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Holmes Vs. Jennison

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Court : US Supreme Court

Decided On : 1840

Appeal No. : 39 U.S. 540

Appellant : Holmes

Respondent : Jennison

Judgement :

Holmes v. Jennison - 39 U.S. 540 (1840)
U.S. Supreme Court Holmes v. Jennison, 39 U.S. 14 Pet. 540 540 (1840)

Holmes v. Jennison

39 U.S. (14 Pet.) 540

ERROR TO THE SUPREME COURT OF

JUDICATURE OF THE STATE OF VERMONT

SYLLABUS

In the State of Vermont, George Holmes was confined under a warrant issued by the governor of that state directing the Sheriff of the County of Washington to convey and deliver him

"to William Brown, the agent of Canada, or to such person or persons as by the laws of said province may be authorized to receive the same at some convenient place on the confines of this state and the said Province of Lower Canada to the end that he, the said George Holmes, may be thence conveyed to the said District of Quebec and be there dealt with as to law and justice appertains."

The warrant stated that "George Holmes was in the custody of the sheriff" by reason of a charge of felony sustained by indictment found by the grand jurors of the District of Quebec, in the Province of Lower Canada; that

"the said George Holmes, on 31 January, 1838, at the Parish of St. Louis of Kamouraska in said district, did feloniously kill and murder one Louis Paschal Achille Tache, and whereas the said George Holmes not being a citizen of the State of Vermont, but a citizen of the said Province of Lower Canada, and has come into this state from the said province of Canada, and the offense whereof he stands charged as aforesaid having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province for the offense aforesaid."

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

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

"STATE OF VERMONT"

" *To John Starkweather, Esquire, Sheriff of the"*

" *County of Washington, greeting: "*

"Whereas, George Holmes, late of Sorel, in the Province of Lower Canada, is now detained in the common jail in said Washington County, and under your custody, by reason of a certain charge of

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felony, sustained by indictment found by the grand jurors of the District of Quebec in said province, to-wit, that the said George Holmes, on 31 January, 1839, at the Parish of St. Louis of Kamouraska in said district, did feloniously kill and murder one Louis Paschall Achille Tache; and whereas the said George Holmes, not being a citizen of the State of Vermont or of any of the United States, but a citizen of the said Province of Lower Canada, and has come into this state from the said province of Canada, and the offense whereof he is charged as aforesaid having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province for the offense aforesaid: "

"You are therefore required that as soon as may be after 27 (instant) April, the body of the said George Holmes, now in your custody, you convey and deliver to William Brown, the agent of Canada, or to such person or persons as by the laws of the said province may be authorized to receive the same at some convenient place on the confines of this state and the said province of Canada to the end that he, the said George Holmes, may be therein conveyed to the said District of Quebec, and be there dealt with as to law and justice appertains."

"Hereof fail not, but of your doings in the premises make due return."

"Given under my hand, at Shoreham, this 16th day of April, 1839."

"S. H. JENNISON"

" *Governor of Vermont* "

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

A correspondence between C.P. Van Ness, Esq., the Governor of the State of Vermont, in the year 1825, with the executive of the United States was also given in evidence. In March, 1825, the Governor of Vermont forwarded to Mr. Clay, the Secretary of State of the United States, a communication addressed to him by "the Acting Governor of Canada," stating that two soldiers of a British regiment who had committed a robbery on two officers of the regiment were then in confinement in jail in Burlington, Vermont, and asked that the offenders should be delivered up to a person to be authorized to receive them, to be brought to justice in the province of Canada. The Governor of Vermont, in the letter to the Secretary of State, expresses his readiness to attend to any directions the Secretary of State of the United States might please to give on the subject. The reply of Mr. Clay, which was transmitted by Governor Van Ness to the Acting Governor of Canada, states:

"I am instructed by the President to express his regret to your Excellency that the request of the Acting Governor of Canada cannot be complied with under any authority now vested in the executive government of the United

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

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

MR. CHIEF JUSTICE TANEY.

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

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

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

The case in the record is this:

George Holmes, the plaintiff in error, was arrested in the State of Vermont on a warrant or order issued by Silas H. Jennison, as governor of the state, and directed to John Starkweather, Sheriff of the County of Washington, in said state, setting forth, that an indictment had been found by a grand jury of the District of Quebec in the British Province of Lower Canada against the said Holmes for the crime of murder, alleged to have been committed within the said District of Quebec, and that as it was fit and expedient that he should be made amenable to the laws of the country where the offense was charged to have been committed, the said Starkweather was commanded to convey the body of the said Holmes to some convenient place on the confines of the State of Vermont and the Province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him, to the end that he might be there dealt with as to law and justice appertained.

On the application of Holmes, a writ of habeas corpus was issued by the Supreme Court of the State of Vermont commanding the

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

Holmes being brought into court in obedience to the said writ of habeas corpus, his counsel moved for his discharge, and at the same time introduced in evidence certain documents which appear in the record (but which it is unnecessary to state here) for the purpose of showing that the governor had no lawful right to surrender him.

The record then proceeds to state the judgment of the court in the following words:

"Wherefore, after a full hearing of the parties, and all the singular the premises aforesaid being seen and fully examined, it is adjudged by the Court here that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law, and that he be remanded and held accordingly under the

process set forth in the return to this writ of habeas corpus."

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

The authority was exercised by governor Jennison under the state. That authority has been drawn in question in the highest court of law in the state upon the ground that it was repugnant to the Constitution of the United States and the decision was in favor of the validity of the authority so exercised. The only inquiry, therefore, upon the question of jurisdiction is whether there has been such a judgment in such a proceeding as is described in that section -- in other words, whether the judgment of the Supreme Court of Vermont, above stated, was a "final judgment" "in a suit," within the meaning of the act of Congress.

As to the final character of the judgment, the question may be disposed of in a few words. In order to determine whether a judgment is final or not, we must first inquire what is in controversy.

In this case, the validity of the governor's warrant was the only question before the Supreme Court of Vermont, and that question was certainly finally settled, for the court in so many words adjudged that the cause of the detention and imprisonment of Holmes was good and sufficient in law, and nothing more remained in the case for the action of the court. The sheriff, upon their judgment, must have proceeded to execute the warrant and have delivered the prisoner to the Canadian authorities without further delay if the proceedings had not been suspended in consequence of the writ of error to this Court.

In the case of *Weston v. Charleston,* 2 Pet. 464, this Court, speaking of the meaning of the word "final" in the section in question, said,

"If it [the word 'final'] were applicable to those judgments and decrees only in which the right was finally decided and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import or than Congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this Court. A prohibition might issue restraining a collector from collecting duties, and this Court would not revise and correct the judgment. The word 'final' must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause."

We have given this long extract from the opinion of the Court because it shows not only the construction which this Court have given to the act of Congress, but the reasons on which its decision has been founded. In the case now under consideration, the judgment given by the Supreme Court of Vermont certainly determined the particular case before it, and was therefore "final" within the meaning of the act of Congress.

It is not, however, sufficient that the decision was final; it must also be made in a "suit" in order to give this Court the right to reexamine it upon writ of error. Was this proceeding before the Supreme Court of Vermont a "suit?"

The question can hardly at this time be considered as an open one in this Court. It has been examined in several cases depending on principles entirely analogous and the jurisdiction sustained upon the fullest consideration. It is true that in England different opinions have been entertained upon the question whether a writ of error would lie from the refusal of a court to discharge a party brought before it on a habeas corpus. And in the reign of Queen Anne, in the case of the *Queen v. Paty,* commonly called the *Aylesbury Case,* there was an angry controversy upon the subject between the House of Peers and the House of Commons in which the privileges of the latter House were particularly involved. The case is reported in 2 Salk. 503 and 2 Lord Raym. 1105, and is fully detailed in 8 State Trials 90-163. In the view, however,

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that we take of this subject it is unnecessary to examine particularly the English cases. They are collected together and fully examined in the Court for the Correction of Errors in the case of *Yates v. New York,* 6 Johns. 337. We refer to them merely to show that they have not been overlooked. They will be found to turn mainly upon the technical meaning applied there to the word "judgment," in which the form in which the proceedings were had and the decision entered were perhaps deemed more material than the subject matter, in order to give to the decision the character of a judgment in a suit.

But with all the strictness upon the subject in the English courts, we are not aware of any case there in which it has been held that a writ of error would not lie from the judgment of a court of record deciding, upon the return of the habeas corpus, that the warrant under which the party was held was sufficient in law to authorize his arrest and detention. Certainly no such decision was given in the case of *Queen v. Paty,* just mentioned, and we think it would be difficult to assign any good reason for refusing the writ of error. If a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court, to recover his liberty. In order to be effectual for the purposes for which it is intended, the proceedings must be summary, and the law has accordingly made them so. And if an officer of a state government, in the exercise of an authority forbidden by

the Constitution of the United States, has deprived an individual of his liberty, why should it be supposed that the summary character of the proceedings by which he must seek to recover it would be deemed by Congress a sufficient reason for denying him the writ of error to this Court? For this, in effect, is the whole amount of the objection. It is said that this is not a final judgment in a suit, and that therefore the act of 1789 does not give the writ of error to this Court.

But whatever would, at this day, be the doctrine of the English courts in similar cases, we consider that the construction of the Act of Congress of 1789 upon this subject has been settled by repeated decisions in favor of the jurisdiction. The cases decided were not indeed cases of proceedings and judgments upon habeas corpus, but arose and were decided upon applications for writs of mandamus and of prohibition. Yet cases of that description stand upon the same principles with the proceedings on a habeas corpus so far as the question now under consideration is concerned. For in cases of mandamus and prohibition, the proceedings, like those upon a habeas corpus, are summary, and the judgment given is not "final" in the sense in which that word is used in relation to common law judgments. And if under the act of 1789 no writ of error would lie except in cases where the suit was brought, the proceedings had, and the judgment entered according to the forms of a suit at common law, then the writ could not be sustained in cases where a peremptory mandamus or a prohibition had been awarded or refused. In

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cases of that description, however, the construction of the act of Congress has been settled in this Court, and settled, as we think, according to the true import of its words. The construction given to it in these cases entitled the present plaintiff in error, as a matter of right, to have the judgment rendered against him by the Supreme Court of Vermont reexamined in this Court.

Before, however, we proceed to refer more particularly to the decisions heretofore given, it is proper to remark, that there is no material difference between the language of the law giving the writ of error from the judgment of the circuit court for

the District of Columbia, and the language used in the twenty-second and twenty-fifth sections of the act of 1789, so far as relates to the forms of proceeding, and the nature of the judgment. Undoubtedly, there are a multitude of cases in which a writ of error will lie from the judgment of a circuit court, where it would not lie to this Court from a judgment rendered in a similar controversy in a state court. But our present inquiry has nothing to do with that distinction. We are speaking merely of the nature of the proceeding in this case, and examining whether it is of that description, that under the twenty-fifth section of the act of 1789, will authorize a writ of error. The writ in that section is given from any "final judgment" "in a suit." In the act relating to the District of Columbia, it is given from any "final judgment." In the twenty-second section of the act of 1789, it is given from "final judgments" "in civil actions." These different forms of expression have always been held to mean the same thing; and, consequently, the decision of this Court upon one of them is equally applicable to the others. With this explanation, we proceed to inquire whether the habeas corpus was "a suit." We have already shown that in these proceedings an authority exercised under a state was drawn in question; that the decision was in favor of the authority; and that the judgment of the court was final. The remaining question is, were these things done in a suit?

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

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

We have already mentioned that a writ of error under the twenty-fifth section, so far as it depends on the forms of proceeding and the nature of the judgment, must be governed by the same rules that apply to similar writs under the twenty-second section and under the act relating to the District of Columbia. But the case of *Weston v. Charleston,* 2 Pet. 449, which has already been referred to, arose on the twenty-fifth section itself and appears to us to be decisive of the point in question. In that case, a prohibition had been obtained by the plaintiffs in error from the Court of Common Pleas of South Carolina for the Charleston District to restrain the City Council of Charleston from levying a tax upon the stock of the United States, held by residents of the city. The city council removed the case by writ of error to the constitutional court, the highest court of law in the state, where the decision of the court of common pleas was reversed and the ordinance imposing the tax held not to be repugnant to the Constitution of the United States. From this decision a writ of error was brought to this Court, and the question was raised here whether a prohibition was a "suit" within the meaning of the act of

1789. The Court held that it was, and Chief Justice Marshall, in delivering the opinion of the Court, says,

"Is a writ of prohibition a 'suit?' The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

We entirely concur in the definition thus given of the meaning of the word "suit" as used in the act of 1789. It makes the act of Congress consistent with the principles of justice, and interprets

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it according to the natural meaning of its words, and it is too plain for argument that according to this definition, the proceedings upon the habeas corpus was a suit in the Supreme Court of Vermont. A right claimed by the prisoner Holmes under the Constitution of the United States was litigated between him and the governor of the state and the sheriff of the county in a court of justice. The proceedings by habeas corpus by which the decision of the court was sought was, in the language of the case referred to, a suit, and we cannot therefore refuse to take jurisdiction upon this writ of error without disregarding the deliberate decisions of this Court.

It is very true that neither the case just mentioned nor the cases before referred to were writs of error upon a refusal to discharge on habeas corpus. But in the English cases, the authorities are stronger in favor of the writ of error in the case of the habeas corpus than in the case of the mandamus. The House of Lords affirmed the judgment of the Court of King's Bench, which decided that a writ of error would not lie to that court from the judgment of the Court of King's Bench of Ireland awarding a peremptory mandamus. But the House of Lords, which is the highest judicial tribunal in England, has never by any decision countenanced the

idea that a writ of error would not lie from the refusal of the Court of King's Bench to discharge a party on habeas corpus. On the contrary, in the *Aylesbury Case,* before mentioned, they decided that a writ of error ought to be issued to bring the question before them. The Commons, indeed, vehemently denied that the writ would lie, but it will be remembered that the Aylesbury men had been imprisoned by the House of Commons for a breach of privilege, and that House was naturally excited by a proceeding which would have made the House of Lords in a great measure the judges of the privileges of the Commons. It is not in heated conflicts of this description between two legislative bodies concerning their respective privileges that we are to look for claim and precise judgments on questions of law, and neither the opinion of the Lords nor the Commons, expressed under such circumstances, ought to be esteemed as safe guides in a court of justice. It is certain, however, that the question whether a writ of error would lie in such a case was then an open one upon which the two Houses differed in opinion. In New York, in the case of *Yates v. People,* before mentioned, it was decided in the Court for the Correction of Errors that a writ of error would lie from the refusal of the supreme court of the state to discharge a party on habeas corpus. There was, indeed, great division of opinion in the court, and so many eminent and distinguished judges dissented from the judgment given that we do not feel authorized to refer to it as having settled the question in New York. Yet that case as well as the English cases show that the point has been a doubtful one, and that the right to the writ of error in the case of the habeas corpus has always stood on firmer and better ground than in the case of the

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mandamus. And we refer to these cases to show, among other things, that the supreme court, in the decisions before mentioned, has not overturned established principles; that it has merely settled doubtful questions, and has not settled them against the weight of judicial authority, and as the construction it has given to the word "suit" in the act of 1789 is well calculated to promote the great ends of justice, and undoubtedly conforms to the intention of the legislature; we perceive no sufficient reason for setting it aside or departing from it. Under the authority of

these decisions, therefore, we hold that the judgment of the Vermont court now before us was a final judgment in a suit, and the plaintiff in error is therefore entitled to have it reexamined in this Court by writ of error.

The case being thus before this Court, it becomes our duty to inquire whether the authority exercised by the Governor of Vermont, was repugnant to the Constitution of the United States.

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

Again, the question under this habeas corpus is in no degree connected with the power of the states to remove from their territory any person whose presence they may think dangerous to their peace, or in any way injurious to their interests. The power of the states in that respect was fully considered by this Court and decided, in the case of *New York v. Miln,* 11 Pet. 102. Undoubtedly they may remove from among them any person guilty of or charged with crimes, and may arrest and imprison them in order to effect this object. This is a part of the ordinary police powers of the states, which is necessary to their very existence and which they

have never surrendered to the general government. They may, if they think proper, in order to deter offenders in other countries from

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coming among them, make crimes committed elsewhere punishable in their courts if the guilty party shall be found within their jurisdiction. In all of these cases, the state acts with a view to its own safety, and is in no degree connected with the foreign government in which the crime was committed. The state does not cooperate with a foreign government not hold any intercourse with it when she is merely executing her police regulations. But in the case of Holmes it is otherwise. The state acts not with a view to protect itself, but to assist another nation which asks its aid. Holmes is not removed from the State of Vermont as a man so stained with crimes as to render him unworthy of the hospitality of the state, but he is delivered up to the Canadian authorities as an act of comity to them. This is not the exercise of a police power, which operates only upon the internal concerns of the state and requires no intercourse with a foreign country in order to carry it into execution; it is the comity of one nation to another, acting upon the laws of nations and determining, for itself how far it will assist a foreign nation in bringing to punishment those who have offended against its laws.

The power which has thus been exercised by the State of Vermont is a part of the foreign intercourse of this country, and has undoubtedly been conferred on the federal government. Whether it be exclusive or not is another question, of which we shall hereafter speak. But we presume that no one will dispute the possession of this power by the general government. It is clearly included in the treatymaking power and the corresponding power of appointing and receiving ambassadors and other public ministers. The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and consequently it was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty and which are consistent with the nature of our institutions and the distribution of powers between the general and state governments. And without attempting to define the exact limits of this treatymaking power or to enumerate

the subjects intended to be included in it, it may safely be assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government. And as the rights and duties of nations towards one another in relation to fugitives from justice are a part of the law of nations and have always been treated as such by the writers upon public law, it follows that the treatymaking power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced when it demands the surrender of anyone charged with offenses against it.

The practice of the government, from the early days of its existence, conforms to this opinion. In the letter of Mr. Jefferson to Mr. Genet of September 12, 1793, 1 Am.State Pap. 175, he speaks of the right of the general government in this respect as if it was

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undisputed. And in the treaty negotiated with England by Mr. Jay during the administration of General Washington, there was an article stipulating for the mutual delivery of persons charged with murder or forgery. The case of Jonathan Robbins, which was the only one that arose under this treaty, produced much excitement in the country and animated debates in Congress. Yet the power of the general government to enter into such an engagement was never questioned. The objections to the surrender of the party rested upon other grounds.

Indeed, the whole frame of the Constitution supports this construction. All the powers which relate to our foreign intercourse are confided to the general government. Congress has the power to regulate commerce; to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations; to declare war; to grant letters of marque and reprisal; to raise and support armies; to provide and maintain a navy. And the President is not only authorized, by and with the advice and consent of the Senate, to make treaties, but he also nominates, and by and with the advice and consent of the Senate appoints, ambassadors and other public ministers through whose agency

negotiations are to be made and treaties concluded. He also receives the ambassadors sent from foreign countries, and everything that concerns our foreign relations that may be used to preserve peace or to wage war has been committed to the hands of the federal government. The power of deciding whether a fugitive from a foreign nation should or should not be surrendered was necessarily a part of the powers thus granted.

It being evident, then, that the general government possesses the power in question, it remains to inquire whether it has been surrendered by the states. We think it has, and upon two grounds.

1. According to the express words of the Constitution, it is one of the powers that the states are forbidden to exercise without the consent of Congress.

2. It is incompatible and inconsistent with the powers conferred on the federal government.

The first clause of the tenth section of the first article of the Constitution, among other limitations of state power, declares that "no state shall enter into any treaty, alliance, or confederation;" the second clause of the same section, among other things, declares that no state without the consent of Congress, shall "enter into any agreement or compact with another state, or with a foreign power."

We have extracted only those parts of the section that are material to the present inquiry. The section consists of but two paragraphs, and is employed altogether in restrictions upon the powers of the states. In the first paragraph, the limitations are absolute and unconditional; in the second, the forbidden powers may be exercised with the consent of Congress, and it is in the second paragraph that the restrictions are found which apply to the case now before us.

In expounding the Constitution of the United States, every word

must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. The many

discussions which have taken place upon the construction of the Constitution have proved the correctness of this proposition and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning, and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article, of which we are now speaking, because the whole of this short section is directed to the same subject -- that is to say it is employed altogether in enumerating the rights surrendered by the states; and this is done with so much clearness and brevity that we cannot for a moment believe that a single superfluous word was used, or words which meant merely the same thing. When, therefore, the second clause declares that no state shall enter into "any agreement or compact" with a foreign power without the assent of Congress, the words "agreement" and "compact" cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word "treaty" in the preceding clause, into which the states are positively and unconditionally forbidden to enter, and which even the consent of Congress could not authorize.

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

But it may be said that there is no treaty, and undoubtedly, in the sense in which that word is generally understood, there is no treaty between Vermont and Canada. For when we speak of "a treaty," we mean an instrument written and executed with the formalities customary among nations, and as no clause in the

Constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the State of Vermont.

But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the Constitution, the states are forbidden to enter into any "agreement" or "compact" with a foreign nation, and as these words could not have been idly or superfluously

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

A few extracts from an eminent writer on the laws of nations, showing the manner in which these different words have been used and the different meanings sometimes attached to them, will perhaps contribute to explain the reason for using them all in the Constitution, and will prove that the most comprehensive terms were employed in prohibiting to the states all intercourse with foreign nations. Vattel, page 192, sec. 152, says: "A treaty, in Latin *foedus,* is a compact made with a view to the public welfare by the superior power, either for perpetuity or for a considerable time."

Section 153.

"The compacts which have temporary matters for their object, are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all; treaties receive a successive execution, whose duration equals that of the treaty."

Section 154. Public treaties can only be made by the

"supreme power, by sovereigns who contract in the name of the state. Thus conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties."

Section 206, page 218. "The public compacts called conventions, articles of agreement, &c.;, when they are made between sovereigns, differ from treaties only in their object."

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

Neither is it necessary in order to bring the case within this prohibition that the agreement should be for the mutual delivery of all fugitives from justice or for a particular class of fugitives. It is sufficient if there is an agreement to deliver Holmes. For the prohibition in the Constitution applies not only to a continuing agreement embracing classes of cases, or a succession of cases, but to any agreement

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whatever. An agreement to deliver Holmes is therefore forbidden, and as much so as if it were an agreement to deliver all persons in the same predicament.

Is there not then in this case an agreement on the part of Vermont to deliver Holmes? And is he not detained in custody, to be delivered up pursuant to this agreement?

It must be remembered that states can act only by their agents and servants, and whatever is done by them, by authority of law, is done by the state itself. The Supreme Court of Vermont, as we have already mentioned, has decided that the warrant of the governor, and the detention of Holmes under it, are authorized by law. Consequently the seizure for the purpose of delivery, the agreement on the one side to deliver, and on the other to receive, is an agreement made by the authorized servants of the state, and of course, in contemplation of law, made by the state itself.

The record before us does not state the application of the Governor of Canada for the arrest and delivery of Holmes, although, from the nature of the transaction, doubtless such an application was made. As it does not, however, appear in the record, we do not act upon the supposition that such a demand was made, nor consider it as in the case. The question is not whether there was a demand, but whether there was an agreement with a foreign power, and the governor's warrant of itself imports an agreement with the Canadian authorities. It directs Holmes to be delivered "to William Brown, the agent of Canada, or to such person or persons as by the laws of the province are authorized to receive him." How is he to be delivered unless they accept? And if the authorities of Vermont agree to deliver him, and the authorities of Canada agree to accept, is not this an agreement between them? From the nature of the transaction, the act of delivery necessarily implies a mutual agreement.

Everyone will admit that an agreement formally made to deliver up all offenders who, after committing crimes in Canada, fly for shelter to Vermont would be unconstitutional on the part of the state. So an agreement, after Holmes had escaped to Vermont, written and signed by the state and provincial authorities by which the Governor of Vermont engaged to seize him and deliver him up to the Canadian officers would unquestionably be unconstitutional. Yet precisely the same thing is done in this case without a regular and formal agreement. It is in

some way or other mutually understood by the parties that he shall be seized and delivered up, and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made. The framers of the Constitution manifestly believed

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that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states. Provisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the state authorities and a foreign government. Hence prohibitions were introduced which were supposed to be sufficient to cut off all communication between them.

But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States.

It is admitted that an affirmative grant of a power to the general government, is not of itself a prohibition of the same power to the states, and that there are subjects over which the federal and state governments exercise concurrent jurisdiction. But where an authority is granted to the Union to which a similar authority in the states would be absolutely and totally contradictory and repugnant, there the authority to the federal government is necessarily exclusive, and the same power cannot be constitutionally exercised by the states.

The exercise of the power in question by the states is totally contradictory and repugnant to the power granted to the United States. Since the expiration of the treaty with Great Britain negotiated in 1793, the general government appears to

have adopted the policy of refusing to surrender persons who, having committed offenses in a foreign nation, have taken shelter in this. It is believed that the general government has entered into no treaty stipulations upon this subject since the one above mentioned, and in every instance where there was no engagement by treaty to deliver and a demand has been made, they have uniformly refused, and have denied the right of the executive to surrender, because there was no treaty and no law of Congress to authorize it. And acting upon this principle throughout, they have never demanded from a foreign government anyone who fled from this country in order to escape from the punishment due to his crimes.

This being the policy of the general government, is not the possession of the power by the states totally contradictory and repugnant to the authority conferred on the federal government? What avails it that the general government, in the exercise of that portion of its power over our foreign relations, which embraces this subject, deems it wisest and safest for the Union to enter into no arrangements upon the subject and to refuse all such demands if the state in which the fugitive is found may immediately reverse this decision and deliver over the offender to the government that demands him? If the power remains in the states, the grant to the general government is nugatory and vain, and it would be in the power of any state to overturn and defeat the decisions of the general government

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upon a subject admitted to be within its appropriate sphere of action, and to have been clearly and necessarily included in the treatymaking power.

The power in question, from its nature, cannot be a concurrent one, to be exercised both by the states and the general government. It must belong exclusively to the one or the other. If it were merely the power to surrender the fugitive, it might be concurrent, because either might seize and surrender, whose officers could first lay hold of him. But the power in question, as has already been stated, is a very different one. It is the power of deciding the very delicate question, whether the party demanded ought or ought not to be surrendered. And in determining this question, whether the determination is made by the United

States or a state, the claims of humanity, the principles of justice, the laws of nations, and the interests of the Union at large, must all be taken into consideration and weighed when deliberating on the subject. Now it is very evident that the councils of the general government and of the state may not always agree on this subject. The decision of the one may stand in direct opposition to the decision of the other. How can there be a concurrent jurisdiction in such a case? They are incompatible with each other, and one must yield. And it being conceded on all hands that the power has been granted to the general government, it follows that it cannot be possessed by the states, because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government.

Again, how are the states to exercise this power? We must not look at the power claimed as if it were confined to fugitives from Canada into the bordering states. The Constitution makes no distinction in that respect, and if the state has the power in this instance, it has the same power in relation to fugitives from England, or France, or Russia. Now how is a state to hold communications with these nations? The states neither send nor receive ambassadors to or from foreign nations. That power has been expressly confided to the federal government. How, then, are negotiations to be carried on with a state when a fugitive is demanded? Are they to treat upon this subject with the ambassador received by the United States? And is he, after being refused by the general government, to appeal to the state to reverse that decision? Such certainly was not the intention of the framers of the Constitution, and cannot be its true construction. Every part of that instrument shows that our whole foreign intercourse was intended to be committed to the hands of the general government, and nothing shows it more strongly than the treatymaking power, and the power of appointing and receiving ambassadors, both of which are immediately connected with the question before us, and undoubtedly belong exclusively to the federal government. It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people and one nation, and to cut off all communications between foreign governments, and the several state

authorities. The power now claimed for the states is utterly incompatible with this evident intention, and would expose us to one of those dangers, against which the framers of the Constitution have so anxiously endeavored to guard.

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

This principle is no doubt, the true one in relation to the grants of power to which it is applied in the case above mentioned of *Sturges v. Crowningshield.* For example, the grant of power to Congress to establish "uniform laws on the subject of bankruptcies throughout the United States" does not of itself carry with it an implied prohibition to the states to exercise the same powers. But in the same case of *Sturges v. Crowningshield,* another principle is stated which is equally sound and which is directly applicable to the point before us -- that is to say that it never has been supposed that the concurrent power of state legislation extended to every possible case in which its exercise had not been prohibited. And that whenever

"the terms in which a power is granted to Congress, or the nature of the power requires that it should be exercised exclusively by Congress; the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it."

This is the character of the power in question. From its nature, it can never be dormant in the hands of the general government.

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

refuse to treat, and refuse to surrender, that the power is supposed to be dormant, and not exercised by the federal government. But is not this a mistake as to the nature of the power? And is it not as fully exercised by the decision not to surrender, as it could be by a decision the other way? The question to be decided is a question of foreign policy, committed, unquestionably, to the general government. The federal government has also the power to declare war, and whenever it becomes a question whether we are to be at peace or at war, undoubtedly the general government must determine that question. And if Congress decides that the honor and interest of the country does not require war, and on that account refuses to declare it, is not this an exercise of its power over the subject? And could it be said that the power was a dormant power, because war had not been declared?

There is, however, an express prohibition to the states to engage in war, and perhaps the case of ambassadors would be more analogous to the one under consideration. The power of appointing "ambassadors, other public ministers, and consuls" is given to the federal government, and there is no prohibition to the

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

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of the Supreme Court, in the case of *Houston v. Moore,* 5 Wheat. 23,

"we are altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be effectual, and at the same time compatible with one another."

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

Nor do we perceive any advantage that could arise to the states at any time from the possession of this power. It is, as we have already said, in no degree connected with their police powers, and they can undoubtedly remove from their territory every description of offenders who, in the judgment of the legislature, are dangerous to the peace of the state. It may indeed be supposed that along the border line which separates the Canadas from the United States, the facility of escape into another jurisdiction is a temptation to crime, and that an arrangement between the authorities of the province and the states which adjoin them, for the mutual delivery of offenders, would be advantageous to both. If such an arrangement is deemed desirable, the foresight of the framers of the Constitution have provided the way for doing it, without interfering with the powers of foreign intercourse committed to the general government, or endangering the peace of the

Union. Under the second clause of the tenth article of he first section of the Constitution, any state, with the consent of Congress, may enter into such an agreement with the Canadian authorities. The agreement would, in that event, be made under the supervision of the United States,

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and the particular offenses defined in which the power was to be exercised, and the national character of the persons who were to be embraced in it, as well as the proof to be required to justify the surrender. The peculiar condition of the border states would take away all just cause of complaint from other nations to whom the same comity was not extended, and at the same time the proper legal safeguards would be provided for the protection of citizens of other states who might happen to become obnoxious to the Canadian authorities and be demanded as offenders against its laws. They would not be left to the unlimited discretion of the states in which they may happen to be found when the demand is made, as must be the case if the power in question is possessed by the states.

Upon the whole, therefore, my three Brothers before mentioned and myself, after the most careful and deliberate examination, are of opinion that the power to surrender fugitives who, having committed offenses in a foreign country, have fled to this for shelter, belongs under the Constitution of the United States exclusively to the federal government, and that the authority exercised in this instance by the Governor of Vermont is repugnant to the Constitution of the United States.

It is therefore our opinion that the judgment of the Supreme Court of Vermont ought to be reversed and the cause remanded to that court, and that it be certified to them, with the record, as the opinion of this Court that the said George Holmes is entitled to his discharge under the habeas corpus issued at his instance.

In the division, however, which has taken place between the members of the court, a different judgment must be entered.

MR. JUSTICE THOMPSON.

This case comes up by writ of error from the Supreme Court of the State of Vermont under the twenty-fifth section of the Judiciary Act of 1789. The proceedings in the state court which are brought here for review have been already so fully stated that it is unnecessary for me to repeat them. It is sufficient for me to state simply that these proceedings are founded upon a writ of habeas corpus under which George Holmes was brought up before the supreme court claiming to be discharged from the custody of the sheriff, when he was held under a warrant from the Governor of Vermont by which the sheriff was commanded to arrest the said George Holmes, as a fugitive from justice, from the Province of Lower Canada, he having been there indicted for the crime of murder.

In the examination of this case, I shall confine myself simply to the question whether the case comes within the twenty-fifth section of the Judiciary Act, so as to give this Court jurisdiction and authority to review the proceedings in the Supreme Court of Vermont. I do not intend to examine the question whether the proceedings upon a habeas corpus is "a suit" within the meaning of this

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twenty-fifth section, or whether a writ of error will lie to review proceedings upon a habeas corpus. Although the case upon these points is not free from doubts, yet, thinking as I do that this Court has not jurisdiction at all of the case, these points are of minor importance.

In the case of *Crowell v. Randall,* 10 Pet. 391, this Court reviewed all the cases which had been brought before it under the twenty-fifth section, when the question of jurisdiction was brought under the consideration of the Court, which review resulted in the following conclusion:

"That it has been uniformly held that to give this Court appellate jurisdiction, two things should have occurred and be apparent upon the record. First, that someone of the questions stated in the section did arise in the court below. And secondly that a decision was actually made known by the same court in the manner required by the section. If both these do not appear on the record, the appellate

jurisdiction fails. That it is not sufficient to show that such question might have occurred or such decision might have been made in the court below. It must be demonstrable that they did exist and were made. That it is not indispensable that it should appear on the record *in totidem verbis* or by direct and positive statement, that the question was made, and the decision given by the court below on the very point. But that it is sufficient if it is clear from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment. That it is not sufficient to show that a question might have arisen or been applicable to the case unless it is further shown on the record that it did arise and was applied by the state court to the case."

According to this construction of the law, it is clear that some one of the cases put in this section of the act did in point of fact arise and was in point of fact decided upon in the state court.

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

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

There is certainly no general power vested in this Court to revise any other cases. And according to the case of *Crowell v. Randall,* it must appear, either directly or by necessary inference, that someone of these questions did in point of fact arise, and was decided by the court. As the record in this case does not point to any treaty or law or any part of the Constitution of the United States or authority embraced by it, that was drawn in question, or that has been violated by the state court; it makes it necessary to examine more at length the several classes of cases mentioned in this twenty-fifth section which fall under the revising power of this Court, to see whether this case can be brought within any of them. This section contains three specified classes. The first is where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States and the decision is against their validity. This record certainly does not show that any treaty or law of the United States or any authority exercised under the United States was drawn in question at all, and of course there could have been no decision against their validity. The court did not profess to act under, or against any such source of authority. The next class is where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. There is no treaty or law of the United

States drawn in question, nor was there any statute of Vermont in any manner under the consideration of the court, or any decision upon the validity of a statute of that state. The record does not furnish the slightest evidence that the State of Vermont had ever passed any law on the subject, and to draw the conclusion from the mere fact of surrender by the governor that the laws of the state had authorized it is certainly looking to something not apparent on the record, which this Court has said cannot be done. If, therefore, the present case falls at all within this class, it must be because it was the exercise of an authority repugnant to the Constitution

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of the United States.

And then the question arises what part of the Constitution has been violated, or is in conflict with the power exercised in this case. The argument at the bar did not point to any specific provision in the Constitution that has been violated except the Fifth Amendment, which declares that no person shall be deprived of life, liberty, or property, without due process of law. It is unnecessary to stop to inquire whether this case falls within that provision, if it would be brought to bear upon it, for this Court has decided that none of these amendments apply to the states, but are limitations upon the powers of the general government. 32 U. S. 7 Pet. 247. The argument has rested principally upon the theory of our government, in relation to the treatymaking power, and the organ for conducting foreign intercourse. There is certainly no specific provision in the Constitution on the subject of surrendering fugitives from justice, from a foreign country, if demanded, and we are left at large to conjecture upon various parts of the Constitution, to see if we can find that such power is by fair and necessary implication embraced within the Constitution: I mean whether any such obligation is imposed upon any department of our government, by the Constitution, to surrender to a foreign government a fugitive from justice. For unless there is such a power vested somewhere, it is difficult to perceive how the Governor of Vermont has violated any authority given by the Constitution to the general government.

If such a power or obligation, in the absence of any treaty or law of Congress on the subject, rests anywhere, I should not be disposed to question its being vested in the President of the United States. It is a power essentially national in its character, and required to be carried into execution by intercourse with a foreign government, and there is a fitness and propriety of this being done through the executive department of the government, which is entrusted with authority to carry on our foreign intercourse. I do not mean to enter at large into the question of surrendering to foreign governments fugitives from justice. Whatever that power or duty or obligation may be, it is in my judgment not within the authority of this Court to regulate or control its exercise.

In order to give such power to this Court, when the surrender has been made under authority of a state, it must appear to be repugnant to the Constitution or an existing law or treaty of the United States. And unless the President of the United States is, under the Constitution, vested with such power, it exists nowhere, there being no treaty or law on the subject. And it appears to me indispensably necessary, in order to maintain the jurisdiction of this Court in the present case, to show that the President is vested with such power under the Constitution. This record shows that such power or authority has been expressly disclaimed by the President on an application by the Governor of Vermont in the year 1825. The Secretary of State, in answer to the letter of the Governor of Vermont on that subject, says

"I am instructed by the President to express his regret to your Excellency, that the request of the Acting Governor of Canada cannot be complied with

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under any authority now vested in the executive government of the United States; the stipulation between this and the British government, for the mutual delivery over of fugitives from justice being no longer in force and the renewal of it by treaty being at this time a subject of negotiation between the two governments."

Here, then, is a direct denial by the President of the existence of such a power in the executive in the absence of any treaty on the subject. And such has been the settled and uniform course of the executive government of the United States upon this subject since the expiration of our treaty with England. And if this be so, it may be emphatically asked what power in the general government comes in conflict with the power exercised by the Governor of Vermont? In order to maintain the jurisdiction of this Court in the present case, it must be assumed that the President has, under and by virtue of the Constitution, in the absence of any treaty on the subject, authority to surrender fugitives from justice to a foreign government; otherwise it cannot be said that the Governor of Vermont has violated the Constitution of the United States. If any such power is to be given to the President by treaty, it is not merely to regulate the mode and manner of exercising an existing power, but must be a treaty creating the power and founded upon the mere comity of nations, and not resting upon any obligation the performance of which a foreign nation has a right to demand of our government. This power to surrender fugitives from justice to a foreign government has its foundation -- its very life and being -- in a treaty to be made between the United States and such foreign government, and is not by the Constitution vested in any department of our government without a treaty. The power, therefore, exercised by the Governor of Vermont can at most be only repugnant to a dormant power, resting entirely upon comity and reciprocity, to be established by treaty, and which may, by possibility, be brought into action at some future day through the instrumentality of such a treaty. This, in my judgment, is too remote and contingent to fall under the protecting authority of this Court under the twenty-fifth section of the Judiciary Act.

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

This class points to some particular clause in the Constitution, or of a treaty, or statute, or commission, held under the United States by which a right, title,

privilege, or exemption is claimed, and the decision is against such claim. It may be again observed that no treaty or law was drawn in question. Nor was any particular clause in the Constitution conferring any privilege or exemption, in any manner whatever alluded to in the record, or can be supposed by any reasonable intendment to have been drawn in question,

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except, perhaps, the Fifth Amendment, which, as it has been already shown, does not apply to the states, whatever may be its construction. Nor can the prohibition to the states to enter into any treaty, alliance, or confederacy, or into any agreement or compact with another state or with a foreign power, be considered as drawn in question or violated. There is nothing in this record to warrant an inference that the State of Vermont had ever entered into any agreement or compact with Canada in relation to the surrender of fugitives from justice. The Governor of Vermont does not profess to act under any such agreement, and it is inconceivable, if any existed, why no allusion whatever is made to it in his warrant, or in the proceedings before the court. The record, in my judgment, does not furnish the least evidence, justifying a conclusion that any treaty, compact, or agreement of any description, had been entered into between the State of Vermont and Canada, on the subject of surrendering fugitives from justice, and the case now before the court is the only one, from anything appearing on the record, where it has ever been attempted. And to construe this single isolated case, and that too, by the governor alone, without any evidence of his acting under the authority of any statute of the state on the subject, to be an entering into a solemn compact or agreement between the State of Vermont and a foreign power, in violation of the article of the Constitution, which prohibits a state from entering into any compact or agreement with a foreign power, is a construction to which I cannot yield my assent.

I am not, therefore, able to discover how any question could have arisen and been decided in the Supreme Court of Vermont coming within the appellate power of this Court. This power is not only affirmatively declared and pointed to certain specified cases; but there is an express denial of the authority of this Court to go

beyond such specific questions. The act declares that no other error shall be assigned or regarded as a ground of reversal, than such as appears on the face of the record, and immediately respects the before-mentioned questions of the validity or construction of the Constitution, treaties, statutes, commission, or authority in dispute.

And it appears to me to be a very strong and cogent objection to taking jurisdiction in this case, that a reversal of the judgment will be entirely unavailing unless the Supreme Court of Vermont shall voluntarily discharge the prisoner. It is certainly not in the power of this Court to enforce its judgment. If the jurisdiction of this Court was clearly and plainly given, it might not be a satisfactory answer that it could not execute its judgment. But where the authority of this Court depends upon a doubtful construction of its appellate power, it furnishes a persuasive reason against applying the power to a case which may result in a nugatory and fruitless judgment. It is not to be presumed that Congress would vest in this Court a power to judge, and decide, and withhold from it the authority to execute such judgment. It would be of no benefit to the party, and would be placing the court in no very enviable a

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situation. If the proceedings on a habeas corpus is a suit within the meaning of the Judiciary Act, an execution of the judgment is the fruit and end of the suit, and is very aptly called the end of the law. And the provisions contained in this twenty-fifth section of the Judiciary Act, show very satisfactorily in my judgment, that the revising power of this Court was not intended to be applied to any case where the court could not execute its judgment. The act declares, that the writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court. And the proceedings upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. This looks to a case where the state court refuses to execute the judgment of this Court.

No such provision is made or allowed, when the writ of error is to a circuit court of the United States. In such case, the Judiciary Act declares that the supreme court, shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereon. And what is the reason for this different mode of executing the judgment of this Court. It is because this Court can coerce the circuit courts to execute the mandate. The Judiciary Act gives to the supreme court the power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States, and that the courts of the United States shall have power to issue writs of *scire facias,* habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

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

The Judiciary Act authorizes this Court to issue writs of habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, with a proviso, however, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are

committed for trial before some court of the same or are necessary to be brought into court to testify (sec. 14). The power, therefore, of this Court to execute its judgment is expressly taken away, and the prisoner obtains no relief. And can it be reasonably supposed that Congress intended by this twenty-fifth section of the Judiciary Act, to embrace cases where the judgment must be a dead letter, and at most merely advisory, and the expression of an opinion upon an abstract question, but utterly fruitless, if the advice shall be disregarded. I cannot yield my assent to the assumption of a power which must place this Court in such a feeble an inefficient situation. If this Court has the power to meet the exigency of the case at all, why not apply at once the appropriate and efficient remedy by habeas corpus, and relieve the prisoner from his illegal imprisonment. But if this power is denied to the court, can it be that the act of Congress has clothed us only with the naked authority to advise the Supreme Court of Vermont to discharge the prisoner? I think not. And that it is therefore a case not embraced under the twenty-fifth section of the Judiciary Act, and that the appellate power of this Court cannot reach the case.

MR. JUSTICE BARBOUR.

This case being brought before us by a writ of error, not from a circuit court of the United States, but from the Supreme Court of Judicature of Vermont, we have no jurisdiction over it unless it comes within some one of the provisions of the twenty-fifth section of the Judiciary Act.

The class of cases described in that section, within which it is supposed that it comes, is defined in the following terms:

"or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity."

Now the record does not in terms state on what ground the court decided; the judgment only declares that the cause of detention and imprisonment -- that is, the

warrant of the Governor of Vermont -- is good and sufficient in law. It must, then, according to the decision of this Court, appear, by clear and necessary intendment that the question of the repugnancy of the authority exercised either to the Constitution or treaties or laws of the United States must have been raised and must have been decided in order to have induced the judgment.

As there is neither any treaty nor law having relation to the case, the single inquiry is whether there is any provision of the Constitution to which the authority in question is repugnant, because if

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there be not then it will follow that there is no ground for the clear and necessary intendment, or for any intendment, that such matter was drawn in question and decided by the court below, as is absolutely necessary to give this Court jurisdiction over a case brought here from a state court.

I proceed, then, to examine the question whether the Constitution contains any such provision.

The only clause of that instrument upon the subject of the surrender of fugitives from justice is found in the second section of the fourth article, and is in these words:

"A person charged in any state with treason, felony, or other crime who shall flee from justice and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

This provision, by the obvious import of its terms, has no relation whatsoever to foreign nations, but is confined in its operation to the states of the Union.

Nor, indeed, should we have expected to have found in such an instrument any provision upon the subject except in relation to the states themselves. It is a compact of government between the states, for themselves and not for others; it consists, therefore, of a designation of the powers granted; the division of those

powers amongst the departments which it created; and of such reciprocal stipulations, limitations, and reservations as the states thought proper to make. But it was no part of the purpose of its framers, to define the duties or obligations of the states thus united to foreign nations or to prescribe the mode of their fulfillment.

There is no other clause of the Constitution which, in terms, has even the remotest allusion to the surrender of fugitives from justice.

Before I proceed to examine the various provisions in the text of the Constitution which have been relied upon as bearing upon the question, I will take notice of an argument urged at the bar as being founded upon the fifth amendment to that instrument.

It was said that the authority exercised in this case, was in violation of that part of the fifth amendment which declares "that no person shall be deprived of life, liberty, or property, without due process of law." This argument is at once met and repelled by the decision of this Court in the case of *Barron v. Baltimore,* 7 Pet. 243, in which this Court decided that the amendments to the Constitution of the United States did not apply to the state governments; that they were limitations upon the power granted in the instrument itself, and not upon the power of distinct governments, framed by different persons, and for different purposes. To which I will add, what is matter of history, that so far from the states which insisted upon these amendments contemplating any restraint or limitation by them on their own powers, the very cause which gave rise to them was a strong jealousy on their part of the power which they had granted in the Constitution. They therefore with anxious solicitude endeavored

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by these amendments to guard against any misconstruction of the granted powers which might, by possibility, be the result of the generality of the terms in which they were expressed. But it is unnecessary to dwell longer on this point, because it is not only decided in the case just cited, but it is also declared in the case of *Lessee*

of Livingston v. Moore, 7 Pet. 551-552, to be settled that the amendments of the Constitution of the United States do not extend to the states.

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

It is admitted that the regulation of our foreign intercourse is confided to the federal government. But that the proposition thus generally propounded may be reduced to a definite form; that we may have some standard of practical application by which to test the nature, character, and extent of this power over foreign intercourse and its bearing upon the present question, it becomes necessary to examine the provisions of the Constitution which relate to it, for it is just that and that only which the provisions of that instrument have made it. The only clauses of the Constitution, as far as I am informed, which relate to our foreign intercourse are:

1. The one which gives to the President, with the advice and consent of the Senate, power to make treaties, and to nominate, and, with the advice and consent of the Senate, to appoint ambassadors, other public ministers, and consuls.

2. That which gives to the President alone power to receive ambassadors and other public ministers.

3. That which absolutely prohibits the states from entering into any treaty, alliance, or confederation,

and lastly that which prohibits them, without the consent of Congress, from entering into any agreement or compact with a foreign power.

Thus it appears that the whole power of foreign intercourse granted to the federal government consists in this -- that while it is authorized, through the President and Senate, to make treaties, the states are prohibited from entering into any treaty, agreement, or compact with a foreign state. Now there is nothing in the record to show that Vermont has violated this prohibition in the Constitution, because it does not appear that that state has entered into any treaty, agreement, or compact whatsoever with any foreign state.

The only argument, then, which can be urged to prove that the act done by the Governor of Vermont is a violation of these provisions of the Constitution must be this -- if not in form, certainly in effect: the President and Senate have power to make treaties with foreign states, but Vermont has surrendered to a foreign state

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a fugitive from justice who was within her jurisdiction; therefore Vermont has violated that part of the Constitution which authorized the President and Senate to make treaties. Can such a conclusion follow from such premises? I would respectfully say that to me it seems to be a *non sequitur.* I am ready to admit that the President and Senate can make treaties, which are not themselves repugnant to the Constitution. I further admit that, as by the usages of nations as well as by the practice of the United States, the surrender of fugitives is deemed to be a proper subject for treaty; therefore it is competent to them to make treaties in relation to that subject. I further admit that if a treaty had been made by which the federal government had bound itself to surrender fugitives to a foreign nation, and one had been arrested under the treaty for the purpose of being surrendered, and the judicial authority of Vermont had discharged him upon habeas corpus, then it might be said that such discharge was repugnant to the treaty. But the question here is not whether the act of the Governor of Vermont is repugnant to a treaty, for there exists none in relation to the subject, but the question is whether it is repugnant to the Constitution, because by that the President and Senate have power to make treaties for the surrender of fugitives, but which power they have not executed?

There are two classes of provisions in the Constitution as to which this question may arise.

The first is where the Constitution operates *per se* by its own intrinsic energy. In cases of this class, it is not necessary that any power should be exercised by any department of the federal government to bring it into active operation. The Constitution is, in this class of its provisions, a perpetually self-existing impediment to any action on the part of the states on the subjects to which they relate.

Thus, to exemplify, it declares that no state shall pass a "bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Now if a state were to pass either of the kinds of law which are thus prohibited, such a state law or any authority exercised under it would necessarily be repugnant to the Constitution. The thing done would be in direct opposition to the supreme law of the land, which had commanded that it should not be done. This class of cases, where there is an express prohibition, has no relation whatever to any conflict between the powers granted to the federal government and those reserved to the states. Such a state law as I have just supposed would be equally repugnant to the Constitution whether there was or was not any power granted to the federal government over the subject on which such a state law operated. This class embraces also certain cases in which a power such as had been previously exercised by the states is granted to the federal government in terms which import exclusion -- such, for example, as the power granted to Congress of exclusive legislation over the District of Columbia. In such a case it has been held that although there is no express prohibition upon the states, yet the terms of the grant by necessary construction imply it, because a provision that

one government shall exercise exclusive power is tantamount to a declaration that no other shall, for if any other could, it would cease to be exclusive, and such a declaration is therefore in effect a prohibition. Here too, then, any action on the part of a state upon a subject thus exclusively granted to the federal government would be repugnant to the Constitution, operating by its own intrinsic energy,

without any action by the federal government, because as to such cases the supreme law of the land has declared in effect that no state shall enter upon this field of power.

The second class of constitutional provisions as to which this question of repugnancy may arise consists of those powers granted to the federal government which the states previously possessed, where there is nothing in the terms of the grant which imports exclusion and where there is no express prohibition upon the states.

As to this class of powers, the great constitutional problem to be solved is whether any of them can be construed as being exclusive. If they can, then the necessary consequence is that the states cannot exercise them, whether the federal government shall or shall not think proper to execute them. If, on the contrary, they are not exclusive but concurrent, then the states may rightfully exercise them, and no question of repugnancy can ever rise whilst the power remains dormant and unexecuted by the federal government. Such a question can only occur when the actual exercise of such a power by the states comes into direct conflict with the actual exercise of the same power by the federal government. This characteristic of concurrent powers is illustrated by the familiar example of the power of taxation. Thus, although the power of laying and collecting taxes is specifically granted to Congress, yet the states, as we all know, are in the habitual exercise of the same power over the same people and the same objects of taxation and at the same time as the federal government, except when the states are restrained by an express prohibition from acting on particular objects -- that is, from laying any imposts or duties on imports or exports, beyond what may be absolutely necessary for executing their inspection laws. And but for that prohibition, I doubt not but that the states would have had as much power to lay imposts or duties on imports or exports as to impose a tax on any other subject of taxation.

I hold the following proposition to be maintainable: that wherever a power such as the states originally possessed has been granted to the federal government, and the terms of the grant do not import exclusion, and there is no express prohibition upon the states, and the power granted to the federal government is dormant and

unexecuted, there the states still retain power to act upon the subject. And I place this upon the ground that in such a case the question of repugnancy cannot occur until the power is executed by the federal government. It is not repugnant to the Constitution, because there is not in that instrument either an express prohibition nor that which is implied by necessary construction arising from words of exclusion. There is therefore nothing in the Constitution

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itself, operating by itself, as it does in cases of express prohibition or terms of exclusion, to which the exercise of such a power by the states is repugnant or with which it is utterly incompatible. It is not repugnant to any law passed or treaty made by the United States, because my proposition in terms assumes that no such law has been passed or treaty made.

I will add in support of this view that as the Constitution contains several express prohibitions upon the states from the exercise of powers granted to the federal government, if we were to apply to its construction the maxim so well founded in reason, *expressio unius est exclusio alterius,* it would seem to lead to the conclusion that all the powers were expressly prohibited which were intended to be prohibited, unless in cases of such necessary and inevitable construction as those in which the power is granted in terms of exclusion, which, as I have said, would cease to be exclusive if the states could still exercise them, and which therefore present a case of absolute incompatibility.

From these general principles I now proceed to the examination of some of the cases in this Court in relation to this question.

In *Sturges v. Crowningshield,* 3 Wheat. 122, there is a good deal of discussion on this subject. In page 16 U. S. 193 of that case, the Chief Justice says,

"These powers [he is speaking of the powers granted to Congress] proceed not from the people of America, but from the people of the several states, and remain after the adoption of the Constitution what they were before except so far as they may be abridged by that instrument. In some instances, as in making treaties, we

find an express prohibition, and this shows the sense of the convention to have been that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff in this respect is undoubtedly correct. Whenever the terms in which a power is granted to Congress or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."

After these general remarks, he propounds this question: "Is the power to establish uniform laws on the subject of bankruptcies throughout the United States of this description?" That is, as explained in the immediately preceding paragraph, one where the terms in which the power is granted to Congress, or the nature of the power, required that it should be exclusively exercised by Congress.

After much other reasoning on the subject, and, amongst other difficulties, stating that of discriminating with any accuracy between insolvent and bankrupt laws, we find him using the following language:

"It does not appear to be a violent construction of the Constitution,

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and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial acts of the

states."

He proceeds to say that the circumstance of Congress having passed a bankrupt law had not extinguished, but only suspended, the right of the states. That the repeal of the bankrupt law could not confer the power on the states, but that it removed a disability to its exercise which had been created by the act of Congress.

In 18 U. S. 5 Wheat. 21, Judge Washington, in delivering the opinion in the case of *Houston v. Moore* distinctly asserts that if Congress had declined to exercise the power of organizing, arming, and disciplining the militia of the several states, it would have been competent to the state governments to have done so in such manner as they might think proper.

In *Wilson v. Blackbird Creek Marsh Company,* 2 Pet. 251-252, the Legislature of Delaware had passed a law which stopped a navigable creek. In the argument it was contended that this law came in conflict with the power of the United States "to regulate commerce with foreign nations, and among the several states." The Chief Justice, in answer to this argument, said,

"If Congress had passed any act which bore upon the case the object of which was to control state legislation over those small navigable creeks into which the tide flows and which abound throughout the lower country of the middle and southern states, we should feel not much difficulty in saying that a state law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states -- a power which has not been so exercised as to affect the question."

He concluded by saying that the Court did not consider the law in question,

"under all the circumstances of the case as repugnant to the power to regulate commerce, in its dormant state, or as being in conflict with any law passed on the subject."

If, then, it be true that it is not the mere existence of a power, but its exercise which it incompatible with the exercise of the same power by the state, and that, too, where the power given was in express terms "to establish uniform laws on the subject of bankruptcies, throughout the United States," the term "uniform" making the case stronger than where the grant contains no such term, and if it be also true that the law of Delaware was not repugnant to

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the power to regulate commerce, in its dormant state, then it seems to me that I have sufficient grounds for the proposition which I have laid down.

Let me, then, apply that proposition and the principles of this Court to this case. I have admitted that the President and Senate might make a treaty for the surrender of fugitives from justice, but they have not done so; that power, in relation to this subject, is in a dormant state; the power exists, but has not been exercised; without the exercise of that power by the President and Senate, the federal executive has no power to surrender fugitives from justice. This was the authoritative declaration of our government in 1791, when Mr. Jefferson, then Secretary of State, held the following language:

"The laws of the United States, like those of England, receive every fugitive (that is, as he had just said before, in the same communication to President Washington, the most atrocious offenders as well as the most innocent victims), and no authority has been given to our executive to deliver them up."

The same authoritative declaration was made by Mr. Clay, by direction of President Adams, in the year 1825 in answer to a demand from Canada, and the reason assigned was that the treaty upon that subject was no longer in force.

It appears, then, that there is no treaty on the subject of surrendering fugitives; that without such treaty the federal executive has no authority to surrender; the authority, then, exercised by the Governor of Vermont, is not repugnant to the power of making treaties in its dormant state, because, in the language of the Chief Justice before cited, it is not the mere existence of the power but its exercise

which is incompatible with the exercise of the same power by the states. It is said by one of the judges, in delivering his opinion in the case of *Houston v. Moore,* that the powers of the federal government are exclusive of the states when there is a direct repugnancy or incompatibility in the exercise of it by the states. It is not said whether this repugnancy is produced by the mere existence of the power in the federal government or by its exercise. But he gives as examples of this the power to establish a uniform rule of naturalization, for which he refers to *Chirac v. Chirac,* 2 Wheat. 259, 15 U. S. 269 , and the delegation of admiralty and maritime jurisdiction, for which he refers to 14 U. S. 1 Wheat. 304, 14 U. S. 337 . In the case in 2 Wheaton, the Chief Justice does say, "that the power of naturalization is exclusively in Congress, does not seem to be, and certainly ought not to be controverted." But the point made, and which immediately precedes this remark was that the law of Maryland, according to which the party had taken the oaths of citizenship, had been virtually repealed by the Constitution of the United States and the act of naturalization enacted by Congress. The remark then was made in relation to a power which had been executed. But the case of *Sturges v. Crowningshield* was decided after that of *Chirac v. Chirac,* and in that later case it was declared that it was not the mere existence, but the exercise, of the power

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

It is said in 14 U. S. 1 Wheat. 337, *arguendo,* by the Court, for it was not the point to be decided that admiralty and maritime jurisdiction is of exclusive cognizance. It would seem from the reasoning of the Court as if this rested upon these grounds: that the Constitution is imperative on Congress to vest all the judicial power of the United States in the courts of the United States; that the

judicial power was declared to extend to all cases of admiralty and maritime jurisdiction, and that therefore, by the terms in which the clause was expressed, the jurisdiction was made exclusive. Such also seems to be the principle laid down in 1 Kent's Commentaries 351, where the author says:

"Whatever admiralty and maritime jurisdiction the district courts possess would seem to be exclusive, for the Constitution declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, and the Act of Congress of 1789 says, 'that the district courts shall have exclusive, original cognizance of all civil causes of admiralty and maritime jurisdiction.' It seems to me, then, that neither of these cases impugns the principles which I have laid down."

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

Upon these grounds I am of opinion, that this case does not come within the provisions of the twenty-fifth section of the Judiciary Act, and consequently that the writ of error ought to be dismissed for want of jurisdiction.

MR. JUSTICE CATRON.

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

First it must be recollected there is no statute in Vermont prohibiting those charged with crimes in other states or foreign countries

from coming into that state, or authorizing their apprehension if they come there; so we understand the fact to be, and that the authority to issue the warrant of arrest in this case was assumed by the governor, as chief magistrate and representative of the state.

Holmes had been guilty of no crime against the laws of Vermont, but the warrant recites he was a subject of the Province of Lower Canada, that he stood indicted for the crime of murder there, and that it was fit and expedient that he should be made amenable to the laws of that province for the offense.

The sheriff, in his return to the writ of habeas corpus, certifies that this warrant was the sole cause of detention and imprisonment.

He was not commanded to hold Holmes to answer to the authorities of Vermont, but ordered forthwith to convey and deliver him to William Brown, the agent of Canada, or to such person or persons as by the laws of said province should be authorized to receive the same at some convenient place on the confines of the state and the province of Canada, to the end that the said George Holmes might be thence conveyed to the District of Quebec and there be dealt with as to law and justice appertained.

We will assume for the present and for the purposes of the argument that an agreement to surrender on which the arrest was founded existed between the executive chief magistrate of Vermont and the Queen of Great Britain; that William Brown was the agent of Great Britain, and represented that Kingdom; that Governor Jennison represented Vermont, and that the arrest was made in part execution of such previous agreement.

In such case, I admit, the act would have been one as of nation with nation, and governed by the laws of nations; that the agreement would have been prohibited by the Constitution and the arrest in part execution of it void, and that the judgment of the state court in favor of the validity of the arrest should be reversed.

But that court was not called on to decide (taking the facts assumed to exist), nor are we permitted to determine in this case how far the state courts and magistrates may go in dealing with fugitives from justice coming within their limits when executing the statutes of the states. No such question has been raised at the bar, nor has it been considered of by the bench.

This is the substance of my opinion drawn up at length on the point in this cause, on which, for a time, I thought the judgment below ought to be reversed. I founded myself upon the fact that an agreement to arrest and surrender Holmes had been made between Vermont and Great Britain before the arrest took place, and that it was made in part execution of such previous agreement. Neither on the argument of the cause nor at any time previous to hearing read the opinion of my four brethren, drawn up by THE CHIEF JUSTICE and with the result of which I had intended to concur, had it occurred to me the fact was doubtful. In that opinion,

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however, it is declared that "nothing appears that a demand was made by Canada of Holmes, and we do not act upon the supposition such a demand was made, nor consider it in the case." Now if no demand was made, I take it as granted, no agreement existed between Great Britain and Vermont for the surrender of Holmes. To assume that a general regulation by treaty or agreement existed between the state and the foreign Kingdom on which the governor's warrant founds itself, and from which the regulation must be inferred, would be charging the chief magistrate of Vermont with a palpable violation of the Constitution of the United States on the ground that he assumed the power of foreign intercourse. There is nothing in the record to establish such a conclusion, nor can it be assumed with any propriety on mere conjecture. It is manifest to my mind the facts stated in the warrant have reference to this individual case. The arrest could therefore not have been made in part execution of any compact or agreement between the state and Kingdom; it follows a judgment of reversal could only be founded on the intention of the governor to make a future agreement, at the time Holmes should be surrendered to Brown or to some sheriff or other officer or agent of Canada having lawful authority to receive the prisoner. The intent we are not

authorized to try; we only have jurisdiction to examine into acts done, and must proceed, if at all, on some past violation of the Constitution of the United States, supposed to be that clause which declares "no state shall, without the consent of Congress, enter into any agreement or compact with another state or with a foreign power."

The defendant, Holmes, is yet in prison under the governor's warrant of arrest; no agreement to surrender him yet exists, and none may ever be made with Great Britain; the act done by the governor is singly that of Vermont, and therefore cannot violate the recited clause of the Constitution.

All my brethren, those who are for reversing the judgment and those who are for dismissing the writ of error, have adopted and are acting on the supposition that no demand to surrender Holmes can be inferred from the facts recited in the warrant of the governor, and that the fact is considered out of the case.

After much consideration, I entertain some doubts whether such an inference could be safely made, and deem it due to the opinion of all my brethren, on the finding of a mere fact in so delicate a matter, to concur with them in the conclusion that no demand was made and that consequently no agreement existed, and therefore to concur with those who think the writ of error should be dismissed. A consequence inevitable to my mind, viewing the case in this aspect.

That an intent to surrender is equivalent to an agreement between two states, and therefore the arrest in violation of the Constitution of the United States, is a doctrine calculated to alarm the whole country.

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The Constitution equally cuts off the power of the states to agree with each other as with a foreign power, yet it is notoriously true that for the fifty years of our existence under the Constitution, the states have, in virtue of their own statutes, apprehended fugitives from justice from other states and delivered them to the officers of the state where the offense was committed, and this independently of

the fourth article and second section of the Constitution and the Act of Congress of 1793, ch. 51, which provides for a surrender on the demand of the executive of one state upon that of another. The uniform opinion heretofore has been that the states, on the formation of the Constitution, had the power of arrest and surrender in such cases, and that so far from taking it away, the Constitution had provided for its exercise, contrary to the will of a state, in case of a refusal, thereby settling, as amongst the states, the contested question whether. on a demand, the obligation to surrender was perfect and imperative or whether it rested on comity, and was discretionary.

After having had written out for me the very able argument delivered before this Court for the plaintiff in error, and after having bestowed much reflection on this subject and written out my views on every point involved, as the safest mode of testing of their accuracy, I have come to the conclusion, divided as the Court is, that it is better for the country this question should for the present remain open.

And I here take the occasion to say that I hold myself free and uncommitted by this opinion or by anything occurring in this cause, to decide in future cases according to their character, and the conclusions I may then form.

I concur, that a proceeding by habeas corpus is a "suit" within the meaning of the Judiciary Act, sec. 25, and that a refusal to discharge a defendant is a final judgment in such suit.

1. But whether a writ of error will lie must depend in every case on the fact: this Court only has jurisdiction where the decision in the state court has drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States; and the decision is against their validity.

2. Or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, &c.;, of the United States, and the decision is in favor of such, their validity.

3. Or, where is drawn in question the construction of any clause of the Constitution, &c.;, and the decision is against the right claimed under such clause.

The agreement being out of the case, the arrest, as an authority exercised under the state, and the decision in favor of its validity, could not be repugnant to the Constitution, as the court did not uphold an agreement, or an exercise of authority under any. Nor can I find that the decision below drew in question the construction of any other clause of the Constitution, more than one prohibiting

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agreements with foreign powers. There being no agreement in the case, certainly none of the exclusive powers secured to the general government, to declare war, to send ambassadors, to make treaties, or to regulate commerce with foreign nations, was violated, as no national intercourse of any kind was had by Vermont with the authorities of Great Britain.

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

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

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

NOTE -- The Reporter has inserted this case in the present volume of reports although no decision on the questions presented to the Court was given. The principles, discussed with great ability by the counsel for the plaintiff in error, the importance of the questions involved in it, and the great judicial learning and knowledge contained in the opinions delivered by the Justices of the Court, are of

the highest interest. Although no judgment was given in the case, it will be seen that a majority of the Court concurred in the opinion that the Governor of the State of Vermont had not the power to deliver up to a foreign government a person charged with having committed a crime in the territory of that government.

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

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