Ex parte Burford.

Commitment.

A warrant of commitment by justices of the peace, must state a good cause certain, supported by oath.[1]

Ex parte Burford, 1 Cr. C. C. 276, reversed.

John Atkins Burford, a prisoner confined in the jail of the county of Alexandria, in the district of Columbia, petitioned this court for a *habeas corpus*, to inquire into the cause of his commitment, alleging that he was confined under and by color of process of the United States, and praying for a *certiorari* to the clerk of the circuit court of the district of Columbia, for the county of Washington, to certify the record by which his cause of commitment might be examined, and its legality investigated. To the petition was annexed a copy of his commitment, certified by the jailer of Alexandria county.

Hiort, for the petitioner, observed, that he was aware of the decision of this court in the case of *Marbury* v. *Madison* (1 Cr. 137), that a *mandamus* would not lie in this court, when it operated as an original process; but there is a vast difference between a *mandamus* and a writ of *habeas corpus*. The former is a high prerogative writ, issuing at the discretion of the court, but this is a writ of right, and cannot be refused. The constitution of the United States, Art. I. § 9, declares, "that it shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

By the 14th section of the judiciary act of 1789 (1 U. S. Stat. 81), it is enacted, "that all the before-mentioned courts of the United States" (including the supreme court) "shall have power to issue writs of *scire facias* **habeas corpus*, and all other writs," &c. "And that either of the [*449 justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment." If a single justice of this court has the power, it would be a strange construction of the law, and of the constitution, to say that the whole court cannot exercise the same power.

The reason why this court would not exercise its appellate jurisdiction in a criminal case, was stated in the case of *United States* v. *More* (*ante*, p. 159), to be, because no mode of exercising it had been appointed by law, the writ of error extending only to civil cases. But if this is an exercise of its appellate jurisdiction, the mode by *habeas corpus* is expressly provided by the statute for that purpose.

March 4th, 1806. Marshall, Ch. J.—There is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favor of liberty, was willing to grant the *habeas corpus*. But the case of *United States* v. *Hamilton*, 3 Dall. 17, is decisive. It was there determined, that this court could grant a *habeas corpus*; therefore, let the writ issue, returnable immediately, together with a *certiorari*, as prayed.

Upon the return of the *habeas corpus* and *certiorari*, it appeared, that on the 28th of December 1805, Burford was committed to the jail of Alex-

[1] Ex parte Bennett, 2 Cr. C. C. 612.

andria county, by a warrant under the hands and seals of Jonah Thompson, and ten other justices of the peace for that county; which warrant was in the following words:

Alexandria County, ss.

Whereas, John A. Burford, of the county aforesaid, shopkeeper, has been brought before a meeting of many of the justices of the peace for the said county, and by them was required to find sufficient sureties, to be bound *450] *with him in a recognisance, himself in the sum of four thousand dollars, and securities for the like sum, for his good behavior towards the citizens of the United States, and their property; and whereas, the said John A. Burford hath failed or refused to find such sureties; these are, therefore, in the name of the United States, to command you, the said constables, forthwith to convey the said John A. Burford to the common jail of the said county, and to deliver him to the keeper thereof, together with this precept; and we do, in the name of the said United States, hereby command you, the said keeper, to receive the said John A. Burford into your custody, in the said jail, and him there safely keep, until he shall find such sureties as aforesaid, or be otherwise discharged by due course of law. Given under our hands and seals, this 28th day of December 1805.

To any constable, and the jailer of the county of Alexandria.

On the 4th of January 1806, the circuit court of the district of Columbia, sitting in the county of Washington, upon the petition of Burford, granted a *habeas corpus*, and upon the return, the marshal certified, in addition to the above warrant of commitment, that Burford was apprehended by warrant, under the hands and seals of Jonah Thompson, and thirteen other justices of the county of Alexandria, a copy of which he certifies to be on file in his office, and is as follows:

Alexandria County, ss.

The undersigned, justices of the United States, assigned to keep the peace within the said county: To the marshal of the district, and all and singular the constables, and other officers of the said county, Greeting: Forasmuch as we are given to understand, from the information, testimony and complaint of many credible persons, that John A. Burford, of the said county, shopkeeper, is not of good name and fame, nor of honest conversa- *451] tion, but an evil-doer and disturber of the *peace of the United States, so that murder, homicide, strifes, discord and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby. Therefore, on the behalf of the United States, we command you, and every of you, that you omit not, by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach, the body of the said John A. Burford, so that you have him before us, or other justices of the said county, as soon as he can be taken, to find and offer sufficient surety and mainprize for his good behavior towards the said United States, and the citizens thereof, according to the form of the statute in such case made and provided. And this you shall in no wise omit, on the peril that shall ensue thereon: and have you before us this precept. Given under our hands and seals, in the county aforesaid, this 21st day of December 1805.

The circuit court, upon hearing, remanded the prisoner to jail, there to remain until he should enter into a recognisance for his good behavior for one year, himself in the sum of $1000, and sureties in the like sum.

Hiort, for the prisoner, contended, that the commitment was illegal both under the constitution of Virginia, and that of the United States. It does not state a cause certain, supported by oath. By the 10th article of the bill of rights of Virginia, it is declared, that all warrants to seize any person whose offence is not particularly described, and supported by evidence, are grievous and oppressive, and ought not to be granted. By the 6th article of the amendments to the constitution of the United States, it is declared, "that no warrants shall issue, but upon probable cause, supported by oath or affirmation." *By the 8th article, it is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him; and the 10th article declares, that excessive bail shall not be required. [*452

In the present case, the marshal's return, so far as it stated the warrant upon which Burford was arrested and carried before the justices, was perfectly immaterial. He did not complain of that arrest, but of his commitment to prison. The question is, what authority has the jailer to detain him? To ascertain this, we must look to the warrant of commitment only. It is that only which can justify his detention. That warrant states no offence: it does not allege that he was convicted of any crime. It states merely that he had been brought before a meeting of many justices, who had required him to find sureties for his good behavior. It does not charge him, of their own knowledge or suspicion, or upon the oath of any person whomsoever. It does not allege that witnesses were examined in his presence, nor any other matter whatever, which can be the ground of their order to find sureties. If the charge against him was malicious, or grounded on perjury, whom could he sue for the malicious prosecution? or whom could he indict for perjury? There ought to have been a conviction of his being a person of ill fame. The fact ought to have been established by testimony, and the names of the witnesses stated. Boscawen on Convictions, 7, 8, 10, 16, 110; Salk. 181.

But the order was oppressive, inasmuch as it required sureties in the enormous sum of $4000, for his good behavior for life.

If the prisoner had broken jail, it would have been no escape, for the marshal is not answerable, unless a cause certain be contained in the warrant (2 Inst. 52, 53), and the reason given by Blackstone (1 Com. 137), why *the warrant must state the cause of commitment, is, that it may be examined into upon *habeas corpus*. And in vol. 4, p. 256, speaking of the power of a justice to require sureties for good behavior, he says, "But if he commits a man, for want of sureties, he must express the cause thereof, with convenient certainty, and take care that such cause be a good one. *Rudyard's Case*, 2 Vent. 22. [*453

Swann, on the same side, was informed by the court, that he need not say anything as to the original commitment by the justices, but might confine his observations to the recommitment by the circuit court, upon the *habeas corpus*.

He observed, that the circuit court did not reverse nor annul the original proceeding by the magistrates. It only diminished the sum in which bail should be required, and limited its duration to one year. It passed no new judgment, but merely remanded the prisoner; it heard no evidence; it was not a proceeding *de novo;* it gave no judgment; it convicted the prisoner of no offence. He is, therefore, still detained under the authority of the warrant of the justices; and if that is defective, there is no just cause of detainer. But if the remanding by the circuit court, is to be considered as a new commitment, it is still a commitment upon the old ground; and if that was illegal, the order of the circuit court has not cured its illegality.

The Judges of this Court were unanimously of opinion, that the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath. If the circuit court had proceeded *de novo*, perhaps, it might have made a difference. But this court is of opinion, that that court has gone only upon the proceedings before the justices. It has gone so far as to correct two of the errors committed, but the rest remain. If the prisoner is really a person of ill fame, and ought to find sureties for his good behavior, the justices may proceed *de novo*, and take care that their proceedings are regular.

The prisoner is discharged.

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*454] *Hopkirk *v.* Bell.

Statute of limitations.

The treaty of peace between Great Britain and the United States, prevents the operation of the act of limitations of Virginia, upon British debts, contracted before that treaty.[1]

An agent for collecting of debts merely, is not a factor, within the meaning of the 13th section of that act.

This was a case certified from the Circuit Court for the fifth circuit, and Virginia district, in chancery sitting, in which the opinions of the judges (Marshall, Ch. J., and Griffin, District Judge) were opposed, upon the following question: "Whether the act of assembly of Virginia for the limitation of actions, pleaded by the defendant, was, under all the circumstances stated, a bar to the plaintiff's demand, founded on a promissory note given on the 21st day of August 1773?"

The certificate contained the following statement of facts agreed by the parties, viz: That David Bell, the defendant's testator, had considerable dealings with the mercantile house of Alexander Spiers, John Bowman & Co. (of which house the plaintiff was surviving partner), in the then colony of Virginia, by their factors, who resided in that colony, and on the 14th of March 1768, gave his bond to the company for 633*l.* 8*s.* 11½*d.*, conditioned for the payment of 316*l.* 14*s.* 5¾*d.*, on demand. That he also became farther indebted in a balance of 121*l.* 0*s.* 4½*d.* on open account, for dealings afterwards had with the company by their said factors. That on the 21st of August 1773, Henry Bell, the defendant, made his writing or promissory note, under his hand, attested by two witnesses, in the following words, to wit:

[1] Re-affirmed, in 4 Cr. 164; s. p. Dunlop *v.* Alexander, 1 Cr. C. C. 498.