concede such a contract to exist, it can extend no further than the right granted to the patentee under the patent laws. We have already shown that this is not the original or absolute right to make, to use, and to sell, which is a right not dependent on the patent, but the right to be protected against the manufacture, use, or sale of this product by others without his permission. When the state of Missouri shall pass a law that everybody may manufacture, use, and sell oleomargarine, it will probably impair the obligation of the Mege patent. If it does not, it will certainly authorize the infringement of his right under the patent, and will be void for that reason. It will be, then, immaterial whether it impairs the obligation of his contract or not.

3. We are unable to see that it is a regulation of commerce among the several states. If it can be called a regulation of commerce at all, it is limited to the internal commerce of the state of Missouri. Being a criminal statute, there is no pretense that it can have any operation outside the boundary of the state. The person who manufactures or sells the article outside of the state is not liable to the penalties of law. The statute does not forbid its importation or exportation, the bringing of it into the state, or carrying it out of the state; nor is its use in the state forbidden to those who choose to use it even for food. It is only forbidden to manufacture it or to sell it for food, to take the place of butter for that purpose. For all other purposes it may be made and sold in the state, and for that purpose, or any other, it may be imported or exported without violating the law. If it could be seen that the law was directed by way of discrimination against the product of a sister state, while no such prohibition existed against the same product in Missouri, or was intended to prevent buying and selling between the states, or importation and exportation, whereby the citizens or the productions of a neighboring state were placed in a worse position in regard to that article than the citizens or the productions of Missouri, the argument would not be without force. Such is the doctrine laid down by the supreme court of the United States in *Woodruff* v. *Parham*, 8 Wall. 123; and in *Hinson* v. *Lott*, Id. 148; and *The State Freight Tax Case*, 15 Wall. 232; *U. S.* v. *Dewitt*, 9 Wall. 41.

4. We are next to inquire whether the statute deprives the owner of this product of his property, within the meaning of the clause of the fourteenth amendment which says: "Nor shall any state deprive any person of life, liberty, or property without due process of law." The statute does not, in direct terms, authorize the seizure or taking of any property, not even that whose manufacture is forbidden. The party is not, in fact, deprived of this property by the statute, or by any proceeding which it authorizes. The personal punishment, by fine and imprisonment, which the statute imposes, must be inflicted according to the law of Missouri, which allows a trial by jury, with all the other forms which from time immemorial

have been held to be due process of law. The moneyed fine, then, and the liberty of which the party may be deprived, are undoubtedly imposed by due process of law.

If it be urged, as it has in some cases, that the effect of the statute upon the right to sell the property is such as to destroy its value, and therefore to deprive the owner of it, there are several answers to the proposition: *First*, the value of the property can hardly be so affected that the party may be said to be deprived of it, while it can readily be transported into some other state, and sold without restriction; *secondly*, and conclusively, that as to the product made or imported into the state after the passage of the statute, the statute was and must be taken as part of the due process of law, and deprived the party of nothing which he owned when it was passed, or which he had a right to make or acquire for sale as food at the time he did so make or buy it. The law in such case did not deprive him of his property. If he is injured in relation to that property, it is by his own action in buying or making it, with the statute before his eyes. That statute was, as to him and to this property, due process of law, of which he had due notice. *Bartemeyer* v. *State*, 18 Wall. 132. His injury or loss, if any, arises out of his determination to defy the law, and it is by the law and its mode of enforcement, which, existing at the time, is due process of law, that he must be tried.

5. The evidence in favor of the petitioner is abundant, and of the highest character, to prove that the article which he sells, and which he is forbidden to sell by the statute of Missouri, is a wholesome article of food prepared from the same elements in the cow which enable her to yield the milk from which butter is made, and when made by Mege's process is the equal in quality for purposes of food of the best dairy butter. No evidence is offered by counsel for Rucker or for the state to contradict this, because they say it is wholly immaterial to the issue before the court. A very able argument is made by counsel, whose ability commands our respect, to show that, such being the character of the article whose manufacture and sale is forbidden by the statute, the legislature of Missouri exceeded its powers in passing it. It is not so much urged that anything in the constitution of Missouri forbids or limits its power in this respect by express language, as that the exercise of such a power in regard to a property shown to be entirely innocent, incapable of any injurious results or damage to public health or safety, is an unwarranted invasion of public and private rights, an assumption of power without authority in the nature of our institutions, and an interference with the natural rights of the citizen and of the public, which does not come within the province of legislation. The proposition has great force, and, in the absence of any presentation of the matters and circumstances which governed the legislature in enacting the law, we should have difficulty in saying it is unsound. Fortunately, as the case before us stands, we feel very clear that, even if well founded,

this objection to the statute is one which we cannot consider in this case.

As already stated, when a writ of *habeas corpus* is issued by the circuit court in behalf of one in custody of a state officer, under judicial proceedings in state courts and under state laws, the only inquiry we can make is, whether he is held in "violation of the constitution, or of a law of congress, or a treaty of the United States." The act in question may be in conflict with the constitution of the state, without violating the constitution, or any law or treaty of the United States. It may be in excess of the powers which the people of Missouri have conferred on their legislative body, and therefore void, without infringing any principle found in the constitution, laws, or treaties of the United States.

We have, in the four objections to this statute first considered, examined all the points in which it is supposed to conflict with the constitution and laws of the United States, and we know of no others, and no others have been suggested. The proposition now under consideration, if well taken, is one for the consideration of the state court when this case comes to trial. It is, in a *habeas corpus* case in the federal courts, excluded by the express language of the statute conferring jurisdiction in such cases. This court does not sit here clothed with full and plenary powers either of common law or of criminal jurisdiction. Its criminal jurisdiction is still more limited than its jurisdiction at common law and in chancery. It has, in common with the district court, jurisdiction of all offenses against the statutes of the United States. Such is not the case before us.

Section 753 goes further, and authorizes the court to issue writs of *habeas corpus* in all cases where a person is in custody in violation of the laws of the United States, including its constitution and its treaties. The prisoner in this case is not prosecuted for a crime or offense against the United States. We have, therefore, no general jurisdiction of the case.

We have endeavored to show that while held under a law of Missouri by Missouri officials, it is not in violation of, it is not forbidden by, the constitution, or any law or treaty of the United States; and the act of congress, under which alone we can exercise the special power of issuing writs of *habeas corpus*, permits us to go no further.

The return of the constable, Rucker, to the writ is sufficient, and the prisoner must be remanded to his custody; and it is so ordered.

McCRARY, J., concurs.

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§ 1. PRELIMINARY. It is proposed in this note not to discuss what is laid down in the principle case, but to give an outline of the jurisdiction and practice of the federal courts in the use of the writ of *habeas corpus*, and to show the growth of that jurisdiction.

§ 2. JURISDICTION OF THE SUPREME COURT.[1] It is proper to state in the outset that the jurisdiction of the supreme court of the United States to issue this writ, and hear and determine causes of detention thereunder, is not derived from the acts of congress, but from the constitution itself, though by the terms of the constitution it is subject to regulation by congress. This grant of jurisdiction is found in section 2, article 3, of the constitution, which enumerates the cases to which the judicial power of the United States shall extend, provides for the exercise of an original jurisdiction by the supreme court in certain cases, and then recites that "in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." Now, the *original* jurisdiction with which the supreme court was clothed by this article did not embrace the use of the writ of *habeas corpus*. This court nevertheless issues this writ as an incident of, and means of, giving effect to *its other jurisdiction;* that is to say, in the limited classes of cases where it has original jurisdiction, as in cases affecting ambassadors, other public ministers, and consuls, or those in which a state is a party, it may undoubtedly, if the circumstances require it, exercise and effectuate its original jurisdiction by means of this writ. It is supposed that if a foreign ambassador were unlawfully restrained of his liberty within the limits of the United States, the supreme court of the United States could, in the exercise of its original jurisdiction "in all cases affecting ambassadors," enlarge him upon *habeas corpus*. But outside of this limited class of cases in which it has original jurisdiction, it cannot issue this writ when the issuing of it would involve an exercise of original jurisdiction. Thus, it cannot issue it at the suit of an alien to obtain the custody of an infant child,[2] nor can it, it is supposed, in cases of arbitrary arrests without legal process by military officers of the United States. From this it is seen that this writ is chiefly used by this court as an incident of its appellate jurisdiction. It is regarded as a writ in the nature of a writ of error, to be used subject to the regulations prescribed by congress, and to the general principles of law, in enlarging persons who are restrained of their liberty by the inferior federal judicatories, when acting in excess of their jurisdiction.[3] Accordingly, it has been held by this court that it has power to issue this writ in every case where a person is in jail under the warrant or order of another court of the United States.[4] This power was exercised as early as 1795 in a case where the district judge for the district of Pennsylvania had committed a person to jail on a charge of treason without any proper examination. The supreme court on *habeas corpus* admitted him to bail.[5] In a later case the same court, by its writ of *habeas corpus*, aided by its writ of *certiorari*, reviewed and reversed a judgment of the circuit court of the United States for the District of Columbia remanding a prisoner on *habeas corpus*.[6] In a more celebrated case a similar use was made of this writ. Two persons had been committed on a charge of complicity in the treason of Aaron Burr, by order of the circuit court of the United States for the District of Columbia.[7] Again, proceeding by *habeas corpus* and *certiorari*, the supreme court of the United States discharged the

[1] As to the appellate jurisdiction of the supreme court in *habeas corpus* cases commenced in the inferior federal courts, see *post*, § 18.

[2] Ex parte Barry, 2 How. (U. S.) 65.

[3] Consult upon this point Ex parte Siebold, 100 U. S. 371; Ex parte Bollman, 4 Cranch, 100; Ex parte Watkins, 3 Pet. 193, 202; S. C. 7 Pet. 568; Ex parte Wells, 18 How. (U. S.) 307, 328; Ableman v. Booth, 21 How. (U. S.) 506; Ex parte Yerger, 8 Wall. 85; Ex parte McCardle, 7 Wall. 506; Durousson v. U. S. 6 Cranch, 312; Wiscart v. Dauchy, 3 Dall. 321; Ex parte Hamilton, Id. 17; Ex parte Burford, 3 Cranch, 448; Ex parte Milburn, 9 Pet. 704; Matter of Metzger, 5 How. (U. S.) 176; Matter of Kaine, 14 How. (U. S.) 103.

[4] Ex parte Bollman, 4 Cranch, 75; Ex parte Kearney, 7 Wheat. 38; Ex parte Yerger, 8 Wall. 85.

[5] U. S. v. Hamilton, 3 Dall. 17.

[6] Ex parte Burford, 3 Cranch, 448.

[7] U. S. v. Bollman, 1 Cranch, C. C. 373.

prisoner, on the ground that the commitment of the circuit court was not warranted in law.[1] It was held by the supreme court of the United States, in 1840, upon an equal division of the justices, which therefore prevented affirmative action, that under the twenty-fifth section of the judiciary act[2] that court had no jurisdiction of a writ of error to a state court to revise its decision upon a writ of *habeas corpus*, remanding a prisoner to the custody of the sheriff, to be delivered under a warrant from the governor of the state to the authorities of a foreign country, there to be tried for an alleged murder.[3] In subsequent cases this court has asserted and beneficially exercised a jurisdiction to review, by its writ of error, decisions rendered by the highest courts of the states in proceedings by *habeas corpus*, where federal questions are involved.[4]

§ 3. HISTORY OF THE FEDERAL STATUTES. There are four statutes regulating the use of the writ of *habeas corpus* by the federal courts and judges. The first is found in the fourteenth section of the judiciary act of 1789.[5] This provides that the writ shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. This provision obliged the courts of the United States to stay their hands in the use of this writ in every case where it should appear that the prisoner was held under state process, although the proceedings under which he was held were absolutely void. It was intended that the judges of the federal courts should have no superintending control whatever over state judgments or state process in the use of this writ. The second statute was the act of 1833, which, at the time of its passage, was generally known as the "force bill."[6] It was adopted in consequence of the nullification ordinance of South Carolina. Its primary object was to protect the revenue officers of the government from state process while carrying out the acts of congress. It extended the use of the writ to persons in custody for acts done in pursuance of a law of the United States or of a judgment of any of its courts. Aimed, in the first instance, at those who sought to nullify the laws of the Union in South Carolina, it came, 20 years later, into use in cases where officers of the United States were arrested under state process for carrying out the provisions of the fugitive slave law of 1850. The third statute in this category is the act of 1842.[7] This grew out of the complications of the case of McLeod and the Canadian rebellion of 1837. This act extended the writ to foreigners acting under the sanction of their own government. It was called into existence by the necessity of preventing a single state from interfering with our foreign relations, by indicting and trying for murder a British subject for acts done as a belligerent, which indecent usurpation of jurisdiction a court of the state of New York had taken upon itself.[8] Then came our late civil strife, and out of this grew the necessity of protecting those who claimed the benefit of the national laws. Accordingly, congress passed in 1863 an act briefly alluded to hereafter; and later, by the act of February 5, 1867, extended the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States," and made the writ issuable by the "several courts of the United States and the several justices and judges of said courts within their respective jurisdictions."[9] All of these statutes are condensed in section 753 of the Revised Statutes of the United

1 Ex parte Bollman, (commonly cited as the case of Bollman & Swartwout,) 4 Cranch, 75.
2 1 St. at Large, 85.
3 Holmes v. Jennison, 14 Pet. 540.
4 Ableman v. Booth, 21 How. 506; Ex parte Tarble, 13 Wall. 397.
5 1 St. at Large, 82.
6 Act of March 2, 1833, c. 57; 4 St. at Large, 632.
7 5 St. at Large, 539.
8 People v. McLeod, 1 Hill, (N. Y.) 377.
9 14 St. at Large, 385.

States. It may be said of them generally, and especially of the last, that they have the effect greatly to enlarge the jurisdiction of the courts and judges of the United States in the use of the writ of *habeas corpus*. They have removed the impediment to its use which formerly existed and which was imposed by the act of 1789, where a prisoner was committed under state authority, provided his imprisonment is contrary to the constitution of the United States or treaties with foreign nations, or the laws of congress.[1]

§ 4. UNDER THE JUDICIARY ACT OF 1789. The judiciary act of 1789, after prescribing the jurisdiction of the district and circuit courts of the United States, and also that of the supreme court, contains the following section: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."[2] For more than 40 years the jurisdiction of the federal courts in the use of the writ of *habeas corpus* was regulated solely by this statute. Under it, not only circuit courts of the United States, but also the judges thereof, were authorized to issue this writ for the purpose of inquiring into causes of commitment, and, except in cases where the privilege of the writ was suspended, to hear and determine the question whether the party was entitled to be discharged.[3] The use of the writ given by this statute extends to all cases of an illegal detention under color of the authority of the United States.[4] It enables a circuit court of the United States to inquire into the jurisdiction of a court martial convened under the authority of the United States, by which a person has been tried for an alleged military offense.[5] Where it appears on return to a *habeas corpus* thus issued by a judge of a federal court, that the prisoner is held under an execution of one of the national courts, under a valid judgment, the court nevertheless has power to discharge him, for any matter arising subsequently to the judgment, which may in law entitle him to his discharge. The court may, therefore, discharge him if it appear that he has been pardoned by the president.[6]

§ 5. REVIEW UNDER THIS ACT OF PROCEEDINGS BEFORE UNITED STATES COMMISSIONERS. The writ of *habeas corpus*, in connection with the writ of *certiorari*, is used by the circuit courts of the United States to review the proceedings of commissioners of those courts when acting as examining magistrates,[7] and also when acting by special appointment of a court of the United States, in a proceeding for the extradition of a fugitive from the justice of a foreign country, under the act of August 12, 1848, § 8.[8] This practice is an-

1 Ex parte Bridges, 2 Woods, 428.

2 Act of September 14, 1789, (1 St. at Large, 81.)

3 Ex parte Milligan, 4 Wall. 2, 110; Ex parte Bollman, 4 Cranch, 75.

4 Re Winder, 2 Cliff. 89; Ex parte Merryman, Taney, Dec. 246; Matter of McDonald, 9 Amer. Law Reg. (O. S.) 661.

5 Barrett v. Hopkins, 7 Fed. Rep. 312. Compare Wise v. Withers, 3 Cranch, 331; Dynes v. Hoover, 20 How. (U. S.) 82.

6 Greathouse's Case, 2 Abb. (U. S.) 382, before HOFFMAN, J.

7 Re Leszynsky, 23 Int. Rev. Rec. 71.

8 9 St. at Large, 302 et seq.; Rev. St. § 5270 et seq. The following are some of the cases in which the writ has been thus used: Re Veremaitre, 9 N. Y. Leg. Obs. 129; Re Kaine, 10 N. Y. Leg. Obs. 257; Re Heilbronn, 12 N. Y. Leg. Obs. 65; Ex parte Kaine, 3 Blatchf. 1; Ex parte Van Aernam, 3 Blatchf. 160; Re Henrich, 5 Blatchf. 414; Re Farez, 7 Blatchf. 34; S. C. Id. 345; Re MacDonnell, 11 Blatchf. 79; S. C. Id. 170; Ex parte Van Hoven, 4 Dill. 414; Ex parte Lane, 6 Fed. Rep. 34; Re Fowler, 4 Fed. Rep. 303; S. C. 18 Blatchf. 430; Re Stupp, 12 Blatchf. 501.