated, and gave a judgment which is conceeded to be legal and regular, upon its face no objection is made. It has the same powers to collect its judgment which the Circuit court of Kane county possesses.—Now is it not great injustice to deny the party its writ to collect its judgment in the only manner which is efficacious to the party, and the only manner in which it can be collected, unless by compelling the party to sue his judgment over again, thereby increasing costs, and creating delays, and perhaps entailing a loss of his debt.

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Sec. 5th. According to the 1st section of chapter 8 of the act creating this Court, it shall have concurrent jurisdiction within the city of Aurora with the circuit Court in *all civil* and *criminal cases*, except in cases of treason and murder. It is clear, then, that this language has reference to the jurisdiction of the said Court in relation to the *subject matters* of the suits that may be tried before it, and not to the jurisdiction of the person of the plaintiff or defendant. Therefore, we find no limitation or restrictions in this section, nor in any part of the act, upon the powers of the Court to get jurisdiction either of the plaintiff or defendant in any case. Then we must look to other parts of the act in relation to the power of the Court, and to the territoria limits so far as getting jurisdiction of the person of the plaintiff

or defendant, or of sending process, mesne or final, to a foreign county. By the same section the rules of practice of the Court of Common Pleas shall conform as near as may be to the rules of practice in the Circuit Court of Kane County, except as otherwise provided in the act. It is the practice of the Circuit Court of Kane County to send summons, executions and other process, both mesne and final, to foreign counties. Then why has not the Court of Common Pleas the same rules of practice in this particular. To send process to a foreign county is but a *rule* of practice that is a *law* of *practice.* In the same section we find this language: "Said Court, and the Judge and the Clerk thereof, shall, respectively, have the *like power, authority and jurisdiction* and perform the *like duties* as the Circuit Court and the Judge and Clerk thereof, in relation to all matters, suits, prosecutions and proceedings within the city of Aurora, so far as the same are not otherwise limited by this act." The words, "*all matters, suits, prosecutions and proceedings,*" do include and are intended to include all things that may be done in relation to the *commencement* of any suit (the subject matter of which the Court has jurisdiction) the *trial* and the *enforcement* of the judgment therein. About this, there cannot be any doubt. So it includes the issuing of final execution as well as the taking of any other step in the progress of the case.

Sec. 6th. It is conceded that the Clerk of the Circuit Court of Kane *has the power* to send an execution to a foreign county; then the Clerk of the Court of Common Pleas *must* have the *power* to do *likewise*, or else he has *not* the like power. If this judgment had been rendered in the Kane Circuit Court, the Clerk could send the execution to Kendall. Now, if the Clerk of the Court of Common Pleas cannot do the same, then he has not the like power. And there is nothing in the act restraining the general force of these words.

Sec. 7th. Again, by the fourth section of the same chapter of the said act, there is this language: "The process of said Court shall be tested in the name of the Clerk thereof, and be issued and executed in the same manner as process from the Circuit Court of said County of Kane." To issue from the Circuit of Kane County, a *fieri facias* to the Sheriff of Kendall County, and he executes it by selling property, is the exercise of a particular power. If the same judgment were in the Court of Common Pleas instead of being in the Circuit Court of Kane, and the Clerk of the Common Pleas issues a *fieri fcaias* to the Sheriff of Kendall County, and he eexcutes it by selling property, then this would be the exercise of the same particular power; or, in other words, both executions would then be *issued* and *executed in the same manner.*

Sec. 8. The same section, 4, also says: "And all orders

judgments and decress of said Court shall be lien upon real and personal estate, and shall be enforced and collected in the same manner as orders, judgments and decrees rendered in the Circuit Court." Can it be said the judgment in this case is enforced and collected in the same manner it could be if it was in the Circuit Court, if you hold the Clerk of the Court of Common Pleas has no power under the law to send the execution to the Sheriff of Kendall County, and the Sheriff has no power to levy by virtue of it, on the property of the defendants and sell the same to satisfy it? When it is admitted, if the judgment had been rendered in Kane Circuit, the Clerk of that Court could have issued and the Sheriff of Kendall could collect the same off the property of the defendant. The power of the Court and Clerk of this Court must be just as ample to carry out the powers with which it is clothed, as the Circuit. If it can try all civil and criminal cases that may arise in the city, then it must have every incidental power that the Circuit Court would have to try the same, if they were tried in the Circuit Court.

Sec 9th. And in this view of the case there is nothing that conflicts with the constitution or the act giving this Court jurisdiction in the city concurrent with the Circuit. While this Court can try only such suits and matters which arise in the city as the Circuit Court can try only such matters as may arise in the county, yet, as to the jurisdiction of the person of the plaintiff or defendant, and the enforcement of its orders, decrees and judgments, it is no more confined to the limits of the City, than the Circuit is confined to the limits of the county. If this is not so, then the Sheriff of Kane County cannot collect any of the judgments rendered in this Court beyond the limits of the City, nor can any process be served beyond the city limits. Section one says that the Court shall have *concurrent* jurisdiction in the City in all civil and criminal cases except murder and treason, with the Circuit court of Kane. This would seem *per se* to give the Court of Common Pleas the same power in every respect as to the issuing of process to a foreign county, either mesne or final, as if the case was tried in the Kane Circuit. See the seperate opinion of Caton J, in the case of Kenney et ux. *vs.* Grier, 13 Ill. 451.

Sec. 10th. The Courts should give a liberal and natural construction to the act creating this Court, instead of an illiberal, unnatural and restricted or strained construction. These Courts ought to meet with liberal support in the construction of their powers, for they are of great accommodation and utility to the people of the cities, saving much expense in collections and litigations. And they would be greatly limited in their usefulness, if they have not the power to send their process beyond the limits of the City or the County. We ask the court to issue a mandamus according to the prayer of the petition in this case.

R. G. MONTONY, Counsel for relator.

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People ex rel
Montgomery vs. Barr

Plffs. Brief & Argument

Filed May 11. 1859
L. Delano
Clerk

In the Supreme Court

The People ex rel &c
vs
Bain } Mandamus
Defts Brief

The defendant resists the application for peremptory mandamus — for the reason that under the Constitution of this State she has no power as Clerk of the Court of Common Pleas of the City of Aurora to issue the execution applied for —

The legislature is by express limitation in the constitution by a proviso in section 1, of Article 5, restricted in its establishment of these courts, ~~of~~
"Provided that inferior local courts of Civil & Criminal jurisdiction may be established by the general assembly in the cities of this State, but such courts shall have a uniform organization & jurisdiction in such cities"—

These Courts may have a civil and criminal jurisdiction but it shall be inferior & local — and the question for solution is what is meant by these words — as applied to courts — Inferior implies a superior — local implies general —

S1A831-1[illegible]

what are the Superior Courts in this State & what are the inferior, what are the general, & what are the local —

The constitution establishes Superior & Circuit Court County Courts & & Courts of Justices of the peace It gives the Supreme Court appellate jurisdiction and says there shall be but one — it gives the Circuit Court jurisdiction "in all cases at law and equity and in all cases of Appeals from all inferior courts" Sec 8. The Circuit Courts & Justices of the peace were in existence at the time of the adoption of the constitution. The jurisdiction & powers of the Circuit courts as established prior to its adoption had been judicially ascertained by decisions of the Supreme Court of the State —

2 Scam 282, "The Circuit Courts are courts of general original jurisdiction and are exclusively vested with jurisdiction in civil cases except those of justices of the peace,

4 Scam 88. The Circuit Courts is styled a court of general jurisdiction,

2 Scam 272, The Circuit Courts are the only superior Courts in the State that possess original & unlimited jurisdiction, They exercise within their respec-

in Counties all the powers and jurisdiction of the Courts of Kings Bench & Common Pleas in England)", "The Circuit Courts are preeminently the Superior Courts of this State —

These decisions are all made in reference to the Circuit Courts before the adoption of the present Constitution. The language of the Statute Creating these Courts is § 29. p. 1146, R.S. "The said Circuit Courts shall be holden at the respective Court Houses of said Counties and the said judges respectively in their respective ~~Circuits~~ Circuits shall have jurisdiction over all matters & suits at Common law & in Chancery arising in each of the Counties in their respective Circuits when the debt or demand shall exceed twenty dollars." Section 31. gives them power to hear and determine all ~~criminal~~ criminal cases.

It will be noticed in passing that the present constitution does not vest in any Court general Criminal jurisdiction — it limits the County Courts § 18 of Article 5, & justices of the peace § 10, Article 13, but leaves the legislature to confer such powers upon the ~~Circuits~~ Circuit Courts as it may see fit —

[12-22-19]

There is another section of the present constitution which it is proper to cite. S. 24. The general assembly may authorize the judgments, decrees, and decisions of any local inferior court of record of original civil or criminal jurisdiction established in a city to be removed for revision directly to the Supreme Court".

Now the common law use of the word inferior as being a court not of record, is excluded by the last section as shewing that the word inferior did not mean Courts not of record — then it must be in reference to the Courts named in the constitution, it could not be the County Court or justices of the peace, because neither of them had any jurisdiction in civil cases specially defined by the constitution & in criminal cases are specially restricted by it — and the Circuit Court has a general jurisdiction of all civil cases, & all appeals from all inferior Courts — but no defined jurisdiction of criminal cases —

How shall these Courts then be so constituted as to be inferior local

courts what powers can be conferred upon them not extending beyond inferiority & locality and yet those of a court of record? The only court under the Constitution superior to it is the Circuit Court. its authority must not be equal concurrent or like it — it must be inferior to it & it must be local — as contradistinguished to the the general jurisdiction of the circuit court. Now in this case is the Court of Aurora inferior to the Circuit Court & local? and is the act which the clerk is called upon to do within the scope of its authority as such inferior local Court?

The civil jurisdiction conferred on this Court is concurrent & co-equal ~~it~~ within the Cities of Aurora in civil cases with the Circuit Court. ~~and~~ Now when it is recollected that the civil jurisdiction is the only one conferred upon the Circuit Court by the Constitution — that that embraces all cases including appeals from the very courts by this power allowed to be established Can it be said that conferring the same extent of power upon the City Court is making it inferior — it is making it equal.

The inferiority of the court applies both to its civil & criminal jurisdiction so that it may be said at the outset that the jurisdiction of the court civilly under which this judgment was entered being beyond the limit prescribed by the constitution this judgment is utterly void - & no authority exists any where to issue execution upon it.

How is the jurisdiction conferred by the act local? - The language of the statute is "within the City of Aurora" - so that so far as the act goes it is not in violation of the Constitution But can it send its process beyond the city limits, as is sought to be done in this case? Can it send original process beyond those limits? If so it at once draws to itself the litigation of the surrounding County, & finally anywhere in the State. A local court must be one confined within certain limits, the word local is not used as to the place of holding the court for every Court is local in that sense, but as to the extent of its jurisdiction in point of territory. the places in which its writ runs - now the King's Writ runneth all over

the rule — So our Circuit Courts exercise as Superior Courts all over the State. But the writs of the Palatinate & some other special courts known to the common law run only within the limits of the Palatine, or other locality for which the court was instituted & not beyond — these were local courts known to the Common law as such — and are spoken of as such.

This Court in 18 Ill 363 it seems to me have disposed of this whole question after quoting the provisions of the constitution they say, "In our opinion this limits the territorial jurisdiction of the courts to be established under this proviso to the cities for which and within which they are established — It does not meet the spirit & intention of this provision of the constitution to establish the courts within the cities nominally and to require their session to be held within the city limits, but its territorial jurisdiction was intended to be thus circumscribed — They were intended to be for the benefit of the cities & to meet their wants, and not of the adjacent Country. They were designed to dispose of litigation arising

[12031-25]

in the cities — If it were competent for the legislature to extend the jurisdiction of the courts to the two Towns named it could have been equally competent to the whole county of Lasalle and with the same propriety might they have extended it to all adjoining counties, or even the whole State,

The constitution fixes no territorial limit unless it be to the City limits within which the courts are established, and we cannot understand the constitution as having an unlimited discretion in the legislature as to the territorial jurisdiction of these local courts for local courts they were certainly designed to be, Should we sustain this act then are the restrictions contained in the first section of the fifth article gone, and the legislature is at full liberty to create a class of courts which may absorb all the litigation of the State, if they will but require their sessions to be held within the cities of the State, This we think is in manifest violation of the Spirit and intention ~~of the~~ as well as the letter of the constitution—

[illegible]

I have quoted this at length as it covers the whole ground of the present application — The act is expressly designed for the City of Aurora, upon its face so far as its territorial jurisdiction is concerned complies with the requirements of the constitution as declared by this court — But because it is said in the act that the process of the court shall be issued and executed in the same manner as process from the circuit court of Kane County" therefore ~~the process~~ it is claimed by the relator that its process may run all over the State — in other words do just what this court said in the case last cited the legislature could not give it the power to do, give inferior jurisdiction on these City Courts outside of the city limits. Courts act only by their process, when that runs the court has jurisdiction. Process of the ~~court~~ cannot run when it has no jurisdiction — and has the court the power to send ~~original~~ final process when it ~~has~~ cannot send original. I am not aware of any such distinction in law — of the seat of the court when

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impressed upon the summons has no validity outside of the City limits & its mandate to the Sheriff to serve no power — how does it happen that the same seal & the same mandate have validity & power when impressed upon & contained in a fiere facias — The defendant may not be arrested under a capias ad respondendum because out of the territorial jurisdiction of the court, and yet may under a capias ad satisfaciendum issued from the same court without the territorial limits —

W. Y. Brush
for Defts

[2831-24]

20 - 214

Sup Court

Prophet

vs

Barr

Defts Argt

Filed May 21. 1859

L. Leland

Clerk

I understand this to be a volunteer argument — as Judge Parker informed me that the case was ready without him. E Peck

State of Illinois }ss.

To the Honorable the Justices of the Supreme Court of the State of Illinois, At a Term thereof begun and holden at Ottawa in the 3d Grand Division on the first Tuesday after the third Monday of April A.D. 1859

Your Petitioner Jehial H. Montgomery of the County of Kane in the State of Illinois respectively represents unto your Honors that Lyman C. Montgomery on the 23d day of September A.D. 1858 in Vacation after the June Term of the Court of Common Pleas of the City of Aurora A.D. 1858 by confession before Hon. A. C. Gibson Judge of the Court of Common Pleas of the City of Aurora did recover a judgment against Robert Jones & Peter Jones for the sum of three Hundred and forty one Dollars and Sixty five cents besides costs in the Court of Common Pleas of the City of Aurora. And your petitioner avers and States that said judgment was regularly and legally obtained and now remains in full force and effect and unsatisfied. He further shows that an execution

has issued to the Sheriff of Kane County to serve and has been returned by said Sheriff no property found and unsatisfied And your Petitioner would further show that the defendants have property in the County of Kendall liable to execution And your Petitioner would further show that he is now the owner of said judgment the same having been assigned to him by the Plaintiff in said judgment Your Petitioner would further show that on the 4th day of May A D 1859 he went to the office of the Clerk of the Court of Common Pleas of said City of Aurora and requested him to issue an execution upon said judgment directed to the Sheriff of Kendall County State of Illinois against the goods and chattels lands & tenements of said Defendants in said judgment the said Dennesly Ryan Clerk of said Court then and there refused to issue said execution directed to the Sheriff of Kendall County alledging as his reason for so refusing that he had no authority by law to send execution out of the County of Kane. By reason of which refusal of said Dennesly Ryan Clerk as aforesaid to issue

said execution as aforesaid Your Petition-
-er is prevented from having satisfaction
of the said Judgment as he is lawfully
and justly entitled to have of the proper-
of the said Robert Dowes & Peter Dowes
in said county of Kendall

Wherefore your Petitioner prays your
Honors to grant a writ of Mandamus
under the seal of this Court directed to
the said Jamesly. Ward Clerk as
aforesaid commanding him as
such clerk forthwith to issue an Execution
against the lands and tenements goods
& chattels of the said Robert Dowes &
Peter Dowes in the usual form of Fieri
Facias directed to the Sheriff of Kendall
County in said State to be by him exe-
-cuted in due form of law And as
in duty bound will ever pray

Ishid H Montgomery
by R H Montgomery
his attorney

Supreme Court April Term A.D. 1859

The People ex relatione
Archibald D. Montgomery
vs
James G. Barr

In the above entitled case the parties agree that the facts stated in the foregoing Petition are correctly stated and that the same are truly and correctly stated and shall be taken and considered by the Court the same as if they were returned by said Barr to an alternative Mandamus

It is agreed that all informalities shall be waived and if in the opinion of this Court the Law authorizes an execution to be issued to a foreign county a final order shall be made and a peremptory mandamus shall issue

R. G. Montgomery
Atty for Petitioner

James G. Barr Defendant
Pro Se

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The People &c Rel
Ichiel H. Montgomery
vs
James G. Bass

Petn for Mandamus

Filed May 11. 1859
L. Leland
Clerk