granted to the company, of the amount sold, &c., and prayed that the defendants might account, and that the lands might be charged with the balance of the purchase-money, &c.

The defendants demurred for want of equity in the bill, and the court below sustained the demurrer, and decreed that the bill be dismissed, with costs. But—

THIS COURT, without argument, overruled the demurrer, reversed the decree, and remanded the cause for further proceedings.

---

*75] **Ex parte* BOLLMAN and *Ex parte* SWARTWOUT.

Habeas corpus.—Treason by levying war.—Commitment.—Criminal jurisdiction.

This court has power to issue the writ of *habeas corpus ad subjiciendum.*[1]

To constitute a levying of war, there must be an assemblage of persons, for the purpose of effecting, by force, a treasonable purpose. Enlistment of men to serve against the government, is not sufficient.

When war is levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors.[2]

Any assemblage of men, for the purpose of revolutionizing, by force, the government established by the United States, in any of its territories, although as a step to, or the means of executing, some greater projects, amounts to levying war. The travelling of individuals to the place of rendezvous is not sufficient; but the meeting of particular bodies of men, and their marching from places of partial, to a place of general rendezvous, is such an assemblage as constitutes a levying of war.[3]

A person may be committed for a crime, by one magistrate, upon an affidavit made before another.

A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths.

Quære? Whether, upon a motion to commit a person for treason, an affidavit, stating the substance of a letter in possession of the affiant, be admissible evidence?

The clause of the 8th section of the act of congress, "for the punishment of certain crimes against the United States" (1 U. S. Stat. 113), which provides that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought," applies only to offences committed on the high seas, or in some river, haven, basin or bay, not within the jurisdiction of a particular state, and not to the territories of the United States, where regular courts are established, competent to try those offences.

The word "apprehended," in that clause of the act, does not imply a legal arrest, to the exclusion of a military arrest or seizure.

C. LEE moved for a *habeas corpus* to the marshal of the District of Columbia, to bring up the body of Samuel Swartwout, who had been committed by the Circuit Court of that district, on the charge of treason against the United States; and for a *certiorari* to bring up the record of the commitment, &c.

---

[1] Ex parte Kearney, 7 Whart. 38; Ex parte Watkins, 3 Pet. 193; s. c. 7 Id. 568; Ex parte Milligan, 3 Wall. 2; Ex parte Yerger, 8 Id. 85; Ex parte Lange, 18 Id. 163; Ex parte Virginia, 100 U. S. 339; Ex parte Siebold, Id. 371. See Ex parte Dorr, 3 How. 103; Ex parte Metzger, 5 Id. 176; Ex parte McCardle, 6 Wall. 318.

[2] See Young *v.* United States, 97 U. S. 65; 1 Burr's Trial, 14–16; United States *v.* Greathouse, 2 Abb. U. S. 364.

[3] United States *v.* Greiner, 4 Phila. 396; United States *v.* Greathouse, 2 Abb. U. S. 364.

And on a subsequent day, *Harper* made a similar motion in behalf of Erick Bollman, who had also been committed by the same court on a like charge.(*a*)

The order of the court below, for their commitment, was in these words: "The prisoners, Erick Bollman and Samuel Swartwout, *were brought up to court, in custody of the marshal, *arrested on a charge [*76 of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson and Ensign W. C. Mead, and the court went into further examination of the charge: Whereupon, it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody, until they shall be discharged in due course of law."(*b*)

(*a*) On a former day (February 5), *C. Lee* had made a motion for a *habeas corpus* to a military officer to bring up the body of James Alexander, an attorney-at-law, at New Orleans, who, as it was said, had been seized by an armed force, under the orders of General Wilkinson, and transported to the city of Washington.

CHASE, J., then wished the motion might lie over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.

JOHNSON, J., doubted, whether the power given by the act of congress (1 U. S. Stat. 81), of issuing the writ of *habeas corpus*, was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion, that either of the judges, at his chambers, might issue the writ, although the court collectively could not.

CHASE, J., agreed, that either of the judges might issue the writ, but not out of his peculiar circuit.

MARSHALL, Ch. J.—The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of the court, to have the motion made in a more solemn manner to-morrow, when you may come prepared to take up the whole ground. [But in the meantime, Mr. Alexander was discharged by a judge of the circuit court.]

(*b*) The warrant by which they were brought before the court was as follows:

DISTRICT OF COLUMBIA, to wit:

The United States of America, to the marshal of the district of Columbia, greeting:

Whereas, there is probable cause, supported by the oath of James Wilkinson, William Eaton, James Lowrie Donaldson, William C. Mead and William Wilson, to believe that Erick Bollman, commonly called Doctor Erick Bollman, late of the city [Seal.] of Philadelphia, in the state of Pennsylvania, gentleman, and Samuel Swartwout, late of the city of New York, in the state of New York, gentleman, are guilty of the crime of treason against the United States of America: These are, therefore, in the name of the said United States, to command you, that you take the bodies of the said Erick Bollman and Samuel Swartwout, if they shall be found in the county of Washington, in your said district, and them safely keep, so that you have their bodies before the circuit court of the district of Columbia, for the county of Washington, now sitting at the capitol, in the city of Washington, immediately to answer unto the United States of America of and concerning the charge aforesaid. Hereof fail not, at your peril, and have you then and there this writ. Witness the honorable WILLIAM CRANCH, Esq., Chief Judge of the said court, this 27th day of January 1807. WILLIAM BRENT, Clerk.

Issued 27th day of January 1807.

The oaths referred to in the order for commitment, were affidavits in writing, and were filed in the court below.(*a*)

*77] *C. Lee*, for Swartwout.—Notwithstanding the decisions of this court in *Hamilton's Case*, 3 Dall. 17, and in *Burford's Case*, 3 Cr. 448, we are now called upon to show that this court has power to issue a writ of *habeas corpus*.

By the constitution of the United States, Art. III., § 2, the grant of jurisdiction to the courts of the United States is general, and extends to all cases arising under the laws of the United States. This court has either original or appellate jurisdiction of every case, with such exceptions and under such regulations as congress has made or shall make. If congress has not excepted any case, then it has cognisance of the whole. The appellate jurisdiction given by the constitution to this court includes criminal as well as civil cases, and no act of congress has taken it away. This court derives its power and its jurisdiction, not from a statute, but from the constitution itself. No legislative act is necessary to give powers to this court. It is independent of the legislature; and in all the late discussions upon the question of putting down courts, it was admitted on all hands, that the legislature could not destroy the supreme court.

But if this court has no criminal jurisdiction to hear and determine, yet they may have a criminal jurisdiction to a certain extent, viz., to inquire into the cause of commitment and admit to bail. This court has no original jurisdiction, except in certain cases; yet it has power to issue a *mandamus* in cases in which it has no appellate jurisdiction by writ or error or appeal, and will issue a prohibition, even in a criminal case, if a circuit court should undertake to try it in a state in which the crime was not committed. So also, if a district court should be proceeding upon a matter out of its jurisdiction, this court would grant a prohibition.

By the judiciary act, § 14 (U. S. Stat. 113), "All the before-mentioned courts" (and the supreme court was the court last mentioned in the preceding section) "shall have power to issue writs of *scire facias*, *habeas corpus*,

*78] *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 either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment: provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

It has been suggested, that the words "and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," forbid the issuing of a *habeas corpus*, but in a case where it is necessary for the exercise of the court's jurisdiction. But the words "necessary," &c., apply only to the "other writs not specially provided for."

(*a*) For these affidavits, see Appendix, note A.

In order to restrict in some degree the general expression "all other writs," the subsequent words are used. The writ of *habeas corpus* was particularly named, because it would not (in all cases where it ought to be granted) come under the general denomination of writs necessary for the exercise of the jurisdiction of the court issuing it.

But admitting for argument, that a writ of *habeas corpus* cannot issue but where it is necessary for the exercise of the jurisdiction of the court issuing it, yet the term "jurisdiction" means the whole jurisdiction given to the court; and as this court has, by the constitution, jurisdiction in criminal cases, which jurisdiction is not taken away by any statute, it is a writ necessary for the exercise of its jurisdiction. Again, by the 33d section of the same act, "upon arrests in criminal cases, where the punishment may be death, bail 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 exercise their discretion therein, regarding the nature *and circumstances of the offence, and of the evidence, and the usages of law." [*79
By this section, the supreme court has jurisdiction to admit a prisoner to bail, in criminal cases punishable with death, and for that purpose, to examine into the nature and circumstances of the offence, and of the evidence. For the exercise of this jurisdiction, the writ of *habeas corpus* is necessary: there is no other writ, "agreeable to the usages of law," which will answer the purpose.

It is doubtful, whether a judge of this court can issue the writ, while the court is sitting, and in a district in which he has no authority to act as a circuit judge.

If it be said, that the writ can only issue, where it is in exercise of appellate jurisdiction, we say, it is appellate jurisdiction which we call upon this court to exercise. The court below has made an illegal and erroneous order, and we appeal in this way, and pray this court to correct the error.

Rodney (Attorney-General) declined arguing the point on behalf of the United States.

Harper, for Bollman.—There are two general considerations: 1. Whether this court has the power generally of issuing the writ of *habeas corpus ad subjiciendum?* 2. If it has the power, generally, whether it extends to commitments by the circuit court?

1. The general power of issuing this great remedial writ, is incident to this court, as a supreme court of record. It is a power given to such a court by the common law. Every court possesses necessarily certain incidental powers as a court: this is proved by every day's practice. If this court possessed no powers but those given by statute, it could not protect itself from insult and outrage: it could not enforce obedience to its immediate orders: it could not imprison for contempts in its presence: it could not compel the attendance of a witness, nor oblige him to testify: it could not compel *the attendance of jurors, in cases where it has original cog- [*80
nisance, nor punish them for improper conduct. These powers are not given by the constitution, nor by statute, but flow from the common law. This question is not connected with another, much agitated in this country, but little understood, viz., whether the courts of the United States have a common-law jurisdiction to punish common-law offences against the govern-

ment of the United States. The power to punish offences against the government, is not necessarily incident to a court. But the power of issuing writs of *habeas corpus*, for the purpose of relieving from illegal imprisonment, is one of those inherent powers, bestowed by the law upon every superior court of record, as incidental to its nature, for the protection of the citizen.

It being clear, then, that incidental powers belong to this, in common with every other court, where can we look for the definition, enumeration and extent of those powers, but to the common law; to that code from whence we derive all our legal definitions, terms and ideas, and which forms the *substratum* of all our judicial systems, of all our legislative and constitutional provisions. It is not possible, to move a single step in any judicial or legislative proceeding, or to execute any part of our statutes, or of our constitution, without having recourse to the common law. The constitution uses, for instance, the terms "trial by jury" and "*habeas corpus*." How do we ascertain what is meant by these terms? By a reference to the common law. This court has power, in some cases, to summon jurors, and examine witnesses. If an objection be made to the competence of a witness, or a juror be challenged, how do you proceed to ascertain the competence of the witness or the juror? You look into the common law. The common law, in short, forms an essential part of all our ideas. It informs us that the power of issuing the writ of *habeas corpus* belongs incidentally to every superior court of record; that it is part of their inherent rights and duties, thus to watch over and protect the liberty of the individual.

Accordingly, we find, that the court of common pleas, in England, though possessing no criminal jurisdiction *of any kind, original or appellate, has power to issue this writ of *habeas corpus*. This power it possessed, *81]
by the common law, as an incident to its existence, before it was expressly given by the *habeas corpus* act. This appears from *Bushell's Case*, reported in Sir Thomas Jones 18, and stated in *Wood's Case*, 3 Wils. 175, by the Chief Justice, in delivering the opinion of the court. *Bushell's Case* was shortly this: A person was indicted at the Old Bailey, in London, for holding an unlawful conventicle. The jury acquitted him, contrary to the direction of the court on the law. For this, some of the jurors, and Bushell among the rest, were fined and imprisoned by the court, at the Old Bailey. Bushell then moved the court of common pleas for a writ of *habeas corpus*, which, after solemn argument and consideration, was granted by three judges against one. Bushell was brought up, and the cause of his commitment appearing insufficient, he was discharged. This took place before the *habeas corpus* act was passed, and is a conclusive authority in favor of the doctrine for which we contend. *Wood's Case*, 3 Wils. 175, and 3 Bac. Abr. 3, are clear to the same point.

Whence does the court of common pleas derive this power? Not from its criminal jurisdiction; for it has none. Not from any statute; for when *Bushell's Case* was decided, there was no statute on the subject. Not from any idea that such a power is necessary for the exercise of its ordinary functions; for no such necessity exists, or has ever been supposed to exist. But from the great protective principle of the common law, which, in favor of liberty, gives this power to every superior court of record, as incidental to its existence.

The court of chancery in England possesses the same power, by the com-

mon law, as appears from 3 Bac. Abr. 3. This is a still stronger illustration of the principle, for the court of chancery is still further removed, if possible, than the court of common pleas, from all criminal jurisdiction, still more exempt from the necessity of such a power for the exercise of its peculiar functions.

The court of exchequer also, as appears from the same authorities, though wholly destitute of criminal jurisdiction, *possesses the power of relieving, by *habeas corpus*, from illegal restraint. [*82

Hence, it appears, that all the superior courts of record, in England, are invested, by the common law, with this beneficial power, as incident to their existence. The reason assigned for it in the English law-books is, that the king has always a right to know, and by means of these courts to inquire, what has become of his subjects. That is, that he is bound to protect the personal liberty of his people, and that these courts are the instruments which the law has furnished him for discharging his high duty with effect.

It may then be asked, whether the same reasons do not apply to our situation, and to this court? Have the United States, in their collective capacity, as sovereign, less right to know what has become of their citizens, than the king or government of England to inquire into the situation of his subjects? Are they under an obligation less strong, to protect individual liberty? Have not the people as good a right as those of England, to the aid of a high and responsible court for the protection of their persons? Is our situation less advantageous in this respect than that of the English people? Or have we no need of a tribunal, for such purposes, raised by its rank in the government, by its independence, by the character of those who compose it, above the dread of power, above the seductions of hope and the influence of fear, above the sphere of party passions, factious views and popular delusion? Of a tribunal whose members, having attained almost all that the constitution of their country permits them to aspire to, are exempted, so far as the imperfection of our nature allows us to be exempted, from all those sinister influences that blind and swerve the judgments of men—have nothing to hope, and nothing to fear, except from their own consciences, the opinion of the public, and the awful judgment of posterity? It is in the hands of such a tribunal alone, that in times of faction or oppression, the liberty of the citizen can be safe. Such a tribunal has the constitution created in this court, and can it be imagined, that this wise and beneficent constitution intended to deny to the citizens the valuable privilege *of resorting to this court for the protection of their dearest rights? [*83

On this ground alone, the question might be safely rested; but there is another, not stronger, indeed, but perhaps, less liable to question. Congress has expressly given this power to this court, by the 14th section of the act of 24th September 1789, commonly called the judiciary act. This section, according to its true grammatical construction, and its apparent intent, contains two distinct provisions. The first relates to writs of *scire facias* and *habeas corpus;* the second, to such other writs as the court might find necessary for the exercise of their jurisdiction. As to writs of *scire facias* and *habeas corpus*, which are of the most frequent and the most beneficial use, congress seems to have thought proper to make a specific and positive provision. It was clearly and obviously necessary, that such writs should be

issued, not merely to aid the court in the exercise of its ordinary jurisdiction, but for the general purposes of justice and protection. The authority, therefore, to issue these writs, is positive and absolute; and not dependent on the consideration, whether they might be necessary for the ordinary jurisdiction of the courts. To render them dependent on that consideration, would have been to deprive the courts of many of the most beneficial and important powers which such courts usually possess.

But the legislature foresaw, that many other writs might, in the course of proceedings, be found necessary for enabling the courts to exercise their ordinary jurisdiction, such as *subpœnas*, writs of *venire facias*, *certiorari*, *fieri facias*, and many others known to our law. To attempt a specific enumeration of these writs might have been productive of inconvenience; for if any had been omitted, there would have been doubts of the power to issue them. Congress, therefore, instead of a specific enumeration of them, wisely chose to employ a general description. This description is contained in the words, "all other writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

*84] *The true grammatical construction of the sentence accords with this construction. The words of restriction or description ("which may be necessary for the exercise of their respective jurisdictions," &c.) stand here as a relative, and must refer to the next antecedent. There are two antecedents: 1st. "Writs of *scire facias* and *habeas corpus*;" and 2d. "All other writs." The second is the next antecedent, to which, of course, the relative terms "which may be necessary," &c., must relate and be confined. Those words, therefore, cannot, either in grammatical construction, or according to the plain object of the legislature, be considered as restricting the grant of power in the first part of the sentence; but merely as explaining the extent of the power given in the second part.

It is clear, then, that this section bestows on this court the power to grant writs of *habeas corpus*, without restriction. Does this power extend to the application now before the court? The term *habeas corpus* is a generic term, and includes all kinds of writs of *habeas corpus*; as well the writ *ad subjiciendum*, as *ad testificandum*, or *cum causâ*, &c. But the 33d section of the same act must remove all doubt upon that point; for when it gives this court power to admit to bail, in cases punishable with death, and commands this court to use their "discretion therein, regarding the nature and circumstances of the offence and of the evidence," it takes it for granted, that the prisoner is to be brought before the court, for the purpose of inquiring into those circumstances. If this section does not give the power, it shows, at least, that the legislature considered it as given before by the 14th section. Again, the latter part of the 14th section gives to each of the justices of this court, and of the district courts, the power for which we contend. It cannot be presumed, that congress meant to give each judge singly, a power which it denied to the whole court. That it confided more in the individual members of the court than in the court itself. That it considered the weight, dignity, character and independence

*85] of each individual *member, as a more firm barrier against oppression than those of the tribunal itself, sitting for the exercise of the highest judicial functions known to our law. This part of the statute is re-

medial and beneficial to the subject, and it is a sound maxim of law, that such statutes are to be construed liberally, in favor of liberty.

Considering it as settled, that congress intended to give this court the power to issue writs of *habeas corpus ad subjiciendum*, the next question is, whether congress had authority, by the constitution, to confer that power? The authority of congress must be tested by the constitution, and if they should appear to this court to have exceeded the limits there prescribed, this court must consider their act void. The power of the judiciary to collate an act of congress with the constitution, when it comes judicially before them, and of declaring it void, if against the constitution, is one of the best barriers against oppression, in the fluctuations of faction, and in those times of party violence which necessarily result from the operation of the human passions, in a popular government. In the violence of those political storms, which the history of the human race warns us to expect, this shelter may indeed be found insufficient;[1] but weak as it may be, it is our best hope, and it is the part of patriotism, to uphold and strengthen it to the utmost. But it is a power of a delicacy inferior only to its importance; and ought to be exercised with the soundest discretion, and to be reserved for the clearest and the greatest occasions.

The question whether congress could confer upon this court the power of issuing the writ of *habeas corpus ad subjiciendum*, depends upon another question, viz., whether this power or jurisdiction be in its nature original or appellate. The original jurisdiction of this court being limited to certain specified cases, of which this is not one, it follows, that if the issuing such a writ of *habeas corpus* be an exercise of original jurisdiction, *the power to issue it cannot be conferred on, or exercised by, this court. [*86

This principle was established by the case of *Marbury* v. *Madison* (1 Cr. 175), where the court said, that "to enable this court to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms; and that if it be the will of the legislature, that a *mandamus* should be used for that purpose, that will must be obeyed. This is true. Yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is in effect the same as to sustain an original action for that paper; and therefore, seems not to belong to appellate, but to original, jurisdiction." This passage needs no comment. The criterion which distinguishes appellate from original jurisdiction is, that it revises and corrects the decisions of another tribunal; and a *mandamus* may be used, when it is for the accomplishment of such a purpose.

The object of the *habeas corpus* now applied for, is to revise and correct the proceedings of the court below (under whose orders the prisoners stand committed), so far as respects the legality of such commitment. If that court had given judgment against the applicants in the sum of $100, the

[1] See Ex parte Merryman, Taney's Dec. 246; Ex parte Winder, 2 Cliff. 89.

power to revise that judgment would have been appellate, and might have been given by congress to this court. From a decision which might take a few dollars from their pockets, they might be relieved. Shall the relief be rendered impossible, because the decision deprives them of all that can distinguish a freeman from the most abject slave, of all that can render life desirable?

If the question, respecting the power of this court, under the constitution and the act of congress, if not *under the common law, to issue the *87] writ of *habeas corpus ad subjiciendum*, were still open, it ought, on these principles and authorities, to be decided in our favor: but it is not open. It has been twice solemnly adjudged in this court. First, in the *Case of Hamilton*, 3 Dall. 17, not long after the court was organized; and very recently in the *Case of Burford*. (1 Cr. 448.) We contend, that the case is settled by these decisions, and that it is no longer a question whether this court has the power which it is now called upon to exercise. The exercise of this power, the benefit of these decisions, the protection of the law thus established, we claim as a matter of right, which this honorable court cannot refuse.

Shall it be said, that no part of our law is fixed and settled, except what is positively and expressly enacted by statute? On the contrary, is it not certain, that by far the greatest portion of that law on which our property, our lives and our reputation depend, rests solely on the decisions of courts? Shall it be said, that all this important and extensive branch of the law is uncertain and fluctuating, dependent on the ever-varying opinions and passions of men, and liable to change with every change of times and circumstances? Shall it be said, that each individual judge may rightfully disregard the decisions of the court to which he belongs, and set up his own notions, his prejudices, or his caprice, in opposition to their solemn judgment? This is not the principle of our law; this is not the tenure by which we hold our rights and liberties. *Stare decisis* is one of its favorite and most fundamental maxims. It is behind this wise and salutary maxim, that courts and judges love to take refuge, in times and circumstances that might induce them to doubt of themselves, to dread the secret operation of their own passions and prejudices, or those external influences, against which, in the imperfection of our nature, our minds can never be sufficiently guarded. In such times and circumstances, a judge will say to himself, "I know not how far I might be able, in this case, to form an impartial opinion. *88] *I know not how far my judgment may be blinded or misled by my own feelings, or the passions of others, by the circumstances of the moment, or the views and wishes of those with whom I am connected. But here is a precedent established, under circumstances which exclude all possibility of improper bias. This precedent is, therefore, more to be relied on than my judgment; and to this I will adhere, as the best and only means of protecting myself, my own reputation, and the safety of those who are to be affected by my decision, against the danger of those powerful, though imperceptible influences, from which the most upright and enlightened minds cannot be considered as wholly exempt."

There have, indeed, been instances where precedents, destructive to liberty, and shocking to reason and humanity, established in arbitrary and factious times, have been justly disregarded. But when, in times of quiet,

and in cases calculated to excite no improper feeling, precedents have been established in favor of liberty and humanity, they become the most sacred, as well as the most valuable parts of the law, the firmest bulwark for the rights of the citizens, and the surest guardian for the consciences and the reputation of judges. Such are the precedents on which we rely.

The *Case of Hamilton* was decided, soon after the establishment of the government, when little progress had been made in the growth of party passions and interests, and when whatever of political feeling can be supposed to have existed in the court, was against the prisoner. Yet this beneficial power was exerted for his relief. He was brought before this court by *habeas corpus*, and was discharged. The precedent thus established was, by this court, fifteen years afterwards, in the *Case of Burford*, declared to be decisive. The case of Burford was wholly unconnected with political considerations, or party feelings. The application was made on behalf of an obscure individual, strongly suspected, though he could not be legally convicted, of a most odious and atrocious crime. The *abhorrence of his supposed offence, the strong circumstances which [*89 appeared against him, the course of his life, his general character, and the universal belief entertained of his guilt, all combined to excite against him every honest feeling of the human heart. Yet he had the benefit of one of those precedents which we now claim; and in his case, the authority of another and a more solemn decision was added to the doctrine for which we contend.

Again, let it be asked, is not the law to be considered as settled by these repeated decisions? Are we still, as to this most important point, afloat on the troubled ocean of opinion, of feeling, and of prejudice? If so, deplorable indeed is our condition. *Misera est servitus, ubi lex est vaga aut incerta.*

This great principle, *stare decisis*, so fundamental in our law, and so congenial to liberty, is peculiarly important in popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge, under the forms of law and by the agency of the courts, is constant and active.

2. The second head of inquiry is, whether the power to issue writs of *habeas corpus* be restricted by the circumstance of the commitment having been made by the circuit court of the district of Columbia?

Before such a principle is admitted, let us inquire into its possible and even probable effects on the liberties of the people. Is it not manifest, that it would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know, that congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result, that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible, and duties so unimportant, or so odious, as necessarily *and [*90 certainly to exclude every man of character, talents and respectability of every party? Will not such courts, therefore, be necessarily filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of those in power for the moment? Can anthing like independence or integrity be expected from such judges? Will they not act continually under

the influence, not merely of their own party passions and prejudices, but of hope and of fear, those great perverters of the human mind? The precedent is already set, that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary, will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record, by such a tribunal, is to stop the course of the writ of *habeas corpus*, is to shut the mouth of the supreme court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party, which it hates and fears. Does the history of the human passions warrant the conclusion, or the expectation, that such an engine will not be used? We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance. We too are men of like passions, and it behoves us, ere we have reached these fatal extremes, to provide, so far as the imperfection of human nature will permit, against the dangers which have assailed others, and which threaten us. The best mode of making this provision is, to establish salutary maxims, in quiet times, and to adhere to them steadily. Let it be now declared, that there resides in this high tribunal (as respectable as our constitution can make it, and as independent as the nature of our government permits), a power to protect the liberty of the citizen, by the writ of *habeas corpus*, against the enterprises of inferior courts, which may be constituted for the purposes of oppression or revenge, and you place one barrier more around our safety.

*91] *What stubborn maxim of law, what binding authority, requires the admission of a principle so repugnant to all our feelings, and to the spirit of the constitution? On what ground, or reason of law, can it be pretended, that a commitment by the circuit court stops the course of the writ of *habeas corpus?* Is it because the circuit court has competent jurisdiction to commit? This cannot be the reason, for every justice of the peace has competent jurisdiction to commit, and the reason, therefore, if it existed, would destroy the whole effect of the writ of *habeas corpus*. Is it because the circuit court has competent jurisdiction to try the offence? This cannot be the reason, for in *Bushell's Case*, formerly cited from 3 Wils. 175, it appears that a commitment by the sessions at the Old Bailey, a criminal court of very high authority, and which had jurisdiction over the offence, did not prevent the court of common pleas from relieving by *habeas corpus*. So also, by the forest laws in England, in former times, the judge of the forest had jurisdiction for the punishment of offences within the forest; and yet it appears, from 2 Inst. 290, that a person committed by the judge of the forest for such an offence, might be relieved by *habeas corpus* from the superior courts. It is well known, too, that by the laws of England, the king has power to erect courts by special commission, with power to try and punish offences. From *Wood's Case*, 3 Wils. 173, it appears, that a person committed by such commissioners, in a case which they had authority to try, may be relieved by *habeas corpus*. This, therefore, cannot be the reason.

Is it because the circuit court is a court of record? So is the court of *piepoudre*. But can it be imagined, that if that court were to commit a man,

in England, the power of relieving by *habeas corpus* from the superior courts would be thereby taken away? Congress may erect as many inferior courts of record as they please. Can it be imagined, that by instituting such *courts, they can, in effect, suspend the writ of *habeas corpus* indefinitely, and in cases where the suspension is expressly forbidden by the constitution. [*92

This power, moreover, has been shown to be appellate; and it is of the very essence of appellate power, to review the decisions of inferior courts of record. Can it be imagined, that such a decision may be reviewed, where a small amount of property only is affected, and that there is no relief, where it deprives a citizen of his liberty? Between superior courts of record, of equal authority and co-ordinate rank, there may properly be a comity observed, which would prevent them from attempting to interfere with the decisions of each other. Perhaps, in England, the court of common pleas would not attempt to release, by *habeas corpus*, a person committed by the exchequer, or chancery, and *vice versâ*. But this comity cannot exist between superior and inferior courts; and there is no doubt, that the court of king's bench, which is a court superior to the common pleas and the exchequer, would grant a writ of *habeas corpus*, for any person imprisoned by either of those courts for a criminal matter.

But this point does not rest on general reasoning alone, however strong. It has been expressly adjudged by this court. The *Case of Burford*, formerly cited, is a complete authority on this point as well as on the former. *Burford's Case* had been acted on judicially by the circuit court of this district. He stood committed under its decision. That court did not, indeed, commit him in the first instance, but he was brought before it on *habeas corpus;* the order of commitment made by the justices of the peace was altered and modified, and he was committed by a new order from the circuit court. This re-commitment was as complete an adjudication upon the subject, as the commitment in the present case. One was as much a determination on record by the circuit court as the other; and one can, no more than the other, preclude the exercise of this court's power to relieve by *habeas corpus*.

*Again, therefore, we claim the benefit of this decision. We again appeal to the great maxim *stare decisis;* we again deprecate the mischiefs that must ensue, if precedents in favor of liberty, made in times and under circumstances the most favorable to correct decision, should be disregarded in other times, and in situations where the existence of passion, prejudice and improper influence may be dreaded. We deprecate the dangers and mischiefs that must ensue, should the laws, on which our dearest rights depend, be thus left to fluctuate on the ever-varying tide of circumstances and events, and we trust that the protecting power of this high tribunal will now fix this great landmark of the constitution, and will place our liberties, so far as the imperfection of human things can permit, beyond the reach of opinion, of caprice, and of sinister views. [*93

February 13th, 1807, MARSHALL, Ch. J., (*a*) delivered the opinion of the

(*a*) The only judges present when these opinions were given were, MARSHALL, Ch. J., WASHINGTON, JOHNSON and LIVINGSTON, Justices. CUSHING, J., and CHASE, J., were prevented by ill-health from attending.

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

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

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

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

The 14th section of the judiciary act (1 U. S. Stat. 81), has been considered as containing a substantive grant of this power. It is in these words: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment: provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

*95] *The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding. It has been urged, that in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute." This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision, and by the context.[1]

[1] See United States *v.* Williamson, 4 Am. L. Reg. 11; Ex parte Everts, 1 Bond 197.

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*. It has been truly said, that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly —when we say the writ of *habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense, it is used in the constitution.

*The section proceeds to say, that "either of the justices of the supreme court, as well as judges of the district courts, shall have [*96 power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment." It has been argued, that congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled. There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to this court, it is denied to every other court of the United States; the right to grant this important writ is given, in this sentence, to every judge of the circuit or district court, but can neither be exercised by the circuit nor district court. It would be strange, if the judge, sitting on the bench, should be unable to hear a motion for this writ, where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private, receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge, at his chambers, should be suspended during his term, than that it should be exercised only in secret.

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

The doubt which has been raised on this subject may be further explained, by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable *the court to exercise its jurisdiction in causes which it is enabled to decide finally. [*97

The various writs of *habeas corpus*, as stated and accurately defined by Judge Blackstone (3 Bl. Com. 129), are, 1st. The writ of *habeas corpus ad respondendum*, "When a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the pris-

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

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case. The state courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases, the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not inferior courts, because they emanate from a different authority, and are the creatures of a distinct government.[1]

2d. The writ of *habeas corpus ad satisfaciendum*, "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring
*98] him up to *some superior court to charge him with process of execution." This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, &c. "Which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed." This writ might, unquestionably, be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of congress; but the power to bring a person up that he may be tried in the proper jurisdiction, is understood to be the very question now before the court.

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

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law, without the leave of the court? It would not be difficult to demonstrate,

[1] See Norris *v.* Newton, 5 McLean 92; United States *v.* Rector, Id. 174; Veremaitre's Case, 3 Am. L. J. 438; Ex parte Safford, 5 Am. L. Reg. 659; Ex parte McCann, 14 Id. 158; United States *v.* French, 1 Gallis. 1; Ex parte Cabrera, 1 W. C. C. 232.

that the writ of *habeas corpus cum causâ* cannot be the particular writ contemplated by the legislature, in the section under consideration; but it will be sufficient to observe, generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a *state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first [*99 appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power, then, which, on this limited construction, would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It concludes with the following proviso, "That writs of *habeas corpus* shall, in no case, extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts—where the person is necessary to be brought into court to testify. That construction cannot be a fair one, which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

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

But the 33d section throws much light upon this question. It contains these words: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted, but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district *court, who shall exercise their [*100 discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law." The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners, not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If, by the sound construction of the act of congress, the power to award writs of *habeas corpus*, in order to examine into the cause of commitment, is given to this court, it remains to inquire, whether this be a case in which the writ ought to be granted. The only objection is, that the commitment has been made by a court having power to commit and to bail. Against this objection, the argument from the bar has been so conclusive, that nothing can be added to it.

If, then, this were *res integra*, the court would decide in favor of the

motion. But the question is considered as long since decided. The *Case of Hamilton* is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision, the court would not lightly depart. (*United States* v. *Hamilton*, 3 Dall. 17.)

If the act of congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution. In the *mandamus* case (*Marbury* v. *Madison*, 1 Cr. 175), it was decided, that this court would not exercise original jurisdiction, except so far as that jurisdiction was given by the constitution.
*101] But so far as that *case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The 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. But this point also is decided in *Hamilton's Case* and in *Burford's Case.*(*a*)

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.[1]

The motion, therefore, must be granted.

(*a*) At February term 1806, in this court, 3 Cr. 448.

[1] The president has no power to suspend the writ of *habeas corpus*, without an act of congress to authorize it. Ex parte Merryman, Taney's Dec. 246; McCall *v.* McDowell, 1 Deady 233; Ex parte Benedict, 4 West. L. Mo. 449. The writ of *habeas corpus* stands, under the constitution, as it was under the common law, an indefeasible privilege, above the sphere of ordinary legislation. United States *v.* Williamson, 4 Am. L. Reg. 5. It cannot be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. Ex parte Keeler, Hempst. 306. The effect of a suspension of the privilege of the writ of *habeas corpus* is, to confer on the executive the power immemorially exercised by the British Crown, before the passage of the *habeas corpus* act, 31 Car. II. (but which was thenceforth taken away by that statute), namely, the power to arrest, by warrant, for treason in *generality*, or suspicion of treason or treasonable practices, without specially expressing the nature of the treasonable acts charged, as required by the *habeas corpus* act, and to imprison the person so arrested on such warrant, for an indefinite period, without bail or trial. See And. 297, pl. 307; 1 Hallam Const. Hist. 252. In the exercise of such a power, there must be a warrant, and it must be for treasonable practices. A suspension of the *habeas corpus* does not divest the civil courts of the right to inquire into the legality of the detention of a person claimed to have been enlisted into the army, through fraud or duress. Such power is inconsistent with the existence of a free government; it is without precedent to justify it; it is against the spirit of the constitution, and of all the foundations on which it is erected. Binney on Habeas Corpus, part III.

Ex parte Bollman.

JOHNSON, J. (*dissenting.*)—In this case, I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me, to assign the reasons upon which I adopt the opinion that this court has not authority to issue the writ of *habeas corpus* now moved for. The prisoners are in confinement under a commitment ordered by the superior *court of the District of Columbia, upon a charge of [*102
high treason. This motion has for its object their discharge or admission to bail, under an order of this court, as circumstances, upon investigation, shall appear to require. The attorney-general having submitted the case without opposition, I will briefly notice such objections as occur to my mind against the arguments urged by the counsel for the prisoners.

Two questions were presented, to the consideration of the court. 1st Does this court possess the power, generally, of issuing the writ of *habeas corpus?* 2d. Does it retain that power in this case, after the commitment by the circuit court of Columbia?

In support of the affirmative of the first of these questions, two grounds were assumed. 1st. That the power to issue this writ was necessarily incident to this court as the supreme tribunal of the Union. 2d. That it is given by statute, and the right to it has been recognised by precedent.

On the first of these questions, it is not necessary to ponder long; this court has uniformly maintained that it possesses no other jurisdiction or power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given.

Our decision, must, then, rest wholly on the due construction of the constitution and laws of the Union, and the effect of precedent, a subject which certainly presents much scope for close legal inquiry, but very little for the play of a chastened imagination.

The first section of the third article of the constitution vests the judicial power of the United States in one supreme court, and in such inferior courts as the congress *may from time to time establish. The second sec- [*103
tion declares the extent of that power, and distinguishes its jurisdiction into original and appellate. The original jurisdiction of this court is restricted to cases affecting ambassadors or other public ministers, and consuls, and those in which a state shall be a party. In all other cases within the judicial powers of the Union, it can exercise only an appellate jurisdiction. The former it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted or extended. In the latter, its powers are subjected to the will of the legislature of the Union, and it can exercise appellate jurisdiction in no case, unless expressly authorized to do so by the laws of congress. If I understand the case of *Marbury* v. *Madison*, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.

It is incumbent, then, I presume, on the counsel, in order to maintain their motion, to prove that the issuing of this writ is an act within the power of this court, in its original jurisdiction, or that, in its appellate capacity, the power is expressly given by the laws of congress. This it is attempted to do, by the 14th and 33d sections of the judiciary act, and the cases of *Hamilton* and *Burford*, which occurred in this court, the former in

1795, the latter in 1806. How far their position is supported by that act and those cases, will now be the subject of my inquiry.

With a very unnecessary display of energy and pathos, this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of adjudications: uniformity in decisions is often as important as their abstract justice: but I deny, that a court is precluded from the right, or exempted from the necessity, of examining into the correctness or consistency of its *104] own *decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which, in the case of *United States* v. *More* (3 Cr. 159), acknowledged that in the case of *United States* v. *Simms* (1 Ibid. 252), it had exercised a jurisdiction it did not possess. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle, is not law, and in a thousand instances, have such cases been declared so by courts of justice.

The claim of the prisoners, as founded on precedent, stands thus. The case of *Hamilton* was strikingly similar to the present. The prisoner had been committed by order of the district judge, on a charge of high treason. A writ of *habeas corpus* was issued by the supreme court, and the prisoner bailed by their order. The case of *Burford* was also strictly parallel to the present; but the writ in the latter case having been issued expressly on the authority of the former, it is presumed, that it gives no additional force to the claim of the prisoners, but must rest on the strength of the case upon which the court acted. It appears to my mind, that the case of *Hamilton* bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in *Marbury* v. *Madison*. In this case, it was decided, that congress could not vest in the supreme court any original powers beyond those to which this court is restricted by the constitution. That an act of congress vesting in this court the power to issue a writ of *mandamus*, in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional, and void. In the case of *Hamilton*, the court does not assign the reasons on which it founds its decision, but it is fair to presume, that they adopted the idea which appears to have been admitted by the district-attorney in his argument, to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now, a concurrent power in such a case must be an *105] original *power, and the principle in *Marbury* v. *Madison* applies as much to the issuing of a *habeas corpus* in a case of treason, as to the issuing of a *mandamus* in a case not more remote from the original jurisdiction of this court. Having thus disembarrassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the judiciary act above referred to.

It is necessary to premise, that the case of treason is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the judiciary act, so far as it has relation to this case, is in these words: "All the before-mentioned courts (of which this is one) 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." I do not think it material to the opinion I entertain, what construction is given to this sentence. If the power to issue the writs of *scire facias* and *habeas corpus* be not restricted to the cases within the original or appellate jurisdiction of this court, the case of *Marbury* v. *Madison* rejects the clause as unavailing; and if it relate only to cases within their jurisdiction, it does not extend to the case which is now moved for. But it is impossible to give a sensible construction to that clause, without taking the whole together; it consists of but one sentence, intimately connected throughout, and has for its object, the creation of those powers which probably would have vested in the respective courts, without statutory provision, as incident to the exercise of their jurisdiction. To give to this clause the construction contended for by counsel, would be, to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of *scire facias* and *habeas corpus*, without an object or end to be answered by them. This idea is not a little supported by the next succeeding clause, in which a power is vested in the individual judges to issue the writ of *habeas corpus*, expressly for the purpose of inquiring into the cause of commitment. That part of the 33d section of the judiciary act which relates to this subject is in the following words: "And *upon all [*106
arrests in criminal cases, bail shall be admitted, except where the punishment is 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 exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence and usage of law."

On considering this act, it cannot be denied, that if it vests any power at all, it is an original power. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted." I quote the words of the court in the case of *Marbury* v. *Madison*. And so far is this clause from giving a power to revise and correct, that it actually vests in the district judge the same latitude of discretion, by the same words, that it communicates to this court. And without derogating from a respectability which I must feel as deep an interest in maintaining as any member of this court, I must believe, that the district court, or any individual district judge, possesses the same power to revise our decision, that we do to revise theirs; nay, more, for the powers with which they may be vested are not so particularly limited and divided by the constitution as ours are. Should we perform an act which, according to our own principle, we cannot be vested with power to perform, what obligation would any other court or judge be under to respect that act?

There is one mode of construing this clause, which appears to me to remove all ambiguity, and to render every part of it sensible and operative. By the consent of his sovereign, a foreign minister may be subjected to the laws of the state near which he resides. This court may then be called upon to exercise an original criminal jurisdiction. If the power of this court to bail be confined to that one case, *reddendo singula singulis*, if the power of the several courts and individual judges be referred to their respective jurisdictions, all clashing and interference of power ceases, and sufficient means

of redress are still held out to the citizen, if deprived of his liberty; and this surely must have been the intention of the legislature. It never could have
*107] been contemplated, that the mandates of this court *should be borne to the extremities of the states, to convene before them every prisoner who may be committed under the authority of the general government. Let it be remembered, that I am not disputing the power of the individual judges who compose this court, to issue the writ of *habeas corpus*. This application is not made to us, as at chambers, but to us, as holding the supreme court of the United States, a creature of the constitution, and possessing no greater capacity to receive jurisdiction or power than the constitution gives it. We may, in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application, the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question, I will not now give an opinion.

One more observation, and I dismiss the subject. In the case of *Burford*, I was one of the members who constituted the court. I owe it to my own consistency, to declare that the court were then apprised of my objections to the issuing of the writ of *habeas corpus*. I did not then comment at large on the reasons which influenced my opinion, and the cause was this: the gentleman who argued that cause confined himself strictly to those considerations which ought alone to influence the decisions of this court. No popular observations on the necessity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defence of his motion, imposed on me the necessity of vindicating my opinion. I submitted, in silent deference to the decision of my brethren. In this case, I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending.

*108] *February 16th, 1807. The marshal of the district of Columbia having returned upon the *habeas corpus*, that he detained the prisoners by virtue of the before-recited order of the circuit court of that district—

C. Lee now moved, that they should be discharged; or, at least, admitted to bail; and contended, 1. That from the record of the circuit court, and upon the face of the proceedings, the imprisonment was illegal and oppressive; and 2. That if the commitment was not illegal upon its face, yet, as the order of the court refers to the testimony on which it was founded, it will appear to be illegal, upon the whole proceedings.

The commitment is not for trial at any particular time, before any particular court, nor in any particular place. By the 3d article of the constitution of the United States, the trial of crimes shall be in the state where they shall have been committed; but when not committed in any state, the trial shall be at such place or places as congress may by law have directed. So, by the 29th section of the judiciary act of 1789 (1 U. S. Stat. 88), in all cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done, without great inconvenience, twelve petit jurors, at least, shall be summoned from thence; and by the

33d section of the same act (Ibid. 91), offenders are to be arrested and imprisoned or bailed for trial, before such court of the United States, as by that act has cognisance of the offence; and copies of the process shall be returned, as speedily as may be, into the clerk's office of such court, together with the recognisances of the witnesses for their appearance to testify in the case, and if the commitment be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of the district where the delinquent is imprisoned, to issue a warrant for the removal of the offender to the district in which the trial is to be had.

*These are provisions for a speedy and fair trial, in obedience to the constitution; for it has always been considered as necessary to a fair trial, that it should be where the witnesses may easily attend, and where the party is known. The 6th amendment to the constitution provides, that the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district, wherein the crime shall have been committed, which district shall have been previously astertained by law." By the act for the punishment of certain crimes, § 8 (1 U. S. Stat. 113), it is enacted, that "the trial of crimes committed" "in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." [*109

By the English *habeas corpus* act, whose provisions are considered as extending to cases even out of the act, the prisoner may petition the court for trial, at the first term, and if not then tried, he is entitled to bail, of course. If the commitment is in a district in which he cannot be tried, he will not be entitled to this privilege, for he is still to be removed to the place of trial. Hence, it is necessary that the commitment should state the court before whom the trial is to be had. It is also necessary, in order that the district judge may know where to send him. No person but the district judge has authority to send him to the place of trial, and if the commitment be not made by the district judge, it is impossible, that he should judicially know where to send him, unless the place of trial be mentioned in the warrant of commitment. It is also necessary, that the accused may know where to collect his witnesses together.

The order of commitment ought also to have stated more particularly the *overt* act of treason. It is too vague and uncertain.

2. The testimony before the circuit court did not show probable cause.

*By the 4th amendment to the constitution, it is declared, "that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation." All the facts necessary to constitute this probable cause must appear upon oath or affirmation. It is not necessary, indeed, that there should be positive proof of every fact constituting the offence; but nothing can be taken into the estimate, when forming an opinion of the probability that the fact was committed by the person charged, but facts supported by oath or affirmation. No belief of a fact, tending to show probable cause, no hearsay, no opinion of any person, however high in office, respecting the guilt of the person accused, can be received in evidence on this examination. [*110

The question, then, is, whether these affidavits exhibit legal proof of probable cause. If the testimony be vague or ambiguous, as to the person,

or as to the offence, the court will apply the maxim of law, that every person is to be adjudged innocent, unless proved to be guilty. The facts stated in General Wilkinson's two affidavits of the 14th and 26th of December, consist of the letters of Col. Burr, the declarations of Swartwout, and the belief of General Wilkinson. Neither the letters of Col. Burr, nor the declarations of Swartwout, contain any ground for probable cause to believe that the prisoners, or either of them, is guilty of treason; and General Wilkinson's belief, as he himself states, is founded upon those facts.

Mr. Lee went into a minute examination of those affidavits, to satisfy the court that the facts stated in them could, at most, prove an intent to set on foot an expedition against Mexico, in case of a war between this country and Spain. He contended, that if the object was such an expedition, at all events, *111] and if they had intended *to force their way through the United States, for the purpose of attacking Mexico, and even if they had done so, they would not have been guilty of treason, but merely of lawless violence. Even if they had plundered the bank at New Orleans, or any private property, or had seized arms and vessels, the property of individuals, it would have been robbery, but not treason.

But the circumstance that no place of trial can be designated, is a sufficient reason for admitting them to bail. They certainly cannot be tried here, for it is not contended, that they have here committed any offence; and this is not the district in which they were first apprehended or brought. They were seized, by order of a military officer, 2000 miles from this place, without any process of law or legal authority, and sent here to be disposed of by the executive. They have been committed for trial, not before any court, or in any particular district, and their imprisonment will be perpetual, unless government can find out when and where the offence was committed, and devise some means of transmitting them to the place of trial.

Mr. Lee attempted to discredit the affidavits of General Wilkinson, by the circumstance that they were made, as he contended, to vindicate and justify the illegal seizure and transportation of the prisoners. He contended also, that those affidavits ought to be totally discarded, because the oath upon which a warrant of arrest or commitment is to be grounded, must be made before the magistrate who is about to issue the warrant. He must be satisfied of the probable cause. The laws were open in New Orleans. General Wilkinson might have gone before a justice of peace there, and made his oath, and obtained a warrant to arrest the prisoners. There was no necessity to proceed in this illegal and unprecedented manner.

F. S. Key, on the same side.—Unless this court can look behind the order for commitment, and examine the grounds upon which it was made, the writ of *habeas corpus* will be wholly useless; for every court or magistrate who *112] commits a person to *prison, will take care to cover himself under the strict forms of law.

The constitution declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. An adherence to rebels is not an adherence to an enemy, within the meaning of the constitution. Hence, if the prisoners are guilty, it must be of levying war against the United States.

In England, the books speak of two kinds of levying of war—direct and constructive. (East's Cr. Law 67.) But there is only one kind in this country; and ought not to be, in England. By using the word "only," the constitution meant to take away all pretence of constructive treason. Every man is to answer for his own acts only. If 100 men conspire, and only 50 actually levy war, the latter only are guilty as principals.

And what reason can be given, why there should not be the same distinction between principal and accessory in treason, as in other crimes. In a republican government, whose basis is the affection of the people, it is unnecessary to guard against offences of this kind, with the same vigilance as in a monarchy or a despotism whose foundation is fear. (4 Tucker's Bl., Appendix, p. 39.) But if this construction of the constitution be not correct, and if the English authorities are to be considered in full force, it must be shown, 1st. That war has been levied; and 2d. That the prisoners are confederates in that war.

The affidavits of General Wilkinson are not authenticated, so as to make them evidence. It does not appear, that an oath was administered to him. The act to prescribe the mode of authenticating public acts, records and judicial proceedings, &c., is extended to the territory *of Orleans, by the act erecting that territory. (2 U. S. Stat. 285.) And even if [*113 this be not strictly a judicial proceeding, yet it is within the meaning of that act. The certificate of the secretary of state (*a*) only shows that it appears by the official returns to his office, that J. Carrick and George Pollock had been appointed justices of the peace for the county of Orleans; but not that they had taken the oaths necessary to qualify them to act.

But if these affidavits are examinable, they do not show any act of treason. They prove no assemblage of men, nor military array. There is not a tittle of evidence, that any two men have been seen together with treasonable intent, whether armed or not. The supposed letter from Col. Burr speaks indeed of choice spirits, but he does not tell us they are invisible spirits. The affidavits of Meade and Wilson relate only to rumors derived from General Wilkinson, whose business it was, if he could get such rumors there, by no other means, to create them himself. The territory of Orleans, if it was to be revolutionized, might be revolutionized, without levying war against the United States. There is no evidence, that the prisoners knew that Col. Burr had any treasonable projects in view. Even if he had such views, he might have held out to them, as he did to others, only the Spanish expedition.

Again, the bench-warrant issued in this case for the arrest of the prisoners was illegal. The court has no authority to issue a bench-warrant, but upon a presentment by a grand jury, or for an offence committed in *the presence of the court. It is not a power inherent in the court, [*114 nor given by any law. The act of congress only gives to a judge out of court, or to a justice of peace, the power of arresting offenders. And it is a power inconsistent with a fair trial, because the court would thereby have

(*a*) The secretary of state of the United States had certified under the seal of his office, that George Pollock and James Carrick were appointed justices of the peace for the county of Orleans, in the territory of Orleans, in the year 1805, as appears by the official returns of the secretary of the said territory, "remaining in the office of this department."

prejudged the case, and decided upon the guilt of the prisoner. No such practice is known in Maryland, under whose laws the court below was acting.

February 17th, 1807. *Jones*, attorney for the district of Columbia, mentioned to the court, that *Hiort*, being better prepared upon points of practice, would make some observations in support of the form of the commitment.

Marshall, Ch. J.—I understand the clear opinion of the court to be (if I mistake it, my brethren will correct me), that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.

Rodney, Attorney-General.—The affidavit of General Wilkinson is sufficiently authenticated. The justices of peace in the territory of Orleans, are officers of the United States; they are appointed by the governor of the territory, who is appointed by the President of the United States; and the secretary of the territory is bound by law to transmit copies of all the executive proceedings of the governor of the territory every six months to the President of the United States. (2 U. S. Stat. 283.) All the officers of the United States are bound to take notice of each other. The act of congress respecting authentication of records, &c., is cumulative only. It does not repeal any former law.

There is some weight in the objection, that the oath ought to be made before the magistrate who issues the *warrant. But one magistrate is as competent as another to administer the oath. The constitution is silent on the subject; and if it be taken before a person competent to administer it, it satisfies the provision of the constitution. How else could a criminal be arrested in one part of the United States, when the witness lived in another?

*115]

It is true, that none of the evidence now offered would be competent on the trial; nor even if it appeared in a proper shape, would it be sufficient to convict the prisoners. But the question is, whether, in this incipient stage of the prosecution, it is not sufficient to show probable cause?

The expedition against Mexico would not be treason, unless it was to be accomplished by means which in themselves would amount to treason. But if the constituted authorities of the United States should be suppressed but for one hour, and the territory of Orleans revolutionized but for a moment, it would be treason. What would be treason by adhering to an enemy, if done towards a rebel, will be a levying of war. (3 Wilson's Lectures 105; 4 Bl. Com. 92.) In treason, all are principals. There are no accessories. It has been argued (and the respectable authority of Judge Tucker is cited), that none are principals but those present at the treasonable act. The argument may have some weight, but it is a point at least doubtful, and therefore, ought to be left to be decided on the trial.

It is true, that we cannot, at present, say exactly when and where the *overt* act of levying war was committed, but from the affidavits, we think it fair to infer, that an army has been actually levied and arrayed. The declaration of one of the prisoners was, that Colonel Burr "was levying an armed body of 7000 men." How the fact has turned out to be since, we do not

know; and it is also true, that we do not know that any men have been seen collected in military array. But Dr. Bollman informed General Wilkinson, that he had seen a letter from Colonel Burr, in which he says, that he should be at Natchez *with 2000 men, on the 20th of December, and that he would be followed by 4000 more, and that he could have [*116 raised 12,000 as easily as 6000, but he did not think that number necessary. If Colonel Burr was actually levying an armed body of men; if he expected to be at Natchez, on the 20th of December, with 2000, and calculated upon being followed by 4000 more, and if he found it so easy to raise troops, is there not a moral certainty, that some troops, at least, have been raised and embodied? It may be admitted, that General Wilkinson was interested to make the worst of the story, but the declarations of the prisoners themselves are sufficient.

Jones, attorney for the district of Columbia, on behalf of the prosecution.—As to the objection, that the commitment must be for trial in some court having jurisdiction over the offence. It was uncertain, whether any, and if any, what place was prescribed for the trial of this offence. But any court of the United States had jurisdiction to commit for trial, by the act of congress for the punishment of certain crimes, &c. (1 U. S. Stat. 113, § 8.) "The trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought." Although the first part of the section speaks of certain crimes committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state," yet the last clause of the section is general, and in its terms applies to the trial of all crimes committed out of the jurisdiction of any particular state. This act of congress is the only exercise of the provision of the 3d article of the constitution, respecting crimes committed not within any state. Unless this act of congress fixes the place of trial, there is no place prescribed, either by the law or the constitution, and the trial may as well be in the district of Columbia, as elsewhere. But if this act of congress does fix the place, then it is objected, *that this district is neither that in [*117 which the prisoners were apprehended, nor that into which they were first brought.

The answer is, that the act of congress means the district in which they shall be legally apprehended, that is, arrested by process of law. It could not mean a mere military seizure. But whether the court below had or had not jurisdiction to try the prisoners, it clearly had jurisdiction to commit them; and if their commitment be irregular, this court will say how they ought to be committed. (1 U. S. Stat. 91, § 33.)

It is objected, that although the judges and justices have power to arrest, yet the courts have not, and therefore, cannot issue a bench-warrant but upon the presentment of a grand jury, or for an offence committed in the presence of the court. And the practice of Maryland is cited. But it is stated, that at Montgomery court, in Maryland, very lately, a venerable and ancient judge of that court did issue a bench-warrant for an offence not presented by the grand jury, nor committed in presence of the court.(*a*)

(*a*) *F. S. Key* stated, that he was present at the transaction alluded to. The facts were, that after the court adjourned, and as the judge was going out of the court

It is not necessary, that the commitment should state the place of trial, nor that they are committed for trial. If, at the time of commitment, it be uncertain where they ought to be tried, they may be committed, generally, until discharged by due course of law. In England, it is only necessary that the commitment should be to some jail in England. 2 Hawk. P. C. 120, b. 2, c. 16, § 18.

As to the authentication of the affidavits of General Wilkinson, it being shown that Pollock and Carrick were duly appointed justices of the peace,
*118] and having *undertaken to act as such, it is to be presumed, that they have taken the necessary oaths.

It is admitted, that the constitution has prevented many questions as to the doctrine of treason. The intention of having a constitutional definition of the crime, was to put it out of the power of congress to invent treasons. But it was impossible to define what should, in every case, be deemed a levying of war. It is a question of fact, to be decided by the jury, from all the circumstances. Warlike array is not necessary. It is only a circumstance. 1 East's Cr. Law 66. According to the English books, a direct levying of war, is a war directly against the person of the king. A constructive levying of war, is war against the government. If men have been levied, and arms provided, with a treasonable intent, this is a sufficient levying of war, without warlike array.

The affidavit of General Eaton establishes the treasonable intent in Col. Burr. The question, then, is, whether that intent, or a knowledge of that intent, can be brought home to the prisoners. Mr. Jones here went into an argument, to show the connection of the prisoners with Col. Burr, and their knowledge of his projects. He observed, that his argument, on a former occasion, respecting the president's message to congress, had been misunderstood. A state of war is a matter of public notoriety, and he had considered the president's message as evidence of that notoriety, it being a communication from the supreme executive, in the course of his duty, to that department of government which alone could decide on the state of war.

He contended, that no specific number, no sufficiency of force to accomplish the object, was necessary to constitute treason. If soldiers are levied and officered, with a treasonable intent, and equipments prepared, so that
*119] they can readily lay hold of their arms; although no men are *actually armed; although only five men in a detachment should march to assemble at a place of rendezvous, and although there should be no warlike array, yet it would be treason. Anything which amounts to setting on foot a military expedition, with intent to levy war against the United States, is treason.

The distinction between those who are present at the *overt* act of levying war, and those who are confederated, adhering, acting and assisting, giving aid and comfort, is contrary to all analogy. In treason, all are principals. In murder, if two conspire, and one is acting and assisting at such a distance as to give aid, he is equally guilty with him who gave the wound.

---

house, a man who had been waiting in the yard, assaulted a lawyer in the presence of the judge, for disrespectful language used by the lawyer in arguing a cause. The judge considered it as a contempt of court, and therefore, directed a bench-warrant to issue.

It has been insinuated, that General Wilkinson is to be considered as *particeps criminis*. If that were the case, it would be no disqualification of his testimony.

Treason is a greater crime in republics than in monarchies, and ought to be more severely punished.

Harper, in reply, congratulated his country on the triumph of correct principles, in the abandonment, on the part of the prosecution, of the dangerous doctrine, that executive messages were to be received as evidence in a criminal prosecution.

Jones.—The sole purpose for which we introduced the president's message, was, to show that the assemblage of a military force by Col. Burr, was a matter of notoriety. We did not attempt or wish to introduce it as direct evidence.

Harper.—To use an executive message in a court of justice, for any purpose of proof whatever, so as to aid in the commitment of a citizen under a criminal accusation; to introduce it as evidence of any fact (of notoriety, for instance, which is a fact); is to give it the effect of testimony, and is a direct violation of the constitution.

*We object to the translation of the ciphered letter contained in General Wilkinson's affidavits, being admitted as evidence, because General Wilkinson has not sworn that it is a true translation, nor sent the original, with the key, so that the court can have a correct translation made. Nor is it proved, that the original was written by Col. Burr, or by his direction, nor that the prisoners were acquainted with its contents. [*120

Another objection to the affidavits is, that they were not made for the purpose of procuring an arrest. They were not made before the judicial officer on whose warrant the proceedings of the court were to be founded; and who would have been bound to cross-examine the witness, to sift the facts, and to judge how far they were proved, and how far they were sufficient to justify the proceedings. But, after a military arrest, the affidavits are drawn up by the author of the arrest, without cross-examination or inquiry, and were sworn to by him, as the justification of his conduct. The persons whom he has thus arrested are sent to a distant part of the country, and these affidavits are sent after them, to operate as the ground of their commitment and detention. No person can lawfully be committed on testimony so taken. In cases of arrests and commitments, the general rules of evidence are no further to be departed from, than the necessity of the case requires. On application to a magistrate for a warrant of arrest, the evidence must necessarily be *ex parte*, but no other departure from the common rules of evidence is justifiable, because not necessary. It is a general rule of law respecting testimony, that it shall be taken before the tribunal which is to act upon it, or under the direction of that tribunal; that the person who is to decide, shall also inquire; that the inquiry shall not be before one tribunal, and the judgment pronounced by another. This rule, so important to the safety of persons accused, is equally applicable to arrests and commitments as to trials, and should, therefore, be equally observed. The party arrested and brought before the magistrate for commitment, has a right to be confronted with his accuser, and to cross-examine

the witnesses produced against him, and by that means, to explain circumstances which, at first view, might criminate him. But if the practice *121] *which is attempted in this case be sanctioned by this court; if a military officer, or any other person, is to be permitted to seize a man, and send him 2000 miles from the place of arrest, and from the place of the alleged transaction, and to send after him an *ex parte* affidavit as the ground of his subsequent commitment, the great security provided by law for the protection of innocence and liberty is broken down.

Mr. Harper then went into a minute examination of the contents of the affidavits, and contended that, if they could be considered by this court as evidence, they did not prove that treason had been committed, nor that the prisoners had participated in any crime or offence whatever.

February 18th, 1807. *Martin*, on the same side.—The order for the commitment was erroneous, in directing the prisoners to be committed to the prison of the court. It ought to have been to the marshal. *Bethel's Case*, 1 Salk. 348; s. c. 5 Mod. 19.

This court cannot remand them, or commit them, upon this *habeas corpus*, for any crime but that for which they were committed in the court below; and can only commit them for trial before some court. The only power given by the 33d section of the judiciary act, is to cause offenders to "be arrested; and imprisoned or bailed, as the case may be, for trial before such court of the United States, as by this act has cognisance of the offence." The place of trial is to be decided by the place where the offence was committed.

The act of congress for the punishment of certain crimes, § 8, (1 U. S. Stat. 113) does not apply to crimes committed in any territory of the United States, in which there are courts of the United States having cognisance of the offence. It applies only to offences committed upon the "high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular *122] state." *The courts of the United States erected in the territory of Orleans are competent to try the offence of treason against the United States, committed within that territory. By the 8th section of the act of congress of 26th March 1804 (2 U. S. Stat. 285), erecting the territory of Orleans, a district court of the United States is established therein, having all the original powers and jurisdiction of a circuit court of the United States. And by the same act, the "act for the punishment of certain crimes against the United States" is extended to that territory.

It was, therefore, a wanton and unnecessary exertion of arbitrary power to send the prisoners here, where they cannot be tried. If there be any probability that a crime was committed by the prisoners, it is equally probable, that it was committed in the territory of Orleans. It is, at all events certain, that it was not committed here. The word apprehended, in the act of congress, cannot mean a legal arrest only. If it did, it would be in the power of a military commander to seize a man, and appoint the tribunal by which he shall be tried.

If it is the duty of this court, to commit the prisoners for trial, it is equally its duty to bind over the witnesses to appear at the time and place of trial, to testify in the case, and to return copies of the process, together with the recognisances of the witnesses, to the office of the clerk of the court

having cognisance of the offence. This shows that, upon every commitment, the witnesses must be in the presence of the tribunal committing. This court cannot commit, unless they first ascertain in what court the trial is to be had.

There is no legal evidence that General Wilkinson ever made oath to his statement. The certificate of the secretary is only that it appears by the return of the secretary of the territory of Orleans, that Pollock and Carrick were justices. A copy of that return ought to be certified.

*February 19th, 1807. THE COURT not having made up an opinion, admitted the prisoners to bail until the next day. The Chief [*123
Justice stated, that the court had difficulty upon two points, viz: 1. Whether the affidavit of General Wilkinson was evidence admissible in this stage of the prosecution; and 2. Whether, if admissible, his statement of the contents of the substance of a letter, when the original was in his possession, was such evidence as the court ought to notice. If the counsel had any authorities on these points, the court said they would hear them.

February 20th, 1807. The CHIEF JUSTICE asked, if the counsel had found any authorities on the points mentioned yesterday.

Rodney, Attorney-General, said, he had not; but he relied on general principles.

F. S. Key, cited *The King* v. *The Inhabitants of Eriswell*, 3 T. R. 707, where the principal question was, whether the *ex parte* examination of the pauper, taken before two justices, to whom no application was made for a removal of the pauper, was good evidence, before two other justices, five years afterwards, upon an application for his removal, the pauper having in the meantime become insane. The judges of the court of king's bench were equally divided. But GROSE, J., said, "nothing can be more unjust, than that a person should be bound by evidence which he is not permitted to hear." "The common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross-examine." BULLER, J., who was opposed to GROSE, upon the principal question, admitted, "that if the taking the examination were not a judicial act, but was merely *coram non judice*, it is *not evidence," and that "it must be [*124
a judicial act, at the time it was taken, or cannot become so at all." Lord KENYON, Ch. J., said, the two justices who took the examination "were not applied to for the purpose of making an order of removal; the overseers called upon them for no other purpose than to examine the pauper; all the proceedings, therefore, were extra-judicial; and the examination on oath might just as well have been taken before the parish clerk, and would have been as much entitled to credit as this."

So, in this case, we say, that, as General Wilkinson did not apply to Justices Carrick and Pollock for a warrant to arrest Dr. Bollman and Mr. Swartwout, and as he did not make the affidavit for the purpose of obtaining from them such warrants, the whole proceedings before those justices were extra-judicial. The affidavits are not such as would support an indictment, if false. In the language of Lord KENYON, they deserve no more credit than if they had been made before the parish clerk. If the affidavit

be a judicial proceeding, it ought to be authenticated according to the act of congress. If it be not a judicial proceeding, it is not evidence.

MARSHALL, Ch. J.—If a person makes an affidavit before a magistrate, to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it, on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in presence of the prisoner?

Rodney, Attorney-General.—The first affidavit would be sufficient, unless disproved or explained by the prisoner on his examination.

Harper.—The necessity of the case is the only ground of an exception to the general rule of evidence; and that necessity ceases when the party is taken.

*125] *February 21st, 1807. MARSHALL, Ch. J., (*a*) delivered the opinion of the court.—The prisoners having been brought before this court on a writ of *habeas corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

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," says a very learned and accurate commentator, "upon this inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only, is it lawful totally to discharge him. Otherwise, he must either be committed to prison or give bail."

The specific charge brought against the prisoners is treason, in levying war against the United States. As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result from the ex-
*126] tension of treason to offences of minor *importance, that great fundamental law which defines and limits the various departments of our government, has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United

(*a*) The other judges present were CHASE, WASHINGTON and JOHNSON. The opinion of Chief Justice MARSHALL, upon the trial of Col. Burr, in the circuit court at Richmond, in the summer of 1807, elucidates and explains some passages in this opinion which were supposed to be in some degree doubtful. For that opinion, see Appendix, note B.

States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action, by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined, that the actual enlistment of men, to serve against the government, does not amount to levying war. It is true, that in that case, the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say, that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those *institutions which have been ordained in order to secure the peace and happiness of society, are not [*127 to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation, by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court, must have conceived it more safe, that punishment, in such cases, should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States, in New Orleans, by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution, would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down, have been the decisions heretofore made by the judges of the United States. *The opinions *128] given by Judge PATERSON and Judge IREDELL, in cases before them, imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force. Judge CHASE, in the trial of *Fries*, was more explicit. He stated the opinion of the court to be, "that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States, by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution, by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the crime: whether by one hundred, or one thousand persons, is wholly immaterial." "The court are of opinion," continued Judge CHASE, on that occasion, "that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used, in pursuance of such design to levy war; but it is altogether immaterial, whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war."

The application of these general principles to the particular case before the court, will depend on the testimony which has been exhibited against the accused. The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with Col. Burr, throughout the last winter. In the course of these conversations, were communicated various criminal projects, which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if indeed it did not constitute a distinct and separate plan, *upon the *129] success of which, other schemes, still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Col. Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected. This deposition exhibits the various schemes of Col. Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose, the affidavit of General Wilkinson, comprehending in its body the substance of a letter from Col. Burr, has been offered, and was received by the circuit court. To the admission of this testimony, great and serious objections have been made. It has been urged, that it is a voluntary or rather an extra-judicial affidavit, made before a person not appearing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extra-judicial, resolves itself into the question, whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of

a commitment, ceases to be extra-judicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made. To decide that an affidavit made before one magistrate, would not justify a commitment by another, might in many cases be productive of great inconvenience, and does not appear susceptible of abuse, if the verity of the certificate be established. Such an affidavit seems admissible, on the principle that before the accused is put upon his trial, all the proceedings are *ex parte*. The court, therefore, overrule this objection.

*That which questions the character of the person who has, on this occasion, administered the oath, is next to be considered. The certificate from the office of the department of state has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of New Orleans to be certified to that office; because the certificate is in itself informal, and because it does not appear that the magistrates had taken the oath required by the act of congress. The first of these objections is not supported by the law of the case, and the second may be so readily corrected, that the court has proceeded to consider the subject, as if it were corrected, retaining, however, any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate. [*130

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Col. Burr to General Wilkinson, as the latter could interpret it, a division of opinion has taken place in the court. Two judges are of opinion, that as such testimony delivered in the presence of the prisoner on his trial, would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although, in making a commitment, the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony, in itself, legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects, to be such as a court and jury might hear. Two judges are of opinion, that in this incipient stage of the prosecution, an affidavit stating the general purport of a letter may be read, particularly, where the person in possession of it is at too great a distance to admit of *its being obtained, and that a commitment may be founded on it. [*131

Under this embarrassment, it was deemed necessary to look into the affidavit, for the purpose of discovering whether, if admitted, it contains matter which would justify the commitment of the prisoners at the bar on the charge of treason. That the letter from Col. Burr to General Wilkinson relates to a military enterprise meditated by the former, has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if, in its progress, the subversion of the government of the United States, in any of their territories, was a mean, clearly and necessarily, to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it, would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design

of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, "Burr's plan of operations is to move down rapidly from the falls, on the 15th of November, with the first 500 or 1000 men, in light boats now constructing for that purpose, to be at Natchez, between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient, in the first instance, to seize on, or to pass by, Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents, now with Burr, say, that if we will protect their religion, and will not subject them to a foreign power, in three weeks, all will be settled."

There is no expression in these sentences, which would justify a suspicion, that any territory of the United States was the object of the expedition.

*132] *For what purpose, seize on Baton Rouge? why engage Spain against this enterprise, if it was designed against the United States? "The people of the country to which we are going are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended, that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected, that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents, now with Burr, say, that if we will protect their religion, and will not subject them to a foreign power, in three weeks, all will be settled." This is apparently the language of a people who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power. That the people of New Orleans, as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to General Wilkinson, so far as the letter is laid before the court, one syllable which has a necessary

*133] or a natural reference *to an enterprise against any territory of the United States. That the bearer of this letter must be considered as acquainted with its contents, is not to be controverted. The letter and his own declarations evince the fact. After stating himself to have passed through New York, and the western states and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be, "to carry an expedition to the Mexican provinces." This statement may be considered as

explanatory of the letter of Col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he said, "this territory would be revolutionized, where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans." If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a mean of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words, a difference of opinion exists. Some of the judges suppose, they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted, that it must have been carried into execution by an open assemblage of *men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority [*134 of the court is of opinion, that the conversation of Mr. Swartwout affords no sufficient proof of such assembling. The prisoner stated, that "Col. Burr, with the support of a powerful association, extending from New York to New Orleans, was levying an armed body of 7000 men from the state of New York and the western states and territories, with a view to carry an expedition to the Mexican territories." That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question, then, is, whether this evidence proves Col. Burr to have advanced so far in levying an army, as actually to have assembled them.

It is argued, that since it cannot be necessary that the whole 7000 men should have assembled, their commencing their march, by detachments, to the place of rendezvous, must be sufficient to constitute the crime. This position is correct, with some qualification. It cannot be necessary, that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary, that there should be an actual assemblage, and therefore, the evidence should make the fact unequivocal. The travelling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are, that Col. Burr "was levying an armed body of 7000 men." *If the term levying, in this [*135 place, imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it

barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war. It is thought sufficiently apparent, that the latter is the sense in which the term was used. The fact alluded to, if taken in the proper sense, is of a nature so to force itself upon the public view, that if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner, in reference to seizing at New Orleans, and borrowing, perhaps by force, from the bank, though indicating a design to rob, and consequently, importing a high offence, do not designate the specific crime of levying war against the United States.

It is, therefore, the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman, there is still less testimony. Nothing has been said by him, to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of Col. Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the district of Columbia, is apparent. It is, therefore, the unanimous opinion of the court that they cannot be tried in this district. *The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or in any river, haven, basin or bay, not within the jurisdiction of any particular state. In those cases, there is no court which has particular cognisance of the crime, and therefore, the place in which the criminal shall be apprehended, or, if he be apprehended, where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed.

*136]

But in this case, a tribunal for the trial of the offence, wherever it may have been committed, had been provided by congress; and at the place where the prisoners were seized by the authority of the commander-in-chief, there existed such a tribunal. It would, too, be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized, in any place which the general might select, and to which he might direct them to be carried.

The act of congress which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state with whom the United States are at peace. There is a want of precision in the description of the offence which might produce some difficulty in deciding what cases would come within it.[1]

---

[1] See United States *v.* Kasinski, 2 Spr. 7; United States *v.* Hertz, 3 Pitts. L. J. 194; s. c. Whart. Prec. § 1123 n.; United States *v.* O'Sullivan, Whart. C. L. § 2802 n.; United States *v.* Lumsden, 1 Bond 5; United States *v.* Workman, Pamph. Trial.

But several other questions arise, which a court consisting of four judges finds itself unable to decide, and therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direc them to be discharged. This is done, with the less reluctance, because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose *those who have been charged with treason to be proper objects for [*137
punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been comitted, institute fresh proceedings against them.

Skillern's executors *v.* May's executors.

Fraud and failure of consideration.

If the obligee of a bond obtain title in his own name, for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the title to the residue of the lands to be lost, by non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond.

A court of equity will annul a contract, which the defendant has failed to perform, and cannot perform, on his part.

Error to the District Court of the United States for the district of Kentucky, in chancery.

The facts of the case, as they appeared upon the record, are as follows: Skillern put into the hands of Richard May several land-warrants, to locate in Kentucky, under an agreement that May should have half the land for locating the whole, who accordingly located the quantity of 2500 acres, in the name of Skillern, but not to his satisfaction, and the matter was not settled between them, at the time of Robert May's death, when his interest in the lands so located descended to his son, John May, the defendants' testator. Skillern afterwards came to an agreement with John May, on the 6th of March 1785, by which Skillern was to assign to John May one military warrant for 200 acres of land, and all the treasury-warrants located in the name of Skillern, with the entries and locations made thereon, which assignment was, on the same day, executed, but never lodged in the land-office, or the office of the surveyor of the county where the lands were situated. In consideration of this assignment, and in full of all demands by Skillern against the representatives of Robert May's estate, John May gave to Skillern a bond, dated March 6th, 1785, to convey to Skillern 1000 acres of the land to which Robert May was entitled at his death, and which remained unsurveyed, to be chosen by Skillern, before the 15th of June 1786. *It was also agreed, [*138
by another writing of the same date, that if Skillern would give up the bond for 1000 acres, John May should convey to him 1100 acres of other land described in the writing, and Skillern was to make his election of the one or the other, before the 1st of October 1786. This last agreement was afterwards cancelled, and a bond, in lieu thereof, given by John May to Skillern, dated October the 9th, 1787, to convey to the latter, on or before the 1st of December 1788, "eleven hundred acres of first rate elk-horn land, well watered, and lying within ten miles of Lexington."