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the time limited by the law, which gives to the president authority to lease for five years. Is it, then, a lease? The legal understanding of a lease for years is, a contract for the possession and profits of land, for a determinate period, with the recompense of rent. The contract in question is strictly within this definition. The *business of smelting is a part of the ^{*539]} operation of mining, although it may be a distinct branch from that of digging the ore; but the law ought not to be so construed as to require the whole operation to be embraced in the same contract. They are different operations, requiring different qualifications, and distinct regulations. This contract is for the possession of land. The work is to be performed at the United States' lead mines, and must, of course, be performed within the limits prescribed by law to be attached to such mines. And there is an express permission to use as much fuel as is necessary to carry on the smelting business, and to cultivate as much land as will suffice to furnish teams, &c., with provender; and there is an express reservation of the rent of six pounds of every hundred pounds of lead smelted, with special and particular stipulation for securing the same. It is not necessary that the rent should be in money. If received in kind, it is rent, in contemplation of law.

We are accordingly of opinion, that the question certified in the record must be answered in the affirmative.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Illinois, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that "the president had power, under the act of the 3d of March 1807, to make the contract set forth in the declaration." Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court accordingly.

^{*540]} *GEORGE HOLMES, Plaintiff in error, v. SILAS H. JENNISON, Governor of the State of Vermont, and JOHN STARKWEATHER Sheriff of the County of Washington, in the said State of Vermont, and their successors in office, Defendants in error. .

Extradition.

In the state of Vermont, George Holmes was confined under a warrant issued by the governor of that state, directing the sheriff of the county of Washington, to convey and deliver him "to William Brown, the agent of Canada, or to such person or persons as, by the laws of said province, may be authorized to receive the same, at some convenient place on the confines of this state and the said province of Lower Canada; to the end that he, the said George Holmes, may be thence conveyed to the said district of Quebec, and be there dealt with as to law and justice appertains."

The warrant stated, that "George Holmes was in the custody of the sheriff," by reason of a charge of felony, sustained by indictment, found by the grand jurors of the district of Quebec, in the province of Lower Canada; that "the said George Holmes, on the 31st day of January 1838, at the parish of St. Louis of Kamourasca, in said district, did feloniously kill and murder one Louis Paschal Achille Tache; and whereas, the said George Holmes not being a citizen of the state of Vermont, but a citizen of the said province of Lower Canada, and has come into

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this state from the said province of Canada, and the offence whereof he stands charged as aforesaid, having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province, for the offence aforesaid."

A writ of *habeas corpus* was, on the petition of George Holmes, issued by the supreme court of Vermont, and on the return thereto by the sheriff, stating the warrant of the governor to be the cause of his detention, he was remanded by the court; Holmes prosecuted a writ of error to the supreme court of the United States. The writ of error was dismissed, the court being equally divided.

ERROR to the Supreme Court of Judicature of the State of Vermont. On the 19th of July 1839, George Holmes presented a petition to the supreme court of the state of Vermont, then in session, setting forth that he was in the custody of John Starkweather, sheriff of the county of Washington, in the common jail of Montpelier, under a warrant bearing date the 16th of April 1839, issued by Silas H. Jennison, governor of Vermont; and that he was unlawfully imprisoned and restrained of his personal liberty. He prayed for a writ of *habeas corpus*, to be directed to the sheriff. The writ was issued, and the sheriff returned that he had the body of the petitioner before the court, and that he held him in custody under the following order from the governor of Vermont:

"STATE OF VERMONT: To John Starkweather, Esquire, Sheriff of the County of Washington, greeting:

Whereas, George Holmes, late of Sorel, in the province of Lower Canada, is now detained in the common jail in said Washington county, and under your custody, by reason of a certain charge of *felony, sustained by indictment found by the grand jurors of the district of Quebec, in said province, to wit: That the said George Holmes, on the 31st day of January 1839, at the parish of St. Louis of Kamouraska, in said district, did feloniously kill and murder one Louis Paschal Achille Tache; and whereas, the said George Holmes, not being a citizen of the state of Vermont, or of any of the United States, but a citizen of the said province of Lower Canada, and has come into this state from the said province of Canada, and the offence, whereof he is charged as aforesaid, having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province, for the offence aforesaid: You are, therefore, required, that, as soon as may be after the 27th day of (instant) April, the body of the said George Holmes, now in your custody, you convey and deliver to William Brown, the agent of Canada, or to such person or persons as, by the laws of the said province, may be authorized to receive the same, at some convenient place on the confines of this state and the said province of Canada; to the end, that he, the said George Holmes, may be therein conveyed to the said district of Quebec, and be there dealt with as to law and justice appertains. Hereof fail not, but of your doings in the premises make due return. Given under my hand, at Shoreham, this 16th day of April 1839.

S. H. JENNISON, Governor of Vermont."

On the hearing of the *habeas corpus*, before the Supreme Court of Vermont, evidence was produced which showed that George Holmes was a native citizen of the United States, having been born in the state of New Hampshire.

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A correspondence between C. P. Van Ness, Esq., the governor of the state of Vermont, in the year 1825, with the executive of the United States, was also given in evidence. In March 1825, the governor of Vermont forwarded to Mr. Clay, the secretary of state of the United States, a communication addressed to him by "the acting governor of Canada," stating that two soldiers of a British regiment, who had committed a robbery on two officers of the regiment, were then in confinement in jail, in Burlington, Vermont, and asked that the offenders should be delivered up to a person to be authorized to receive them, to be brought to justice in the province of Canada. The governor of Vermont, in the letter to the secretary of state, expresses his readiness to attend to any directions the secretary of state of the United States might please to give on the subject. The reply of Mr. Clay, which was transmitted by Governor Van Ness to the acting governor of Canada, states: "I am instructed by the president to express his regret to your excellency, that the request of the acting governor of Canada cannot be complied with, under any authority now vested in the executive government of the United States; the stipulation between this and the

*542] British government, for the mutual delivery of fugitives from justice, being no longer in force; and the renewal of it by treaty, being, at this time, a subject of negotiation between the two governments."

A motion was made for the discharge of the prisoner, upon the ground of the insufficiency of the cause alleged for his detention, as being at variance with the provisions of the constitution of the United States; and after a hearing of the case, the court rendered judgment against the application, and ordered the prisoner to be remanded. George Holmes prosecuted this writ of error.

The case was argued by *Van Ness*, for the plaintiff in error. No counsel appeared on the part of the defendants.

Van Ness, for the plaintiff in error.—The case in the record now before the court presents two general questions. First, has this court jurisdiction? And secondly, if it has, is the judgment complained of erroneous?

The question of jurisdiction depends essentially upon the provisions of the constitution of the United States, defining the powers of this court, and upon the 25th section of the judiciary act of 1789, prescribing the mode in which the judgments of state courts, in certain cases, can be here re-examined. But before entering upon this field, it may be proper briefly to advert to the principles of the common law, as it regards the prosecution of writs of error. It appears never to have been judicially settled in England, whether this writ would lie where a judgment had been rendered on the return to a *habeas corpus*; though the point, in one or two instances, has been incidentally alluded to, while in another, it was directly agitated, but without any decisive result. In the case of *Wagoner*, called the *Case of the City of London*, reported in 8 Co. 253, there was an objection made to the return upon a *habeas corpus*, that it consisted too much in recital, instead of being more direct and certain; and the court answered, that it "was not a demurrer in law, but a return on a writ of privilege, upon which no issue could be taken or demurrer joined; neither upon the award would any writ of error lie, the return being to inform the court of the truth of the matter in which such precise certainty is not required as in pleading." In the case

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of the *King v. Dean and Chapter of Trinity Chapel, in Dublin*, reported in 8 Mod. 28, and in 1 Str. 536, a writ of error was brought to the king's bench, in England, to reverse a judgment of the king's bench, in Ireland, awarding a peremptory *mandamus*, and it was decided, that error would not lie. In the first-mentioned report of this case, the court is represented as saying: "It is against the nature of a writ of error, to lie on any judgment but in causes where an issue can be joined and tried, or where judgment may be had upon a demurrer and joinder in demurrer, and therefore, it would not lie *on a judgment for a *procedendo*, nor on the return of a *habeas corpus*." By the report of Strange, which is much more full, and doubtless, more correct, it appears, that on the first argument of the case, the judges doubted as to whether the writ of error could be brought, some of them leaning one way, and some the other way. But after a second argument, they agreed, that the writ could not be sustained. Nothing, however, is said about a writ of error on a *habeas corpus*, except that one of the judges inferred from the form in which the judgment was entered in the case of the *Aylesbury men* (of which I shall presently take notice), that that case was not thought to be one in which a writ of error could be brought. And upon looking into the reasons assigned for the decision, it will be seen, that the principal one was the omission of the words, "*ideo consideratum est*," in the entry of the judgment. [*543]

Here, let it be observed, that in neither of the two cases referred to was there a question, whether a writ of error would lie in the case of a *habeas corpus*; and therefore, that whatever may have been said by the court in either of them, upon this point, was foreign to the subject before them, and cannot be entitled to the weight of authority. And it should be particularly noticed, that the principal reason upon which the last-mentioned case was finally decided, was the omission of the words, "*ideo consideratum est*," in the entry of the judgment; thus placing the question, whether the decision of the court constituted a regular judgment upon the particular words made use of in entering such decision on the record, instead of determining that point from the nature and effect of the decision so given.

But there remains the case of the *Aylesbury Men* (*Regina v. Paty*), in which the question which we are now discussing, directly arose. This case occurred in the first years of the reign of Queen Anne, and is reported in 2 Salk. 503, and in 2 Ld. Raym. 1105, and also in Holt 526. There was a commitment by order of the house of commons, of certain persons, for an alleged contempt, in having commenced an action against the constables of Aylesbury, for refusing to take their votes at an election for members of parliament. The prisoners were brought before the court of king's bench, by a writ of *habeas corpus*, and three of the four judges held, that the commitment was legal; but Holt, Chief Justice, declared the contrary. A writ of error to the house of lords upon this judgment, having been applied for, the house of commons insisted, that none ought to be granted, while the house of lords took the opposite side. The latter condemned the course pursued by the commons, and requested of the Queen, "that no consideration whatever should prevail with her majesty to suffer an obstruction to the known course of justice; but that she would be pleased to give effectual orders for the immediate issuing of the writ of error." And in refer-

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ring to the several objections made by the commons, they said : "As to the second thing they (the commons) have taken upon them to *assert, [544] that no writ of error lies in the case ; we affirm to your majesty, with great assurance, that the house of commons have no right or pretence to determine whether that be so or not. The right to judge when a writ of error is properly brought, is by law intrusted to that court to which the writ of error is returnable. And therefore, we shall not at present say anything to your majesty, in an extra-judicial way, and before the proper time, as to the point, whether a writ of error brought upon a judgment for remanding prisoners upon a *habeas corpus* can be maintained." Now, although the house of lords did not in terms declare that the writ, if brought, would be sustained by them, yet it would certainly be unreasonable to suppose, that they would have pressed the subject in the manner they did, had they been of the contrary opinion. And as this case occurred nearly one hundred years after that of the *City of London*, it follows most clearly, that what had been loosely said in the latter, had never grown into authority, nor had any effect towards settling the principle. The question, therefore, remains an open and unsettled one, in England, to this day.

In Coke's Com. on Littleton, 288 b, it is laid down, that "a writ of error lieth, when a man is aggrieved by an error in the foundation, proceedings, judgment or execution." And again, that "without a judgment, or an award in the nature of a judgment, no writ of error doth lie." Now, what is a judgment, but the decision of the court upon the case before it ? And is not the decision upon the return to a *habeas corpus*, determining whether the imprisonment of a person is lawful or unlawful, a judgment in the case; or, at least, an award in the nature of a judgment ? There is a case regularly brought before the court, and the merits of the question which it was designed to try are examined and determined. If this determination does not constitute a judgment, I am at a loss to understand what does. And moreover, in order to determine this, is it reasonable or proper, that we should shut our eyes to the nature and character of the act performed by the court ; and look merely at the particular set of words, that may happen to be used in recording such act ? It should here be noted, that error lies in England, to reverse an outlawry ; that it lies upon a statute-merchant ; and also upon a fine ; in neither of which last two cases, at least, can it be said, that there is any judgment of a court.

In the state of New York, this subject was very fully and ably discussed in the case of *Yates v. People*, reported in 6 Johns. 337 ; and it was there decided by the court of errors, the highest judicial tribunal in the state, that a writ of error would lie in the case of a *habeas corpus*. It is true, that there was a respectable minority in the court, dissenting from the decision, but it can scarcely be denied, that the weight of the argument was on the side of the majority. And I beg, particularly, to refer the court to the opinion delivered by that great man, De Witt Clinton, who, though not a technical, [545] nor even a practising lawyer, exposed in a *masterly and unanswerable manner, the weakness and absurdity of the grounds urged, why a writ of error should not be considered a legal and appropriate remedy in a case of this kind.

Upon the whole, therefore, it appears to me, that the jurisdiction of this

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court in the present case, so far as it concerns the point whether a writ of error will lie in the case of a *habeas corpus*, is sustainable, even upon the principles of the common law. But we will now turn to the constitution and laws of the United States ; upon which, after all, as I have already said, the question essentially rests. The constitution provides, that in all cases arising under the same, the laws of the United States, and the treaties made under their authority, this court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress shall make. By the 25th section of the judiciary act of 1789, a final judgment or decree in any suit, in the highest court of law or equity in which a decision could be had, of a state, may be re-examined and reversed or affirmed in this court, upon a writ of error, where is drawn in question, upon other subjects, the validity of an authority exercised under any state, on the ground of such authority being repugnant to the constitution or laws of the United States, and the decision of the state court is in favor of the validity of such authority.

The principal question which the record in this case presents is, whether the authority exercised by the governor of Vermont, under or on behalf of the state, in issuing the order for the arrest of the plaintiff in error, and his transportation to a foreign country, was in violation of, or repugnant to, the constitution of the United States. And it has been fully settled by this court, that it need not, in terms, be stated, that the constitution or an act of congress was drawn in question, in order to give the court jurisdiction on error from a state court ; but that it is sufficient, if the record shows that some one of the requisite questions was necessarily involved in the case. I will not, therefore, spend further time to prove that the subject-matter of this cause may come here ; but will proceed with the examination, as to whether it has been brought here in the manner prescribed by the act of congress.

The substance of what is required is, that there should be a question, of which, by the constitution, this court has appellate jurisdiction ; the manner of bringing that question here being but matter of form. And herein consists the difference between the principles which are to govern the decision of this case, and those which are applicable to writs of error in England. There, the right to bring error appears to depend upon the form of the proceedings which are sought to be re-examined, without regard to the merits of the controversy ; while here, it depends upon the principles involved in the case, without regard to the form of the proceedings. It is but fair to suppose, that it was the intention of congress, in framing the provisions of the judiciary act of 1789, which have been ^{*already} stated, to carry [*546] into execution the grant of jurisdiction contained in the constitution ; and in that light, the act should be liberally construed. But so far as it may be supposed, that the object was to make exceptions to the grant, the construction ought to be a strict one. And here let me make the passing remark, that although, in my judgment, some erroneous ideas have been entertained as respects the power of congress to make exceptions, yet that I do not deem it necessary to my present purpose, to enter upon that question.

I return to the point, the constitution, as we have seen, embraces in the jurisdiction, all cases arising under the same, or under the laws and treaties

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of the United States ; while the act of congress provides for a writ of error from the judgment of a state court, in any suit in which certain questions of the nature of those mentioned in the constitution, and including the one presented by the record before the court, shall arise. Can there be a reasonable doubt, that the main object of the law was, to provide for bringing up the questions specified, without reference to the particular form of the proceedings in which they might occur ? Is it not plain, that the terms "any suit," were intended to be used in a sense co-extensive with "all cases?" And, indeed, I feel persuaded, that I might safely rest the question upon the meaning of the term "suit," by itself considered. It is defined, to be "the lawful demand of one's right;" and what broader expression can be necessary to include the writ of *habeas corpus*, which is brought to recover one's personal liberty, the highest and most valuable of all rights ?

But finally, I view this question to have been settled (at least in effect) by this court. In the case of the *Columbian Insurance Company v. Wheel-right*, 7 Wheat. 534, it was decided, that error would lie upon the award of a peremptory *mandamus*. Error was also sustained in a similar case, in favor of Mr. Kendall, the postmaster-general. 12 Pet. 524. And in the case of *Weston v. City Council of Charleston*, 2 Pet. 450, it was determined, that this writ might be brought upon a denial to grant a prohibition. In the last-mentioned case, the following language, with reference to the word "suit," was used by Chief Justice MARSHALL, in delivering the opinion of the court : "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

I wish to bring back to the notice of the court, that it has been settled in England, by the house of lords, that neither in the case of a *mandamus*, nor of a prohibition, can a writ of error be sustained. As to the former, it was decided in the case already cited, of the *King v. Dean and Chapter of Trinity Chapel*, which was *carried up to the house of lords. And *547] with regard to the latter, it was settled in the case of the *Bishop of St. David's v. Lucy*, 1 Salk. 154 ; 1 Ld. Raym. 545. If, then, this court has exercised jurisdiction in both of those cases, contrary to the decisions of the highest courts in England, why should not the jurisdiction be sustained in the one now before the court ; when it has never been determined in England, that a writ of error could not be brought to reverse a judgment rendered on the return to a *habeas corpus*? Surely, it will not be said, that property is more worthy of the protection of this court, than the personal liberty of the citizen. Nor can it be pretended, that a *mandamus* or a prohibition is esteemed a higher remedy than the writ of *habeas corpus*, the privilege of which was considered of so sacred a character, and so essential to the personal security of the people, that the constitution has provided against any suspension of it, even by congress, except in cases of rebellion or invasion.

But I will leave this part of the case, in the full persuasion that, even without any other argument or authority, the determination of this court, and the reasons upon which it was founded in the case of *Weston v. City*

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Council of Charleston, is absolutely decisive in favor of the jurisdiction which I have endeavored to maintain.

I come now to the main question in the case, which is, whether the judgment of the state court is erroneous or not. I am not able to present to this court the reasons upon which the three judges of the court below, who concurred in the decision, founded their judgment; since they have never appeared willing to assign any, though repeatedly called upon to do so.

The first point, upon this part of the case, for which I contend, is, that the surrender of persons charged with the commission of crimes in foreign countries, is a mere matter of comity between nations, and not of obligation; but that whether it be the one or the other, the subject is wholly of a national character, and the power over it conferred exclusively upon the government of the Union. Of the more early writers who have treated upon the subject, Grotius, Burlamaqui and Vattel assert, that a positive obligation exists to make the surrender; while Puffendorf, Martens and Lord Coke deny the existence of such obligation, and hold, that surrenders are only made upon the ground of national comity, or by virtue of treaty stipulations. The authors and legal characters, who have more recently treated of the matter, in this as well as in other countries, generally, if not all of them, maintain the latter position.

There are two adjudged cases in this country, which deserve to be noticed. The one is a decision of Chancellor KENT, of New York, and is to be found in 4 Johns. Ch. 106; and the other, of Chief Justice TILGHMAN, of Pennsylvania, reported in 10 Serg. & Rawle 125. Chancellor KENT insists, that, by the laws of nations, there is an absolute and positive national obligation to surrender fugitives from justice, on proper demand being made. He *undertakes to maintain, that the article in the treaty of [*_548 1794, between the United States and Great Britain, providing for the mutual surrender of persons charged with murder and forgery, created no new obligation; and he even supposes it to have operated, during its existence, as a restriction, so far as it related to the crimes in regard to which surrenders were to be made. Chief Justice TILGHMAN maintains precisely the opposite ground; and it appears to me, that no impartial man can read his opinion, without acknowledging the superiority of his reasoning, and becoming convinced of the correctness of his conclusions. There is no English authority that maintains the doctrine of obligation. In two of the cases cited by Chancellor KENT, the persons accused were sent to Ireland for trial, and in another, to Calcutta; but in all three of them, it was upon the ground, that this was allowable by the provisions of the *habeas corpus* act of Charles II., since the places to which the prisoners were sent were under the dominion of the king of England. What was done with the man who was suspected of a murder in Portugal, is left in doubt; the whole report of the case being as follows: "On a *habeas corpus*, it appeared, that the defendant was committed to Newgate, on suspicion of murder in Portugal, which (by Mr. Attorney) being a fact out of the king's dominions, is not triable by commission, upon 35 of Henry VIII., c. 3, § 1, but by a constable and marshal; and the court refused to bail him." It certainly does not appear, that he was to be sent out of the country. The remark of Judge HEATH, in the case of *Meer v. Kay*, 4 Taunt. 34, although foreign to the question before the court, so far from operating

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against us, clearly shows that he did not consider the surrender of criminals as a matter of obligation. He expressly put it upon the ground of the "comity of nations," that it had been held that the crew of a Dutch ship, which had run away with the vessel, might be sent back.

But the decisions and practice of our own government ought to be deemed to be conclusive upon this subject. Ever since the organization of the general government, it has been held, that we were under no obligation to surrender persons who had sought an asylum here, though charged with the commission of crimes, previous to their change of country. In the year 1791, the governor of South Carolina made a request that the president of the United States should demand of the governor of Florida, certain persons who had committed crimes in South Carolina, and fled to Florida. Mr. Jefferson, the secretary of state, in his report to President Washington, says: "England has no convention with any nation for the surrender of fugitives from justice, and their laws have given no power to their executive to surrender fugitives of any description, they are accordingly constantly refused; and hence, England has been the asylum of the Paolis, the la Mottes, the Calonnis; in short, of the most atrocious offenders, as well as of the most innocent victims, who have been able to get there. The laws of the United States, like those of England, receive every fugitive; and no authority has been given to ^{*549]} our executives to deliver them up. If, then, the United States could not deliver up to General Quesnada (Governor of Florida), a fugitive from the laws of his country, we cannot claim as a right the delivery of fugitives from us. And it is worthy of consideration, whether the demand proposed to be made in Governor Pinkney's letter, should it be complied with the other party, might not commit us disagreeably, and perhaps dishonorably; for I do not think that we can take for granted, that the legislature of the United States will establish a convention for the mutual delivery of fugitives; and without a reasonable certainty that they will, I think we ought not to give Governor Quesnada any ground to expect that in a similar case we would redeliver fugitives from his government."

In the year 1793, Mr. Jefferson answered an application of Mr. Genet, the French minister, in the following terms: "The laws of this country take no notice of crimes committed out of their jurisdiction. The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries; but until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices. The former is viewed, therefore, as the lesser evil. When the consular convention with France was under consideration, this subject was attended to; but we could agree to go no further than is done in the ninth article of that instrument, where we agree mutually to deliver up captains, officers, marines, sailors and all other persons, being part of the crews of vessels. Unless, therefore, the persons demanded be part of the crew of some vessel of the French nation, no person in this country is authorized to deliver them up; but on the contrary, they are under the protection of the laws."

Mr. Monroe, as secretary of state under President Madison, in his instructions to our commissioners at Ghent, said: "Offenders, even con-

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spirators, cannot be pursued by one power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favor." And as our government has, in all cases of applications from foreign powers, refused to surrender, upon the same ground, I would ask whether these decisions, and this practice, ought not to be conclusive upon all the authorities of our national and state governments? Are we still to search among the general and vague remarks of the old writers upon the laws of nations, to ascertain what are our obligations in this respect; when they have been so fully settled by our own government? This, indeed, would be most extraordinary.

But I have said, that whether a matter of obligation, or of comity, the subject appertains exclusively to the national government. It is now well settled and understood, that there are three ways in which the states have been deprived of power by the constitution. First, where there is a grant of power to the national government, exclusive in its terms. Secondly, where, after a grant ^{*to} that government, there is a prohibition upon the states in relation to the same object. And thirdly, ^[*550] where the exercise by the states of an authority conferred upon the national government would be repugnant and incompatible.

Before proceeding to inquire whether the power to act upon the subject of surrendering fugitives from foreign countries, is included in any grant of the character described under the first of these heads; or whether, in any prohibition referred to, under the second; let us see whether it does not become exclusive in the national government, simply upon the principle stated under the last head.

From the very nature and organization of the general or national government, it is vested with the sole jurisdiction over all matters of a national character, and of external concern. The states, by the adoption of the existing constitution, have become divested of all their national attributes, except such as relate purely to their internal concerns. They are not known to foreign governments as states, nor can they properly be distinguished by them from the mass of this nation. Every question, then, which can arise, and to which a foreign power is a party, or in relation to which any correspondence with such power becomes necessary, belongs to the government of the nation. In short, as to all such matters, we are one and indivisible; precisely the same as if we had no separate states, nor any authorities in the country except those of the Union.

Can it be denied, that the demanding and surrendering of fugitives, as between different countries, is a matter of national and of external concern? The demand is made by the government of one country, upon that of another country, and the surrender made in compliance with such demand, is most clearly an act performed at the instance, and for the benefit, of a foreign power. And if this is a mere matter of national comity, and not of obligation, as I believe I have satisfactorily shown, the interference of the states would be, if possible, still more improper and incompatible. Some states might practise upon one principle, and some upon another; which might lead to an entire want of uniformity in their proceedings, even as to the same foreign power. The views and plans, too, of the national government in relation to the subject, would always be subject to be frustrated

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and defeated by the action of the states ; the consequences of all which could scarcely fail to be highly mischievous, if not actually dangerous.

Some of the writers who assert the existence of the obligation referred to, go so far as to say, that a refusal to surrender a fugitive may be cause of war. But has a state the power in this way to involve the whole nation in a foreign war ? Or let us suppose, that one of our states should demand a criminal from a foreign government, and the latter refuse a compliance, would the state in that case have the right to declare war ? On whose behalf, would she make such declaration ? On her own, or on that of the national government ? The moment we admit, that a state can act upon a matter of this kind, we are unavoidably led into these difficulties.

*For with the duty or obligation to surrender, is coupled the power to demand, and to this power follows the right to enforce such demand. Who, then, can, for an instant, yield his assent to a proposition so absurd and so dangerous ?

From what I have already said, it appears to me, there can be no room for an argument, that the states may severally act upon the subject, until the national government shall have acted, or until the two powers come in competition with each other. If this were to be the rule, then, the United States, by entering into regulations with some foreign nations, would deprive the states of their powers with regard to such nations, while they would remain as to other countries, and might be exercised upon entire distinct principles from those adopted by such regulations. Some states, too, as already stated, might decide one way, and some another way ; so that we might have between the national and the state governments, several different and contradictory practices in relation to the same matter. It follows, therefore, that this is a power which, independently of its being purely of a national and external character, is not susceptible of being divided up among the national and state governments, or of being concurrently exercised between them.

But I apprehend, that the states are prohibited by the constitution from acting upon this subject. The powers of war and peace, and of making treaties, are conferred upon the general government ; and at the same time, expressly prohibited to the states. Every incident, therefore, which follows the grant, is equally included in the prohibition ; and thus is the whole subject of the foreign relations of the country placed under the exclusive jurisdiction of the government of the Union. That the matter now in question is necessarily one of foreign intercourse, and may even call into action the war-power ; or, at any rate, that it is peculiarly proper for the exercise of the treaty-making power ; appears so clear, that I will add nothing upon that point to what has already been said.

If it should be said, that although the United States have the power to regulate this subject by treaty, yet that until they do so, the states, by making surrenders, do not violate the constitution of the United States ; the answer, in my judgment, is easy and plain. If the United States can make a treaty for the surrender of fugitives, generally, they can make one for the surrender of a particular person ; and the power to agree to make the surrender, implies the power to refuse it. Well, suppose, they should refuse to enter into such a treaty, in a particular case, from a conviction that the person in question ought not to be surrendered, and a state should under-

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take to deliver up the same person, upon the ground, that the general government had made no treaty touching the case; would not this be a violation of the constitution? And would it not be equally so, where the arrangement should be refused by our government, for some special reason arising out of our intercourse with the foreign power applying for it? The general government alone understands the state of our relations with each foreign government, *and therefore, can alone know how to act, in a case of this kind, towards each one of them. And it would be extraordinary, that there should be no way to prevent the states from interfering and disconcerting the action and intentions of the general government, in a matter so essentially connected with our foreign intercourse, except for the United States actually to make a treaty on the subject. But there are even some opinions, that a fugitive from justice cannot be delivered up to a foreign government, in any other way than by treaty. Upon this principle, it would certainly seem, that the subject, as a direct and necessary consequence, belonged, by the constitution, exclusively to the treaty-making power. For it would be a singular supposition, that the states are prohibited from making treaties with foreign powers, and yet not prohibited from doing those acts in relation to such powers, which can only be performed through the intervention of treaties.

And what measure of action by the general government, according to the doctrine against which I am contending, would bring the constitution into actual operation upon the states? Would a treaty of the United States with some foreign power, for the mutual surrender of persons charged with murder, leave the states at liberty to make surrenders to the same power for forgery, or any other crime less than murder? I hardly think this will be contended for by any one; and yet the case, in my judgment, would stand upon the same ground, as when the United States refused to make a treaty to deliver up for any offence whatever. If the mere negative action of the general government, in part, should preclude the states to the same extent, why should not the negative action in whole, have the effect to exclude them altogether? It may, perhaps, be said, that the determination of the general government to surrender for one crime, was acting upon the subject, and therefore, precluded the states from surrendering for any crime; as well those left untouched, as the one provided for. But if the general government, from motives of policy, and for reasons deemed sound, should determine to make no surrenders at all, to some particular power, why should not this determination have the same effect as the other? Mr. Jefferson, in his letter to Mr. Genet, said: "When the consular convention with France was under consideration, this subject was attended to; but we could agree to go no further than is done in the ninth article of that instrument, where we agree mutually to deliver captains, officers, marines and sailors." Can it, with reason, be contended, that after that determination, it was in the power of the individual states to deliver up to the French government fugitives charged with offences against its laws?

It will be further seen, that the states are prohibited even from entering, without the consent of congress, into "any agreement or compact with another state, or with a foreign power." Now, can it with any propriety be said, that a state can act upon this subject, and at the instance of a foreign government, when, at the same time, she is prohibited from entering into

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any agreement or compact *with such government in relation to the same? Certainly, the power to act implies the power to regulate the manner of action. If one party has a duty or obligation to perform towards another, the two ought to have a right to come to some agreement or understanding as to the way or manner of performing such duty or obligation. Is not this so plain, that it cannot be misunderstood by a person of the most ordinary capacity? And, indeed, should not the very order of surrender, made at the instance of a foreign power, be deemed to constitute an agreement to make such surrender? What else can you call it, where one party asks the performance of an act, and the party applied to consents, but an agreement to do the thing required?

If, then, the subject in question does not belong exclusively to the national government, it does not belong to it at all. For, if so vested, it is because it appertains to the foreign intercourse of the country; and is necessarily exclusive. But if not so vested, then it is among the reserved powers of the states, and remains exclusively with them. If it is a reserved power of the states, it will at once be seen, that all that has been done in relation to it, by the national government, from the adoption of the constitution to this time, has been void and unconstitutional. The 27th article in Jay's treaty was void. The surrender, under it, of Robins, *alias* Nash, was, of course, unauthorized. And all the negotiations and correspondence which have taken place upon the subject, during this whole time, have been without any authority. Yet nothing of this kind appears ever to have been contended for, or even suggested. The case of Robins was largely and warmly discussed in the house of representatives of the United States, at the time of his surrender, or soon afterwards; and among all the objections raised in regard to it, no question appears to have been made of the authority of the national government over the subject, nor a suggestion that the states had any concern with it.

Again, it could only be upon the ground of connecting the subject with the right of the states to regulate their internal police, that it could be supposed to be included in their reserved powers. But none of the writers on public law have treated this question as one at all connected with the internal police of a country, or with any internal power whatever. On the contrary, it has been uniformly ranked among the questions of external and foreign concern; and is spoken of only when treating of the relations between different countries. And in the case of the *City of New York v. Miln*, 11 Pet. 105, the police powers of the states were fully examined and defined by this court; and I think it will not be denied, that they were extended to their utmost limits. But at the same time, it will be perceived, that the subject now under discussion was not embraced by any of the principles declared to be applicable to those powers. The state law in that case had its operation, and its whole operation, within the territory and jurisdiction of New York. It neither led, nor could lead, to an intercourse or correspondence with any foreign power whatever. And it had, moreover, no reference *to the commission of crimes, within or without the state, nor to the arrest of criminals of any description.

It is true, that the legislature of the state of New York, several years ago, enacted a law authorizing the governor of the state, in his discretion, to surrender fugitives from foreign countries. But public opinion has lately

*554] *to the commission of crimes, within or without the state, nor to the

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manifested itself strongly against the validity of the law ; and the governor, during the last year, refused to act under it, upon the express ground, that the national government had exclusive jurisdiction over the subject, and consequently, that the act of the legislature was unconstitutional and void.

But secondly, if it should be admitted that a state, by some police regulations within her power to make, could effect the expulsion from her jurisdiction of a person charged with a crime in another country ; still the act of the governor of Vermont, in the present case, was not of that character, but was a direct act of foreign intercourse, and therefore, illegal and void. The order for the arrest of the plaintiff in error was not founded upon any law of the legislature of Vermont for the regulation of her internal police ; nor, in fact, upon any authority whatever proceeding from the state. On the contrary, it is manifest from the order itself, and has always been admitted, that the governor proceeded upon the ground of a supposed obligation on the part of the state, arising under the laws of nations, to surrender fugitives from justice, on the application of foreign governments ; and a belief that he had a right, as the executive of the state, to fulfil such obligations, without any authority for the purpose, derived from the constitution or legislative acts of the state. But if any further proof were wanting, that the governor of Vermont was not acting, nor authorized to act, merely by virtue of his office, in the execution of any internal police regulation, it would be sufficient to point to the article in the constitution of that state, which declares, that "the people of this state, by their legal representatives, have the sole, inherent and exclusive right of governing and regulating the internal police of the same."

Neither has there been any practice or usage of the state, upon which the act in question can be attempted to be justified. Not a single person has ever been surrendered on the part of the state ; and it appears by the record, that in the year 1825, there was a positive refusal to give up two men who were demanded, as thieves, by the governor of Canada, and that the decision of the executive of Vermont was approved by the president of the United States. And here I beg the court to understand, that this case is not referred to, so far as it respects the decision of the then governor of Vermont, as an authority in point of law, but merely as one fact, among others, in order to exclude any pretence of an authority from usage for the proceeding in this case. And equally certain is it, that so far as it regards the surrender of American citizens, there could be no reciprocity on the part of Canada ; since, by the laws of that province, no subject of the realm can be sent prisoner out of the country. It was upon this ground, *that Lord Aylmer, the governor of Canada, in the year 1833, refused to [**555

surrender, on the application of the governor of New York, four men who had come over the line, and barbarously murdered a young woman in the town of Champlain.

We have now arrived at the third and last point ; which is, that admitting a state to possess the right to act upon the subject of surrendering to foreign governments, fugitives from justice, yet that the sovereign power of the state must be brought into action, and the surrenders made under a regular law or proceeding of such power ; and that as the act now complained of was without any such authority, it was a violation of the provision

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in the constitution of the United States which declares, that "no person shall be deprived of life, liberty or property, without due process of law."

But here arises the question, whether this provision in the constitution is applicable to the states ; or, in other words, whether it constitutes a protection against the unlawful exercise of state power. I am aware, that it has been decided by this court, in the case of *Barron v. City of Baltimore*, 7 Pet. 243, that the amendments to the constitution of the United States, commonly called the bill of rights, were simply limitations of the powers of the general government, and had no effect upon the state governments. But as the decision is a recent one, and stands alone, I trust the court will attend to me, while I submit a few remarks upon a question so important and interesting.

Let me begin, by observing, that the rule of construction which can generally be resorted to, in order to determine the sense of any provision in the original constitution, cannot be applied to the articles of amendment. The constitution itself was one connected work, and was the result (if I may be allowed the expression) of a concentration of mind ; and in deciding upon one part of it, reference may be had to other parts, and the whole so construed as consistently to stand together. But the case is very different as it regards the amendments ; these have little or no connection with each other, varying both in their character and in their terms, and were originally proposed from different quarters, and with different objects. Each article, therefore, if not each clause, should be construed simply according to its own nature, and the terms in which it may be expressed.

With the utmost deference, I beg leave to observe, that in my humble judgment, an error was committed by the court, in the case referred to, in supposing all the articles of amendment to be in the nature of limitations of governmental power, or to have been so intended, at the time of their adoption. When we speak of a limitation of power, we have naturally in view some power which, without such limitation, might be lawfully exercised ; and of this character are the prohibitions in the original constitution, whether relating to the general government, or to the states. That some of the amendments are of the same character is unquestionably true. But there are others which are not so ; among which is the one containing ^{*556]} the clause declaring that "no person shall be deprived of life, liberty or property, without due process of law." These latter cannot be considered as limitations of power, but are to be understood as declarations of rights—of absolute rights, inherent in the people, and of which no power can legally deprive them.

The right of personal liberty has existed ever since the first creation of man, and is incident to his nature. It has been recognised from the earliest organization of society, and the first institution of civil government, until the present time. And for the plain reason, that this sacred right is beyond the reach of all legitimate power, it cannot properly be the subject of a limitation to the action of a regular government. Whether the declaration of this right, as well as of others, was made a part of the constitution of the United States, with a view, principally, of guarding it from violations by the general government, it is not material to inquire. We find it there, and the only question now is, as to the extent of its operation.

That the clause in question (and indeed the whole article in which it

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appears) embraces every person within the limits and jurisdiction of the whole Union, will not be denied. All that remains to be determined is, whether it is to be construed as leaving the states free to encroach upon the right which it declares every one shall enjoy ; or whether it is to be understood as recognising and adopting the principle that no power from any quarter can do so. In other words, whether the clause was inserted because it was deemed more proper for the states than for the general government to deprive a person of his life or liberty without law ; or, whether, to promulgate a general command against the violation of a right possessed by a title above all legitimate governmental power.

If it should be supposed, that in forming the constitution, no protection was wanted from the general government against the illegal exercise of state power, the answer is, that this, though generally true, is by no means universally so. There are several restrictions upon the states, in the constitution, for the benefit and security of the people ; and that, too, where the same powers are prohibited to the general government. One, for example, is, that no state shall pass *ex post facto* laws. And this is, for the reason, that no person ought to be punished by any government, for an act made criminal after the fact. Yet, surely, this principle is not more worthy of being guarded by the general government, than that a person shall not be twice punished for the same offence ; or that he shall not be deprived of his life or liberty, except by due course of law. But we find that the United States stand pledged in the constitution to guaranty to every state in the Union a republican form of government, and to protect each of them against domestic violence ; thus becoming directly and deeply interested that state power shall not be unlawfully or improperly exercised. It may, with truth, be affirmed, that most of the amendments to the constitution contain principles which lie at the very foundation of civil liberty, and are most intimately connected with the dearest *rights of the people. Principles [*557 which should be cherished and enforced by a just and parental government, to the utmost extents of its authority : principles which, in reality, like those proclaimed from the burning mount, deserve to be diligently taught to our children, and to be written upon the posts of the houses, and upon the gates.

It is true, that most of the states have incorporated into their constitutions the same principles ; though several of those instruments do not contain the important provision relied upon in this case. But this furnishes no argument against allowing them the force in the constitution of the United States for which I contend. Some of the state constitutions also contain the prohibition against passing *ex post facto* laws ; but does this weaken the authority of the same restriction upon the states in the general constitution ? And is it not, moreover, very proper, that the state constitutions should themselves embrace all the provisions necessary to a good government, whether they are needed for the present, or not ; since it cannot be foreseen, what further amendments or alterations may take place in the constitution of the United States.

But the distinction which I have endeavored to establish between the limitations of power and the declarations of rights, is adopted in the clearest manner in the constitution itself. The ninth article of the amendments declares, that "the enumeration in the constitution of certain rights, shall

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not be construed to deny or disparage others retained by the people." And the tenth article provides, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." Here we see, that the framers of these amendments had no idea of confounding the limitations of power, and the declarations of rights ; but treated each as distinct from the other. If the amendments had treated only of the former, certainly, the reservation, both to the states and to the people, in the tenth article, would have answered every purpose. But the ninth article was deemed necessary, as it regarded the rights declared to exist, in order to prevent the people from being deprived of others by implication, that might not be included in the enumeration. It appears clear to my mind, then, that the provision in the constitution to which I have referred, instead of limiting the powers of the general government, directly calls into action those powers, for the protection of the citizen. That it forms a part of the supreme law of the land by which all the authorities of the states, as well as those of the Union, are bound. And that the establishment of the contrary doctrine would essentially weaken the security of the people ; since it would leave without the protection of the paramount and superintending power of the Union, the great and fundamental right of personal liberty.

The question recurs, whether the plaintiff in error was arrested and is held, "without due process of law ;" and thus in violation of the constitution of the United States. I have already said, with ^{*558]} regard to this part of the case, that the sovereign power of the state of Vermont alone could authorize the surrender. I beg now to add, that I deem this position to be maintainable, whether it depends upon comity or upon obligation ; though, perhaps, its defence might be thought most complete upon the first ground. If there is nothing upon the subject, beyond comity, then it rests entirely in the discretion of the state, as to the cases in which she will make surrenders, as well as to the conditions upon which they shall take place ; and, indeed, whether she will make surrenders at all. How, then, but through the sovereign power of the state, can a discretion like this be regulated or exercised ? And has it not always been with us a fundamental doctrine, that discretion in rulers, although the law of tyrants, is the scourge of a free people ? In a despotic form of government, the sovereign power is the will of the monarch, who can act, in every instance, as may suit his pleasure. But can the governor of one of our states, of his own mere will, regulate and act upon this comity ? Can he, without any authority from the constitution, or the legislative power of his state, issue an order for the arrest and delivery to a foreign government of any person whatever ? If he can do this, then is the liberty of the citizen wholly at his arbitrary disposal. Does not the bare statement, however, of this point, carry along with it an argument, so unanswerable, that nothing further need be said upon it ?

But it is a fact, that the only ground upon which the order for the surrender in this case has ever been attempted to be justified, was that there existed, by the laws of nations, a positive obligation on the part of the state of Vermont, to make surrenders in like cases ; and that the governor of the state, by virtue of his office, had the power to carry into execution that obligation. Let us see, whether this doctrine will stand the test of reason.

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The laws of nations have no force over the people, individually, in any country, but only regulate the conduct of nations, as such, towards each other. If any duties or obligations are created by those laws, as between one country and another, each of these owes duties or obligations in her collective capacity, and can only perform them as its own sovereign authority may direct or permit. In an absolute government, as already stated, the sovereignty centres in the monarch, and everything is directed by him, according to his own arbitrary will. But in a public, the sovereign power resides in the people, or is lodged where they have placed it; and the proceedings must always be in conformity with the principles of the government. It follows, therefore, that when it becomes necessary, in the performance of national duty or obligation towards a foreign power, to interfere with individuals, it can be done only through laws emanating from the sovereign authority of the state where they reside, or happen to be. For as the obedience of individuals is due only to those laws, so are they, at the same time, under their protection, and can only be reached through them. The statement of a *plain and familiar case will be sufficient to exemplify this proposition. Our government deemed the country to be under an obligation, by the laws of nations, to observe neutrality in the late Canadian revolt, and to prevent our citizens from taking part in the contest; but did it attempt, in the performance of this duty, to order personal arrests, or to meddle with the liberty of the people, without laws of congress passed expressly for the purpose? Certainly not!

The plaintiff in error, at the time of his arrest, was under the protection of the laws of the state of Vermont. In the constitution of that state, it is declared, that "no person can be justly deprived of his liberty, except by the laws of the land or the judgment of his peers;" and by an existing act of the legislature of the state, it is provided, that "no person's body shall be restrained or imprisoned, unless by authority of law." No action, moreover, has taken place by the legislature of the state, upon the subject of the surrender of fugitives to foreign powers. Well, how are the people to understand these provisions? To what laws, or to the laws of what country, are they directed for protection? Why, most surely, to the laws of the same state; and such as may be known and understood by the people as laws for their immediate direction and government. Laws, in short, passed by the proper authorities for the regulation of the internal and civil concerns of the state.

But a new and extraordinary doctrine has been proclaimed, and acted upon in this case. A doctrine which, if true, would prove that the people have been laboring under a delusion, and that their fancied security was but an idle dream. That they can no longer look to the general and state constitutions, and to the most positive legislative injunctions, for protection and defence. That they cannot, as they have been taught to suppose, lay their hand upon the book containing them, and say—This is our political Bible; this is the rock of our political salvation; upon which we can rest in security, even against the blowing of the winds, or the coming of the storms. No! on the contrary, they are now directed to Grotius, to Puffendorf and Vattel, to learn what measure of personal liberty they are entitled to, and under what circumstances they can repose in safety in the midst of their families.

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It appears, that the King of England, with all the royal prerogatives, does not possess the power which is claimed for the governor of the state of Vermont. The provision of the constitution of that state to which I have referred, was copied from the great charter of English liberty, and has been there understood in a different sense. Sir W. Blackstone, in the first volume of his celebrated Commentaries, makes the following remarks: "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it, except by the sentence of the law. No power on earth, but the authority of the parliament, can send any subject of England out of the land against his will; no! not even a criminal. To this purpose, the great charter declares, *that no freeman shall be ^{*560]} imprisoned, unless by the judgment of his peers, or by the law of the land."

In Canada, the governors have uniformly refused to deliver up British subjects, because their *habeas corpus* act protects them. In order to place this point in a clear light, I will give an extract or two from the letter already referred to, of Lord Aylmer, to Governor Marcy, dated the 27th of May 1833: "I have been under the necessity of delaying an answer to your Excellency's letter of the 4th of April last, in consequence of objections raised by the attorney-general of the province, to the surrendering of the four individuals charged with the murder of Elizabeth Stevenson; that officer being of opinion, that it was not competent to the executive, in the absence of any regulation by treaty, or legislative enactment on the subject, to dispense with the provision in the *habeas corpus* act." Again, he says, "the subject has received every consideration, and I very much regret to say, that the opinion of the attorney-general is confirmed by a majority of those who have been called upon."

We have seen, then, that no president of the United States, no governor of Canada, and lastly, no king of England, has ventured to act in a case of this kind, except by legislative authority, or by treaty, which is tantamount to a law. Yet we have lived to witness the attempt of the governor of one of the states in this land of freedom, to break over all legal and constitutional restraints, and of his own will and authority, to exercise this arbitrary, this tremendous power, over the liberties of the people.

Let me here declare, that I do not mean to be understood as contending, that the clause in the constitution of the United States which is relied upon, can be brought to bear upon every unlawful or irregular act in the course of judicial or other proceedings under the laws of the states, by which a person might be deprived of his liberty, and for which he might bring an action of false imprisonment, or have his *habeas corpus*, before the proper tribunals or authorities. But it certainly does appear to me, that when the executive of a state, in the exercise of a governmental power, and simply by virtue of his office, undertakes to issue an order for the arrest and transportation of an individual, for a cause over which the state has invested his department of the government with no authority or jurisdiction whatever; this court has, by its appellate power, under the 25th section of the judiciary act of 1789, the right to interpose its protection, and to enforce the provision in question.

If I have succeeded, then, in showing that the act now complained of

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was wholly without law or authority ; it follows, that the position has been sustained, even admitting the jurisdiction of the states, yet that the plaintiff in error has been "deprived of his liberty, without due process of law," and therefore, in violation of the constitution of the United States. And thus have I completed the observations which I designed to make upon the several questions involved in the case before the court.

*TANEY, Ch. J.—The court have held this case under consideration for some time ; and as the end of the term is now approaching, it is proper to dispose of it. The members of the court, after the fullest discussions, are so divided, that no opinion can be delivered as the opinion of the court. It is, however, deemed advisable, in order to prevent mistakes or misconstruction, to state the opinions we have respectively formed. And in the opinion which I am now about to express, I am authorized to say, that my brothers STORY, McLEAN and WAYNE, entirely concur.

This case presents a question of great importance, upon which eminent jurists have differed in opinion. Can a state, since the adoption of the constitution of the United States, deliver up an individual found within its territory, to a foreign government, to be there tried for offences alleged to have been committed against it ? This involves an inquiry into the relative powers of the federal and state governments, upon a subject which is sometimes one of great delicacy. In the case before us, the party concerned is an obscure individual, not a citizen of the United States ; and who is not likely to attract any great share of public attention. But in times of war and of high excitement, the principle now to be decided may reach cases where great public interests are concerned ; and where the surrender may materially affect the peace of the Union. We are fully sensible of the importance of the inquiry, and of the necessity of approaching it with the utmost deliberation and caution.

There is, however, a preliminary point to be disposed of. It has been suggested, that the question above mentioned cannot be brought here, in the form in which it appears in this record ; and that we have not jurisdiction to re-examine the judgment of the supreme court of Vermont, pronounced in summary proceeding by *habeas corpus*.

The case in the record is this : George Holmes, the plaintiff in error, was arrested in the state of Vermont, on a warrant or order issued by Silas H. Jennison, as governor of the state, and directed to John Starkweather, sheriff of the county of Washington, in said state, setting forth, that an indictment had been found by a grand jury of the district of Quebec, in the British province of Lower Canada, against the said Holmes, for the crime of murder, alleged to have been committed within the said district of Quebec ; and that as it was fit and expedient, that he should be made amenable to the laws of the country where the offence was charged to have been committed, the said Starkweather was commanded to convey the body of the said Holmes to some convenient place on the confines of the state of Vermont, and the province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him ; to the end that he might be there dealt with as to law and justice appertained. On the application of Holmes, a writ of *habeas corpus* was issued

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by the supreme court of the state of Vermont, commanding the *said Starkweather to bring into court the body of the said Holmes ; and in the return to this writ, the warrant or order of the governor of the state, as above described, was set forth as the cause of the said arrest and detention.

Holmes being brought into court, in obedience to the said writ of *habeas corpus*, his counsel moved for his discharge ; and at the same time introduced in evidence certain documents which appear in the record (but which it is unnecessary to state here), for the purpose of showing that the Governor had no lawful right to surrender him. The record then proceeds to state the judgment of the court in the following words : " Wherefore, after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined, it is adjudged by the court here, that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law ; and that he be remanded and held accordingly, under the process set forth in the return to this writ of *habeas corpus*."

It will be seen, from the foregoing statement, that the proceedings in question were in the highest court of the state of Vermont ; that the judgment is formally and fully entered on its records ; and it is evident from the very terms of the judgment, that the validity of the governor's warrant was drawn in question, and decided by the court. It will hardly be said, after this judgment, that the governor was not acting in this business under the authority of the state. There is, indeed, no statute of Vermont giving him the power he exercised. But his conduct has been fully examined by the highest judicial tribunal in the state, and they have adjudged, that the warrant issued by him was authorized by law, and bound the sheriff to hold the prisoner, and deliver him, in the manner directed, to the Canadian authorities. We must receive this decision as conclusive evidence of the laws of Vermont upon this subject ; and consequently, the proceedings of the governor must be taken as justified by the laws of the state, and treated as an authority exercised under it. Here, then, is precisely one of the cases in which the writ of error is given in the 25th section of the act of 1789.

The authority was exercised by Governor Jennison, under the *state. That authority has been drawn in question in the highest court of law in the state, upon the ground, that it was repugnant to the constitution of the United States ; and the decision was in favor of the validity of the authority so exercised. The only inquiry, therefore, upon the question of jurisdiction, is, whether there has been such a judgment in such a proceeding as is described in that section ; in other words, whether the judgment of the supreme court of Vermont, above stated, was a "final judgment" "in a suit," within the meaning of the act of congress. As to the final character of the judgment, the question may be disposed of in a few words. In order to determine whether a judgment is final or not, we must first inquire, what is in controversy. *In this case, the validity of the governor's warrant was the only question before the supreme court of Vermont, and that question was certainly finally settled ; for the court, in so many words, adjudged that the cause of the detention and imprisonment of Holmes was good and sufficient in law ; and nothing more remained in the case for the action of the court. The sheriff, upon their judgment, must have proceeded to execute the warrant, and have delivered the pris-

*563] In this case, the validity of the governor's warrant was the only question before the supreme court of Vermont, and that question was certainly finally settled ; for the court, in so many words, adjudged that the cause of the detention and imprisonment of Holmes was good and sufficient in law ; and nothing more remained in the case for the action of the court. The sheriff, upon their judgment, must have proceeded to execute the warrant, and have delivered the pris-

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oner to the Canadian authorities, without further delay, if the proceedings had not been suspended in consequence of the writ of error to this court.

In the case of *Weston v. City Council of Charleston*, 2 Pet. 464, this court, speaking of the meaning of the word *final*, in the section in question, say, "If it (the word *final*) were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments in actions of ejectment, and decrees in chancery, dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties; and this court would not revise and correct the judgment. The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause." We have given this long extract from the opinion of the court, because it shows not only the construction which this court have given to the act of congress, but the reasons on which its decision has been founded. In the case now under consideration, the judgment given by the supreme court of Vermont certainly determined the particular case before them; and was, therefore, final, within the meaning of the act of congress.

It is not, however, sufficient, that the decision was final; it must also be made in a "suit," in order to give this court the right to re-examine it upon writ of error. Was this proceeding before the supreme court of Vermont a "suit?" The question can hardly, at this time, be considered as an open one in this court. It has been examined in several cases, depending on principles entirely analogous, and the jurisdiction sustained, upon the fullest consideration. It is true, that in England different opinions have been entertained upon the question, whether a writ of error would lie from the refusal of a court to discharge a party brought before it on a *habeas corpus*. And in the reign of Queen Anne, in the case of the *Queen v. Paty and others*, commonly called the *Aylesbury Case*, there was an angry controversy upon the subject, between the house of peers and the house of commons; in which the privileges of the latter house were particularly involved. The case is reported in 2 Salk. 503, and 2 Ld. Raym. 1105; and is fully detailed in 8 State Trials, 90-163. In the view, however, *that we take of this subject, it is unnecessary to examine particularly the English [*564] cases. They are collected together and fully examined in the court for the correction of errors, in the case of *Yates v. People of the State of New York*, 6 Johns. 337. We refer to them merely to show that they have not been overlooked. They will be found to turn mainly upon the technical meaning applied there to the word "judgment;" in which the form in which the proceedings were had, and the decision entered, was perhaps deemed more material than the subject-matter, in order to give to the decision the character of a judgment in a suit.

But with all the strictness upon the subject in the English courts, we are not aware of any case there in which it has been held, that a writ of error would not lie from the judgment of a court of record, deciding, upon the return of the *habeas corpus*, that the warrant under which the party was held

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was sufficient in law to authorize his arrest and detention. Certainly, no such decision was given to the case of the *Queen v. Paty and others*, just mentioned ; and we think it would be difficult to assign any good reason for refusing the writ of error. If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court, to recover his liberty. In order to be effectual for the purposes for which it is intended, the proceedings must be summary ; and the law has accordingly made them so. And if an officer of a state government, in the exercise of an authority forbidden by the constitution of the United States, has deprived an individual of his liberty, why should it be supposed, that the summary character of the proceedings by which he must seek to recover it, would be deemed by congress a sufficient reason for denying him the writ of error to this court ? For this, in effect, is the whole amount of the objection.

It is said, that this is not a final judgment in a suit ; and that, therefore, the act of 1789 does not give the writ of error to this court. But whatever would, at this day, be the doctrine of the English courts, in similar cases, we consider that the construction of the act of congress of 1789, upon this subject, has been settled by repeated decisions, in favor of the jurisdiction. The cases decided were not, indeed, cases of proceedings and judgments upon *habeas corpus*, but arose and were decided upon applications for writs of *mandamus* and of *prohibition*. Yet cases of that description stand upon the same principles with the proceedings on a *habeas corpus*, so far as the question now under consideration is concerned. For in cases of *mandamus* and *prohibition*, the proceedings, like those upon a *habeas corpus*, are summary ; and the judgment given is not final, in the sense in which that word is used in relation to common-law judgments. And if, under the act of 1789, no writ of error would lie, except in cases where the suit was brought, the proceedings had, and the judgment entered, according to the forms of a suit at common law ; then the writ could not be sustained in cases where a peremptory *mandamus* or a *prohibition* has been awarded or refused. In ^{*565]}cases of that description, however, the construction of the act of congress has been settled in this courts and settled, as we think, according to the true import of its words. The construction given to it, in these cases, entitled the present plaintiff in error, as a matter of right, to have the judgment rendered against him by the supreme court of Vermont re-examined in this court.

Before, however, we proceed to refer more particularly to the decisions heretofore given, it is proper to remark, that there is no material difference between the language of the law giving the writ of error from the judgment of the circuit court for the district of Columbia, and the language used in the 22d and 25th sections of the act of 1789, so far as relates to the forms of proceeding, and the nature of the judgment. Undoubtedly, there are a multitude of cases in which a writ of error will lie from the judgment of a circuit court, where it would not lie to this court from a judgment rendered in a similar controversy in a state court. But our present inquiry has nothing to do with that distinction. We are speaking merely of the nature of the proceeding in this case, and examining whether it is of that description that, under the 25th section of the act of 1789, will authorize a writ of error. The writ in that section is given from any "final judgment" "in a suit." In the act relating to the district of Columbia, it is given from any "final judg-

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ment." In the 22d section of the act of 1789, it is given from "final judgments" "in civil actions." These different forms of expression have always been held to mean the same thing; and consequently, the decision of this court upon one of them is equally applicable to the others. With this explanation, we proceed to inquire, whether the *habeas corpus* was "a suit." We have already shown, that in these proceedings, an authority exercised under a state was drawn in question; that the decision was in favor of the authority; and that the judgment of the court was final. The remaining question is, were these things done in a suit?

The first case in which this question appears to have arisen, was that of the *Columbian Insurance Company v. Wheelright*, 7 Wheat. 534. The circuit court for the district of Columbia had, in that case, awarded a peremptory *mandamus*, to admit the defendants to the offices of directors in the said insurance company. The company, thereupon, brought a writ of error to the supreme court, and the question whether a writ of error would lie, from the order of a court awarding a peremptory *mandamus*, was directly presented. It was argued by counsel, and decided by the court; and it was ruled, that the writ of error would lie. It is true, that this case was decided under the act of congress relating to the district of Columbia. But in delivering the opinion, the court remark, that the law relating to the district, under which that case arose, was "similar in its provisions with the judiciary act of 1789, ch. 20, § 22." The decision, therefore, in that case, was, in effect, a decision upon the construction of the act of 1789.

*The same interpretation was again given to this act of congress, in the case of *Kendall v. United States*, 12 Pet. 524. The question of jurisdiction was in that case most fully and deliberately considered by the court. The English and American cases on the subject were carefully examined and discussed; and all of the objections taken in the English books, and arising from the summary form of the proceeding, and the nature of the decision, were brought forward and considered by the court. But the case of the *Columbian Insurance Company v. Wheelright*, was supposed to have settled the question; and the jurisdiction was sustained. There was no written opinion by the court on this point; but the case is a recent one, and the circumstances above mentioned are yet fresh in the recollection of the members of the court. After these two decisions, whatever may be regarded as the doctrines of the English courts in such cases, the question whether a writ of error will lie under the 22d section of the act of 1789, from the judgment of a court awarding a peremptory *mandamus*, can hardly be considered as open for discussion in this court.

We have already mentioned, that a writ of error, under the 25th section, so far as it depends on the forms of proceeding, and the nature of the judgment, must be governed by the same rules that apply to similar writs under the 22d section, and under the act relating to the district of Columbia. But the case of *Weston v. City Council of Charleston*, 2 Pet. 449, which has already been referred to, arose on the 25th section itself, and appears to us to be decisive of the point in question. In that case, a prohibition had been obtained by the plaintiffs in error, from the court of common pleas of South Carolina, for the Charleston district, to restrain the city council of Charleston from levying a tax upon the stock of the United States, held by residents of the city. The city council remove the case by writ of error to the

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constitutional court, the highest court of law in the state, where the decision of the court of common pleas was reversed ; and the ordinance imposing the tax held not to be repugnant to the constitution of the United States. From this decision, a writ of error was brought to this court, and the question was raised here, whether a prohibition was a suit, within the meaning of the act of 1789. The court held that it was ; and Chief Justice MARSHALL, in delivering the opinion of the court, says, "Is a writ of prohibition a suit ? The term is certainly a very comprehensive one ; and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various ; but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." We entirely concur in the definition thus given of the meaning of the word "suit," as used in the act of 1789. It makes the act of congress consistent with the principles of justice, and interprets ^{*it} according to the natural meaning of its words : and it is too plain for argument, that according to this definition, the proceeding upon the *habeas corpus* was a suit in the supreme court of Vermont. A right claimed by the prisoner Holmes, under the constitution of the United States, was litigated between him and the governor of the state, and the sheriff of the county, in a court of justice. The proceedings by *habeas corpus* by which the decision of the court was sought, was, in the language of the case referred to, a suit ; and we cannot, therefore, refuse to take jurisdiction upon this writ of error, without disregarding the deliberate decisions of this court.

It is very true, that neither the case just mentioned, nor the cases before referred to, were writs of error upon a refusal to discharge on *habeas corpus*. But in the English cases, the authorities are stronger in favor of the writ of error in the case of the *habeas corpus*, than in the case of the *mandamus*. The house of lords affirmed the judgment of the court of king's bench, which decided that a writ of error would not lie to that court, from the judgment of the court of king's bench of Ireland, awarding a peremptory *mandamus*. But the house of lords, which is the highest judicial tribunal in England, have never by any decision countenanced the idea, that a writ of error would not lie from the refusal of the court of king's bench to discharge a party on *habeas corpus*. On the contrary, in the *Aylesbury Case*, before mentioned, they decided, that a writ of error ought to be issued to bring the question before them. The commons, indeed, vehemently denied that the writ would lie ; but it will be remembered, that the Aylesbury men had been imprisoned by the house of commons, for a breach of privilege ; and that house was naturally excited by a proceeding which would have made the house of lords in a great measure the judges of the privileges of the commons. It is not in heated conflicts of this description, between two legislative bodies, concerning their respective privileges, that we are to look for calm and precise judgments on questions of law ; and neither the opinion of the lords nor the commons, expressed under such circumstances, ought to be esteemed as safe guides in a court of justice. It is certain, however, that the question whether a writ of error would lie in such a case, was then an open one, upon which the two houses differed in opinion. In New York, in the case of *Yates v. People*, before mentioned, it was decided in the court for the correction of errors, that a writ of error would lie from the refusal of the

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supreme court of the state to discharge a party on *habeas corpus*. There was, indeed, great division of opinion in the court, and so many eminent and distinguished judges dissented from the judgment given, that we do not feel authorized to refer to it as having settled the question in New York. Yet that case, as well as the English cases, show, that the point has been a doubtful one, and that the right to the writ of error in the case of the *habeas corpus* has always stood on firmer and better ground than in the case of the **mandamus*. And we refer to these cases, to show, among other things, that the supreme court, in the decisions before mentioned, have not overturned established principles ; that they have merely settled doubtful questions, and have not settled them against the weight of judicial authority ; and as the construction they have given to the word suit, in the act of 1789, is well calculated to promote the great ends of justice, and undoubtedly conforms to the intention of the legislature ; we perceive no sufficient reason for setting it aside, or departing from it. Under the authority of these decisions, therefore, we hold that the judgment of the Vermont court, now before us, was a final judgment in a suit ; and the plaintiff in error is, therefore, entitled to have it re-examined in this court by writ of error.

The case being thus before this court, it becomes our duty to inquire, whether the authority exercised by the governor of Vermont, was repugnant to the constitution of the United States? In this part of the case, it may be well to inquire into the nature and extent of the powers which have been claimed and exercised by the governor of Vermont. It is the power to surrender any one found within the jurisdiction of the state, who has committed an offence in a foreign country. The individual to be surrendered on this occasion was a resident of Canada. But if the state possesses the power of delivering up fugitives from justice who, having committed offences in a foreign country, have fled to this for shelter, the power, as known to the laws of nations, is not confined to the subjects or residents of the country where the offence was committed. It is limited only by the policy of the state upon whom the demand is made. And if the surrender of Holmes is not repugnant to the constitution of the United States, there is nothing in that instrument that forbids the delivery up of a citizen of any other state, when found within its borders, who may be demanded by a foreign government, upon the ground, that he has committed some offence within its territory. And if this power remains with the states, then every state of the Union must determine for itself the principles on which they will exercise it ; and there will be no restriction upon the power, but the discretion and good feeling of each particular state.

Again, the question under this *habeas corpus* is in no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interests. The power of the states in that respect was fully considered by this court and decided, in the case of *New York v. Miln*, 11 Pet. 102. Undoubtedly, they may remove from among them any person guilty of, or charged with, crimes ; and may arrest and imprison them, in order to effect this object. This is a part of the ordinary police powers of the states, which is necessary to their very existence, and which they have never surrendered to the general government. They may, if they think

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proper, in order to deter offenders in other countries from *coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. In all of these cases, the state acts with a view to its own safety ; and is in no degree connected with the foreign government in which the crime was committed. The state does not co-operate with a foreign government, nor hold any intercourse with it, when she is merely executing her police regulations. But in the case of Holmes, it is otherwise. The state acts, not with a view to protect itself, but to assist another nation which asks its aid. Holmes is not removed from the state of Vermont, as a man so stained with crimes as to render him unworthy of the hospitality of the state ; but he is delivered up to the Canadian authorities, as an act of comity to them. This is not the exercise of a police power, which operates only upon the internal concerns of the state, and requires no intercourse with a foreign country, in order to carry it into execution ; it is the comity of one nation to another, acting upon the laws of nations, and determining, for itself, how far it will assist a foreign nation in bringing to punishment these who have offended against its laws.

The power which has thus been exercised by the state of Vermont, is a part of the foreign intercourse of this country ; and has undoubtedly been conferred on the federal government. Whether it be exclusive or not, is another question, of which we shall hereafter speak. But we presume, that no one will dispute the possession of this power by the general government. It is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors and other public ministers. The power to make treaties is given by the constitution, in general terms, without any description of the objects intended to be embraced by it ; and consequently, it was designed to include all those subjects, which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty ; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments. And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it ; it may safely be assumed, that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government. And as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law ; it follows, that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognised and enforced, when it demands the surrender of any one charged with offences against it.

The practice of the government, from the early days of its existence, conforms to this opinion. In the letter of Mr. Jefferson to Mr. Genet, of September 12th, 1793 (1 Am. State Pap. 175), he speaks of the right of the general government in this respect, as if it was *undisputed. And ^{*570]} in the treaty negotiated with England by Mr. Jay, during the administration of General Washington, there was an article stipulating for the mutual delivery of persons charged with murder or forgery. The case of *Jonathan Robins*, which was the only one that arose under this treaty,

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produced much excitement in the country, and animated debates in congress. Yet the power of the general government to enter into such an engagement was never questioned ; the objections to the surrender of the party rested upon other grounds.

Indeed, the whole frame of the constitution supports this construction. All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce ; to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations ; to declare war ; to grant letters of marque and reprisal ; to raise and support armies ; to provide and maintain a navy. And the president is not only authorized, by and with the advice and consent of the senate, to make treaties ; but he also nominates, and, by and with the advice and consent of the senate, appoints ambassadors and other public ministers, through whose agency negotiations are to be made and treaties concluded. He also receives the ambassadors sent from foreign countries ; and everything that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government. The power of deciding whether a fugitive from a foreign nation should or should not be surrendered, was, necessarily, a part of the powers thus granted.

It being evident, then, that the general government possesses the power in question, it remains to inquire, whether it has been surrendered by the states ? We think it has : and upon two grounds. 1. According to the express words of the constitution, it is one of the powers that the states are forbidden to exercise without the consent of congress. 2. It is incompatible and inconsistent with the powers conferred on the federal government.

The first clause of the tenth section of the first article of the constitution, among other limitations of state power, declares, that " no state shall enter into any treaty, alliance or confederation ;" the second clause of the same section, among other things, declares, that no state, without the consent of congress, shall " enter into any agreement or compact with another state, or with a foreign power." We have extracted only those parts of the section that are material to the present inquiry. The section consists of but two paragraphs ; and is employed altogether in restrictions upon the powers of the states. In the first paragraph, the limitations are absolute and unconditional ; in the second, the forbidden powers may be exercised with the consent of congress : and it is in the second paragraph, that the restrictions are found which apply to the case now before us.

In expounding the constitution of the United States, every word *must have its due force, and appropriate meaning ; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition ; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning ; and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article, of which we are now speaking, because the whole of this short section is directed to the

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same subject ; that is to say, it is employed altogether in enumerating the rights surrendered by the states ; and this is done with so much clearness and brevity, that we cannot for a moment believe, that a single superfluous word was used, or words which meant merely the same thing. When, therefore, the second clause declares, that no state shall enter into "any agreement or compact" with a foreign power, without the assent of congress, the words "agreement" and "compact," cannot be construed as synonymous with one another ; and still less can either of them be held to mean the same thing with the word "treaty" in the preceding clause, into which the states are positively and unconditionally forbidden to enter ; and which even the consent of congress could not authorize.

In speaking of the treaty-making power conferred on the general government, we have already stated our opinion of the meaning of the words used in the constitution, and the objects intended to be embraced in the power there given. Whatever is granted to the general government is forbidden to the states, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former ; and it is very clear, therefore, that Vermont could not have entered into a treaty with England, or the Canadian government, by which the state agreed to deliver up fugitives charged with offences committed in Canada.

But it may be said, that here is no treaty ; and, undoubtedly, in the sense in which that word is generally understood, there is no treaty between Vermont and Canada. For when we speak of "a treaty," we mean an instrument written and executed with the formalities customary among nations ; and as no clause in the constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say, that there was any express prohibition of the power exercised by the state of Vermont. But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution, the states are forbidden to enter into any "agreement" or "compact" with a foreign nation ; and as these words could not have been idly or superfluously

*572] *used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.

A few extracts from an eminent writer on the laws of nations, showing the matter in which these different words have been used, and the different meanings sometimes attached to them, will, perhaps, contribute to explain the reason for using them all in the constitution ; and will prove that the most comprehensive terms were employed in prohibiting to the states all intercourse with foreign nations. Vattel, p. 192, § 152, says, "A treaty, in Latin *fœdus*, is a compact made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time." § 153. "The compacts which have temporary matters for their object, are called agreements, conventions and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution, once for all ; treaties receive a successive execution, whose duration equals that of the treaty." § 154. Public treaties can only be made

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by the "supreme power, by sovereigns who contract in the name of the state. Thus, conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties." § 206, p. 218. "The public compacts called conventions, articles of agreement, &c., when they are made between sovereigns, differ from treaties only in their object."

After reading these extracts, we can be at no loss to comprehend the intention of the framers of the constitution in using all these words, "treaty," "compact," "agreement." The word "agreement," does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms, "treaty," "agreement," "compact," show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal positive or implied, by the mutual understanding of the parties.

Neither is it necessary, in order to bring the case within this prohibition, that the agreement should be for the mutual delivery of all fugitives from justice, or for a particular class of fugitives. It is sufficient, if there is an agreement to deliver Holmes. For the prohibition in the constitution applies not only to a continuing agreement, embracing classes of cases, or a succession of cases, but to any agreement *whatever. An agreement ^[*573] to deliver Holmes is, therefore, forbidden; and as much so, as if it were an agreement to deliver all persons in the same predicament. Is there not, then, in this case an agreement on the part of Vermont to deliver Holmes? And is he not detained in custody, to be delivered up, pursuant to this agreement?

It must be remembered, that states can act only by their agents and servants; and whatever is done by them, by authority of law, is done by the state itself. The supreme court of Vermont, as we have already mentioned, have decided, that the warrant of the governor, and the detention of Holmes under it, are authorized by law. Consequently, the seizure for the purpose of delivery, the agreement on the one side to deliver, and on the other to receive, is an agreement made by the authorized servants of the state; and, of course, in contemplation of law, made by the state itself. The record before us does not state the application of the governor of Canada for the arrest and delivery of Holmes, although, from the nature of the transaction, doubtless, such an application was made. As it does not, however, appear in the record, we do not act upon the supposition that such a demand was made, nor consider it as in the case. The question is not, whether there was a demand, but whether there was an agreement with a foreign power; and the governor's warrant, of itself, imports an agreement with the Canadian authorities. It directs Holmes to be delivered "to William Brown, the agent of Canada, or to such person or persons as by the laws of the province are authorized to receive him." How is he to be delivered, unless they accept? And if the authorities of Vermont agree to

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deliver him, and the authorities of Canada agree to accept, is not this an agreement between them? From the nature of the transaction, the act of delivery necessarily implies a mutual agreement.

Every one will admit, that an agreement, formally made, to deliver up all offenders who, after committing crimes in Canada, fly for shelter to Vermont, would be unconstitutional on the part of the state. So, an agreement, after Holmes had escaped to Vermont, written and signed by the state and provincial authorities, by which the governor of Vermont engaged to seize him and deliver him up to the Canadian officers, would, unquestionably, be unconstitutional. Yet precisely the same thing is done in this case, without a regular and formal agreement. It is, in some way or other, mutually understood by the parties, that he shall be seized and delivered up; and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed, that the constitutionality of the act depends on the mere form of the agreement? We think not. The constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the constitution, to place the question upon the formality with which the agreement is made. The framers of the ^{*574]} constitution manifestly believed, *that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves, to obtain influence in separate states. Provisions were, therefore, introduced, to cut off all negotiations and intercourse between the state authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the state authorities and a foreign government. Hence, prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.

But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States. It is admitted, that an affirmative grant of a power to the general government, is not, of itself, a prohibition of the same power to the states; and that there are subjects over which the federal and state governments exercise concurrent jurisdiction. But, where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive; and the same power cannot be constitutionally exercised by the states.

The exercise of the power in question by the states, is totally contradictory and repugnant to the power granted to the United States. Since the expiration of the treaty with Great Britain, negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons, who, having committed offences in a foreign nation, have taken shelter in this. It is believed, that the general government has entered into no treaty stipulations upon this subject, since the one above mentioned; and in every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of congress to authorize it. And acting upon this principle throughout, they have never demanded from a foreign government any one who fled

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from this country in order to escape from the punishment due to his crimes.

This being the policy of the general government, is not the possession of the power by the states totally contradictory and repugnant to the authority conferred on the federal government? What avails it, that the general government, in the exercise of that portion of its power over our foreign relations, which embraces this subject, deems it wisest and safest for the Union, to enter into no arrangements upon the subject, and to refuse all such demands; if the state in which the fugitive is found, may immediately reverse this decision, and deliver over the offender to the government that demands him? If the power remains in the states, the grant to the general government is nugatory and vain; and it would be in the power of any state, to overturn and defeat the decisions of the general government, *upon a subject admitted to be within its appropriate sphere of [*575] action; and to have been clearly and necessarily included in the treaty-making power.

The power in question, from its nature, cannot be a concurrent one, to be exercised both by the states and the general government. It must belong, exclusively, to the one or the other. If it were merely the power to surrender the fugitive, it might be concurrent; because either might seize and surrender, whose officers could first lay hold of him. But the power in question, as has already been stated, is a very different one. It is the power of deciding the very delicate question, whether the party demanded ought, or ought not, to be surrendered. And in determining this question, whether the determination is made by the United States or a state, the claims of humanity, the principles of justice, the laws of nations, and the interests of the Union at large, must all be taken into consideration, and weighed, when deliberating on the subject. Now, it is very evident, that the councils of the general government and of the state may not always agree on this subject. The decision of the one may stand in direct opposition to the decision of the other. How can there be a concurrent jurisdiction in such a case? They are incompatible with each other, and one must yield. And it being conceded on all hands, that the power has been granted to the general government, it follows, that it cannot be possessed by the states; because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government.

Again, how are the states to exercise this power? We must not look at the power claimed, as if it were confined to fugitives from Canada into the bordering states. The constitution makes no distinction in that respect; and if the state has the power in this instance, it has the same power in relation to fugitives from England, or France or Russia. Now, how is a state to hold communications with these nations? The states neither send nor receive ambassadors to or from foreign nations. That power has been expressly confided to the federal government. How, then, are negotiations to be carried on with a state, when a fugitive is demanded? Are they to treat upon this subject with the ambassador received by the United States? And is he, after being refused by the general government, to appeal to the state to reverse that decision? Such, certainly was not the intention of the framers of the constitution, and cannot be its true construction. Every part of that instrument shows, that our whole foreign intercourse was

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intended to be committed to the hands of the general government ; and nothing shows it more strongly than the treaty-making power, and the power of appointing and receiving ambassadors ; both of which are immediately connected with the question before us, and undoubtedly belong exclusively to the federal government. It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation ; and to cut off all communications between foreign governments, and the several state *authorities. The power now *576] claimed for the states, is utterly incompatible with this evident intention ; and would expose us to one of those dangers, against which the framers of the constitution have so anxiously endeavored to guard.

But it may be said, that the possession of the power to surrender fugitives to a foreign nation by the states, is not incompatible with the grant of the same power to the United States ; and that in the language of this court, in the case of *Sturges v. Crowninshield*, 4 Wheat. 196, "it is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." And the case before us may, perhaps, be likened to those cases in which affirmative grants of power to the general government, have been held not to be inconsistent with the exercise of the same powers by the states, while the power remained dormant in the hands of the United States.

This principle is, no doubt, the true one, in relation to the grants of power, to which it is applied in the case above mentioned of *Sturges v. Crowninshield*. For example, the grant of power to congress to establish "uniform laws on the subject of bankruptcies throughout the United States," does not of itself carry with it an implied prohibition to the states to exercise the same powers. But in the same case of *Sturges v. Crowninshield*, another principle is stated, which is equally sound, and which is directly applicable to the point before us ; that is to say, that it never has been supposed, that the concurrent power of state legislation extended to every possible case in which its exercise had not been prohibited. And that whenever "the terms in which a power is granted to congress, or the nature of the power requires that it should be exercised exclusively by congress ; the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it." This is the character of the power in question. From its nature, it can never be dormant in the hands of the general government.

The argument which supposes this power may be dormant in the hands of the federal government, is founded, we think, in a mistake as to its true nature and character. It is not the mere power to deliver up fugitives from other nations upon demand ; but the right to determine whether they ought or ought not to be delivered, and to make that decision, whatever it may be, effectual. It is the power to determine whether it is the interest of the United States to enter into treaties with foreign nations, generally, or with any particular foreign nations, for the mutual delivery of offenders fleeing from punishment from either country ; or whether it is the interest and true policy of the United States, to abstain altogether from such engagements, and to refuse, in all cases, to surrender them. In the case first above supposed, it will be admitted, that if the United States have entered into such treaties, the states could not interfere, be-

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cause the United States will then have exercised the power ; and the exercise of the same power by the states would be altogether contradictory and repugnant. It is in the latter case, where they *refuse to treat and refuse to surrender, that the power is supposed to be dormant, [*577 and not exercised by the federal government. But is not this a mistake as to the nature of the power ? And is it not as fully exercised by the decision not to surrender, as it could be by a decision the other way ? The question to be decided is a question of foreign policy ; committed, unquestionably, to the general government. The federal government has also the power to declare war ; and whenever it becomes a question whether we are to be at peace or at war, undoubtedly, the general government must determine that question. And if congress decides that the honor and interest of the country does not require war, and, on that account, refuses to declare it, is not this an exercise of its power over the subject ? And could it be said, that the power was a dormant power, because war had not been declared.

There is, however, an express prohibition to the states to engage in war ; and perhaps the case of ambassadors would be more analogous to the one under consideration. The power of appointing "ambassadors, other public ministers and consuls," is given to the federal government ; and there is no prohibition to the exercise of the same power by the states. Now, if the general government deemed it to be the true policy of the country to have no communication or connection with foreign nations, by ambassadors, other public ministers or consuls ; and refused, on that account, to appoint any ; could it be said, that this power was dormant in the hands of the government, and that the states might exercise it ? Or if the general government deemed it advisable to have no such communications with some particular foreign nation, could any state regard it as an unexercised power, and therefore, undertake to exercise it ? We can readily imagine, that there may be reasons of policy, looking to the whole Union, that might induce the government to decline an interchange of ambassadors with certain foreign countries. It is not material to the question in hand, whether that policy be right or wrong. But assuming such a case to exist, can any state regard it as an unexecuted portion of the power granted to the federal government ; and, by appointing an ambassador or consul, counteract its designs and thwart its policy ? There can be but one answer, we think, given to this question. And yet the case before us, is in all respects like it. It is a portion of our foreign policy, and of our foreign intercourse. The general government must act, for it is the only nation known to foreign powers ; and as their ambassadors are accredited to the United States, and not to the states, whatever demands they have, they must address to the general government. And in every case, therefore, where an offender, such as we are speaking of, is within the United States, and the foreign government desires to get possession of him ; the demand must be made on the general government ; and they are as much bound to decide upon it, as they are upon a question of sending or receiving an ambassador, or a question of peace or war. How, then, can a state exercise a concurrent power, or any power on the same, question ? In the language *of the supreme court, in the case [*578 of *Houston v. Moore*, 5 Wheat. 23, "we are altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in

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relation to the same subject, to be effectual ; and, at the same time, compatible with one another."

The confusion and disorder which would arise from the exercise of this power by the several states, is too obvious to need comment. At the present moment, when Europe is at peace, there is no strong inducement to pursue an offender who has taken refuge in this country ; and very earnest efforts, therefore, are not often made to obtain possession of the fugitive. But in the ordinary course of human affairs, this cannot always be the case ; and if civil commotions should take place in any of the great nations of Europe, powerful inducements will often exist to pursue those who may be compelled to fly from the vengeance of the victorious party. And in case a war should break out between any of the leading governments of the old world, sufficient motives will perhaps be found to make the belligerent nations extremely anxious to obtain possession of persons who may be found in some one of the United States. And how could this great national power be exercised with uniformity or advantage, if the several states were, from time to time, to determine the question ? One would probably determine to surrender for one set of offences ; another, another. One state, perhaps, would surrender for political offences ; another would not : and one state might deliver up fugitives to one nation only ; while another state would select some other foreign nation, as the only object of this comity. Such conflicting exercises of the same power would not be well calculated to preserve respect abroad or union at home. In times of high excitement, nothing but mischief could grow out of it.

Nor do we perceive any advantage that could arise to the states, at any time, from the possession of this power. It is, as we have already said, in no degree connected with their police powers ; and they can, undoubtedly, remove from their territory every description of offenders who, in the judgment of the legislature, are dangerous to the peace of the state. It may, indeed, be supposed, that along the border line which separates the Canadas from the United States, the facility of escape into another jurisdiction is a temptation to crime, and that an arrangement between the authorities of the province and the states which adjoin them, for the mutual delivery of offenders, would be advantageous to both. If such an arrangement is deemed desirable, the foresight of the framers of the constitution have provided the way for doing it, without interfering with the powers of foreign intercourse committed to the general government, or endangering the peace of the Union. Under the second clause of the tenth article of the first section of the constitution, any state, with the consent of congress, may enter into such an agreement with the Canadian authorities. The agreement would, in that event, be made under the supervision of the United States, ^{*and the particular offences defined in which the power was} _{*579]} to be exercised ; and the national character of the persons who were to be embraced in it, as well as the proof to be required to justify the surrender. The peculiar condition of the border states would take away all just cause of complaint from other nations, to whom the same comity was not extended ; and at the same time, the proper legal safeguards would be provided, for the protection of citizens of other states, who might happen to become obnoxious to the Canadian authorities, and be demanded as offenders against its laws. They would not be left to the unlimited discretion of the

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states in which they may happen to be found, when the demand is made ; as must be the case, if the power in question is possessed by the states.

Upon the whole, therefore, my three brothers, before mentioned, and myself, after the most careful and deliberate examination, are of opinion, that the power to surrender fugitives, who, having committed offences in a foreign country, have fled to this for shelter, belongs, under the constitution of the United States, exclusively to the federal government ; and that the authority exercised in this instance by the governor of Vermont, is repugnant to the constitution of the United States. It is, therefore, our opinion, that the judgment of the supreme court of Vermont ought to be reversed, and the cause remanded to that court ; and that it be certified to them, with the record, as the opinion of this court, that the said George Holmes is entitled to his discharge, under the *habeas corpus* issued at his instance. In the division, however, which has taken place between the members of the court, a different judgment must be entered.

THOMPSON, Justice.—This case comes up by writ of error from the supreme court of the state of Vermont, under the 25th section of the judiciary act of 1789. The proceedings in the state court which are brought here for review, have been already so fully stated, that it is unnecessary for me to repeat them. It is sufficient for me to state, simply, that these proceedings are founded upon a writ of *habeas corpus*, under which George Holmes was brought up before the supreme court, claiming to be discharged from the custody of the sheriff, when he was held under a warrant from the governor of Vermont, by which the sheriff was commanded to arrest the said George Holmes, as a fugitive from justice, from the province of Lower Canada, he having been there indicted for the crime of murder.

In the examination of this case, I shall confine myself simply to the question, whether the case comes within the 25th section of the judiciary act, so as to give this court jurisdiction and authority to review the proceedings in the supreme court of Vermont. I do not intend to examine the question, whether the proceedings upon a *habeas corpus* is "a suit," within the meaning of this *25th section ; or whether a writ of error will lie to review proceedings upon a *habeas corpus*. Although the case, upon [*580 these points, is not free from doubts ; yet, thinking as I do, that this court has not jurisdiction at all of the case, these points are of minor importance.

In the case of *Crowell v. Randell*, 10 Pet. 391, this court reviewed all the cases which had been brought before it under the 25th section, when the question of jurisdiction was brought under the consideration of the court ; which review resulted in the following conclusion : "That it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred, and be apparent upon the record. First, that some one of the questions stated in the section did arise in the court below ; and secondly, that a decision was actually made by the state court ; in the manner required by the section. If both these do not appear on the record, the appellate jurisdiction fails. That it is not sufficient to show, that such question might have occurred, or such decision might have been made, in the court below. It must be demonstrable, that they did exist, and were made. That it is not indispensable, that it should appear on the record, in *totidem verbis*, or by direct and positive statement, that the ques-

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tion was made, and the decision given by the court below on the very point ; but that it is sufficient, if it be clear from the facts stated, by just and necessary inference, that the question was made ; and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment. That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise and was applied by the state court to the case." According to this construction of the law, it must appear, that some one of the cases put in this section of the act did, in point of fact, arise, and was, in point of fact, decided upon in the state court.

Let us test the case now before us by these rules. This record does not in any manner whatever point to the authority under which the governor of Vermont claimed to have acted. Nor is there any treaty, or law of the United States, or any particular part of the constitution alluded to in the record, with which the power exercised by the governor is brought in conflict or decided against. In all the cases heretofore brought up under this provision in the judiciary act, the record puts the proceedings in the state court upon some specific law or authority, under which the court professed to act ; and which enabled this court to examine such claim on the part of the state court, and to see whether it fell within the revising power of this court. But as the proceedings in the case, in the state court, do not point to the authority under which the governor claimed to have acted, we are left to mere conjecture upon that point. As the case stands upon this record, it is a mere exercise of power by the governor, in arresting George

Holmes, for the purpose *of delivering him over to some person in
*581] Canada, authorized to receive him. This record does not show any demand, or even request, by any authority in Canada, to have this done. From anything that appears on this record, it was a self-moved action on the part of the governor, under a sense of justice ; that as he was charged with the crime of murder in Canada, and must be punished there, if anywhere, he saw fit to arrest him and send him there. Nothing appears on the record, in any manner whatever, warranting the conclusion that the state of Vermont had authorized the governor to exercise such power ; or any arrangement had been made between the state and the government of Canada upon this subject. And admitting this to have been an arbitrary exercise of power, without even the color of authority ; it does not rest with this court to control or correct the exercise of such power, unless the case is brought within some one of the three classes of cases specified in the act of congress.

There is certainly no general power vested in this court to revise any other cases. And according to the case of *Crowell v. Randell*, it must appear, either directly, or by necessary inference, that some one of these questions did, in point of fact, arise, and was decided by the court. As the record in this case does not point to any treaty, or law, or any part of the constitution of the United States, or authority embraced by it, that was drawn in question, or that has been violated by the state court ; it makes it necessary to examine more at length, the several classes of cases mentioned in this 25th section, which fall under the revising power of this court, to see whether this case can be brought within any of them. This section contains

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three specified classes. The first is, where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity. This record, certainly, does not show that any treaty or law of the United States, or any authority exercised under the United States, was drawn in question at all ; and, of course, there could have been no decision against their validity ; the court did not profess to act under, or against, any such source of authority. The next class is, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity. There is no treaty or law of the United States drawn in question, nor was there any statute of Vermont in any manner under the consideration of the court, nor any decision upon the validity of a statute of that state. The record does not furnish the slightest evidence that the state of Vermont had ever passed any law on the subject ; and to draw the conclusion from the mere fact of surrender by the governor, that the laws of the state had authorized it, is certainly looking to something not apparent on the record, which this court has said cannot be done. If, therefore, the present case falls at all within this class, it must be because it was the exercise of an authority repugnant to the constitution ^{*of} the United States ; and then the question arises, what part of the ^[*582] constitution has been violated, or is in conflict with the power exercised in this case. The argument at the bar did not point to any specific provision in the constitution that has been violated, except the fifth amendment ; which declares that no person shall be deprived of life, liberty or property, without due process of law. It is unnecessary to stop to inquire, whether this case falls within that provision, if it would be brought to bear upon it ; for this court has decided, that none of these amendments apply to the states, but are limitations upon the powers of the general government. 7 Pet. 247. The argument has rested principally upon the theory of our government, in relation to the treaty-making power, and the organ for conducting foreign intercourse. There is certainly no specific provision in the constitution on the subject of surrendering fugitives from justice, from a foreign country, if demanded ; and we are left at large to conjecture upon various parts of the constitution, to see if we can find that such power is by fair and necessary implication embraced within the constitution : I mean, whether any such obligation is imposed upon any department of our government, by the constitution, to surrender to a foreign government a fugitive from justice. For unless there is such a power vested somewhere, it is difficult to perceive how the governor of Vermont has violated any authority given by the constitution to the general government. If such a power or obligation, in the absence of any treaty or law of congress on the subject, rests anywhere, I should not be disposed to question its being vested in the president of the United States. It is a power essentially national in its character, and required to be carried into execution by intercourse with a foreign government ; and there is a fitness and propriety of this being done through the executive department of the government, which is intrusted with authority to carry on our foreign intercourse. I do not mean to enter at large into the question of surrendering to foreign governments fugitives from justice. Whatever that power, or duty, or obligation, may be, it is, in

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my judgment, not within the authority of this court to regulate or control its exercise. In order to give such power to this court, when the surrender has been made under authority of a state, it must appear to be repugnant to the constitution, or an existing law or treaty, of the United States. And unless the president of the United States is, under the constitution, vested with such power, it exists nowhere ; there being no treaty or law on the subject. And it appears to me indispensably necessary, in order to maintain the jurisdiction of this court in the present case, to show that the president is vested with such power under the constitution. This record shows that such power or authority has been expressly disclaimed by the president, on an application by the governor of Vermont, in the year 1825. The secretary of state, in answer to the letter of the governor of Vermont on that subject, says, "I am instructed by the president, to express his regret to your excellency, that the request of the acting governor of Canada cannot be complied with, *under any authority now vested in the exec-
*583] utive government of the United States ; the stipulation between this and the British government, for the mutual delivery over of fugitives from justice, being no longer in force, and the renewal of it by treaty, being at this time a subject of negotiation between the two governments." Here, then, is a direct denial by the president of the existence of such a power in the executive, in the absence of any treaty on the subject. And such has been the settled and uniform course of the executive government of the United States upon this subject, since the expiration of our treaty with England. And if this be so, it may be emphatically asked, what power in the general government comes in conflict with the power exercised by the governor of Vermont ? In order to maintain the jurisdiction of this court, in the present case, it must be assumed, that the president has, under and by virtue of the constitution, in the absence of any treaty on the subject, authority to surrender fugitives from justice to a foreign government ; otherwise, it cannot be said, that the governor of Vermont has violated the constitution of the United States. If any such power is to be given to the president by treaty, it is not merely to regulate the mode and manner of exercising an existing power ; but must be a treaty creating the power, and founded upon the mere comity of nations, and not resting upon any obligation, the performance of which a foreign nation has a right to demand of our government. This power to surrender fugitives from justice, to a foreign government, has its foundation, its very life and being, in a treaty to be made between the United States and such foreign government ; and is not, by the constitution, vested in any department of our government, without a treaty. The power, therefore, exercised by the governor of Vermont, can, at most, be only repugnant to a dormant power, resting entirely upon comity and reciprocity, to be established by treaty ; and which may, by possibility, be brought into action at some future day, through the instrumentality of such a treaty. This, in my judgment, is too remote and contingent to fall under the protecting authority of this court, under the 25th section of the judiciary act.

The remaining class of cases embraced in this section, is, where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed

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by either party, under such clause of the said constitution, treaty, statute or commission. This class points to some particular clause in the constitution, or of a treaty, or statute or commission, held under the United States; by which a right, title, privilege or exemption is claimed, and the decision is against such claim. It may be again observed, that no treaty or law was drawn in question. Nor was any particular clause in the constitution, conferring any privilege or exemption, in any manner whatever alluded to in the record, or can be supposed, by any reasonable intendment, to have been drawn in question; ^{*except, perhaps, the fifth amendment, which, as} [*584] it has been already shown, does not apply to the states, whatever may be its construction. Nor can the prohibition to the states to enter into any treaty, alliance or confederacy, or into any agreement or compact, with another state, or with a foreign power, be considered as drawn in question or violated. There is nothing in this record to warrant an inference, that the state of Vermont had ever entered into any agreement or compact with Canada, in relation to the surrender of fugitives from justice. The governor of Vermont does not profess to act under any such agreement; and it is inconceivable, if any existed, why no allusion whatever is made to it in his warrant, or in the proceedings before the court. The record, in my judgment, does not furnish the least evidence, justifying a conclusion that any treaty, compact or agreement of any description, had been entered into between the state of Vermont and Canada, on the subject of surrendering fugitives from justice; and the case now before the court is the only one, from anything appearing on the record, where it has ever been attempted. And to construe this single isolated case, and that, too, by the governor alone, without any evidence of his acting under the authority of any statute of the state on the subject, to be an entering into a solemn compact or agreement between the state of Vermont and a foreign power, in violation of the article of the constitution, which prohibits a state from entering into any compact or agreement with a foreign power; is a construction to which I cannot yield my assent.

I am not, therefore, able to discover how any question could have arisen, and been decided in the supreme court of Vermont, coming within the appellate power of this court. This power is not only affirmatively declared and pointed to certain specified cases; but there is an express denial of the authority of this court to go beyond such specific questions. The act declares, that no other error shall be assigned or regarded as a ground of reversal, than such as appears on the face of the record, and immediately respects the before-mentioned questions of the validity or construction of the constitution, treaties, statutes, commission or authority in dispute.

And it appears to me to be a very strong and cogent objection to taking jurisdiction in this case, that a reversal of the judgment will be entirely unavailing, unless the supreme court of Vermont shall voluntarily discharge the prisoner. It is certainly not in the power of this court to enforce its judgment. If the jurisdiction of this court was clearly and plainly given, it might not be a satisfactory answer, that it could not execute its judgment. But where the authority of this court depends upon a doubtful construction of its appellate power, it furnishes a persuasive reason against applying the power to a case which may result in a nugatory and fruitless judgment. It is not to be presumed, that congress would vest in this court a power to

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judge and decide, and withhold from it the authority to execute such judgment. It would be of no benefit to the party, and would be placing the court in no very enviable a *situation. If the proceeding on a *habeas corpus* is a suit in the meaning of the judiciary act, an execution of the judgment is the fruit and end of the suit, and is very aptly called the end of the law. And the provisions contained in this 25th section of the judiciary act, show very satisfactorily, in my judgment, that the revising power of this court was not intended to be applied to any case where the could not execute its judgment. The act declares, that the writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court. And the proceedings upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. This looks to a case where the state court refuses to execute the judgment of this court. No such provision is made or allowed, when the writ of error is to a circuit court of the United States. In such case, the judiciary act declares, that the supreme court, shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereon. And what is the reason for this different mode of executing the judgment of this court. It is because this court can coerce the circuit courts to execute the mandate. The judiciary act gives to the supreme court the power to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States; and that the 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 agreeable to the principles and usages of law.

But no such coercive power is given over a state court; and hence the necessity of authorizing this court to execute its own judgment. If the supreme court of Vermont shall refuse to execute the judgment of this court, requiring the discharge of the prisoner Holmes, can this court in any way enforce its judgment? If it can be done at all, it must be by sending a *habeas corpus* to the sheriff or jailer, having the custody of the prisoner, to bring him here to be discharged. And if that officer shall return that he holds him under a commitment of the supreme court of Vermont, what can this court do? We must remand him; and there ends our jurisdiction.

The judiciary act authorizes this court to issue writs of *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; with a proviso, however, 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 (§ 14). The power, therefore, of this court to execute its judgment is expressly taken away; and the prisoner obtains no relief. And can it be reasonably supposed, that congress intended by this 25th section of the judiciary act, to embrace cases where

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the judgment must be a dead letter, and at most merely advisory, and the expression of an opinion upon an abstract question, but utterly fruitless, if the advice shall be disregarded. I cannot yield my assent to the assumption of a power which must place this court in such a feeble, an inefficient situation. If this court has the power to meet the exigency of the case at all, why not apply at once the appropriate and efficient remedy by *habeas corpus*; and relieve the prisoner from his illegal imprisonment. But if this power is denied to the court, can it be, that the act of congress has clothed us only with the naked authority to advise the supreme court of Vermont to discharge the prisoner? I think not. And that it is, therefore, a case not embraced under the 25th section of the judiciary act; and that the appellate power of this court cannot reach the case.

BALDWIN, Justice.—Concurring most fully and cordially in the opinions delivered by those of my brethren, who are opposed to any action by this court, on this case, I have nothing to add to the reasons assigned by them, respectively, lest it might imply my want of confidence in the grounds which they have taken; and, in my mind, maintained with conclusive force. There are, however, two subjects of high consideration involved in this case, which I feel constrained to notice; as my opinion would have been governed by them, had there been no other grounds for my declining to interfere with the order of the supreme court of Vermont, remanding the relator to the custody whence he was brought before them by the writ of *habeas corpus*. 1. The constitution of the United States confers no power on any department of the federal government, to prevent a state or its officers from sending out of its territory a person in the situation of Holmes, the relator. 2. That a writ of error does lie from this to a state court, to revise their proceedings on a writ of *habeas corpus*.

That the treaty-making power of the constitution is competent to bind the states, by a stipulation to surrender fugitives from justice, is not denied by any; nor that where such power is executed by a treaty, a state is under an obligation to surrender; but that while such power remains dormant or contingent, the obligation does not exist, and that congress have no power to impose it, has been too clearly established by my brethren, to leave it in my power to add to the weight of their reasoning. But while I admit the competency of the treaty-making power to compel, I utterly deny its power to prevent the expulsion of a fugitive from justice from the territory of a state, pursuant to its laws, or the general authority vested in its executive or other appropriate officers, to administer and enforce its regulations of internal police. This distinction between the power to compel, and the power to prevent the surrender of a fugitive, is visible in the whole frame of the constitution, as well in the general lines which it designates, in separating the powers of the federal and state governments, by grants, prohibitions and separations, as by its more specific provisions.

There cannot be found a clause in the whole instrument, which, in terms, or by any fair construction, can be made to bring the power to compel a state not to surrender, within any enumerated subject over which congress can legislate; unless it is sought as one of a vagrant nature, to be exercised under such of the various items specified, as may be suggested by a train of ingenious, refined and subtle reasoning, from one implication to another, till

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there is found some hook whereby to connect this with some granted power. Nay, it is cautiously omitted in the prohibition on the states, to use any language, which can be tortured into a reference to the subject-matter ; and as the nature of the treaty-making power precludes any enumeration of the subjects of its exercise, it is left with no other prescribed limitation, than, that treaties, to have their constitutional effect, must be made “under the authority of the United States.” This power must then be called into action, and act on the subject, before a state can be deprived of the right to surrender, or retain a fugitive, at its pleasure ; a right which each state possessed in its plenitude, on the dissolution of the articles of confederacy, and which remained unimpaired, till it became party to the constitution, on its adoption by the people thereof, whereby they held the power subject to such restraints, as treaty stipulations might impose in future. Without such stipulation, the whole subject-matter of fugitives of any description, from a foreign nation, or any of its colonies or dependencies, is reserved to the respective states, as fully as before the constitution ; but with such stipulation in a treaty, I admit, the state is as much bound to make the surrender, as if it had been a subject of express delegation of power to the president and senate ; or as if the same provision had been made in relation to foreign fugitives from justice or service, as those from the respective states, but which is guardedly omitted.

In the second clause of the second section of the fourth article, the constitution provides, that “a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state from which he fled.” A corresponding provision is made for fugitives from service or labor ; and congress, by the act of 1793, have prescribed the mode in which the provision of the constitution shall be carried into effect. (1 U. S. Stat. 302.) It will not be pretended, that these provisions do not impose upon the states of this Union, an obligation as imperative, and impair their reserved rights to the same extent, as a similar stipulation in a treaty between the United States and any foreign state ; let it then be assumed, that there was such a treaty with Great Britain, in relation to fugitives from justice in Canada (and a stronger case cannot be supposed) ; the question it involves is not difficult of solution.

The object and great purpose of the constitution and congress, in one case, and of the treaty in the other, is to make it the duty of the state and its officers, to make the surrender, on a demand ; but it does not follow, that it may not be done voluntarily, or without demand ; to take the fugitive to the border and force him to pass the line, whether the authorities of the adjacent states or provinces are desirous, or even willing to receive him or not, is but an ordinary police power. This is the true point in issue ; whether a state is prohibited by the constitution, from doing, of its own accord, an act which it is bound to do, whenever demanded pursuant to a law or a treaty of the United States ; and which it might do or refuse, if the subject was neither within the law nor treaty-making power of the United States. Had no provision been made for the reclamation of fugitives from the states, there could be no pretence for denying to the states an unlimited discretion over the whole subject ; the constitution has put one single limitation on this dis-

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cretion, in case of a demand from the executive of another state; leaving that discretion as free and full, where no demand is made, as if the constitution had been wholly silent on the subject. And if it had been so silent, the only difference would have been, that though there would have been no obligation to surrender, on a demand, there would have been the same right and power to do it, as now exists in each state, in respect to their respective fugitives; or as would exist under a treaty-making provision for the reciprocal delivery of fugitives from the Canadas, or the states.

No injunction of the constitution can be violated, nor the faith of treaties impaired, by each state or province refusing to be made a Botany Bay, an asylum or even the receptacle of the vagabonds, the criminals or convicts of the other; any duty of state to state, of state to the Union, and the United States to foreign powers, is fully and faithfully executed by the performance of the duties and stipulations imposed or made. But no political community, no municipal corporation, can be under any obligation to suffer a moral pestilence to pollute its air, or contagion, of the most corrupting and demoralizing influence, to spread among its citizens, by the conduct and example of men, who, having forfeited the protection of their own government by their crimes, claim to be rescued from the consequences, by an appeal to the same constitution and laws, under which our own citizens are not, and cannot be screened from punishment, when it is merited by their conduct. No state can be compelled to admit, retain or support foreign paupers, or those from another state; they may be removed, or sent where they came; not because poverty is a crime, but because it is a misfortune not to be mitigated or relieved by the compulsory contributions of those among whom they throw themselves, or are cast by their governments for maintenance.

Every state has acknowledged power to pass and enforce quarantine, health and inspection laws, to prevent the introduction of disease, pestilence or unwholesome provisions; such laws interfere with no powers of congress or treaty stipulations; they relate to internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power, under the constitution, save by requiring the consent of congress to the imposition of duties on exports and imports, and their payment into the treasury of the United States. 11 Pet. 102, 130, &c.; 9 Wheat. 203, &c.; 12 Ibid. 436, &c. See § 10, art. 1, cl. 2. "These laws form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government," &c.; 9 Wheat. 203. "No direct general power over these subjects is granted to congress, and consequently, they remain subject to state legislation. Ibid. "The constitutionality of such laws has never, so far as we have been informed, been denied" (Ibid. 205), and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens." Ibid. "The power to direct the removal of gunpowder, is a branch of the police power, which unquestionably remains with the states." 12 Wheat. 443. "We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles, is undoubtedly an exercise of that power; and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state." Ibid. 444.

These principles were re-affirmed in the *City of New York v. Miln*, in

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language worthy of repetition, and most appropriate to this case in all its bearings. "That the state of New York possessed power to pass this law (respecting foreign paupers), before the adoption of the constitution of the United States, might probably be taken as a truism, without the necessity of proof. But as it may tend to present it in a clearer point of view, we will quote a few passages from a standard writer upon public law, showing the origin and character of this power." Vattel, book 2, ch. 7, § 84. "The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." Ibid. book 2, ch. 8, § 100. "Since the lord of the territory, may, whenever he thinks proper, forbid its being entered; he has, no doubt, a power to annex what conditions he pleases, to the permission to enter." "The power then of New York to pass this law, having undeniably existed at the formation of the constitution, the simple inquiry is, whether by that instrument it was taken from the state, and granted to congress; for if it were not, it yet remains with them." "If, as we think, it be a regulation, not of commerce, but of police; then it is not taken from the states. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment." "It is apparent, from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose, a report was required of the names, places of birth, &c., of all passengers; that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable as paupers." "The power reserved to the several states, will extend to all the objects which, in the ordinary course of affairs, concern the liberties, lives and properties of the people; and the internal order, improvements and prosperity of the state." 11 Pet. 132-3.

After a review of *Gibbons v. Ogden*, and *Brown v. Maryland*; and showing that their opinion is not in collision with the principles of either of those cases, the court say: "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider an impregnable position. They are these: That a state has the same undeniably and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people; and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal regulations, or what may, perhaps, more properly be called 'internal police,' are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive." 11 Pet. 139. "We think it as competent, and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported;

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or from a ship, the crew of which may be laboring under an infectious disease." *Ibid.* 143.

These principles were not declared for the first time in the case of *Miln*; they flowed from those which were established as unquestionable in the *United States v. Bevans*, where this language is used: "What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts; unless that jurisdiction has been ceded to the United States (3 Wheat. 386-7) by a cession of territory; or which is essentially the same, of general jurisdiction." *Ibid.* 388. "It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the general government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction, have divested Massachusetts of the power to regulate the trade of her bay?" *Ibid.* 389.

It would be, at least, superfluous, if not presumptuous, in me, to attempt to illustrate or enforce the soundness of these principles, which this court declare to be impregnable positions, on which they plant their opinion. That they may neither be shaken nor impaired by any future collision between them, and any opinions which may be founded on a contrary construction of the constitution, is most ardently to be desired, by all who wish to see the federal and state governments move within their respective orbits, with the same harmony, for the future, as they have done for the past. The continuance of this harmony, will, in my opinion, be in imminent danger, not only of interruption, but of extinction, whenever the course of this court shall be such, as to subvert the great principles of constitutional jurisprudence, on which it has defined the line of separation between the powers which are granted to the United States, and those prohibited or reserved to the states, or the people thereof, respectively. Nor is there one among these latter powers, which it is so dangerous to attempt to impair, as that of internal police; and especially, that portion of it which relates to fugitives, vagabonds, criminals or convicts, whether they have fled from justice before or after trial: for if a state cannot expel from her territory this species of pestilence, so infectious, contagious and fatal to the morals of the community, in which they are suffered to mix and move unmolested, her power of police is a shadow, a farce, while this most feculent mass of corruption remain a public nuisance, which the power of a state is incompetent to abate.

It is but a poor and meagre remnant of the once sovereign power of the states, a miserable shred and patch of independence, which the constitution has not taken from them, if, in the regulation of its internal police, state sovereignty has become so shorn of authority, as to be competent only to

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exclude paupers, who may be a burden on the pockets of its citizens; unsound, infectious articles, or diseases, which may affect their bodily health; and utterly powerless to exclude those moral ulcers on the body political, which corrupts its vitals, and demoralize its members. If there is any one subject on which this court should abstain from any course of reasoning, tending to expand the granted powers of the constitution, so as to bring internal police within the law or treaty-making power of the United States, by including it within the prohibition on the states, it is the one now before us. Nay, if such construction is not unavoidable, it ought not to be given; lest we introduce into the constitution a more vital and pestilential disease than any principle on which the relator could be rescued from the police power of Vermont, would fasten on its institutions, dangerous as it might be, or injurious its effects. Should an adjudication, so fearful in its consequences, be made in a case of a kindred nature with this, the people and states of this Union will "plant themselves" on the "impregnable positions," taken in the opinions of this court, in the cases quoted; and standing on grounds thus consecrated, refuse to surrender those rights which we had declared to be "complete, unqualified and exclusive."

The power of this court is moral, not physical; it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts; not by its mere authority as a tribunal, from which there is no appeal; and if ever its solemn decisions should be overlooked by itself, or we should cease to respect those of our predecessors, the people and the states will still adhere to them; and our successors will refuse to follow our deviations from the ancient path. It may be the doctrine of the day, that the reserved rights of the states are too broad, and the powers of congress too narrow; but it will not withstand the scrutiny of time, or the deliberate consideration of the principles on which the cases referred to have been decided, and those therein promulgated. If they shall ever be disregarded in public opinion, and their reversal follow; it will not be done by the establishment of those principles on which it is now attempted to enlarge the prohibitions on the states, and to expand the powers of congress, by implication upon implication, to effect both objects by ingenious or far-fetched suppositions or assumptions. Ingenuity, talents and subtlety can work a countermine under the constitution, by which the contrary effect may be produced; whereby the reserved powers of the states may absorb as much of the granted powers of the general government, as the adoption of the grounds on which the relator's case has been placed would take from those which have neither been granted by, nor prohibited to the states. Equally dreading and avoiding both extremes, I am content to take the constitution as it has hitherto been expounded by this court, on all subjects connected with the cause now before us; in my opinion, it leaves no open point, even admitting what is known not to exist, that there was a treaty stipulation on the subject. But without such stipulation, the relator's case is most bald and barren of merits, it rests upon doctrines not to be sanctioned consistently with past adjudications, which, in the *United States v. Bevans*, asserted the jurisdiction and legislative power of a state to be co-extensive with its territory, over all subjects not delegated to the general government; and in *Gibbons v. Ogden*, *Brown v. Maryland*, and *New York v. Miln*, declared, that no power over the internal police of a state

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had been so delegated by the constitution ; but was reserved exclusively to the states. I deem it wholly unnecessary to make a detailed application of those cases to the present ; their affinity is too visible, on a comparison, to require anything more than a reference to them, respectively, as they are reported ; police is in every feature ; the moral and physical health of the people is the common object of police regulations in all their ramifications, as applied to the vast variety of subjects which they embrace, and none of which are confided to any other than state power ; and all of which must remain under its exclusive control, till the constitution is changed.

The states are enjoined by the constitution, to surrender a fugitive from another state, on a demand ; they will be obliged to do it, under a treaty stipulation, to a foreign power ; and thus far, but no farther, has there been, or can be, any abridgment of their power over the subject : they cannot be deprived of their right of expelling from their territory those fugitives who have no privileges within it ; or be compelled to retain them, when they are not entitled to the protection of its constitution or laws. Any refugee crosses the border at his peril ; his government may not desire to reclaim him for punishment, and be unwilling to receive him again ; but that matters not to the state to which he flies ; the right and power to remove, expel and voluntarily to surrender the fugitive, is as perfect as if it was a duty prescribed by a power paramount to that of the state.

This is, in my opinion, the turning point of this case ; and this right to determine what persons fleeing from abroad shall be suffered to remain a burden on its citizens for their support, or a dangerous example to the community, is so peculiarly and appropriately a subject of state jurisdiction, as to be incapable of delegation to any other power. Any action of congress upon it, would be not only an assumption of ungranted power, but a direct usurpation of powers reserved to the states ; and if exercised by means of coercion, to compel a state to retain the vagabonds from other states, or the border provinces, would operate more fatally on the morals of the people, than pestilence upon their health, or gunpowder on their property and their lives. Happily, such power is not visible in the constitution ; nor has it been infused into it by construction ; whenever internal police is the object, the power is excepted from every grant, and reserved to the states, in whom it remains, in as full and unimpaired sovereignty, as their soil, which has not been granted to individuals or ceded to the United States ; as a right of jurisdiction of the land and waters of a state, it adheres to both, so as to be impracticable of exercise by any other power, without cession or usurpation. Such is the power which the governor, as chief magistrate of Vermont, has exercised over this fugitive ; in my opinion, it was properly exercised ; and that no department of this government is competent, on subjects of police, to control him, or any other state officer, in the execution of his or their offices.

By the course which has been taken, all danger of interfering with the relations of the United States and foreign powers, either in matters of commercial intercourse, or diplomatic concern, is avoided ; such interference could happen only on the refusal to deliver up the fugitive, on the demand or request of the authorities of Canada ; for a compliance with either, would rather add strength to, than tend to weaken, the pre-existing relations of amity and comity between the two nations. On the other hand, if the

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delivery was spontaneous, and made in the true spirit of border peace, and mutual safety from crime, the boon would be the more acceptable; or if the authorities of the state should send the fugitive back whence he came, those of Canada would have no cause of complaint, because they had made no reclamation, or because Vermont was unwilling to incorporate among its citizens a foreigner whom his own government was disposed not to take back. The United States cannot complain, for neither their rights nor power can be affected, unless some department of their government shall put itself in the place of Vermont, to determine on what subject its internal system of police shall operate, and how it shall be executed; but on any other ground or pretext, there can be no colorable argument or reason for such interference. That the case before us is one in any way affecting our foreign relations, seems to me wholly supposititious; and the untoward consequences which seem to be apprehended from affirming the exercise of the power of the governor, appear as wholly conjectural, and without any rational foundation in fact or principle. But be this as it may, we have no warrant from the constitution, and congress can give us none, to authorize us to interfere with the exercise of a power, which comes within every definition which this court has given of a regulation of the internal police of a state; or to examine whether it has been exerted under the authority of a state law, or by the constitutional power of its chief executive magistrate. It suffices for all the purposes of this case, that the subject-matter is not of federal cognisance; but is excluded from the jurisdiction of the United States, to its full extent, and reserved for the action of another sovereignty, whose power over it must remain untouched, till an amendment to the constitution shall displace it. That this may never be done is, in my opinion, devoutly to be wished by every friend to the permanency of our institutions.

The other ground on which I am opposed to any interference with the proceeding of the supreme court of Vermont in this matter is, that it is not within the appellate jurisdiction of this court, under the 25th section of the judiciary act; because the order of that court on a *habeas corpus*, is not a judgment on which a writ of error can be brought. I cannot so well define the nature and object of the writ of *habeas corpus*, or so well explain the proceedings upon it, as in the language of this court: "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 question 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 revising that decision, and therefore, appellate in its nature." 4 Cranch 101. "This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. If, &c., upon inquiry, it manifestly appears, that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in

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such cases only is it lawful totally to discharge him, otherwise he must either be committed to prison, or give bail." *Ibid.* 125-6. "The judiciary act (§ 14) authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ, for the purpose of inquiring into the cause of commitment." *3 Pet.* 201. "It is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." "It is in the nature of a writ of error, to examine the legality of the commitment." *Ibid.* 202. It lies to a circuit court of the United States, sitting in a state (*3 Dall.* 17), or to the circuit court of this district (*3 Cranch* 448; *4 Ibid.* 101); it is an exercise of appellate jurisdiction, and "we are but revising the effect of their process, &c., under which the prisoner is detained." *7 Pet.* 573. But it does not lie in favor of persons committed for treason or felony, plainly expressed in the warrant, convicted a contempt (*9 Wheat.* 39), or of a crime, by a court of competent jurisdiction (*3 Pet.* 202, 208), or persons in execution (*Ibid.*), nor will the court, upon the writ, look beyond the judgment, and re-examine the charges on which it was rendered (*Ibid.* 202); for if this court cannot directly revise the judgment of a circuit court in a criminal case, they cannot do it indirectly. *Ibid.* 208. The power to issue this writ being concurrent in this court, the circuit, and district courts, and every judge of either, the action upon the writ, when the party is before a court or judge, is directed to the same object, "for the purpose of inquiring into the cause of commitment," in order to ascertain whether he shall be remanded to prison, discharged on bail, or without bail; in doing which, this court has no more power than any district judge; the nature of the power and the rules by which it must be exercised, are the same. *4 Cranch* 96.

This court has declared this power to be appellate, and not original; so I shall take it, on its authority, though, if the point was new, it would seem to me to be the exercise of a special authority given by the judiciary act, for the specific purpose therein set forth; and that from the very nature of a high prerogative writ, it must be issued, and acted upon by prerogative, and not appellate power; especially by the courts of the United States, whose jurisdiction is special, and limited to the cases specified in the constitution and judiciary act. Taking, however, the power to issue the writ, and the action upon it to be appellate, then every district judge can exercise it to the same extent that this or a circuit court can; consequently, he can revise the process of either court, by which a person has been committed, by inquiring into the cause of commitment, and proceeding thereupon, in the same manner as if the commitment had been by a justice of the peace. This inquiry is confined to the question of re-commitment or discharge, the result of which depends on the discretion of the judge or court before whom the prisoner is brought; the warrant of commitment must be inspected, to see whether it sets out a proper cause for imprisonment; the evidence is examined for probable cause of prosecution; and if the warrant and evidence are sufficient, then the question of bail, and its amount, necessarily arises, which is, confessedly, a matter purely discretionary, subject only to the provision of the eighth amendment to the constitution, the 33d section of judiciary act (*1 U. S. Stat.* 91), and the fourth section of the act of 1793. (*Ibid.* 334.)

On this view of the nature and object of the writ of *habeas corpus*,

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with the proceeding upon it, considered as the exercise of appellate jurisdiction, the first inquiry is, whether the manner in which it has been exercised, can be revised by a writ of error to any court or judge of the United States. That a writ of error will not lie upon any proceeding before a judge of this court, or a district judge, in vacation, is too clear for discussion; there is no court, no record to remove, no judgment to revise, the judge acts by a summary order, which affects only the question of imprisonment, discharge or bail; the very nature of such action, by an appellate power, by a judge out of court, precludes its revision by another appellate power; which can act only by a writ of error, directed to a court of record, to remove their final judgment and proceedings in the case. This court cannot issue a writ of error to a district court, in any case where a special authority to do it is not expressly given by law; nor to a circuit court, unless by the provision of the judiciary act (7 Cranch 108, 287; 2 Wheat. 259, 395; 6 Pet. 495-6; 12 Ibid. 143; 13 Ibid. 290); nor can the circuit court issue a writ of error to a district court, in any other than the specified cases provided for; "nor issue compulsory processes to remove a cause before final judgment." Such process (as a *certiorari*) is void, and may be disregarded (2 Wheat. 225-6) as a nullity.

By the 22d section of the judiciary act, final judgments and decrees, in civil actions in the district courts, may be re-examined in the circuit courts, on a writ of error; whereby the power of the circuit court rests on two things; the judgment must be final, and must be rendered in a civil action, neither of which can exist in a *habeas corpus* issued under the 14th section, which gives authority to issue and act upon this writ, in two classes of cases. 1. To all the courts of the United States, where it is necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. 2. To either of the justices of the supreme court, as well as judges of the district court, "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 they are in custody under the authority of the United States, committed for trial before some court of the same, or to testify, &c. (1 U. S. Stat. 82.)

On a full consideration of this section, this court, in the case of *Bollman and Swartwout*, held, that it applied to the great writ of *habeas corpus ad subjiciendum*, providing the "means by which this great constitutional privilege should receive life and activity," that the generic term *habeas corpus*, when used singly and without additions, means the great writ now applied for; "and in that sense, it is used in the constitution." 4 Cranch 94-100. It was also held, that it did not apply to a *habeas corpus ad respondendum*, to process from a state court, to a *habeas corpus cum causa*, or the mode of bringing causes into a court of the United States, from a state court (Ibid. 96, 98); consequently, this great writ issues only in cases where a party is imprisoned on the charge of some criminal offence against the United States; and not in a civil action, to which they may be a party, as is apparent from the view taken by the court in connecting the 33d and 34th sections.

The 33d section directs, that, "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 a district court; who shall

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exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law" (1 U. S. Stat. 91); on which the court remark: "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; and the 33d section was held to be explanatory of the 14th. 4 Cranch 99-100.

Hence, there are, in my opinion, three objections to a writ of error from a circuit to a district court, to revise their proceedings on a writ of *habeas corpus ad suljiciendum*: 1. It is not a civil action. 2. The order to recommit, to bail, or discharge is not a final judgment or decree. 3. The action of the court is discretionary, depending on the nature of the case, the evidence, and the usages of law. These objections apply with greater force to a writ of error from this to a circuit court, under the 22d section, which provides, that "upon a like process, may final judgments and decrees in civil actions, and suits in equity, in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, be re-examined in the supreme court. Independent then of the three objections above mentioned, others arise from the additional provisions in relation to the writ of error from the supreme court. It lies only from a final judgment, in a civil action, &c., brought in a circuit court by original process, or removed there from a state or district court; consequently, it lies not upon a proceeding on a *habeas corpus*; which is the exercise of appellate power, commencing on petition, affidavit, and motion for the writ, and terminating by an order which the court makes according to its discretion. This order, from its nature and effect, is not and cannot be final; for it only discharges the party from any further confinement, under the process under which he was arrested, "but not from any other process which may be issued against him, under the same indictment." 9 Pet. 710. The inquiry being merely preliminary to a trial, the order is only interlocutory, and can extend no further than to the specific subjects of the inquiry, which can have no bearing on the final result of the prosecution as to guilt or innocence.

By using the term "original process," the law excludes that which is appellate; it relates to the writ, by which a plaintiff brings a defendant into the circuit court, to answer a demand made in a civil action for a debt or damages; but surely not to a writ issued for persons in confinement under a criminal charge, directed to the officer or person who has him in custody under the authority of the United States, the object of which is to procure the liberation of the prisoner. The same conclusion results from the reference of civil actions in the circuit court, "removed there from courts of the several states;" these actions are described in the 12th section, which prescribes the mode of removal, and declares that when removed, "the cause shall proceed in the same manner, as if it had been brought there by original process." So, as to civil actions removed there by appeal from a district court, which are defined in the 21st section, and confined to final decrees "in causes of admiralty and maritime jurisdiction;" whence it follows, that the proceeding of the circuit court on a writ of *habeas corpus*, cannot be comprehended within either of the three classes of cases, to which a writ

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of error is confined by the terms of the 22nd section of the judiciary act.

The provisions of the 23d and 24th sections lead to the same conclusion, by pointing only to those cases in which an execution can issue, or be superseded by the writ of error, and where, upon affirmance, the court may decree just damages to the respondent in error for his delay, and single or double costs, at their discretion; and by directing the mode of proceeding by the supreme court, on affirming or reversing, and sending a special mandate to the circuit court, to award execution thereupon (1 U. S. Stat. 85), which will be hereafter considered in connection with the 25th. An application of these provisions to a writ of error on a writ of *habeas corpus*, makes it manifest, that the law contemplated no such case; no execution issues, the order for recommitment or to give bail, or for a discharge, cannot be superseded; no damages can accrue by delay, and no mandate for execution can be awarded, for no final judgment exists on which an execution could issue. Had it been intended to embrace a *habeas corpus*, some provision appropriate to the case would have been made; its entire omission affords the most conclusive evidence to the contrary; or if anything is wanting to remove all doubt, it will be found in the nature and object of this great writ, this constitutional privilege. It was designed to afford a speedy remedy to a party unjustly accused of a crime, without obstructing or delaying public justice; both of which objects would be defeated, by the delays consequent upon a writ of error, as it may be taken out by either party; if it can be by one, the court can make no distinction between them, as it is a writ of right. See 7 Wheat. 42. For these reasons, I am fully convinced, that no writ of error can be issued by this, or a circuit court, under the authority of the judiciary act, to revise a proceeding on a writ of *habeas corpus*, by any judge or court of the United States: the next inquiry is, whether it can issue on a similar proceeding in a state court.

By the 25th section it is provided, "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision of the suit could be had," &c. (enumerating the particular classes of cases), "may be re-examined, and reversed or affirmed, in the supreme court of the United States, upon a writ of error," &c., "in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceeding upon the reversal shall be the same, except, that the supreme court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause has once been remanded before, proceed to a final decision of the same, and award execution. 1 U. S. Stat. 86; 1 Wheat. 353. This section differs from the 22d, only in using the term "any suit," in place of "civil actions," the effect of which is, that the writ of error lies to remove an indictment from a state court, as held in *Cohens v. Virginia*, 6 Wheat. 390-1, 407, 410, &c., and to a prohibition, in *Weston v. City of Charleston*, 2 Pet. 463-4, but the nature of the judgment to be re-examined is the same—it must be a final one. The 23d section applies to the writ of error to a state court, in all respects as to a circuit court. So does the 24th, unless so far as its provisions come within the exception of the 25th, which it becomes necessary to consider. The 24th section directs, that when a judgment or decree of the circuit court

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shall be reversed by the supreme court, it shall proceed to render such judgment, or pass such decree, as the circuit court should have rendered or passed; except when the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the supreme court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon." Connecting this section with the exception in the 25th, we have the precise case provided for in the latter; "where the damages to be assessed" (in a suit at law), "or the matter to be decreed" (in a suit in equity) "are uncertain;" then the supreme court may "proceed to a final decision, and award execution," if the cause had been before remanded. Now, it is most evident, that neither the exception in the 24th or 25th section, can apply to a proceeding on the writ of *habeas corpus*, for two conclusive reasons: 1. That if the reversal is in favor of the petitioner or plaintiff in this writ, there are no damages to be assessed, nor any matter to be decreed which is uncertain; the judgment to be rendered is certain, and can be none other, than for the discharge of the prisoner, on, or without, bail; and is not, nor can be a final decision of the cause. 2. The original suit is on the warrant of commitment, and a decision which precedes the application for the writ of *habeas corpus*, the issuing of which, and the proceeding upon it are, as has been held uniformly by this court, the exercise of appellate jurisdiction and power. A third reason is equally apparent in both sections, the final judgment must have been one, on which an execution could be awarded by the circuit court, on a special mandate from this, under the 24th; or by this court, in a case coming within the exception of the 25th; and in either case, there must have been a final decision of the cause, before any execution could be awarded. The terms "original suit," and "cause," are used in the same sense, in the 24th section, so in the 25th; "suit" and "the cause" mean the same thing, both terms referring to the final action of this court, whether they "remand the cause for a final decision," by the circuit court, and send them a special mandate to award execution under the 24th; or themselves "proceed to a final decision of the same (the cause) and award execution," under the 25th section.

These considerations bring this inquiry to a narrow space, presenting to my mind stronger objections to the jurisdiction of this court over the present case, than would apply to a writ of error to a court of the United States; while all the reasons which apply in the latter case, operate with full force on this; unless some distinction can be found between the terms "civil actions," and "any suit," or "the cause," in which a final judgment has been rendered, which will justify a writ of error to a state court, in a case where it would not lie to a court of the United States, by reason of its not being a final decision or judgment; or on any other ground than that it was not a civil action. The only distinction between the two classes of cases consists singly in this; that the term "any suit," in the 25th section, is broader than the term "civil actions," &c., in the 22d; whereby criminal cases may be revised by this court, on a writ of error to a state court; though they are excluded from the appellate jurisdiction of this over circuit courts; unless they are certified by a circuit court, on a division of opinion between the judges thereof, under the sixth section of the act of 1802 (2 U. S.

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Stat. 159), if such action as is therein prescribed, can be called the exercise of appellate power, and not a mere special statutory authority.

In following to its consequences the settled principle of this court, that in issuing and acting upon a writ of *habeas corpus*, under the 14th section, it is by appellate power, it will appear, that the reasons for so considering this power are most conclusive against the exercise of their appellate jurisdiction over writs of error to the proceedings of a state or circuit court, on such a writ issued by either. In defining appellate power in such cases, the court say: "It is the revision of a decision of an inferior court, by which a citizen has been committed to jail;" the question on a *habeas corpus* "is always distinct from that which is involved in the cause itself" (4 Cranch 100); these questions are separated, and may be decided by different courts." "The decision that the individual shall be imprisoned must always precede the application for the writ of *habeas corpus*; and this writ must always be for the purpose of revising that decision; and therefore, appellate in its nature." Ibid. 101. The case on a *habeas corpus* is "a mere inquiry, &c., whether the accused shall be discharged or held to bail." Ibid. 125. The law which gives authority to issue the writ, defines its object, "for the purpose of inquiring into the cause of commitment" (3 Pet. 201); "its legality, and the sufficiency of that cause." Ibid. 202. "Considering then, as we do, that we are but revising the effect of the process awarded by the circuit court, under which the prisoner is detained, we cannot say, that it is the exercise of an original jurisdiction." A discharge under this writ, discharges the party only from such process, and not "from any other process under the same indictment" (9 Pet. 710), or a new one. 4 Cranch 136.

Let, then, whatever term, action, case, cause, suit, be given to a writ of *habeas corpus*, and the proceedings upon it; let the final action of the court upon it be called a decision, an award, a judgment or order, the character or nature of either, and the effects are the same; nothing is revised but the process or arrest, and the decision on which the process issued, and the arrest is made; the inquiry is limited to the cause of commitment; and every question arising is always so distinct from "the cause itself," that this inquiry can be determined by one court, and the cause by another. There can, then, be no final decision of "any suit," the "original suit," or "the cause," on a writ of *habeas corpus*, the subject-matter in controversy remains unaffected by the mere inquiry into the cause of commitment, its sufficiency, or the legality of the process, as fully as if no *habeas corpus* had been issued; any judgment rendered by any court affects only the process; nor can it be in any sense deemed a "final judgment in a suit," on "the cause itself," or "a final decision of the same," so as to make it cognisable in this court, by any appellate jurisdiction, on a writ of error to a circuit court, under the 22d, or a state court, under the 25th section of the judiciary act.

Another objection equally fatal to the writ of error in this case is, that though the awarding the writ of *habeas corpus* is a matter of right, and "is granted *ex debito justitiae*," yet the action of the court is governed by its sound discretion, exercised on the whole circumstances of the case, according to which "the relief is allowed or refused on a motion." But a rule or order, denying the motion, is not a judgment, "is it only a decision on a collateral or interlocutory point, which has never been deemed the foundation of a writ of error," which lies "only upon a final judgment or deter-

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mination of a cause." "A very strong case illustrating the doctrine is, that error will not lie to the refusal of a court to grant a peremptory *mandamus*," &c., as held by the house of lords. See 6 Pet. 656-7, and cases cited; 9 Pet. 4, 6. No principle is, or can be better settled by this court, than that no writ of error lies upon any proceeding in a case, depending on the discretion of the court. 1 Pet. 168; 6 Ibid. 217, 656; 7 Ibid. 149; 13 Ibid. 15. There can be no case more peculiarly and exclusively of that description, than one involving only the question of discharge, or recommitment on a *habeas corpus*; which is declared to be "the appropriate process" for that purpose. 4 Cranch 100. "A mere inquiry, without deciding upon guilt" (Ibid. 125), "always distinct from the question, whether he shall be convicted or acquitted" (Ibid. 101), and directed only to process (7 Pet. 573; 9 Ibid. 710), not to the final determination of the cause (6 Ibid. 657), but to a decision on a mere interlocutory collateral point, cautiously excluded from revision on error by the judiciary act.

The same result is found in "the principles and usages of (the common) law," as laid down in the time of Coke, without a single deviation to this time. In 8 Co. 127 *b*, 128 *a*, it was declared, that no writ of error could lie upon a *habeas corpus*; because it was "*festinum remedium*." s. p. 1 Str. 539. It will not lie upon a writ of *procedendo*; the refusal of a prohibition, or *mandamus* for the party, shall not be hung up on error (1 Str. 391, 543); nor on a judgment *quod computet*, in account; *quod partitio fiat*, in partition; by default, in trespass; on awards of inquiry, on awards interlocutory, and not definitive; nor till the "last judgment" is rendered, on "all the matter with the original," the "whole matter of the cause;" because, till then, the judgment or award is not final. 11 Co. 38 *b*-40 *a*. See Com. Dig. Pleader, Error, B. When an interlocutory judgment or award works a forfeiture, then error lies to be relieved therefrom. 11 Co. 41 *a*. But this is only an exception to a universal rule, that error lies only on a final judgment which determines the whole subject-matter in a cause; from which this court has never yet departed, by any direct adjudication in error, under either the 22d or 25th sections of the judiciary act, or on the rules of the common law.

That the course of opinions delivered in this case by the majority, if not all the other judges, is different from mine, is apparent; but as no judgment has been rendered by the court, this point cannot be judicially settled: it is yet open to argument by counsel, whenever a similar case arises; and of consequence, remains open for the consideration of this court, or any of its members, here or elsewhere, as it has hitherto been considered. My reference to the judiciary act and the opinions of this court, have been more in detail than to principles of the common law, or the adjudged cases; because the former appeared to me to be conclusive, as to what the law of the land and of the court has been, is, and ought to be in future. If it admitted of doubt, as to the latter, it sufficed for the case, to show, by a brief reference, what the common law has been for centuries, and now is, without ever so far departing from what I deem my judicial duty, as to even inquire what it ought to be; as if it was in my power to abrogate, or vary from its rules on this or any other subject. When a point is decided by the adjudged cases, or laid down as settled in the books of acknowledged authority, I take it, and feel bound to act upon it, as the common law, which is

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infused into our jurisprudence ; unless some act of congress, some local law, or some decision of this court, prescribes another rule. When this court declare, that "we are entirely satisfied to administer the law as we find it" (7 Wheat. 45 ; 3 Ibid. 209), I feel bound to endeavor to find, and when found, to follow it in all its course ; and in searching among fountains, rather than the rivulets of the law, for its true principle, I have found no safer guide than its forms, which from ancient times have embodied and preserved, unchanged, those principles which time has consecrated, by the certainty of the law, and the security and repose which an adherence to its rule affords to the rights of property and person.

Forms of writs, process, proceedings in suits, judgments and executions, in all their various applications to matters of jurisprudence, were devised of old, and are yet followed, in order to practically apply the rules and principles of the law they enforce upon persons, property and rights of all description ; and when these forms are overlooked, the principles to which they give life, activity and effect, will be forgotten or disregarded ; nor is there a more effectual mode of producing both results, than, at this day, to look beyond those rules which have prevailed for centuries, and been respected as the land-marks of the law, to the reasons on which they were originally founded, of which this case affords a strong illustration. It is admitted, that in the whole course of the common law, there is no one precedent of a writ of error, upon the proceeding on a writ of *habeas corpus* ; yet it has been earnestly contended at the bar, that error lies in such case, on general principles ; and that the contrary course of the English courts has arisen from the mere omission to enter on the proceeding by *habeas corpus*, the purely technical words, "*ideo consideratum est*," in the order or award made by the court. Had the learned counsel of the relator disclosed to the court the result of an inquiry, why these (so called) technical words were deemed so important, the reasons would have been found to be most decisive in a case of *habeas corpus* or *mandamus* ; for before the statute of ——, no record was made of the proceedings on those writs, no judgment was rendered on them, and consequently, there was no record to remove from an inferior to a superior court, by a writ of error.

The omission of the term "*ideo consideratum est*," which is the appropriate and only form known to the common law to denote the judgment of a court, on a matter of record, in contradistinction to an order or award in granting or refusing a motion, was deemed good evidence that the law did not recognise a decision in which these words were not used, as a final judgment on which a writ of error could be brought ; especially, when, by the common law, such a decision was not made a matter of record, or so considered. However these reasons may operate on the mind of others, they satisfy mine, that they are founded in the best established principles of the common law, and that when they are not found in the forms it has adopted, to denote the action of a court, on a matter before them, their decision is not a judgment of record, cognisable in error, or in the words of Coke and this court ; "that without a judgment or an award in the nature of a judgment, no writ of error doth lie" (6 Pet. 656) ; nor on decisions on motions "addressed to the sound discretion of the court, and as a summary relief which the court is not compellable to allow." Ibid. 657. The refusal to

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quash an execution, is not, in the sense of the common law, a judgment ; much less a final judgment ; it is a mere interlocutory order. Even at the common law, error lies only from a final judgment ; and by the express provisions of the judiciary act, &c., § 22, a writ of error lies in this court only on final judgments. *Ibid.* A writ of error will not lie to a writ of error *coram vobis*, granted by the circuit court to correct its own errors ; “ it is subject to the same exceptions which have always been sustained in this court, against revising the interlocutory acts and orders of the inferior courts.” 7 Pet. 147 ; 1 *Ibid.* 340. “ It is not one of those remedies over which the supervising power of this court is given.” *Ibid.* 148. “ The writ of error (*coram vobis*) was but a substitution for a motion in the court below.” *Ibid.* No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. 7 Pet. 149 ; s. p. 9 Wheat. 578, cited. In both cases, the writ of error was dismissed, “ because it was a case proper for the exercise of that discretion, and not coming within the description of an error in the principal judgment.” *Ibid.* “ The decision of the court upon a rule or motion is not of that character (a final judgment) ; this point which is clear by the words of the (judiciary) act, has been often adjudged by this court.” The cases in 6 Pet. 648, and 9 *Ibid.* 4, are noted with approbation, and their principles re-affirmed. See 9 *Ibid.* 602. These are the reasons why a writ of error will not lie at common law, or under the judiciary act, in such cases, and these are the general principles of all law, and the foundation of the universal rule ; that where power is given to any tribunal, to be exercised at its discretion, whether it is legislative, executive, judicial or special, the decision of such tribunal is revisable only by some other tribunal, to which a supervisory power is given. 6 Pet. 729-30 ; s. p. 7 Cranch 42, &c. ; 1 Pet. 340 ; 2 *Ibid.* 163 ; 3 *Ibid.* 203 ; 10 *Ibid.* 472, &c. ; 12 *Ibid.* 611. The forms and modes of expression, by which any tribunal pronounces its discretion to have been exercised, does not affect the nature or character of its decision ; that depends on what it has decided and its effect, whether it is a final judgment, or an interlocutory one, or a mere summary order, direction or decision, on a rule or motion, which is not in law a judgment, though it may be expressed in the words appropriate to a judgment. The law looks to the thing done, as the true test of whether it is cognisable in error. To make it so, there must be a consideration of the record, on the matter of law, not of discretion ; a final judgment of the whole matters of law in the suit, by determining the controversy, and the cause ; which, by the forms of the common law, always is expressed in the dead language of the old forms of judgment, “ *ideo consideratum est*,” which has exposed this term to the imputation of technicality ; but when its sense and meaning is expressed in the living language of this court, and applied to the varied subjects and modes of its action, a very different character must be attributed to the significant and appropriate terms in which their decision is announced, according to the case before them.

Thus, in awarding the writ of *habeas corpus*, “ the motion is granted,” 4 Cranch 101 ; or, “ on consideration of the petition,” &c., “ whereupon, it is considered, ordered and adjudged, that a writ of *habeas corpus* be forthwith granted,” &c. 7 Pet. 583. So, where the party is discharged, “ it is, therefore, the opinion of the court,” &c., “ that there is not sufficient

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evidence," &c., "to justify his commitment" (Ibid. 134), "and therefore, as the crime has not been committed," the court can only direct them to be discharged. Ibid. 136. Or, after reciting the return of the marshal, "on consideration whereof," &c., "it is now here considered," &c., that—be discharged from the writs "in the said return mentioned" (7 Pet. 585); in other words, the motion is granted. On the refusal to award the *habeas corpus*, "on consideration of the rule granted in this case," &c., "it is considered, ordered and adjudged by the court, that the rule be discharged, and that the prayer of the petitioner for a writ of *habeas corpus* be and the same is hereby refused." 3 Pet. 209. Or "upon the whole, it is the opinion of the court, that the motion be overruled." "Writ denied." 7 Wheat. 45. "The rule, therefore, to show cause is denied, and the motion for the *habeas corpus* is overruled" (9 Pet. 710); the motion is not granted. When this court decides on a certificate of division of opinion of the judges of a circuit court, the form is: "this cause came on to be heard on the transcript of the record," &c., "on the questions and points," &c., "certified to this court; on consideration whereof, it is the opinion of this court," that, &c. (3 Pet. 189), the point is decided. On an appeal in a suit in equity, "this cause came on," &c., on "consideration whereof, it is ordered and decreed," &c. 3 Pet. 221. On a writ of error to a circuit court, "this cause came on to be heard on the transcript of the record, &c., on consideration whereof, it is ordered and adjudged by the court, &c." 3 Pet. 241. On a writ of error to a state court, "this cause," &c., "on consideration whereof, it is considered and declared," &c. "It is, therefore, considered and adjudged," &c. (3 Pet. 267), or, "on consideration whereof, it is ordered and adjudged," &c. (Ibid. 291), that the decree or judgment be reversed or affirmed. On a rule to show cause why a *mandamus* should not issue, "on consideration whereof, it is now here considered and ordered by this court, that the rule prayed for be and is hereby granted," 6 Pet. 776. On the motion for a peremptory *mandamus*, after the return, "the court doth therefore direct that a *mandamus* be awarded," &c. 7 (Pet. 648); or, "on consideration of the rule, &c., it is now here considered, ordered and adjudged by this court." 8 Pet. 304-6. On a motion for an attachment or not obeying a peremptory *mandamus*, "the motion is dismissed." 8 Pet. 590. On refusal to grant the rule to show cause, "the rule is therefore refused" (11 Pet. 174); or on a motion for a *mandamus* being denied, "on consideration of the motion, &c., it is now here ordered and adjudged," &c., and "the same is hereby overruled" (12 Pet. 344, 475); or, "the motion for the *mandamus* is denied." 13 Pet. 290. In applying these varied forms to the substance, it is apparent, that this court adheres to those of the common law and its principles, having, it is true, less regard to mere terms, but leaving no difficulty in ascertaining their meaning, in their use, and application to their action on the case before them. Thus, in deciding on a rule or motion, in a case of a *habeas corpus* or *mandamus*, they use or omit, as the case may be, the terms appropriate to a judgment, or those of a mere order directing or declaring the result of their opinion; yet on referring to the subject-matter which they have decided, the court in using the terms denoting judgment, always conclude on consideration of the rule, motion, petition or return; and never leave their action open to any doubt as to the character of their decision, whether it finally disposes

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of the cause, or is a mere summary order, on some matter of an intermediate nature. But when the court proceeds to render a final decree or judgment, on an appeal or writ of error, it is always done in the appropriate language of judgment: "This cause came on to be heard, on the transcript of the record of the —— court, &c.," on consideration whereof, &c.; showing that they act upon the cause itself, on a judicial inspection of the record and decide on all the matters of law therein contained (5 Pet. 199), and not on preliminary matters which leave the cause undecided. This action is also on a final judgment or decree of the court below; which decided the whole cause, and would have been conclusive on it, had no appeal or writ of error been taken, or if the law had allowed none; the appellate power can act only on such decrees and judgments; in appeals, it acts on the facts as well as the law of the case; in writs of error, it acts only on the matters of law. 1 Wheat. 335; 2 Ibid. 142; 6 Pet. 49; 7 Ibid. 149, 282; 12 Ibid. 331; 13 Ibid. 164.

These forms lead to the true rules and principle of law which are the test of what judgments, decrees, orders or awards in the nature thereof, are cognisable in error, and what are not; what are so, has been seen; what are not, is most distinctly declared by this court. "We have only to say, that a judge must exercise his discretion in those intermediate proceedings, which take place between the institution and the trial of a suit; and if in the performance of his duty, he acts oppressively, it is not to this court that application is to be made" (8 Pet. 590; s. p. 9 Ibid. 604); "the appropriate redress, if any, is to be obtained by an appeal, after the final decree shall be had in the cause." 13 Ibid. 408. No language can apply more forcibly to a proceeding on the writ of *habeas corpus*. It is intermediate between the institution and trial of the suit or prosecution; it is within the discretion of the court to remand or discharge; their order therein is interlocutory in its nature, not definitive of the suit, but on the mere collateral questions of bail, commitment, or discharge from process of arrest; and whether terms of judgment are used or omitted, in granting or refusing the motion, the substance is the same; no final judgment in the suit is, or can be rendered; it remains open for trial as fully as before the *habeas corpus* was awarded. The cases in this court on *habeas corpus*, are decisive of the point, that no order or judgment rendered in them are final in their nature or effect; and in the very common and familiar case of a question of freedom or slavery, which is decided on the writ of *habeas corpus* on a motion to discharge; it has never been doubted, that the question of right, was perfectly upon a writ of *hominem replegiando*, let the decisions on the *habeas corpus* have been either way.

On the review of the forms and principles of the common law, as adopted by this court, there is (as is admitted) no precedent of a writ of error on a *habeas corpus* being sustained, which is powerful evidence that no principle exists which can justify it; while those which are unquestioned forbid it; and I am utterly unable to comprehend, by what sound rule of jurisprudence, prescribed to the courts of the United States, a double appellate power in the same court, ever can be exercised over the same suit, and the same subject-matter: 1. By the writ of *habeas corpus ad subjiciendum*;

2. By writ of error.

When appellate power is once exerted, it is spent by the judgment of the

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of error, the judgment below must be either affirmed or reversed ; this court must give the same judgment as the court below should have done, unless in the excepted cases, which cannot arise on the *habeas corpus*. And when this is done, there remains the further act of directing a special mandate to another court, to award execution of the judgment of this ; or for this court to do it, in the case provided for. 1 Wheat. 353, &c. There must also be infused into the law, some mode or process by which the order for commitment, bail or discharge, may be superseded by the party suing out the writ of error ; some provision must be also made, as to the progress of the prosecution, during the pendency of the writ of error. Now, process may be issued, or a new indictment may be found for the same offence, nay, a trial may be had, before this court can decide on the sufficiency of the first cause of commitment ; and when they shall have done this by "a final decision of the cause" or suit, and sent their "special mandate to award execution thereupon," the return to that mandate may be, that the party has been arrested on other process, convicted of the offence, or is at liberty, after an acquittal. This court can award no execution, till the cause has been once remanded, under the 25th section as it now reads. So, in a case coming within the exception of the 24th, for in all other cases, they must, on reversing, render the same judgment which ought to have been rendered below. Now, if we had reversed the judgment of the supreme court of Vermont, we could have rendered a judgment of discharge, for there are no damages to be assessed, and nothing uncertain to be adjudged ; yet we could award no execution, till a mandate had been first sent, and returned unexecuted, or not returned, or returned with the above or the same reasons, as are to be found on the return to the mandate in *Martin v. Hunter*, 7 Cranch 628 ; 1 Wheat. 305-6 : "That the writ of error in this case was improvidently allowed under the authority of that act (the 25th section) ; that the proceedings thereon in the supreme court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court."

If such an occurrence has actually happened in a case, where this court had undoubted jurisdiction, it may be expected in future cases of a writ of error, in one like the present ; which can be brought within the law, only by a successive train of implication upon implication, till ingenious reasoning may fasten it to some expression, which may be thought to justify the assumption of the power. But more than jurisdiction must be assumed, before this court could exert it to the extent which such a case requires ; for though resistance to its mandate may be contingent, or merely possible, it ought to be well considered, whether, when it should happen, the court felt assured that they would be sustained by the law and constitution, in enforcing obedience by *mandamus*, attachment, and the imprisonment of the judges of the highest court of a state.

It is not enough, that the term "any suit" may embrace a case of *habeas corpus* ; it must be one which in all other respects admits of the action prescribed in the judiciary act, in all its provisions relative to the appellate jurisdiction of this court ; if it is, there will be found no defect of power to execute its final mandate or execution, by the authority of this court. If it is not, then, if the court assumes jurisdiction, it must usurp power to carry into effect a judgment which the law does not recognise, and consequently, makes no provision for its execution. It is dangerous, at least, if not unwise

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or rash, to exercise a power which may be given by the constitution ; but which congress has given no authority to execute, or given in terms so obscure, that to so construe them, is in substance the exercise of legislative power, by the judicial department. However desirable it may be thought, to enlarge jurisdiction, and expand its exercise, so as to embrace cases not yet known to the law, or by so construing the constitution and law, as to make it, by reasoning, what it ought to have been in the text ; and giving inference and incident the effect of ordinance and enactment, increase the ostensible power of the court ; yet, assuredly, it will continue to lose, in public confidence, that moral strength, which can alone insure its efficient and quiet action, in the same proportion as it extends ungranted jurisdiction. No course appears to me to lead more certainly to such results, than that which the court has been urged to take in this case ; had we reversed the (so called) final judgment, and our mandate had encountered new process, &c., our own solemn judgment would have had a most ludicrous effect, as a final decision, of what ? not the suit, cause or prosecution, but on the legality of the original process, which is a most conclusive reason why a decision on mere process is not the subject of a writ of error. Or had the matter remained as it was, our reversal would have respected only the refusal to discharge the party from the process ; our mandate to discharge, would, if executed, leave him liable to arrest on new process, without affecting the suit ; which is an equally conclusive reason to show that a final decision in error on the *habeas corpus* is not such as is contemplated by the 24th or 25th sections, or provided for by either. Or, should that court refuse obedience to our mandate, the predicament of this court would be precisely the same as in *Martin v. Hunter* ; they must, at the next term, proceed in one of the following modes.

1. Follow the precedent of *Martin v. Hunter*—issue “a writ of error” to the supreme court of Vermont, “founded” on their “refusal to obey the mandate of this court ;” raise that refusal to the dignity of a final judgment (*vide 1 Wheat. 305*), and then reverse it, and affirm “the judgment of the district court.” *Ibid. 262*. This, however, would not be a course appropriate to the present case : there is no judgment of any inferior court, or if there was, this court would have no power, by the 25th section, to affirm or reverse it, because the decision complained of was had in the highest court of law of the state (6 Pet. 49) ; nor could any mandate be directed to any other court (1 Wheat. 353 ; 8 Pet. 314) ; and it requires no reasoning to show, that this court ought not, and would not, deal with the jailer or other person who had the custody of the relator. 7 Pet. 282.

2. “Proceed to a final decision of the cause and award execution,” as specially authorized by the 25th section ; but this would be abortive, as there could be no final decision of the cause of prosecution, on a mere inquiry into the cause of commitment ; nor could any execution be awarded against person or property ; and the nature of the case precludes any efficient action, save by a mandate to be directed to the court, most certainly not to the jailer.

3. Issue a peremptory *mandamus* to the judges, to carry the mandate into effect (see 5 Cranch 115 ; 7 Pet. 648 ; 8 *Ibid. 305*), which is expressly authorized by the 14th section of the judiciary act, and is most appropriate to this case ; it being necessary for the exercise of the appellate jurisdiction

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of this court, and agreeable to the principles and usages of law—the common law. 12 Pet. 492-3. And if that *mandamus* is not obeyed, then on the authority of the 17th section, award an attachment, and if no sufficient cause is shown to avert it ; “punish by fine and imprisonment,” this “contempt of authority.” (1 U. S. Stat. 81, 83.) 1 Story 59, 60. See 8 Pet. 588, 590.

Such is the power with which this court is invested by the constitution and laws, so it may, and ought to be exerted, whenever it becomes necessary to exercise its appellate jurisdiction, in vindicating its authority to enforce the law in its majesty, upon any tribunal, which has rendered a judgment under state authority, in violating of the constitution, a law or treaty of the United States ; and refuses to obey the mandate of reversal. On every case which lawfully invokes the action of these powers, this court, I trust, will not hesitate to exert it, that it will, by so doing, “plant” itself in public opinion and confidence, on an “impregnable position” (11 Pet. 139), I cannot doubt ; nor, that when this court deliberately takes the first step in exercising jurisdiction on a writ of error to a state court, they will be prepared, and resolved to take the last, should the exigencies of the case invoke it. But if the court is not well assured that the law of the case will fully justify the last, the time for reflection is before the first step is taken : otherwise, they may be induced, if not compelled, to halt, to retrace their steps by retrogression, or to stop the progress of the cause to final judgment and execution, from a doubt whether they have, or the conviction that they have not, the legitimate power to finish what they had begun.

BARBOUR, Justice.—This case being brought before us by a writ of error not from a circuit court of the United States, but from the supreme court of judicature of Vermont, we have no jurisdiction over it, unless it comes within some one of the provisions of the 25th section of the judiciary act. The class of cases described in that section, within which it is supposed that it comes, is defined in the following terms : “or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity.”

Now, the record does not, in terms, state on what ground the court decided ; the judgment only declares that the cause of detention and imprisonment, that is, the warrant of the governor of Vermont, is good and sufficient in law. It must, then, according to the decision of this court, appear, by clear and necessary intendment, that the question of the repugnancy of the authority exercised, either to the constitution, or treaties or laws of the United States, must have been raised, and must have been decided, in order to have induced the judgment. As there is neither any treaty nor law having relation to the case, the single inquiry is, whether there is any provision of the constitution to which the authority in question is repugnant ; because, if *there is not, then it will follow, that there is no ground [*587 for the clear and necessary intendment, nor for any intendment, that such matter was drawn in question, and decided by the court below ; as is absolutely necessary to give this court jurisdiction over a case brought here from a state court.

I proceed, then, to examine the question, whether the constitution contains any such provision ? The only clause of that instrument, upon the

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subject of the surrender of fugitives from justice, is found in the second section of the fourth article, and is in these words: "A person charged in any state, with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This provision, by the obvious import of its terms, has no relation whatsoever to foreign nations; but is confined in its operation to the states of the Union. Nor, indeed, should we have expected to have found in such an instrument any provision upon the subject, except in relation to the states themselves. It is a compact of government between the states, for themselves, and not for others; it consists, therefore, of a designation of the powers granted; the division of those powers amongst the departments which it created; and of such reciprocal stipulations, limitations, and reservations, as the states thought proper to make. But it was no part of the purpose of its framers, to define the duties or obligations of the states, thus united, to foreign nations, or to prescribe the mode of their fulfilment. There is no other clause of the constitution, which, in terms, has even the remotest allusion to the surrender of fugitives from justice.

Before I proceed to examine the various provisions in the text of the constitution, which have been relied upon as bearing upon the question; I will take notice of an argument urged at the bar, as being founded upon the fifth amendment to that instrument. It was said, that the authority exercised in this case, was in violation of that part of the fifth amendment which declares, "that no person shall be deprived of life, liberty or property, without due process of law." This argument is at once met and repelled by the decision of this court, in the case of *Barron v. Mayor and City and City Council of Baltimore*, 7 Pet. 243; in which this court decided, that the amendments to the constitution of the United States, did not apply to the state governments. That they were limitations upon the power granted in the instrument itself; and not upon the power of distinct governments, framed by different persons, and for different purposes. To which I will add, what is matter of history, that so far from the states which insisted upon these amendments, contemplating any restraint or limitation by them on their own powers; the very cause which gave rise to them, was a strong jealousy on their part of the power which they had granted in the constitution. They, therefore, with anxious solicitude, endeavored, *by [588] these amendments, to guard against any misconstruction of the granted powers, which might, by possibility, be the result of the generality of the terms in which they were expressed. But it is unnecessary to dwell longer on this point; because it is not only decided in the case just cited, but it is also declared in the case of the *Lessee of Livingston v. Moore*, 7 Pet. 551-2, to be settled, that the amendments of the constitution of the United States do not extend to the states.

I now return to the text of the constitution itself. It was said in the argument, that by that instrument, the whole foreign intercourse of the country was confided to the federal government. That as between foreign nations and the United States, the individual states are not known. That they are known only in their confederated character, as the United States. That the question as to the surrender of fugitives from justice, being a

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national one, it follows as a consequence, that it can only be decided and acted upon by the United States. It is admitted, that the regulation of our foreign intercourse is confided to the federal government. But that the proposition thus generally propounded, may be reduced to a definite form; that we may have some standard of practical application by which to test the nature, character and extent of this power over foreign intercourse, and its bearing upon the present question; it becomes necessary to examine the provisions of the constitution which relate to it; for it is just that, and that only, which the provisions of that instrument have made it. The only clauses of the constitution, as far as I am informed, which relate to our foreign intercourse, are: 1. The one which gives to the president, with the advice and consent of the senate, power to make treaties, and to nominate and, with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls. 2. That which gives to the president alone, power to receive ambassadors, and other public ministers. 3. That which absolutely prohibits the states from entering into any treaty, alliance or confederation: and lastly, that which prohibits them, without the consent of congress, from entering into any agreement or compact with a foreign power. Thus it appears, that the whole power of foreign intercourse granted to the federal government, consists in this, that while it is authorized, through the president and senate, to make treaties, the states are prohibited from entering into any treaty agreement or compact, with a foreign state. Now, there is nothing in the record to show that Vermont has violated this prohibition in the constitution, because it does not appear, that that state has entered into any treaty, agreement or compact whatsoever with any foreign state.

The only argument, then, which can be urged, to prove that the act done by the governor of Vermont is a violation of these provisions of the constitution, must be this, if not in form, certainly in effect: The president and senate have power to make treaties with foreign states, but Vermont has surrendered to a foreign state ^{*a fugitive from justice who was} _[*589] within her jurisdiction; therefore, Vermont has violated that part of the constitution which authorized the president and senate to make treaties. Can such a conclusion follow from such premises? I would respectfully say, that to me, it seems to be a *non sequitur*. I am ready to admit, that the president and senate can make treaties, which are not themselves repugnant to the constitution. I further admit, that, as by the usages of nations, as well as by the practice of the United States, the surrender of fugitives is deemed to be a proper subject for treaty; therefore, it is competent to them to make treaties in relation to that subject. I further admit, that if a treaty had been made, by which the federal government had bound itself to surrender fugitives to a foreign nation, and one had been arrested under the treaty, for the purpose of being surrendered, and the judicial authority of Vermont had discharged him upon *habeas corpus*; then it might be said, that such discharge was repugnant to the treaty. But the question here is, not whether the act of the governor of Vermont is repugnant to a treaty, for there exists none in relation to the subject; but the question is, whether it is repugnant to the constitution, because, by that, the president and senate have power to make treaties for the surrender of fugitives, but which power they have not executed?

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There are two classes of provisions in the constitution, as to which this question may arise. The first is, where the constitution operates *per se*, by its own intrinsic energy. In cases of this class, it is not necessary that any power should be exercised by any department of the federal government, to bring it into active operation. The constitution is, in this class of its provisions, a perpetually self-existing impediment to any action on the part of the states, on the subjects on which they relate. Thus, to exemplify: it declares, that no state shall pass a "bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Now, if a state were to pass either of the kinds of law which are thus prohibited; such a state law, or any authority exercised under it, would necessarily be repugnant to the constitution. The thing done would be in direct opposition to the supreme law of the land, which had commanded that it should not be done. This class of cases, where there is an express prohibition, has no relation whatever to any conflict between the powers granted to the federal government, and those reserved to the states. Such a state law as I have just supposed, would be equally repugnant to the constitution, whether there was or was not any power granted to the federal government over the subject on which such a state law operated. This class embraces also certain cases in which a power, such as had been previously exercised by the states, is granted to the federal government, in terms which import exclusion: such, for example, as the power granted to congress, of exclusive legislation over the district of Columbia. In such a case, it has been held, that although there is no express prohibition upon the states, yet the terms of the grant, by *590] necessary construction, imply it; because a provision that **one government* shall exercise exclusive power, is tantamount to a declaration that no other shall; for if any other could, it would cease to be exclusive; and such a declaration is, therefore, in effect, a prohibition. Here, too, then, any action on the part of a state, upon a subject thus exclusively granted to the federal government, would be repugnant to the constitution, operating by its own intrinsic energy, without any action by the federal government; because, as to such cases, the supreme law of the land has declared, in effect, that no state shall enter upon this field of power.

The second class of constitutional provisions, as to which this question of repugnancy may arise, consists of those powers granted to the federal government, which the states previously possessed; where there is nothing in the terms of the grant which imports exclusion, and where there is no express prohibition upon the states. As to this class of powers, the great constitutional problem to be solved is, whether any of them can be construed as being exclusive. If they can, then the necessary consequence is, that the states cannot exercise them; whether the federal government shall or shall not think proper to execute them. If, on the contrary, they are not exclusive, but concurrent, then the states may rightfully exercise them; and no question of repugnancy can ever arise, whilst the power remains dormant and unexecuted by the federal government. Such a question can only occur when the actual exercise of such a power by the states comes into direct conflict with the actual exercise of the same power by the federal government. This characteristic of concurrent powers, is illustrated by the familiar example of the power of taxation. Thus, although the power of laying and collecting taxes is specifically granted to congress, yet the states, as we all

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know, are in the habitual exercise of the same power, over the same people, and the same objects of taxation, and at the same time, as the federal government ; except when the states are restrained by an express prohibition from acting on particular objects ; that is, from laying any imposts or duties on imports or exports, beyond what may be absolutely necessary for executing their inspection laws. And but for that prohibition, I doubt not but that the states would have had as much power to lay imposts or duties on imports or exports, as to impose a tax on any other subject of taxation.

I hold the following proposition to be maintainable : That wherever a power, such as the states originally possessed, has been granted to the federal government, and the terms of the grant do not import exclusion, and there is no express prohibition upon the states, and the power granted to the federal government is dormant and unexecuted ; there the states still retain power to act upon the subject. And I place this upon the ground, that in such a case, the question of repugnancy cannot occur, until the power is executed by the federal government. It is not repugnant to the constitution, because there is not in that instrument either an express prohibition, nor that which is implied by necessary construction arising from words of exclusion. There is, therefore, nothing in the constitution ^{*itself, operat-} [*591] ing by itself ; as it does in cases of express prohibition or terms of exclusion ; to which the exercise of such a power by the states is repugnant, or with which it is utterly incompatible. It is not repugnant to any law passed, or treaty made, by the United States, because my proposition in terms assumes that no such law has been passed, or treaty made. I will add, in support of this view, that as the constitution contains several express prohibitions upon the states, from the exercise of powers granted to the federal government ; if we were to apply to its construction the maxims so well founded in reason, *expressio unius, est exclusio alterius*, it would seem to lead to the conclusion, that all the powers were expressly prohibited which were intended to be prohibited ; unless in cases of such necessary and inevitable construction as those in which the power is granted in terms of exclusion ; which, as I have said, would cease to be exclusive, if the states could still exercise them, and which, therefore, present a case of absolute incompatibility.

From these general principles, I now proceed to the examination of some of the cases in this court, in relation to this question. In *Sturges v. Crowninshield*, 4 Wheat. 122, there is a good deal of discussion on this subject. In p. 193 of that case, the chief justice says, "These powers (he is speaking of the powers granted to congress) proceed not from the people of America, but from the people of the several states ; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition ; and this shows the sense of the convention to have been, that the mere grant of a power to congress, did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to

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congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." After these general remarks, he propounds this question : "Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States of this description?" That is, as explained in the immediately preceding paragraph, one where the terms in which the power is granted to congress, or the nature of the power, required that it should be exclusively exercised by congress. After much other reasoning on the subject, and, amongst other difficulties, stating that of discriminating with any accuracy between insolvent and bankrupt laws, we find him using the following language : "it does not appear to be a violent construction of the constitution, *and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states." He proceeds to say, that the circumstance of congress having passed a bankrupt law, had not extinguished, but only suspended the right of the states. That the repeal of the bankrupt law could not confer the power on the states, but that it removed a disability to its exercise which had been created by the act of congress.

In 5 Wheat. 21, Judge WASHINGTON, in delivering the opinion in the case of *Houston v. Moore*, distinctly asserts, that if congress had declined to exercise the power of organizing, arming and disciplining the militia of the several states, it would have been competent to the state governments to have done so, in such manner as they might think proper. In *Wilson and others v. Blackbird Creek Marsh Company*, 2 Pet. 251-2, the legislature of Delaware had passed a law which stopped a navigable creek. In the argument, it was contended, that this law came in conflict with the power of the United States "to regulate commerce with foreign nations, and among the several states." The chief justice, in answer to this argument, said, "If congress had passed any act which bore upon the case, the object of which was to control state legislation over those small navigable creeks, into which the tide flows, and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying, that a state law, coming in conflict with such act, would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states ; a power which has not been so exercised as to affect the question." He concluded by saying, that the court did not consider the law in question, "under all the circumstances of the case, as repugnant to the power to regulate commerce, in its dormant state, or as being in conflict with any law passed on the subject."

If, then, it be true, that it is not the mere existence of a power, but its

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exercise, which is incompatible with the exercise of the same power by the state ; and that, too, where the power given was in express terms, "to establish uniform laws on the subject of bankruptcies, throughout the United States," the term "uniform" making the case stronger than where the grant contains no such term ; and if it be also true, that the law of Delaware was not repugnant to *the power to regulate commerce, in its dormant state ; then it seems to me, that I have sufficient grounds for the pro- [**593 position which I have laid down.

Let me, then, apply that proposition, and the principles of this court to this case. I have admitted, that the president and senate might make a treaty for the surrender of fugitives from justice, but they have not done so ; that power, in relation to this subject, is in a dormant state ; the power exists, but has not been exercised ; without the exercise of that power by the president and senate, the federal executive has no power to surrender fugitives from justice. This was the authoritative declaration of our government, in 1791, when Mr. Jefferson, then secretary of state, held the following language : "The laws of the United States, like those of England, receive every fugitive (that is, as he had just said before, in the same communication to president Washington, the most atrocious offenders as well as the most innocent victims), and no authority has been given to our executive to deliver them up." The same authoritative declaration was made by Mr. Clay, by direction of President Adams, in the year 1825, in answer to a demand from Canada ; and the reason assigned was, that the treaty upon that subject was no longer in force.

It appears, then, that there is no treaty on the subject of surrendering fugitives ; that without such treaty, the federal executive has no authority to surrender ; the authority, then, exercised by the governor of Vermont, is not repugnant to the power of making treaties, in its dormant state : because, in the language of the chief justice, before cited, it is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is said by one of the judges, in delivering his opinion in the case of *Houston v. Moore*, that the powers of the federal government are exclusive of the states, when there is a direct repugnancy, or incompatibility in the exercise of it by the states. It is not said, whether this repugnancy is produced by the mere existence of the power in the federal government, or by its exercise. But he gives as examples of this, the power to establish a uniform rule of naturalization, for which he refers to *Chirac v. Chirac*, 2 Wheat. 259, 269 ; and the delegation of admiralty and maritime jurisdiction, for which he refers to 1 Wheat. 304, 337. In the case in 2 Wheaton, the chief justice does say, "that the power of naturalization is exclusively in congress, does not seem to be, and certainly ought not to be, controverted." But the point made, and which immediately precedes this remark was, that the law of Maryland, according to which the party had taken the oaths of citizenship, had been virtually repealed by the constitution of the United States, and the act of naturalization enacted by congress. The remark, then, was made in relation to a power which had been executed. But the case of *Sturges v. Crowninshield* was decided after that of *Chirac v. Chirac* ; and in that later case, it was declared, that it was not the mere existence, but the exercise of the power, *which is incompatible with the exercise of the same power [**594

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by the states; and what makes this principle especially applicable is, that the power of establishing a system of naturalization, and bankrupt laws, is contained in the same clause, and expressed, identically, in the same terms. So that, if the mere existence of the power as to bankruptcy, without its exercise, does not prohibit the states from acting on it; by like reason, the mere existence of the power as to naturalization, without its exercise, does not prohibit them from acting on it.

It is said in 1 Wheat. 337, *arguendo*, by the court (for it was not the point to be decided), that admiralty and maritime jurisdiction is of exclusive cognisance. It would seem, from the reasoning of the court, as if this rested upon these grounds: that the constitution is imperative on congress, to vest all the judicial power of the United States, in the courts of the United States; that the judicial power was declared to extend to all cases of admiralty and maritime jurisdiction; and that, therefore, by the terms in which the clause was expressed, the jurisdiction was made exclusive. Such also, seems to be the principle laid down in 1 Kent's Com. 351, where the author says: "Whatever admiralty and maritime jurisdiction the district courts possess, would seem to be exclusive; for the constitution declares, that the judicial power of the United States, shall extend to all cases of admiralty and maritime jurisdiction; and act of congress of 1789, says, "that the district courts shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction." It seems to me, then, that neither of these cases impugns the principles which I have laid down.

I consider it wholly irrelative to this case, to inquire, whether the authority exercised by the governor of Vermont was, or was not, justified by the constitution and laws of that state. Not only would the words of the act of congress, under which this case has been brought up, clearly require this construction; but this court has expressly decided the question, in the case of *Jackson v. Lamphire*, 3 Pet. 280, in which they say, that this court has no authority, on a writ of error from a state court, to declare a state law void, on account of its collision with a state constitution.

Upon these grounds, I am of opinion, that this case does not come within the provisions of the 25th section of the judiciary act; and consequently, that the writ of error ought to be dismissed, for want of jurisdiction.

CATRON, Justice.—To distinguish this cause from others that often arise in the states where statutes exist authorizing the arrest of fugitives from justice from other states, and foreign governments, it becomes necessary to ascertain precisely what the case before us is.

First, it must be recollected, there is no statute in Vermont prohibiting those charged with crimes in other states, or foreign countries, *from coming into that state, or authorizing their apprehension if they come ^[*595] there: so we understand the fact to be; and that the authority to issue the warrant of arrest in this case was assumed by the governor, as chief magistrate and representative of the state. Holmes had been guilty of no crime against the laws of Vermont; but the warrant recites he was a subject of the province of Lower Canada; that he stood indicted for the crime of murder there; and that it was fit and expedient that he should be made amenable to the laws of that province for the offence. The sheriff, in his

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return to the writ of *habeas corpus*, certifies that this warrant was the sole cause of detention and imprisonment. He was not commanded to hold Holmes to answer to the authorities of Vermont; but ordered forthwith to convey and deliver him to William Brown, the agent of Canada, or to such person or persons, as by the laws of said province should be authorized to receive the same, at some convenient place on the confines of the state, and the province of Canada; to the end that the said George Holmes might be thence conveyed to the district of Quebec, and there be dealt with as to law and justice appertained.

We will assume, for the present, and for the purposes of the argument, that an agreement to surrender, on which the arrest was founded, existed between the executive chief magistrate of Vermont, and the queen of Great Britain; that William Brown was the agent of Great Britain, and represented that kingdom; that Governor Jennison represented Vermont; and that the arrest was made in part execution of such previous agreement. In such case, I admit, the act would have been one as of nation with nation, and governed by the laws of nations; that the agreement would have been prohibited by the constitution, and the arrest, in part execution of it, void; and that the judgment of the state court in favor of the validity of the arrest should be reversed. But that court was not called on to decide (taking the facts assumed to exist), nor are we permitted to determine in this case, how far the state courts and magistrates may go, in dealing with fugitives from justice coming within their limits, when executing the statutes of the states. No such question has been raised at the bar, nor has it been considered of by the bench.

This is the substance of my opinion, drawn up at length, on the point in this cause, on which, for a time, I thought the judgment below ought to be reversed. I founded myself upon the fact, that an agreement to arrest and surrender Holmes had been made between Vermont and Great Britain, before the arrest took place; and that it was made in part execution of such previous agreement. Neither on the argument of the cause, nor at any time previous to hearing read the opinion of my four brethren, drawn up by the chief justice, and with the result of which I had intended to concur, had it occurred to me, the fact was doubtful. In that opinion, however, it is declared, that "nothing appears that a demand was made by Canada of Holmes; and we do not act upon the supposition such a demand was made; nor consider it in the case." Now, if no demand was made, I take it as granted, no agreement existed between Great Britain and Vermont for the surrender of Holmes. To assume that a general regulation by treaty or agreement, existed between the state and the foreign kingdom, on which the 'governor's warrant founds itself, and from which the regulation must be inferred, would be charging the chief magistrate of Vermont with a palpable violation of the constitution of the United States, on the ground that he assumed the power of foreign intercourse. There is nothing in the record to establish such a conclusion; nor can it be assumed, with any propriety, on mere conjecture. It is manifest to my mind, the facts stated in the warrant have reference to this individual case. The arrest could, therefore, not have been made in part execution of any compact or agreement between the state and kingdom: it follows, a judgment of reversal could only be founded on the intention of the governor to make a future

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agreement, at the time Holmes should be surrendered to Brown, or to some sheriff, or other officer, or agent of Canada, having lawful authority to receive the prisoner. The intent, we are not authorized to try ; we only have jurisdiction to examine into acts done ; and must proceed, if at all, on some past violation of the constitution of the United States, supposed to be that clause which declares, "no state shall, without the consent of congress, enter into any agreement or compact with another state, or with a foreign power." The defendant, Holmes, is yet in prison under the governor's warrant of arrest ; no agreement to surrender him yet exists, and none may ever be made with Great Britain ; the act done by the governor, is singly that of Vermont, and therefore, cannot violate the recited clause of the constitution.

All my brethren, those who are for reversing the judgment, and those who are for dismissing the writ of error, have adopted, and are acting on the supposition, that no demand to surrender Holmes can be inferred from the facts recited in the warrant of the governor ; and that the fact is considered out of the case. After much consideration, I entertain some doubts, whether such an inference could be safely made ; and deem it due to the opinion of all my brethren, on the finding of a mere fact in so delicate a matter, to concur with them in the conclusion that no demand was made, and that, consequently, no agreement existed ; and therefore, to concur with those who think the writ of error should be dismissed. A consequence inevitable to my mind, viewing the case in this aspect.

That an intent to surrender, is equivalent to an agreement between two states, and therefore, the arrest in violation of the constitution of the United

States, is a doctrine calculated to alarm the whole country. *The ^{*597]} constitution equally cuts off the power of the states to agree with each other, as with a foreign power ; yet, it is notoriously true, that for the fifty years of our existence under the constitution, the states have, in virtue of their own statutes, apprehended fugitives from justice from other states, and delivered them to the officers of the state where the offence was committed ; and this, independently of the fourth article and second section of the constitution, and the act of congress of 1793, ch. 51, which provides for a surrender on the demand of the executive of one state upon that of another. The uniform opinion heretofore has been, that the states, on the formation of the constitution, had the power of arrest and surrender in such cases ; and that so far from taking it away, the constitution had provided for its exercise, contrary to the will of a state, in case of an unjust refusal ; thereby settling, as amongst the states, the contested question whether on a demand, the obligation to surrender was perfect and imperative, or whether it rested on comity, and was discretionary.

After having had written out for me the very able argument delivered before this court, for the plaintiff in error ; and after having bestowed much reflection on this subject, and written out my views on every point involved, as the safest mode of testing of their accuracy ; I have come to the conclusion, divided as the court is, that it is better for the country, this question should for the present remain open. And I here take the occasion to say, that I hold myself free, and uncommitted by this opinion, or by anything occurring in this cause, to decide, in future cases, according to their character, and the conclusions I may then form.

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I concur, that a proceeding by *habeas corpus* is a suit, within the meaning of the judiciary act, § 25; and that a refusal to discharge a defendant is a final judgment in such suit. 1. But whether a writ of error will lie, must depend, in every case, on the fact: This court only has jurisdiction where the decision in the state court has drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States; and the decision is against their validity. 2. Or, where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, &c., of the United States; and the decision is in favor of such their validity. 3. Or, where is drawn in question the construction of any clause of the constitution, &c., and the decision is against the right claimed under such clause.

The agreement being out of the case, the arrest, as an authority exercised under the state, and the decision in favor of its validity, could not be repugnant to the constitution; as the court did not uphold an agreement, or an exercise of authority under any. Nor can I find that the decision below drew in question the construction of an other clause of the constitution, more than the one prohibiting *agreements with foreign powers. [*598] There being no agreement in the case; certainly none of the exclusive powers secured to the general government, to declare war, to send ambassadors, to make treaties, or to regulate commerce with foreign nations, were violated; as no national intercourse of any kind was had by Vermont with the authorities of Great Britain.

Whether the arrest violated the laws of Vermont, is immaterial to this court; we have no power, under the 25th section, to interfere, and must leave parties injured to seek redress in the state courts.

It follows, from the nature or the case, this court has no jurisdiction to entertain the writ of error; which, I think, should be dismissed.

THIS cause came on to be heard, on the transcript of the record from the supreme court of judicature of the state of Vermont, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that this writ of error to the said supreme court be and the same is hereby dismissed, for the want of jurisdiction.

NOTE.—The reporter has inserted this case in the present volume of reports, although no decision on the questions presented to the court was given. The principles, discussed with great ability by the counsel for the plaintiff in error, the importance of the questions involved in it, and the great judicial learning and knowledge contained in the opinions delivered by the justices of the court, are of the highest interest. Although no judgment was given in the case, it will be seen that a majority of the court concurred in the opinion, that the governor of the state of Vermont had not the power to deliver up to a foreign government a person charged with having committed a crime in the territory of that government.

After this case had been disposed of in the supreme court of the United States, on a *habeas corpus* issued by the supreme court of judicature of the state of Vermont, George Holmes was discharged. The judges of that court were satisfied, on an examination of the opinions delivered by the justices of the supreme court, that by a majority of the court it was held, that the power claimed to deliver up George Holmes did not exist.¹

¹ See *Ex parte Holmes*, 12 Vt. 631.

