

STATE PAPER.

Counter declaration of the court of Denmark, in reply to the memorial delivered by the British minister.

"The law of nations is unalterable. Its principles do not depend on circumstances. An enemy engaged in war can exercise vengeance upon those who do not expect it; but in this case, and without violating the right law, a fatal reciprocity may take place; but a neutral power which lives in peace, cannot admit of, nor acknowledge such a compensation as it can only screen itself by its impartiality and by its treaties. It is not pardonable for her to renounce her rights in favor of any belligerent power. The basis of her rights is the universal and public law, before which all authority must vanish: it is neither a party nor a judge; nor do the treaties give room to privileges and favors. All these stipulations constitute the perfect law: they are mutual obligations. That would be a very unnatural agreement which any of the contracting parties might at pleasure suppress, interpret or restrain. In this manner all treaties would in general become impracticable, because they would be useless. What becomes of equity, fidelity and surety? and how much more unjust must become oppression, when it sets aside the infringement of sacred duties, the advantages of which have been enjoyed, but only acknowledged as long as they suited self-interest.

"Denmark will surely never attempt to justify the present government in France, its nature and origin; but she will neither give her judgment, and her neutrality will not permit her to express her mind on this subject. We only confine ourselves to the lamenting the disasters which befall that country, and on its account, all Europe; and the wishing to see them brought to a speedy termination. But this is not the moment to own or acknowledge a form of government, which we have always refused to acknowledge. The nation is there, and the authority which it acknowledges, is that to which application is made in cases concerning individuals. The commercial connections subsist likewise in the same manner as they did between England and France, as long as the latter chose to preserve peace. The nation has not ceased to acknowledge her treaties with us, at least she conforms herself agreeably to those treaties. As she appeals to them, so do we appeal to them—and frequently with good success, both for ourselves and in favor of those subjects of the belligerent powers, who commit their effects to the protection of our flag. In cases of refusal and delay, we have frequently been obliged to hear often and reluctantly, that they only used to take reprisals, since the nations with whom they were at war, shewed as little regard for their treaties with us; and thus the neutral flag becomes the victim of errors, with which it cannot reproach itself. The path of justice still continues open in France. The consuls and the manufactories of private individuals, are heard. No one is prevented from applying to the tribunals of commerce. This is sufficient in ordinary cases. No fresh negotiations are required for the maintenance of existing treaties. Ministers become quite superfluous in this respect; there are judges, and this is sufficient.

"These considerations are already violated by the observation, that our grievances are frequently heard in France, and that there is no possibility of getting them redressed. The municipalities to whom application must be made, are certain, not alike equitable—sentences of the tribunals of commerce, are not founded upon uniform principles—the extreme means of refuge to a medium of power is totally removed—and these circumstances occasion at times grievous acts of injustice. In this respect none are greater sufferers than the penal powers who cry aloud against those unjust proceedings, and yet seem to justify them by their own imitation.

"A negotiation between a neutral and a belligerent power, which would have for its object that the latter should not make use of neutrality to the detriment of the former cannot be thought of. A neutral power has fulfilled all its duties if it never has receded from the strictest impartiality, and from the acknowledged sense of its treaties, in case the neutrality should prove more advantageous to one of the belligerent powers than to another, become foreign to the neutrality and does not concern it. This depends on local situations and circumstances, and does not remain alike. The detriments and advantages are compensated and balanced by time. All that does not absolutely depend on a neutral power, ought to have no influence on its neutrality; otherwise a partial and frequently but momentary interest, would become the interpreter and judge of existing treaties.

"The distinction between private speculations, and those made by the government and the municipalities, seems to us to be as new as it is totally unknown. As this case cannot at all find place here, it would be superfluous to discuss the question, whether a contract between a neutral government and a belligerent power, respecting supplies or provisions for armies, garrison towns, or ships of war, can be contrary to a treaty in which no such exception has been mentioned. The only question here is respecting speculations, which might be made by private individuals, respecting the sale of productions quite harmless in their nature, the disposal of which is not less important to the vendor, than the possession of them is to the purchaser; respecting the use of the ships of the nation, which must chiefly seek her subsistence in navigation about the corn trade. Nor is the question here about ports of war, but about ports of commerce; and if it be lawful to reduce by famine blockaded harbors, it would not be quite so just to accumulate this misery upon so many others, when it befalls the innocent, and may even reach provinces in France, which have not deserved this increase of wretchedness, either on the part of England or on that of her allies.

"The want of grain, as a consequence of the failure of domestic productions, is not a thing unusual, which might only take place in the present moment; or which might be occasioned by the grounds which constitute the difference so often alleged between the present and former wars.—France is almost constantly able to make imports from abroad. Africa, Italy, America, furnishes her with much more corn than the Baltic. In the year 1769, France was more exposed to famine than it is now,

and yet England could not then avail herself of the same ground. On the contrary, when soon after Frederick IV. king of Denmark, on account of his war with Sweden, which requires almost constantly importations from abroad like France, could believe that he might adopt the principle, that exportation can be lawfully prevented, if one has hopes to conquer an enemy, by so doing, and he intended to apply, with regard to the country, this principle, which is only considered as valid with regard to blockaded ports; all the powers reconstituted, particularly G. Britain, and unanimously declared this principle to be new and inadmissible—so that the king convinced to the contrary, desisted from it. A war can certainly differ from others with regard to its occasion, tendency, necessity, justice or injustice. This can be a most important concern to the belligerent powers. It can and must have influence upon the peace, upon the indemnification, and other necessary circumstances. But all this is absolutely of no concern to the neutral powers. They will upon the whole, give the utmost deference to those on whose side justice seems to be; but they have no right to give way to this sentiment. Where a neutrality is not quite perfect, it ceases to be a neutrality.

"The ships bearing the British flag, like those which bear that of the allies of England, find in all the harbors of his majesty every possible safety, assistance and protection—but those cannot be reckoned among their enemies. The French privateers cannot be considered as pirates by the neutral powers, as long as England does not consider and treat them as such. In England the prisoners are deemed to be prisoners of war—they are exchanged—and negotiations have even been entered into for this purpose. The usual laws of war are there observed in all respects; and by this rule alone we ought to go. The tri-colored flag was acknowledged in Denmark, at a period when it was acknowledged every where else. Every alteration in this respect would be impossible, without involving ourselves in a war, or without deserving one.

"The admittance of privateers in Norway is a consequence of this neutrality, before which all regard must vanish. It has found place in all the maritime wars that ever befell Europe. All the nations in their turn have availed themselves of and desired it.—The local description allows no general prohibition. It would only bring us into dilemmas, because we could not abide by it in a remote country, where there are coasts of immense extent, numberless harbors and anchoring places, and only a small number of inhabitants.

"The prohibition would therefore be illusory, and even dangerous, as the French in virtue of their decrees, would then destroy the ships which they would no longer hope to put in a state of safety. The subject is otherwise of small importance; & the means against it are numerous and easily to be applied. (Signed)

"A. P. VON BERNSTORFF."

SUPREME COURT OF THE UNITED STATES, FEBRUARY TERM, 1807.

Erick Bollman and Samuel Swartwout. On motion for a habeas corpus ad subjunctandum.

Marshall, chief justice, delivered the opinion of the court, as follows:

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by their common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The 14th section of the judicial act, has been considered as containing a substantive grant of this power.

It is in these words: "That all the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. Provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective ju-

risdictions in some cause which they are capable of finally deciding.

It has been urged that in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision and by the context.

It may be worthy of remark that this act was passed by the first congress of the U. S. sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended unless when in cases of rebellion or invasion the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation they give, to all the courts, the power of awarding writs of *habeas corpus*.

It has been truly said that this is a generic term and includes every species of that writ. To this it may be added that when used singly, when we say the writ of *Habeas Corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.

The section proceeds to say that "either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment."

It has been argued that congress could never intend to give a power of this kind, to one of the judges of this court which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration that if the power be denied to this court, it is denied to every other court of the U. States; the right to grant this important writ is given, in this sentence, to every judge of the circuit or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from every court in the United States; and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of *habeas corpus* as stated and accurately defined by judge Blackstone, (3 Bl. Com. 129) are 1st. The writ of *habeas corpus ad respondendum* "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above."

This case may occur when a party having a right to sue in this court, (as a state at the time of the passage of this act, or a foreign minister) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court, of the United States, or of a state court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and consequently could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, and he would already be in the charge of the person who, under an original writ from this court would be directed to take him into custody, and would already be confined in the same jail in which he would be confined under the process of this court if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case. The state courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court, and in those cases the mode of proceeding is particularly prescribed, and is not by *Habeas Corpus*. They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government. 2d. The writ of *Habeas Corpus ad satisfaciendum* "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it. 3d. *Ad prosequendum, testificandum, delibendum, &c.* "which issue when it is necessary to remove a prisoner, in order to

prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court consistently, with the most limited construction of the words in the act of congress; but the power to bring a person up that he may be tried in the proper jurisdiction is understood to be the very question now before the court.

4th and last, "The common writ *ad faciendum ad respondendum*," which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (when the writ is frequently denominated an *habeas corpus cum causa*) to do and receive whatever the king's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supercedes all proceedings in the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *habeas corpus cum causa* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally, that the same act prescribes a different mode for bringing into the courts of the United States, suits brought in a state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the U. States.

The only power then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It includes with the following proviso:—"That writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts because it specifies a case it is particularly applicable to the use of the power by courts—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of *habeas corpus*, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted, with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the 3rd section throws much light upon this question. It contains these words, "and upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law."

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court, possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If by the sound construction of the act of congress the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it. If then this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; & altho' the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (U. S. v. Hamilton, 8 Dallas 17.)

If the act of congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution.

In the mandamus case † it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise, is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

It has been demonstrated at the bar that the question brought forward on a *habeas corpus* is always distinct from that which is involved in the cause itself. The questi-

on whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.

The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of reversing that decision, and therefore appellate in its nature.

But this point also is decided in Hamilton's case and in Burford's case. † If at any time the public safety should require the suspension of the powers vested by this act in the courts of the U. S. it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed this court can only see its duty and must obey the laws.

The motion, therefore, must be granted.

* Laws U. S. vol. 1, p. 68.

† 1. *Cranche's reports, Mabury v. Madison.*

‡ At February term, 1806, in this court.

[Judge Johnson's Opinion To-Morrow.]

Translated for the American.

PROCLAMATION TO THE PEOPLE AND ARMY OF HAYTI.

I wish to lay open to your view those perfidious machinations which a band of evil disposed persons have dared to put in practice against your freedom. These men, strangers to every humane sentiment, have compelled me, against my will, to war with them. What right have they to pretend to domineer over the people? What services have they rendered to the public liberty? By what sacrifices have they manifested their devotion to their country? It is the same Petion that betrayed Gen. Toussaint (to have advanced him to a superior grade) to unite himself with Rigaud, whom he afterwards abandoned, joined the French in order to combat us, until, from personal danger, he was compelled to seek his own safety; for whom they have claimed a right to public gratitude. This crafty man, at all times full of deception, entertains an immeasurable ambition, to which he has given himself up; and, under the mask of a deceitful philosophy, proceeds, step by step, in the execution of his odious designs: Who has been seen, from a hypocritical disposition, to affect a weariness of the burden of command, and appear to abandon it to his subalterns, whilst he has pretended to regret in public the fate of the cultivators and of the soldiers, and to lament the rigor of those privations which they have experienced, in order to secure, by a false compassion, the esteem of those deluded men, who, at the moment he spoke to them of freedom, were by him precipitated into slavery. He did not wait for the favorable instant to unveil the atrocity of his soul; he determined to unmask himself! Aided by wretches, known only by the baseness of their dispositions, he has dared to insult the public authority.

Bonnet, the English spy, at Petit-Guave, where he turned traitor, where he was afterwards the instrument of the 30th Ventose, and where, after having deluded the too easy Gen. Vilate, peaceably withdrew himself before the event, and has been one of the causes of all the disgraces of that estimable, but unhappily, too credulous officer. Blanchet, the elder, who, having been treasurer at Jeremie, during the civil war of the South, transported to the continent the funds of the state which had been confided to him, and employed them for his own purposes. Blanchet, the younger, known only by his ambition, his fury, and his hatred of the whites and blacks.—Domaicq, of whom the name alone is an injury; others, such as Lys, whom it is repugnant to name; together with the rest of the low and vile blood-hounds of this infamous horde. Who shall guarantee that they will not betray you in the same manner that they have betrayed all the parties they have heretofore embraced!

Where can we find an equal assemblage of crimes! After having massacred the emperor, whom they charged with shedding the blood of the Haytiens, did they not cruelly assassinate more than thirty of the superior officers? And for what reason? One reddens to think of it! Sorely because they are blacks, and enlightened.

What motives can they have for the commission of such unheard of crimes, unless it be the thirst of command, and the unhappy rage of their cruel hatred against those men who, a long time since, excited their unjust jealousy?

They have dared to attribute to the unhappy Dessalines, those very crimes which they had suggested to him, and of which they have been the violent instigators. After having teased him with continual solicitations, and when he had yielded to their atrocious entreaties, did they not charge him with decreasing the death of Thomas Thoust, which they had instigated with so much rage?

Dessalines was peaceably at Gonaves, when they forged a false correspondence between that merchant and Ferrand, by the aid of which they denounced him as a traitor, that they might be enabled, by his death, to obtain the pillage of his effects.

They have dared to impute to the emperor, as well as to the blacks, the massacre of the whites; but to whom can you attribute the excitement of these cruel butcheries, unless to these barbarous men? They have declared, "That the women and even the children should be destroyed!"—and have said, "Behold a time that you should take the place of the whites, and sport on the labor of the blacks!" My days, have they not been