SUPREME COURT OF THE UNITED STATES,

FEB. TERM, 1807.

Ex parte { *Erick Bollman* *and* *Samuel Swartwout.*

On motion for a *Habeas Corpus ad subjiciendum.*

MARSHALL, *Chief Justice*, delivered the opinion of the court, as follows:

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

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

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

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

The enquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the U. S. the power to award a writ of *Habeas Corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

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

It is in these works: "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 enquiry into the cause of commitment. *Provided* that writs of *Habeas Corpus* shall in no case extend to prisoners in goal unless where they are in custody under or by color of the authority of the U. S. or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The only doubt of which this section can be susceptible is whether the restrictive words of the first sentence limit the power to the award of such writs of *Habeas Corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some cause which they are capable of finally deciding.

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

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

It may be worthy of remark that this act was passed by the first Congress of the 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 Dis-"trict Courts, shall have power to "grant writs of *Habeas Corpus* for the "purpose of an enquiry 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 U. States; and as it is granted to *all* in the *same sentence* and by the *same words*, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

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

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

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

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court; and in 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.

2d. The writ of *Habeas Corpus ad satisfaciendum* "when a prisoner hath "had judgment against him in an ac-"tion, and the plaintiff is desirous to "bring him up to some superior court "to charge him with process of execu-"tion."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole juridical 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 testi-"mony, 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 is-"sues out of any of the courts of West-"minster-hall, when a person is sued "in some inferior jurisdiction, and is "desirous to remove the action into the "superior court, commanding the infe-"rior judges to produce the body of the "defendant, together with the day and "cause of his caption and detainer "(when the writ is frequently denomi-"nated an *habeas corpus cum causa*) "to *do and receive* whatever the king's "court shall consider in that behalf. "This writ is grantable of common "right, without any motion in court, "and it instantly supercedes all pro-"ceedings in the court below."

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

It would not be difficult to demonstrate that the writ of *Habeas Corpus cum causa* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally that the same act prescribes a different mode for bringing into the courts of the U. States, suits brought in a state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the 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 goal, unless "where they are in custody under or "by color of the authority of the United "States, or are committed for trial be-"fore some court of the same, or are "necessary to be brought into court to "testify."

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

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

But the 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 dis-"cretion 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 enquire 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.—(*U. S. v. Hamilton, 3 Dallas 17.*)

If the act of Congress gives this court the power to award a writ of *Habeas Corpus* in the present case, it remains to enquire whether that act be compatible with the constitution.

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

It has been demonstrated at the bar that the question brought forward on a *Habeas Corpus*, is always distinct from that which is involved in the cause itself. The 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.‡

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.

The motion, therefore, must be granted.

* *Laws U. S. Vol.* 1. *p.* 58.

† 1. *Cranch's reports, Marbury v. Madison.*

‡ *At Feb. term*, 1806, *in this court.*

[*Judge Johnson's opinion in our next.*]

FOR THE NATIONAL INTELLIGENCER.

MR. SMITH,

SIR,

In your paper of the 2d instant, I observe a publication, under the signature of A. S. Hooe,—on which I feel it my duty to remark.—That gentleman by taking a retrospect of his conduct towards me, must as in a mirror, see his duplicity. This retrospection I will furnish him with.

On the day preceding my offering a resolution, expressive of confidence in the President and approbatory of the measures of the present administration, Mr. Hooe desired to talk with me, and when aside, mentioned he understood, I contemplated introducing such a resolution, and expressed his hostility to it, or any resolution that might be construed to convey a censure on the republican minority. After a friendly conversation on the subject, in which I informed Mr. H. the purport of the resolution I intended submitting to the House, and manifested to him my inflexible determination to do so;—we parted perfectly friendly as I supposed. On the morning after the introduction of said resolution, upon entering the passage that led to the delegates chamber, with Baldwin M. Lee, Esq. a member from Westmoreland county (with whom I had no acquaintance at that time.) I observed Mr. H. accompanied by a Mr. Alexander (a relation of his) and one or two others. I addressed him as usual, and his conduct was such as is represented in Mr. Lee's certificate, annexed hereto, except as to shaking a stick over my head. I observed the weapon in his hands, but am impressed with the idea, he did not shake it over my head. However, on this I may be mistaken. I must confess that I was much astonished at such bullying conduct, and could attribute it to no other cause than the subject of the aforesaid resolution; and as I had made use of no personalities, I could but view it an unjustifiable attack on me; his superior corporeal powers and preparation for the assault, together with the improper time and place, prevented my noticing his conduct further at that time, than to inform him he should hear from me. His observations about *my using improper language the day before* must have had reference to my prefatory remarks on presenting the resolution. Yet no indecorous language was used by me. The annexed certificates of Mr. Hunter, of the Senate, of Messrs. Stephenson and Pendleton of the house of delegates, shew that Mr. Hooe is incorrect in his assertions, that we were not together after breakfast, on our way to Richmond, and that he received me with great coldness. The certificates of captain Summers, also of the house of delegates, corroborate the assertion, that there was *no pre-existing difference*,—or if he harbored resentment towards me, he carefully concealed it.

But I am told Mr. H. says his animosity towards me, is predicated on an occurrence that took place near two years ago;—If such latent cause existed, why has Mr. H. permitted it to lay dormant so long?—When he resides not more than a day's ride from me, and the greater part of last fall, was within two hours ride of me,—nay, was then at my house, on an intimate and friendly footing. Mr. Kemp's certifying that Mr. Hooe mentioned to him *several days* before I presented the resolution, his determination to call me to account;—does not prove the resolution was not the cause of insult;—as it was generally understood *several days* before I presented it, that I intended to do so. However, if it was not the cause, Mr. H's conduct is equally unjustifiable. The epithets which he states he applied to me, are truely disgraceful,—but when misapplied, they recoil on the accuser. I should not have mentioned a sentence as to the cause of our difference,—it being quite unimportant to the public,—had not Mr. H. insinuated in his publication, that I had been guilty of "certain private misconduct," which is destitute of truth. Mr. H. makes repeated mention of chastising me;—pray what has been his chastisement? It is true, he, accompanied by a few particular friends and a weapon in hand, and possibly others concealed,—grossly insulted me;—for which I called him to the field. We exchanged a shot, which proving ineffectual, were about to repeat it, when the interference of the civil authority, put an end to the contest, and we were recognised for the preservation of the peace.

Your's, &c.

JAMES H. BLAKE.

Fairfax county, Feb. 6th, 1807.

At the request of Dr. Blake to charge my recollection with the circumstances respecting a difference which lately happened between him and A. S. Hooe, Esq. of King George County. I think they were as follows: viz. Some time in the month of December last, I fell in conversation with Dr. Blake in the Capitol in the city of Richmond, and as we were walking side by side to one of the doors of the Capitol, we met Mr. H. above spoken of, Dr. Blake accosted him in a friendly manner as I thought, and Mr. Hooe's reply to Dr. Blake was very abrupt accompanied with much anger and abuse, Mr. Hooe said a great deal to Dr. B. and among the many harsh and disagreeable expressions which he made use of he called him a scoundrel and *charged him with making use of improper language on yesterday*, but did not mention what language. Dr. B. stood very firm, and observed he should not consider himself accountable to any gentleman for what he had said under these walls. Mr. Hooe had in his hand a whip or a grape vine, which he shook over the Dr's. head. Dr. Blake observed to Mr. H. it was an improper time and place to settle their difference, turned short around and observed that he, Mr. H. should hear from him.

BALDWIN M. LEE.

Richmond, 20*th Jan.* 1807.

I here state a particular circumstance, which happened on our journey to Richmond, which taught me to believe that "perfect peace and harmony" existed at that time, between Dr. Blake and Mr. A. S. Hooe, viz. We stopped on the road at a tavern, I think at Hanover court house, and Mr. H. having alighted from his stage; whilst the Doctor was still seated in the same stage with myself, he called to Mr. Hooe and asked him to be so obliging as to set up an advertisement there. Mr. Hooe replied, to the best of my recollection, *with pleasure, Sir*, and instantly advanced to the stage where the doctor was, and took from him the paper.

The letter in my possession, which Mr. H. refers to, is a denial of certain charges of a private nature, which Dr. B. I always understood, never was apprised Mr. H. alledged against him, until after the insult.

JOHN C. HUNTER.

Fairfax County, Feb. 6*th*, 1807.

At the request of Dr. Blake we make the following statement:

About the last of Nov. 1806, we travelled in the same stage with Dr. B. from Fredericksburgh to Richmond. There was another stage that left Fredericksburgh about the same time, in which was Mr. A. S. Hooe. Both stages were very crouded—and the *passengers of each were frequently together* at the different taverns where the stages stoped. In particular, they all breakfasted together at the Bowling Green. We are under the impression that during the journey we were both made acquainted with Mr. H. by Dr. B. but upon this point we cannot recollect sufficiently to speak with confidence. We saw or heard nothing, however, to induce a suspicion that there was any ill-blood between those gentlemen.

J. STEPHENSON,
PHILIP C. PENDLETON.

Summer Grove, 6th Feb. 1807.

SIR—in reply to your enquiries, I with cheerfulness state, that on the morning of the 2nd of December last, being in the chamber of the Executive Council, I observed you engaged in an apparently friendly conversation with a gentleman; who from your introduction, I found to be Alexander S. Hooe, esq. That I never heard of any misunderstanding between that gentleman and yourself, until the morning you informed me of the insult he had offered you.

I am with sentiments of respect and esteem, Your obedient, servant.

GEO: SUMMERS.

James H. Blake, esq.

[The foregoing communication was received some time since; its insertion has been delayed by more important articles.]

Philadelphia, Feb. 18.

PROSPECT OF LATE NEWS

FROM EUROPE—The ship Oliver Ellsworth, from Liverpool, took a pilot on Sunday last, off New York, came within Sandy Hook, and anchored: but a violent gale coming on the same evening from north west, obliged her to put to sea for safety. We shall probably receive London papers by her to the 8th of January, as she is stated to have had a passage of only 38 days.

Baltimore, February 21.

From a file of Charleston papers deposited at the Merchant's Coffee-House as late as Feb. 9, inclusive, the following news (received at that place by arrivals from Europe to Dec. 31, inclusive, and from N. Orleans to Jan. 21) has reached us:—

That a general embargo at Hamburg allowed no neutral to sail, even in ballast.—The American consul remonstrated, but in vain. To prevent any mischief in consequence of the resemblance between the English and his countryman, he has ordered the latter to send in their names to him, that he may inspect and renew their passports if necessary. Hamburg was garrisoned by 860 Italians.

The members of the English factory were ordered to Verdun.

Judge Workman and Mr. Bradford, printer, at Orleans, were among the persons who have been arrested by the orders of general Wilkinson.

Orders were received at Orleans, to take or destroy (if necessary) all boats belonging to Burr or his friends.

[An address from General Kosciusko to the Poles, is added, which shall be given in our next.]

Charleston, Feb. 12.

FOULK, governor of West-Florida, with 300 men, was at Fort St. Johns, within a few miles of New-Orleans, on the 21st ult. He had requested permission to land his men and march to Baton Rouge, but was refused by General WILKINSON.

STOLEN

On last Tuesday night from the stable of the subscriber, an IRON GREY HORSE, 8 years old, 14 1-2 hands high, black mane and tail; the hair rubbed off each flank, and the inside of his off thigh shod all round.

I will give TEN DOLLARS for the horse and thief or FIVE DOLLARS for the horse only.

LAWRENCE HAYS,
New Jersey avenue.

Washington, Feb. 23—3t