agreeably to the acts of Congress in such case made and provided, and was argued by counsel. In consideration whereof, it is the opinion of this court that the plaintiff in this case is entitled to recover of the defendant the money paid by the plaintiff to Thornton, as being money paid for his (Smith's) use. Whereupon it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

JOHN A. BARRY, PLAINTIFF IN ERROR, *v.* MARY MERCEIN AND ELIZA ANN BARRY.

This court has no appellate power, in a case where the Circuit Court refused to grant a writ of *habeas corpus*, prayed for by a father to take his infant child out of the custody of its mother.[1]

The judgments of a Circuit Court can be reviewed only when the matter in dispute exceeds the sum or value of two thousand dollars. It must have a known and certain value which can be proved and calculated in the ordinary mode of business transactions.[2]

But a controversy between a father and mother, each claiming the right to the custody, care, and society of their child, relates to a matter in dispute which is incapable of being reduced to any pecuniary standard of value.[3]

The writ of error must be dismissed for want of jurisdiction.

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[1] The ruling in this case has been changed by statute, and an appeal now lies to the Supreme Court from the Circuit Court. Act of Feb. 5, 1867, 14 Stat. at L., 385; Rev. Stat., §§ 763, 764; *Ex parte McCardle*, 6 Wall., 318.

[2] APPLIED. *Youngston Bank* v. *Hughes*, 16 Otto, 524. FOLLOWED. *Potts* v. *Chumasero*, 2 Otto, 361. CITED. *Ex parte Vallandigham*, 1 Wall., 251; *Elgin* v. *Marshall*, 16 Otto, 580.

"To ascertain, then, the matter in dispute, we must recur to the foundation of the original controversy, — to the matter in dispute when the action was instituted. The descriptive words of the law point emphatically to this criterion; and, in common understanding, the thing demanded (as in the present instance, the penalty of a bond) and not the thing found, constitutes the matter in dispute between the parties." *Wilson* v. *Daniel*, 3 Dall., 404. Affidavits may be filed to ascertain the amount in controversy. *Course* v. *Stead*, 4 Dall., 22; *United States* v. *McDowell*, Id., 22; *Roch* v. *Parker*, 5 Cranch, 387; *Hogan* v. *Foison*, 10 Pet., 160.

When judgment is for the defendant, and the plaintiff appeals, the amount in controversy is the amount of the demand in the plaintiff's declaration. *Cooke* v. *Woodrow*, 5 Cranch, 13; *Pratt* v. *Law*, 9 Id., 457; *Gordon* v. *Ogden*, 3 Pet., 33; *Knapp* v. *Banks*, 2 How., 73.

But the defendant cannot avail himself of the amount of the demand; to thus give the court jurisdiction. *Ex parte Bradstreet*, 7 Pet., 634.

The Supreme Court will not take jurisdiction of a case, although the whole property claimed by the lessor of the plaintiff in error, under a patent, and which was recovered in ejectment, exceeded $2,000, where the title to a lot of ground, part of the whole tract, which was of less value than $500, was only involved in the case before the court. *Grant* v. *McKee*, 1 Pet., 248.

[3] FOLLOWED. *De Krafft* v. *Barney*, 2 Black, 704, 714. And see *Rogers* v. *Kennard*, 54 Tex., 38.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

The facts are sufficiently set forth in the opinion of the court, to which the reader is referred.

A motion was made by the counsel for the defendants in error, viz. *Mr. William W. Campbell* and *Mr. Rockwell*, to dismiss the case for want of jurisdiction, which motion was opposed by *Mr. Barry*, in proper person.

Mr. Campbell, for the motion.

In the summer of 1844, John A. Barry, the plaintiff in error, *presented his petition to the Circuit Court for the Southern District of New York, praying that a [*104 writ of *habeas corpus ad subjiciendum* might issue, directing Eliza Ann Barry, the wife of petitioner, and Mary Mercein, her mother, to bring up the person of an infant child, the daughter of the petitioner and the said Eliza Ann, his wife, and which infant daughter was in the custody of the said Mary Mercein and Eliza Ann Barry. Previous to this period, and for more than five years, a controversy had been going forward in the courts of New York, prosecuted by the petitioner, for the purpose of obtaining the custody of this same child. Three or four times writs of *habeas corpus* had been granted by the local courts of that State, and indeed in one form or another all the courts, both of common law and of equity, had passed upon this vexed and protracted litigation. Twice had the court of last resort, the Court of Errors, after solemn and able arguments, passed upon the case, and refused to grant the application of the petitioner. The relatives of Mrs. Barry were wearied in mind, and exhausted almost of resources, by the long, persevering, and vexatious proceedings of the plaintiff in error in this cause.

Prior, however, to the application to the Circuit Court for the Southern District of New York, the plaintiff in error applied to this court for a writ of *habeas corpus*, which was refused. I shall have occasion to refer to these decisions hereafter.

In his application to the Circuit Court, in order to bring himself within the provisions of the constitution and laws of the United States, the petitioner sets forth that he is a natural born subject of the queen of Great Britain, and claims that the said infant child, though born in the State of New York, of a mother who is a native of that State, is also a British subject and allegient to the British crown.

After a patient hearing and a careful investigation of the law and the facts, Judge Betts refused to allow the writ, and he gave his reasons in an opinion of great length, in which he enters upon a review of the whole law upon the subject. I feel that there is nothing to be added to that opinion. It is able, lucid, and it seems to me entirely conclusive. While it is in the highest degree creditable to him as a judge of the courts of the United States, it is at the same time a masterly vindication of the decisions and the learning of the courts of New York.

He closes that opinion by saying,—

"I deny the writ of *habeas corpus* prayed for, because:—

"1. If granted, and a return was made admitting the facts stated in the petition, I should discharge the infant on the ground that this court cannot exercise the common law functions of *parens patriæ* and has no common law jurisdiction over the matter.

"2. Because the court has not judicial cognizance of the matter by virtue of any statute of the United States.

*105] * "3. If such jurisdiction is to be implied, that then the decision of the Court of Errors of New York supplies the rule of law or furnishes the highest evidence of the common law rule which is to be the rule of decision in the case.

"4. Because by that rule the father is not entitled on the case made by this petition to take this child out of the custody of its mother."

It is this decision which the plaintiff in error seeks to reverse, and on this motion to grant this writ of error it is respectfully submitted,—

1. That this is not such a final judgment as is contemplated by the statute of 1789, which a writ of error may be brought to reverse.

2. That there is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascertained so as to allow a court of error to bring up the matter to this court from the Circuit Court.

3. That the application was to the discretion of the Circuit Court, and this court will never interfere to control the discretion of the inferior court. The parties who are proceeded against are the wife and mother of plaintiff in error. The plaintiff in error cannot proceed against his wife in this court, her domicil in the eye of the law being the same as her husband's.

5. The Circuit Court possess no other or different powers in relation to *habeas corpus* under the act, than are possessed

by this court, and this court have already passed upon this case by refusing to grant the writ when application was made upon the same state of facts directly to this court. This court have no jurisdiction over the subject-matter, and the writ of error should be quashed for want of jurisdiction.

1. This is not such a final judgment as is contemplated by the statute.

The language of the statute, § 22, is that final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, may be reëxamined and rendered or affirmed in a Circuit Court holden in the same district upon a writ of error whereto shall be annexed and returned therewith at the day and place thereby mentioned an authenticated transcript of the record, assignment of errors, prayer for reversal, citation, &c.

"And upon a like process" (that is, writ of error, record, &c.), 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 State courts, or by appeal from District Courts, &c., and "when the matter in dispute exceeds the sum or value of two thousand dollars," &c., be reëxamined and reversed or affirmed by the Supreme Court.

*Now it is respectfully but confidently submitted to this court that the decision of the Circuit Court in this matter, upon an *ex parte* application and where no summons or other process was served upon the defendants in error, or either of them, is not a final judgment in a civil action, or a final decree in a suit in equity. [*106

It is stated that the petition was filed; but it was not served, nor was any original process issued or served; there were, therefore, no parties before the court, there was no action *in personam* or *in rem*, there cannot well be an action at law or a suit in equity where there are no parties before the court.

The act of March 3d, 1803, uses the expression, "cases in equity," but they are confined to cases of admiralty and maritime jurisdiction, and to be carried up to the Supreme Court by appeal.

Judge Betts says, in this case,—"A procedure by *habeas corpus* can in no legal sense be regarded as a suit or controversy between private parties." *Holmes* v. *Jennison et al.*, 14 Pet., 540, refused to discharge under *habeas corpus*. If a suit not a suit between private parties.

2. There is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascer-

tained. Now by the twenty-second section of the judiciary act, to which I have referred, a writ of error to this court does not lie unless the matter in controversy, exclusive of costs, exceeds the sum of two thousand dollars. Now, though in some cases, the court have allowed testimony of value to be given by affidavits or *vivâ voce*, when the demand is not for money, yet this appears to have been done only in cases where real value could be readily fixed, and it has allowed the value of an office or its emoluments to be thus established.

I do not see how the value is to be ascertained in this case; and, indeed, it does not seem to be one of the actions at law or suits in equity contemplated by the act to reverse the judgment or decree in which writs of error may be brought.

In the case of *Columbian Insurance Company* v. *Wheelwright and others*, 7 Wheat., 534, a writ of error was held to lie for this court to the Circuit Court for the District of Columbia, upon a judgment overruling a peremptory mandamus. But it was quashed on account of the matter in controversy not being of the value of one thousand dollars, though in that case the value of the office was allowed to be appraised. But the language of the act of February 27, 1801, is different from that of the act of 1789.

In the act of 1801, writs of error may be brought to reverse or affirm final judgments, orders, or decrees in said Circuit Court. But, as in the act of 1789, final judgments in civil actions and suits in equity. Act of 27 February, 1801, § 8 (2 Stat. at L., 106), contains the provision in relation to writs of error to Circuit Court for the District of Columbia.

*107] *3. The application was to the discretion of the Circuit Court, and this court will not interfere to control the discretion of an inferior court.

It has been repeatedly decided in this court that the exercise of the discretion of the court below in refusing or granting amendments of pleadings on motions for new trials, and refusing to reinstate cases after nonsuit, affords no ground for writ of error. See *United States* v. *Buford*, 3 Pet., 31; *United States* v. *Evans*, 5 Cranch, 280; *Maryland Insurance Co.* v. *Hodgson*, 6 Id., 206.

See also the case of *Boyle* v. *Zacharie*, 6. Pet., 657, where the object of the writ of error was to reverse the decision of the Circuit Court in refusing to quash a writ of *venditioni exponas*, and where it was held not to lie. In that case, Mr. Justice Story said,—"A very strong case illustrating the general doctrine is, that error will not lie to the refusal of a

court to grant a peremptory mandamus upon a return made to a prior mandamus which the court allowed as sufficient."

The case before the court is one of a similar character, and resting equally in the sound discretion of the Circuit Court.

4. The plaintiff in error cannot proceed in this court against his wife; her domicil being in law the same as his. If the proceeding in the Circuit Court can be annulled as an action at law or a suit in equity, then clearly the plaintiff in error could not carry on such action or suit in any of the courts of the United States against his wife, as one of the defendants.

5. The Circuit Court possesses no other or different power than this court in relation to a writ of *habeas corpus*, and this court have already passed upon this case and refused the writ for want of jurisdiction. The writ of error should therefore be quashed for want of jurisdiction.

The language of the fourteenth section is, "that all the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*," &c. The power of this court to issue writs of *habeas corpus* has never been doubted by the court and has repeatedly been exercised; but its power to issue a writ in the present case has been doubted and the writ refused. The court, after hearing the plaintiff in error on original application to this court on the same state of facts as were presented to the Circuit Court, refused to grant the writ. It is respectfully submitted that the application to a Circuit Court has in no respect changed the aspect of the matter, and if this court had no jurisdiction over the subject-matter when the original petition was presented, neither can it have jurisdiction now, when the subject comes up for its decision from the judgment of an inferior court.

In the case of *Ex parte Barry*, 2 How., 65, Mr. Justice Story says:—"It is plain, therefore, that this court has no original *jurisdiction to entertain the present petition, and we cannot issue any writ of *habeas corpus*, except [*108 when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the constitution and laws of the United States."

Is it not equally plain that the Circuit Court can issue no writ of *habeas corpus*, except when it is necessary for the exercise of its jurisdiction, original or appellate, given to it by the constitution and laws of the United States? Was this *habeas corpus* necessary to the exercise of the jurisdiction of the Circuit Court? True, the eleventh section of the judicial act gives the Circuit Court original cognizance with the

courts of the several States, of all suits of a civil nature at common law or in equity.

But "a procedure by *habeas corpus* (says Judge Betts) can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of sovereign, to ascertain whether the infant in this case is wrongfully detained, and in a way conducing to its prejudice."

It has been well and often remarked, that the power of the courts of the United States is given to them by express and written grant; and where they exercise the power of issuing writs of *habeas corpus*, they find their authority in "thus it is written." They derive no jurisdiction from the common law. The grand inquisition of the sovereignty of the United States is not to be invoked unless in cases where the written law gives the power to invoke it. Certainly, this is not one of the cases. It is a case for the grand inquisition of the State of New York. That grand inquest has repeatedly decided this matter.

"What question (says Judge Betts in this same opinion) can be regarded as in principle more local or intro-territorial than those which pertain to the domestic institutions of a State,—the social and domestic relations of its citizens? Or, what could probably be less within the meaning of Congress than that, in regard to these interesting matters, the courts of the United States should be empowered to introduce rules or principles, because found in the ancient common law, which should trample down and abrogate the policy and cherished usages of a State, authenticated and sanctified as a part of her laws by the judgment of her highest tribunals."

I submit this question of jurisdiction, with entire confidence, to this court. I know its practice has been in conformity with the language of its late eminent chief justice.

"We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it."

I submit, therefore, with great deference, the motion that this writ of error should be quashed, as irregular, and for want of jurisdiction.

*109] *Mr. Barry*, in opposition to the motion, made the following points, which he maintained at great length.

1. The record in the above cause presents the case of a "final judgment" by the Circuit Court for the Southern

District of New York in a "suit," within the meaning of the twenty-second section of the judiciary act of 1789; and the plaintiff in error is therefore entitled to have such judgment reëxamined in this court by writ of error, provided the court below had jurisdiction of the case, authority to issue the writ of *habeas corpus ad subjiciendum*, and the record presents a *primâ facie* case for the award of such writ. United States Laws, Stat. at L., 81; *Holmes* v. *Jennison*, 14 Pet., 540; *Weston et al.* v. *City Council of Charleston*, 2 Id., 449; *Kendall* v. *United States*, 12 Id., 614; Sto. Com. Abr., 608; *Columbian Ins. Co.* v. *Wheelwright and others*, 7 Wheat., 534; Co. Litt., 288, b.

2. The court below had jurisdiction of this case, and authority to issue the writ of *habeas corpus* under the Constitution, at the common law, by implication, and by statute; and consequently committed error in deciding that it had not such jurisdiction and authority. The petition on the record presents a *primâ facie* case for the award of such writ, and the court below committed error in denying it to the plaintiff in error, to whom it belonged as a writ of right by the "law of the land"; his title resting, in *debito justitiæ*," on probable cause shown by affidavit; 36 Edw. 3, cap. 9; 42 Edw. 3; 8 Henry 4; 8 Henry 6; 28 Edw. 1; 3 Car. 1; 16 Car. 1, cap. 10; 31 Car. 2; Bac. Abr. Title *Hab. Corp.; Greenhill's case*, 4 Ad. & E., Eng. Com. L., 624; *United States* v. *Green*, 3 Mason, 482; *Rex* v. *Winton*, 5 T. R., 89; *Rex* v. *Isley*, 5 Ad. & E., 441; Constitution United States; *Yates's case*, 6 Johns. (N. Y.), 422, 423; Bollman & Swartwout, 4 Cranch, 75; *Ex parte Randolph*, 2 Brock., 447; 3 Bl. Com., 132; 3 Bac. Abr., 421; Judiciary Act, 1789, § 14; United States Stat., 2 Mar., 1831, § 38; *Kearney's case*, 7 Wheat., 38; *Crosby's case*, 3 Wils., 172; 1 Kent Com., 301; *Wood's case*, 3 Wils.; 3 Bac. Abr. (3); *In re Pearson*, 4 Moo., 366; Mag. Char., cap. 29; *United States* v. *Bainbridge*, 1 Mason, 71; 1 Kent Com., 220; United States Supreme Court, *Ex parte Barry*, 2 How., 65; 19 Wend. (N. Y.), 16, and cases cited; *Vernon* v. *Vernon*, MS. case, New York Chancery, 11th June, 1839; *Ahrenfeldt's case*, Ch. New York, July, 1840; *Commonwealth* v. *Briggs*, 16 Pick. (Mass.), 204; *In re Mitchell*, Charlt., 489; *State of South Carolina* v. *Nelson*, MS. case, 1840; *Prather's case*, 4 Dessau (S. C.), 33; 25 Wend. (N. Y.), 72, 73; Gov. Seward's Mess. to Senate, Albany, 20th March, 1840; 5 East, 221; 12 Ves., 492; 2 Russ., 1; Review of *D'Hauteville's case*, 30; 2 and 3 Victoria, cap. 54; 11 Ves., 531; *People* v. *Mercein*, 3 Hill (N. Y.), 399; *Ex parte Burford*, 3 Cranch, 449.

*110] *3. The court below, if it had jurisdiction by implication, committed error in assuming that the court for the correction of errors, by its decisions on the case of the plaintiff on two former writs of *habeas corpus*, in 1840 and 1842, had either "supplied the rule of law," or given "evidence of the common law rule" which was to be the rule of decision in the case on this record, two years after,—a case entirely *de novo*,—in 1844. And the court below committed further error in deciding, that by such assumed rule of law or evidence of the common law rule, the plaintiff in this cause was not entitled, on the case made by him, to the custody of his child,—the same being a prejudication on the merits,—no argument being had before the court in respect of either such assumed rule, or the evidence thereof, or on the merits. No such rule existed in point of fact, and consequently no evidence thereof could exist; decision Supreme Court New York, 1842, 3 Hill (N. Y.), 399; MS. Opinion, Chan. New York, April, 1844.

4. The plaintiff in error being of legeance to the crown of England, his child, though born in the United States during its father's temporary residence therein,—twenty-two months and twenty days,—notwithstanding its mother be an American citizen, is not a citizen of the United States. It is incapacitated by its infancy from making any present election, follows the legeance of its father, *partus sequitur patrem*, and is a British subject. The father being domiciled and resident within the dominions of her Britannic Majesty, such is also the proper and rightful domicil of his wife and child, and he has a legal right to remove them thither. The child being detained from the father, its natural guardian and protector, without authority of law, the writ of *habeas corpus ad subjiciendum* is his appropriate legal remedy for its restoration to him from its present illegal detention and restraint; Constitution United States, art. 3, § 2; Judiciary Act, 1789, § 11; *Inglis* v. *Trustees Sail. Snug Harb.*, 3 Pet., 99; 7 Anne, cap. 5; 4 Geo. 3, cap. 21; *Warrender* v. *Warrender*, 2 Cl. & F., 523; Story Confl. L., 30, 36, 43, 74, 160; Shelf. Marriage, Ferg., 397, 398.

5. If the laws of the proper domicil of the plaintiff (and by necessary consequence that of his family), applicable to the case on the record, be not repugnant to the laws or policy of this country, and this be proved to the court, the case is one proper for the exercise of the comity of the American nation,—not of the court, but of the nation; and the court below will extend that comity to the plaintiff, not only by awarding him the writ of *habeas corpus ad subjiciendum*, the

appropriate legal remedy sought, but also by deciding the case on its merits, at the hearing, agreeably to the law of his domicil; *In re Wilkes*, 1 Ken., 279; *Dartmouth College* v. *Woodward*, Con. Rep. United States, 577; *Warrender* v. *Warrender*, 2 C. & F., 529; 9 Bligh., N. S., 110; *Bill for Protection of Minors, Senate of New York, 1840; Gov. Seward's Message to Senate, 20th March, 1840. [*111

Mr. Rockwell, for the motion to dismiss, in reply and conclusion.

1. The writ of *habeas corpus* is not issued as a matter of course, upon the application, but is addressed to the discretion of the court, and may be refused if upon the application itself it appears that, if admitted to be true, the applicant is not entitled to relief. 2 Bl. Com., 132, 133, n. (16); 3 Bulstr., 27; 2 Roll., 138.

King v. *Hobhouse*, 2 Chit., 207, marg. note.—"The writ of *habeas corpus*, whether at common law or under the 3 Car. 2, does not issue as a matter of course in the first instance, upon application, but must be grounded on affidavit, upon which the court are to exercise their discretion whether the suit shall issue or not."

See also *The Spanish Sailors*, 2 W. Bl., 1324.

King v. *Barnard Schiever*, 2 Burr., 765.—*Habeas corpus* for a prisoner of war taken on board an enemy's prize-ship denied in the first instance.

Ex parte Kearney, 7 Wheat. 38.—In this case the application was *ex parte*, and in the first instance denied by the court, and in subsequent cases.

Commonwealth v. *Robinson*, 1 Serg. & R. (Pa.), 353.—The court declared it a matter of discretion whether to grant or refuse a writ of *habeas corpus* to discharge an apprentice from military service on application of the master.

Ex parte Tobias Watkins, 3 Pet., 193.—Petition denied in the first instance.

2. A writ of error does not lie to review the decision of a court, except upon final judgment, and the order of a court, denying in the first instance an *ex parte* application for a writ of *habeas corpus*, cannot be reviewed by writ of error.

The People v. *President of Brooklyn*, 13 Wend. (N. Y.), 130, Court of Errors Mandamus, marg. note.—"A writ of error does not lie upon the refusal of the Supreme Court to grant a peremptory mandamus when application is made by motion. It only lies for the relator when judgment is pronounced after issue joined upon plea or demurrer interposed

upon the coming in of the return of the alternative mandamus."

Boyle v. *Zacharie et al.*, 6 Pet., 648, marg. note.—"A writ of error will not lie to a Circuit Court of the United States, to revise its decision in refusing to grant a writ of *venditioni exponas*, issued on a judgment obtained in that court."

Per Story, J. (p. 657.)—"A very strong case, illustrating the general doctrine, is, that error will not lie to the refusal of a court to grant a peremptory mandamus upon a return made to a prior mandamus which the court allowed as sufficient." 3 Bro. P. C., 505.

*112] *The Dean and Chapter of *Dublin* v. *King*, 1 Bro. P. C., 73.—Application to the King's Bench for mandamus to admit Robert Dugale to his office as clerk, upon which there was an award of a peremptory mandamus; held writ of error not to lie, there being no plea and judgment.

Weston v. *City Council of Charleston*, 2 Pet., 449.

Holmes v. *Jennison*, 14 Pet., 540.—"I do not intend to examine the question whether proceeding upon a *habeas corpus* is a 'suit,' within the meaning of the twenty-fifth section; or whether writ of error will lie to review proceedings upon a *habeas corpus*, although the case on these points is not free from doubts," &c. *Per* Thompson, J., 550; Judge Baldwin's opinion, 622, 625.

Columbian Insurance Co. v. *Wheelwright*, 7 Wheat., 534. Mandamus valuation of office.

II. The Circuit Court had no jurisdiction of the subject matter.

1. That court derives all its jurisdiction from the constitution of the United States and the acts of Congress, and is strictly confined to the acts of Congress conferring jurisdiction, and defining the powers of the court.

1 Kent Com., 294.—"With judicial power, it may be generally observed, as the Supreme Court declared in the case of *Turner* v. *Bank of North America*, 4 Dall., 8, that the disposal of the judicial power, except in a few specified cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the federal courts to every subject which the constitution might warrant."

McIntyre v. *Wood*, 7 Cranch, 504, to the same effect; *United States* v. *More*, 3 Id., 159; 6 Id., 305; 3 Dall., 321; 1 Cranch, 212.

Mr. Barry. The Circuit Court must enlarge their jurisdiction, as the Circuit Court has the residuum of authority inherent, and incidental powers at common law as a high court of record.

2. The only power conferred on the Circuit Court is in the judicial act of 1789:—

§ 14. "That all the beforementioned 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.

"And that either of them, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of inquiring into the cause of commitment.

"Provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless when they are in custody under or by order 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."

*1. This statute provides that "all the beforementioned courts," &c., referring to the Supreme, Circuit, and District Courts, and conferring like powers on all. The original jurisdiction of all these courts, and the appellate jurisdiction of the Supreme and Circuit Courts had been all defined. The court derives all its power from this statute, and the limitations of it are to be precisely followed, *expressio unius exclusio est alterius.* [*113

Ex parte Ballard; Ex parte Swartwout, 4 Cranch, 75, *per* Marshall, Ch. J., 93.—"Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, but the courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend their jurisdiction."

"The power to award the writ by any of the courts of the United States must be given by written law."

Page 95.—"If the power be denied to this court, it is denied to every other court of the United States."

Ex parte Tobias Watkins, 3 Pet., 193, by Marshall, Ch. J., p. 201.—"The judicial act 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."

Ex parte Barry, 2 How., 65, marg. note.—"The original jurisdiction of this court does not extend to the case of a petition by a private individual for a *habeas corpus* to bring

up the body of his infant daughter, alleged to be unlawfully obtained from him."

Why not? If not conferred on the Supreme Court it is not conferred on the Circuit or District Courts by this statute.

2. The object of this section was not to confer upon any of these courts a general authority to issue this writ. It was designed as auxiliary,—"Which may be necessary for the exercise of their respective jurisdictions."

The *scire facias* is a writ of execution, in all cases founded upon a record, and is a necessary incidental power to the exercise of the jurisdiction of any court. So of *habeas corpus*, without which power the court would not be able even to protect suitors or witnesses attending court from a writ, &c., &c.

3. That part of the section conferring the power upon the judges in vacation to issue the writ "for the purpose of inquiring into the cause of commitment," as does the proviso, indicates that reference was only had to confinement under a United States process, or "under color of authority of the United States."

31 Car. 1, ch. 2, provides,—"That on complaint and request in writing by or on behalf of any person committed and charged with any crime, (unless," &c.), "the chancellor, &c., shall award a writ of *habeas corpus*," &c.

The powers of the section had doubtless reference to the English statute, and to confer a limited and not general authority.

*114] *The decisions of the United States courts in relation to writs of mandamus are entirely analogous. They are both prerogative writs, and the defining and limiting the power to issue writs of *habeas corpus* by statute restricts them more than the others.

1 Kent Com., 294.—"It has been decided that Congress has not delegated the exercise of judicial power to the Circuit Court but in certain specified cases. The eleventh section of the judicial act of 1789, giving jurisdiction to the Circuit Court, has not covered the whole ground of the constitution, and these courts cannot, for instance, issue a mandamus but in those cases in which it may be necessary to the exercise of their jurisdiction."

McIntire v. *Wood*, 7 Cranch, 504; *McClurg* v. *Silliman*, 6 Wheat., 598; *Kendall* v. *United States*, 12 Pet., 524-618.

If this is considered one of "the other writs not specified by statute" (§ 14, judiciary act), the term is very properly used,—"necessary for the exercise of their respective juris-

dictions," giving a judicial construction to the meaning of the latter term.

Ex parte Colura, 1 Wash. C. C., 232, marg. note.—"The courts of the United States and the justices thereof are only authorized to issue writs of *habeas corpus* to prisoners in jail under color of the authority of the United States, or committed by courts of the United States, or required to testify in a case depending in a court of the United States."

"The jurisdiction of the courts of the United States is limited; and the inferior courts can exercise it only in cases in which it is conferred by act of Congress."

United States v. *French*, 1 Gall., 1, marg. note.—"The Circuit Court has no authority to issue a *habeas corpus* for the purpose of surrendering a principal in discharge of his bail, when the principal is confined in jail merely under process of a State court."

Per curiam. "We have no authority in this case to issue a *habeas corpus*. The authority given by the judicial act of 1789, chap. 20, § 14, is confined to cases where the party is in custody under color of process under authority of the United States, or is committed for trial before some court of the United States, or is necessary to be brought into court to testify."

N. B. The party in this case was confined under a penal law of Congress (2 Statutes at Large, 506), in which State courts have, by repeated decision, no jurisdiction.

In all the following cases *habeas corpus* was issued, where the party was confined under color of process of the United States, and although any other exercise of the power was not in express terms denied, yet in a number of them the court proceed upon the assumption of its being so limited, and in no instance form a contrary opinion. *Ex parte Wilson*, 6 Cranch, 52; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Randolph*, 2 Brock., 476, 477; 3 Dall., 17; 4 Id., 412; 3 Cranch, 447; 4 Id., 75; 3 Pet., *201; 9 Id., 704; 1 Mason, 71; 2 Brock., 6, 447; 1 Wash., 277. The case in 3 [*115
Mason, 482, of *United States* v. *Green*, the only case where granted and point not then raised.

3. Although in numerous decisions infants are doubtless under the control of courts of law as to their custody, and courts having jurisdiction may issue writs of *habeas corpus*, yet the courts, representing the sovereign power of the State, adopt the course which they may deem for the benefit of the child at their discretion. It is an extension of the original purposes of the writ, and not contemplated by the powers of

the judicial act, nor consistent with the limited authority of the general government.

DeManneville v. *DeManneville*, 10 Ves., 52–66, Ld. Chan. in conclusion, p. 66.—"I must either give the child to the father, when I know not what he proposes to do if it remain with him; or to the mother, to which upon some principles there is great objection; or I must take some middle course; and I shall take care that the intercourse of both father and mother with the child, so far as is consistent with its happiness, shall be unrestrained." Ordered that the child should not be removed out of jurisdiction.

King v. *Grenhill*, 4 Ad. & E., 624.—"Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house, or into contact with his children, and does not intend to do so." Marg. note.

The general government is one of defined and limited powers. It is the design of the constitution that the judicial should be co-extensive with the legislative authority, but not to exceed it. These powers are comparatively free and well defined, and are exceptions to the authority residing in the State, and subject to their judicial authority. The great mass of authority remains in the States, and is governed by and dependent upon State authority.

All questions arising out of the domestic relations are peculiarly and appropriately within the province of the State governments; and the court will be slow in countenancing any principle, or giving any construction of the constitution and laws that shall decree to itself this branch of local authority.

In relation to husband and wife, parent and child, the various and diversified and vexed questions that arise concerning the custody of children, the court will not be anxious by any doubtful construction to enlarge their jurisdiction. The court exercising that jurisdiction cannot dispose of the various questions involved, as in ordinary questions of pecuniary value, by a judgment and execution. They must enter the nursery and inquire as to the character and habits of the respective parents,—the wishes of the child,—and make such orders from time to time as may be required by the ever changing circumstances of all the parties concerned. What
*116] portion of these *questions would this court have to take charge of, and what new set of rules or officers for these wards of the court?

If the writ of error is sustained, and the case remanded,

and the Circuit Court ordered to issue the writ, it will be the duty of the Circuit Court to make such orders as will be for the benefit of the child, and vary them from time to time. Can these be reviewed by this court?

This proceeding is really a question as to the custody of an infant child, and of guardianship on the part of the courts of the United States; and although called *habeas corpus ad subjiciendum*, it is so by fiction of law. It is not a question of the personal liberty of the child, but of its custody and nurture. It is not in substance at all that great writ of English or American liberty, but a great extension, if not entire perversion, of its object.

Master and Servant.—Are the relative rights and duties of the master and servant a matter of local or national jurisdiction?

Suppose a servant from Kentucky flies to Ohio. His master pursues him and takes him. He is ordered to bring his writ of *habeas corpus* before the Circuit Court. The court denies the application. He brings his writ of error to this court. Has the court jurisdiction? Will it order the Circuit Court to issue the writ? If not, why not?

If in obedience to the order the Circuit Court issues the writ, and refuses to discharge the person, a writ of error lies to this court.

Petition for Divorce.—It is not embraced in the tenth section of the judicial act of 1789.

1. The power of the court to issue the writ at all is given by statute, in the fourteenth section, and must be limited to the purposes, and by the restrictions in the act.

2. It is not a "suit of a civil nature at common law or in equity, when the matter in dispute exceeds the sum or value of $500."

3. The phraseology in the twenty-fifth section is different, —"in any suit." The object is different, to have the power of the United States, in relation to treaties, constitution, laws, or authority of United States. The term is used in its most general sense,—civil, criminal, equity, and all others. The object is to control the decisions of State courts on national questions. See *Holmes* v. *Jennison*, 14 Pet., 2.

III. The court has not jurisdiction of the parties. One of the defendants in error, Mrs. Barry, has no domicil in the United States, but follows that of her husband.

1. In order to give the court jurisdiction *all* the defendants must be liable to be sued before the United States court. 1 Kent, Com., 324; *Strawbridge* v. *Curtiss*, 3 Cranch, 267.

2. "A married woman follows the domicil of her husband.

This results from the general principle, that a person who is *117] under *the power and authority of another possesses no right to choose a domicil." Story, Con. of L., 45, and authorities there cited.

Greene v. *Greene*, 11 Pick. (Mass.), 410.—"The domicil of the wife follows that of the husband." 14 Pick. (Mass.), 181.

So in *settlement cases*.—"A wife and minor child can have no settlement separate from the husband and father." *Shirley* v. *Watertown; Sears* v. *City of Boston*, 1 Met. (Mass.), 242, absent a number of years, &c. The petitioner himself declares (p. 4), "That the said Eliza Ann, by her intermarriage with your petitioner, became a denizen of the British empire, and entitled to inherit within the said realm as though she were a British subject. All the privileges, advantages, and immunities, being supervenient upon those of her *domicilium originis* as an American citizen." If so, can any thing but a divorce or death deprive her of these rights? He speaks of her going "to her own proper home at Liverpool"; and, p. 6, that his wife should "return to her own proper home and duties."

3. The Supreme Court have their appellate jurisdiction only in those cases in which it is affirmatively given by the acts of Congress, and no such appellate jurisdiction is given in this case. *Wiscart* v. *Dauchy*, 3 Dall., 321; *Clarke* v. *Bazadone*, 1 Cranch, 212; *Court of United States Territory northwest of the Ohio, United States* v. *More*, 3 Cranch, 159, criminal case from Circuit Court of District of Columbia; *Ex parte Kearney*, 7 Wheat., 38. No appeal from Circuit Court in criminal cases.

IV. The Supreme Court has not jurisdiction, as the matter in dispute does not amount to $2,000. *Ex parte Bradstreet*, 7 Pet., 634. "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States has been to allow the value to be given in evidence."

In this case evidence was offered in the court below between Martha Bradstreet and Apollos Cooper, a writ of right of the value of the land in dispute; but that value not appearing on the record the court dismissed the proceedings. Mandamus issued to reinstate the case.

Per Marshall, C. J., p. 647.—"Every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the

matter in dispute exceeds the sum or value of two thousand dollars.

"In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court and of the courts of the United States is to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the District Court had a right to give the *value of the property demanded in evidence at or before the trial of the cause," &c. [*118

United States v. *More*, 3 Cranch, 172, *per* Marshall, C. J., p. 172.—"But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation under the constitution, prohibiting the exercise of other powers than those described." "Thus the appellate jurisdiction of this court from the judgments of the Circuit Court is described affirmatively; no restrictive words are used. Yet it has never been supposed that a decision of a Circuit Court could be reviewed, unless the matter in dispute should exceed the value of two thousand dollars. There are no words in the act restraining the Supreme Court from taking cognizance of causes under that sum; their jurisdiction is only limited by the legislative declaration, that they may reëxamine the decisions of the Circuit Court when the matter in dispute exceeds the value of two thousand dollars." The words "matter in dispute" seem appropriated to civil cases, when the subject in contest has a value beyond the sum mentioned in the act.

Wilson v. *Daniel*, 3 Dall., 401.—"The verdict or judgment does not ascertain the value of the matter in dispute," &c.

All the judges, in giving their opinions, proceed upon the ground that the case must be one of pecuniary value.

United States v. *Brig Union*, 4 Cranch, 216, marg. note.—"It is incumbent on the plaintiff in error to show that this court has jurisdiction of the cause." "This court will permit *vivâ voce* testimony to be given of the value of the matter in dispute."

Gordon v. *Ogden*, 3 Pet., 33. The plaintiff claimed two thousand dollars; had judgment for less; writ of error by defendant below; court held no jurisdiction; *aliter* where writ in such case is by plaintiff below; action for violating a patent.

Ritchie v. *Mauro & Forrest*, 2 Pet., 244, *per* Marshall, C. J., of Supreme Court, p. 244.—"In the present case the

majority of the court are of opinion that the court has no jurisdiction of the case; the value in controversy not being sufficient to entitle the party by law to claim an appeal. The value is not the value of the minor's estate, but the value of the office of guardian. The present is a controversy merely between persons claiming adversely as guardians, having no distinct interest of their own. The office of guardian is of no value, except so far as it affords a compensation for labor and services, thereafter to be earned."

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought up by writ of error to the Circuit Court for the Southern District of New York.

It appears from the record that the plaintiff in error is a subject of the queen of Great Britain, and resides in Liver-
*119] pool, Nova Scotia. *In April, 1835, he intermarried with Eliza Ann Barry, one of the defendants in error, who is the daughter of the late Thomas B. Mercein, of the city of New York; and upon some unfortunate disagreement between the plaintiff in error and his wife, a separation took place in the year 1838, and they have ever since lived apart; she residing in New York, and he at Liverpool. They have two children, a son and a daughter. The son is with his father; and the daughter, now about ten years of age, is with her mother.

The plaintiff in error filed his petition in the Circuit Court of the United States for the Southern District of New York, at April term, 1844, stating that his wife had separated from him without any justifiable cause and refused to return, and unlawfully detained and kept from him his daughter; that she was harboured, countenanced, and encouraged in these unlawful proceedings by her mother, Mary Mercein, the other defendant in error; and prayed that the writ of *habeas corpus ad subjiciendum* might issue, commanding the said Mary Mercein and Eliza Ann Barry to have the body of his daughter, Mary Mercein Barry, by them imprisoned and detained, with the time and cause of such imprisonment or detention, before the Circuit Court to do and receive what should then and there be considered of the said Mary Mercein Barry. The petition was supported by the usual affidavits and proofs. The case came on to be heard in the Circuit Court, and it was then ordered and adjudged by the court that the petition be disallowed, and the writ of *habeas corpus* denied. It is upon this judgment that the writ of error is brought.

A motion has been made to dismiss the writ of error for the want of jurisdiction in this court. In the argument upon this motion, the power of the Circuit Court to award the writ of *habeas corpus*, in a case like this, has also been very fully discussed at the bar. But this question is not before us, unless we have power by writ of error to reëxamine the judgment given by the Circuit Court, and to affirm or reverse it, as we may find it to be correct or otherwise. And the question therefore to be first decided is, whether a writ of error will lie upon the judgment of the Circuit Court in this case refusing to grant the writ of *habeas corpus*. It is an important question; deeply interesting to the parties concerned; and we have given to it a full and mature consideration.

By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes.[1]

The act of 1789, ch. 20, § 22, provides that final judgments and decrees in civil actions and suits in equity in a Circuit Court, when the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be reëxamined and reversed or *affirmed in the Supreme Court. And it is by this law only that we are authorized to reëxamine any judgment in a Circuit Court by writ of error. [*120

Before we speak more particularly of the construction of this section, it may be proper to notice the difference between the provisions contained in it, and those of the twenty-fifth section, in the same act of Congress, which gives the appellate power over the judgments of the State courts. In the latter case, the right to reëxamine is not made to depend on the money value of the thing in controversy, but upon the character of the right in dispute, and the judgment which the State court has pronounced upon it; and it is altogether immaterial whether the right in controversy can or cannot be measured by a money standard.

But in the twenty-second section, which is the one now under consideration, the provision is otherwise; and in order to give this court jurisdiction to reëxamine the judgment of a Circuit Court of the United States, the judgment or decree must not only be a final one, in a civil action or suit in equity,

[1] Relied on, *in dissenting opinion*, *Daniels* v. *Railroad Co.*, 3 Wall., 254, *Ex parte Bradley*, 7 Wall., 384. Cited. *United States* v. *Young*, 4 Otto, 259.

but the matter in dispute must exceed the sum or value of two thousand dollars, exclusive of costs. And in order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.

In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute. And it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.

The question for this court to decide is, whether a controversy of this character can, by a fair and reasonable construction, be regarded as within the provisions of the twenty-second section of the act of 1789. Is it one of those cases in which we are authorized to reëxamine the decision of a Circuit Court of the United States, and affirm or reverse its judgment? We think not. The words of the act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law, which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor indeed is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the Circuit Court. And since this court can *121] *exercise no appellate power unless it is conferred by act of Congress, the writ of error in this case must be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed for the want of jurisdiction.