which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."[1] The true meaning of this clause seems to be that whenever the United States is owner of the land which it uses as a fort, etc., the legislature of the state in which such land is included may *permit* congress to exercise exclusive jurisdiction over it. Where the United States, owning land for the purpose of a military fort within one of its territories, by an act of congress, erects such territory into a state, without making any reservation of exclusive jurisdiction to the United States within the limits of the land which it thus holds for the purpose of a military fort, political jurisdiction over such land passes to the state thus created.[2] But if the legislature of such state subsequently, upon a suggestion of the federal secretary of war, passes an act ceding exclusive jurisdiction over such military reservation to the United States, the act will be effective to vest in the courts of the United States jurisdiction of crimes committed within such reservation, although such jurisdiction has never been formally and expressly assumed by an act of congress. Reasoning thus, it was held by Mr. Justice MILLER that a person committed by a commissioner of the circuit court of the United States to answer for a crime committed within the military reservation of Fort Leavenworth, was not entitled to be discharged by *habeas corpus*.[3] It has also been held that after a state has been admitted into the Union, the fact that within its boundaries there is land, the fee of which is in the United States, which is set apart as an Indian reservation, is not of itself sufficient to give to a court of the United States jurisdiction to try a person for a murder committed within the limits of such reservation. Accordingly, a prisoner held under an indictment in the United States circuit court for the district of Nevada, for a murder alleged to have been committed "at and within the boundaries of the Moapa Indian reservation of the United States of America, in the district aforesaid," was entitled to be discharged on *habeas corpus*.[4] On the other hand, by the very terms of the constitution, the jurisdiction which is acquired by the United States by the cession by a state of land for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, and by the acceptance of such cession by congress, becomes, by strong inference from the terms of the constitution, an "exclusive" jurisdiction. It becomes subject to the "exclusive legislation" of congress; and, though the courts of the several states are bound by the laws of congress as part of the supreme law of the land, and though it is no doubt competent for congress to vest in the state judicatories the power to hear controversies arising under the laws of the United States, and competent for those judicatories, in the exercise of a comity, though not in pursuance of an obligation, to assume the exercise of such power;[5] yet congress has committed the jurisdiction of crimes within these places exclusively to the federal tribunals, by enacting that "the jurisdiction vested in the courts of the United States, in the causes and proceedings hereafter mentioned, shall be exclusive of the courts of the several states: 1. Of all crimes and offenses cognizable under the authority of the United States."[6] It is accordingly held that federal jurisdiction of crimes committed within the limits of a navy-yard of the United States is exclusive of the state in which such navy-yard is situated, and that a person arrested by state process, on charge of a crime committed within such limits, is arrested in violation of the laws of the United States, within the meaning of section 753 of the Revised Statutes, and is entitled to be discharged upon *habeas corpus* by a court of the United States.[7]

1 Const. U. S. art. 1, § 9.
2 U. S. v. Stahl, Woolw. 192.
3 Ex parte Hebard, 4 Dill. 380.
4 Ex parte Sloan, 4 Sawy. 330.
5 The British Prisoners, 1 Woodb. & M. C. C. 70, Prigg v. Pennsylvania, 16 Pet. 539, 608.
6 Act Sept. 24, 1789, c. 20, §§ 9 and 11; 1 St. at Large, 76, 78. The language above given is as the law now stands in the Rev. St. U. S. at § 711.
7 Ex parte Tatem, 1 Hughes, 588.

§ 8. STATE PROSECUTIONS FOR ACTS WHICH ARE EXCLUSIVELY OF FEDERAL COGNIZANCE. The provision of the Revised Statues of the United States has been already pointed out, which vests in the courts of the United States a jurisdiction, exclusive of the courts of the several states, "of all crimes and offenses cognizable under the authority of the United States."[1] It seems to be established that congress may exclude the jurisdiction of the courts of the state from offenses which are within the power of congress to punish.[2] Many cases might, however, be cited where convictions by state tribunals of offenses within the power of congress to punish have been upheld.[3] These decisions have proceeded generally upon the ground that congress had not exercised the power of providing for the punishment of the particular offense. When congress exercises this power the exercise of it is understood to exclude the power of the state to provide such punishment, unless such power is reserved to the state by the act of congress.[4] The provision of the Revised Statutes of the United States, above quoted, is not found in the same distinctive form in any previous federal statute, though the substance of it is drawn from sections 9 and 11 of the judiciary act of 1789.[5] It has been supposed by a learned federal judge in a recent case to have been framed *ex industria*, and to have been placed in the Revised Statutes, not merely for the purpose of excluding the jurisdiction of all other courts, federal as well as state, except as otherwise provided, which was the substance and effect of the provisions of the judiciary act, but for the express purpose of excluding the jurisdiction of the courts of the state.[6] It has been accordingly held by the federal courts at circuit that where a person is prosecuted in a state court for an offense which is an offense of federal cognizance, he may be discharged from imprisonment under such prosecution either before or after conviction; the federal courts proceeding upon the ground that the state courts have no jurisdiction. It was so held where the state prosecution was for passing counterfeit national bank bills.[7] It was likewise so held where the state prosecution was for perjury, which perjury was committed before a federal tribunal.[8]

§ 9. CONTESTS FOR THE CUSTODY OF CHILDREN. There is a difference of opinion as to whether the writ of *habeas corpus* may be used in the federal courts in cases of contest touching the custody of children, where the parties claiming such custody are residents of different states. It was held by Mr. District Judge LEAVITT in the southern district of Ohio, in 1858, that the federal courts have not jurisdiction to make such a use of this writ. The ordinary jurisdiction of the circuit courts of the United States, under section 11 of the judiciary act of 1789,[9] did not extend to such a controversy; for the matter in dispute had no value which could be estimated in money; and, as it was not a case within the ordinary jurisdiction of such courts, it was not a case where the writ of *habeas corpus* could be issued as ancillary to any other fed-

[1] Rev. St. U. S. § 711, subs. 1.

[2] 1 Kent, Comm. 339; Houston v. Moore, 5 Wheat. 1; The Moses Taylor, 4 Wall. 411; Martin v. Hunter, 1 Wheat. 304; Com. v. Fuller, 8 Metc. (Mass.) 313; Ex parte Houghton, 7 Fed. Rep. 657; Ex parte Bridges, 2 Woods, 429; S. C. *sub nom.* Brown v. U. S. 14 Amer. Law Reg. (N. S.) 576, affirming decision of Mr. District Judge ERSKINE, Id. 566; S. C. 4 Amer. Law Rec. 132, 178. See, also, Com. v. Tenney, 97 Mass. 50; State v. Adams, 4 Blackf. 146; State v. Pike, 15 N. H. 83; People v. Kelley, 33 Cal. 145; People v. Sweetman, 3 Parker, Crim. R. 358; Prigg v. Pennsylvania, 16 Pet. 539, 608.

[3] Fox v. Ohio, 5 How. (U. S.) 410; State v. Randall, 2 Aik. 89; Com. v. Fuller, 8 Metc. (Mass.) 313; Moore v. Illinois, 14 How. (U. S.) 13; Com. v. Tenney, 97 Mass. 50; Jett v. Com. 18 Grat. 933; S. C. 7 Amer Law Reg. (N. S.) 260. See, also, U. S. v. Wells, 12 Amer. Law Reg. (N. S.) 424.

[4] Sturgis v. Crowninshield, 4 Wheat. 122; Prigg v. Pennsylvania, 16 Pet. 589.

[5] 1 St. at Large, 76, 78.

[6] Ex parte Houghton, 7 Fed. Rep. 657, 660, per WHEELER, J.

[7] Ex parte Houghton, 7 Fed. Rep. 657, before Mr. District Judge WHEELER.

[8] Ex parte Bridges, *sub nom.* Brown v. U. S. *ut supra*.

[9] 1 St. at Large, 78.

eral process or in aid of the exercise of any other jurisdiction.[1] The same view was taken of the question by Mr. District Judge BETTS, in the southern district of New York, where the writ was applied for in such a case by an alien. On the contrary, as early as 1824, this writ was thus issued and used by Mr. Justice STORY at circuit, in the case of a contest for the custody of a child between a citizen of New York and a citizen of Rhode Island. The jurisdiction seems to have been conceded and to have been exercised without question.[3] In 1867, Mr. District Judge DEADY, of the district of Oregon, considered this question in an elaborate opinion, in a case where the mother of a child, being a citizen of California, had sued out a writ of *habeas corpus* before him to obtain its custody from its father, her divorced husband, who had removed with the child to Oregon. The learned judge decided in favor of the jurisdiction, and awarded the custody of the child to the mother.[4] In a case just alluded to, the circuit court of the United States for the southern district of New York, in 1844, Mr. District Judge BETTS presiding, refused to issue a writ of *habeas corpus* at the suit of an alien husband residing in Nova Scotia, to obtain the custody of his child from his wife residing in New York. From this decision a writ of error was prosecuted in the supreme court of the United States, but the writ was there dismissed for want of jurisdiction. The supreme court proceeded upon the ground that the judgments of the circuit courts of the United States can be reviewed by the supreme court on writ of error, only where the matter in dispute exceeds the sum or value of $2,000, which matter of dispute must have a known and certain value, such as can be proved and calculated in ordinary business transactions.[5] This principle is just as fatal to the jurisdiction of the circuit court of the United States in the issuing of the writ of *habeas corpus* as an original writ in such a case, as it is to the jurisdiction of the supreme court to review upon error such a decision of the circuit court. There is no matter in controversy possessing a pecuniary value to the amount of $500, such as is necessary to give jurisdiction of controversies between citizens of different states to a circuit court of the United States, under the eleventh section of the judiciary act. Notwithstanding the high authority to the contrary, it seems to the writer entirely beyond question that no such jurisdiction exists. If the question of jurisdiction had been argued and contested before a judge as eminent as Mr. Justice STORY, it scarcely admits of doubt that he would have decided against it. It would be just as easy to support a jurisdiction in the federal circuit court to issue a writ of replevin at the suit of a citizen of another state from that in which the defendant resided, for a chattel of the value of five dollars, as to issue a *habeas corpus* to obtain the custody of an infant child, whose custody possesses no pecuniary value in law.[6]

§ 10. UNDER THE ACT OF 1833. The second statute regulating the use of *habeas corpus* in the federal courts was the act of 1833,[7] commonly called the "force bill." It was entitled "An act further to provide for the collection of duties on imports." As already stated, it was adopted in consequence of the nullification ordinance of South Carolina. Its object was to enable the president and the national courts to enforce the laws of the Union in that state against the efforts of the state authorities to prevent the collection of the federal revenue. It contained two provisions relating to the writ of *habeas cor-*

1 Ex parte Everts, 1 Bond, 197.

2 Barry v. Mercein, MS. See the case on error, 5 How. 103.

3 U. S. v. Green, 3 Mason, 482.

4 Bennett v. Bennett, Deady, 299.

5 Barry v. Mercein, 5 How. 103.

6 In Ex parte Barry, 2 How. 65, the supreme court of the United States refused to issue the writ of *habeas corpus* in such a case, on the ground that it would be the exercise of an original jurisdiction, which the court did not possess.

7 Act of March 2, 1833, c. 57, § 3; 4 St. at Large, 632.

pus. The first is found in section 3. This section provided for the removal of causes from the state courts to the United States circuit courts, where such causes consisted of prosecutions "against any officer of the United States, or other person, for or on account of any acts done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person under such laws of the United States." Among other things, this section provided that "it shall be the duty of the clerk of said United States circuit court, if the suit were commenced in the court below by summons, to issue a writ of *certiorari* to the state court, requiring said court to send to the said circuit court the record and proceedings in said cause; or, if it were commenced by *capias* he shall issue a writ of *habeas corpus cum causa*, a duplicate of which said writ shall be delivered to the clerk of the state court, or left at his office by the marshal of the district, or his deputy, or some person duly authorized thereto; and thereupon it shall be the duty of the said state court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the state court shall be wholly null and void; and if the defendant in any such suit be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the said cause according to the rules of law and the order of the circuit court, or of any judge thereof in vacation."[1]

But the provision of this statute with which we are principally concerned enlarges the jurisdiction of the federal courts in the use of the writ of *habeas corpus ad subjiciendum* in the following language: "That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree by any judge or court thereof, anything in any act of congress to the contrary notwithstanding. And if any person or persons to whom such writ of *habeas corpus* may be directed, shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall, on conviction before any court of competent jurisdiction, be punished by fine not exceeding $1,000, and by imprisonment not exceeding six months, or by either, according to the nature and aggravation of the case."[2] As already intimated, the primary object of this statute was to protect the revenue officers in carrying out the acts of congress in South Carolina.[3] At the time when it was enacted, it was not supposed that it would come into general use in the other states. But it became necessary, 20 years later, to resort to it for the purpose of discharging from state custody officers of the

[1] 4 St. at Large, 633. The provisions of this section are embodied in the Rev. St. § 643. It has been construed and applied in the following cases: Dennistoun v. Draper, 5 Blatchf. 336, NELSON, J.; Abranches v. Schell, 4 Blatchf. 256; Wood v. Mathews, 2 Blatchf. 370; Vietor v. Cisco, 5 Blatchf. 128; Peyton v. Bliss, 1 Woolw. 170; Warner v. Fowler, 4 Blatchf. 311; Buttner v. Miller, 1 Woods, 620.

[2] Act of March 2, 1833, c. 57, § 7; 4 St. at Large. 634. The substantial feature of section 7 of this statute is embodied in that clause of section 753 of the Revised Statutes which prohibits the use of the writ of *habeas corpus* to the courts, justices, and judges of the United States, except in cases (among others) where the prisoner "is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof."

[3] Ex parte Bridges, 2 Woods, 428, 431; Ex parte Robinson, 6 McLean, 355.

United States and other persons imprisoned for executing the fugitive slave law of 1850. As the fugitive slave law itself has been repealed, slavery abolished, and as the state of things which led to those conflicts between federal and state jurisprudence have passed away, it will be sufficient merely to cite the cases in which the writ was thus used in the federal courts.[1] While the jurisdiction of the courts of the United States and the judges thereof, under this statute, to discharge on *habeas corpus* persons held in custody for acts done in pursuance of a law of the United States, is undoubted, yet it has been well said that the circumstances which warrant the exercise of this jurisdiction ought to be clear. In order to justify a federal court or judge in withdrawing, in this summary manner, a cause from the jurisdiction of a state court, it should appear with reasonable certainty that the person is indicted in the state court for an act done in pursuance of federal authority, and *warranted* by it. The reason is that if the federal court or judge makes a mistake in the exercise of this summary jurisdiction, resulting in the discharge of the prisoner, there is no process known to the law by which the mistake may be revised and corrected by the supreme court of the United States. But if the prisoner is left to take his trial in the state court, and if any of the rights secured to him by the constitution or laws or authority of the United States are violated in any judgment which may be there rendered against him, he may have the same corrected by a writ of error in the supreme court of the United States, under section 709 of the Revised Statutes.[2] The settled construction of this act appears to be that it gives relief to one in state custody, not only when he is held under a law of the state which seeks expressly to punish him for executing the laws or process of the United States, but also when he is in such custody under a general law of the state which applies to all persons equally, where it appears that he is *justified* for the act done because it was "done in pursuance of a law of the United States, or of a process of a court or judge of the same."[3]

§ 11. WHAT IS JUSTIFICATION UNDER FEDERAL AUTHORITY. (1) *Homicide by United States Marshal in Effecting an Arrest.* Whether the act for which the party has been arrested by state authority is justified under federal authority, within the meaning of the statute above cited, must, of course, remain in many cases a difficult question. Where a bailiff, appointed by a marshal of the United States, on process against a person for violating the internal revenue laws, attempted the arrest of the latter at his house in the night-time, and, after having made his authority known, was fired upon several times by such person, whereupon he fired upon and killed the latter, for which he was arrested by the state authorities and indicted for murder, he was discharged upon *habeas corpus* by BALLARD, J., of the district court of the United States for the district of Kentucky. The learned judge was very careful to disclaim any intention to interfere unduly with state authority, and he was careful to disclaim all right and power to discharge the relator on any such ground as that of self-defense. "A jury," said he, "would probably acquit him on such ground, independent of the process under which he acted; but I have nothing to do with any such inquiry. It belongs only to the state court. I have only to inquire whether what he did was done in pursuance of a law and process of the United States, and so justified—not excused—by that law and process.

[1] Ex parte Robinson, 6 McLean, 355; The Fugitive Slave Law, (charge of Mr. Justice NELSON to the grand jury,) 1 Blatchf, 635; Ex parte Robinson, 1 Bond. 39; S. C. 4 Amer. Law Reg. (O. S.) 617; Ex parte Jenkins, 2 Amer. Law Reg. (O. S.) 144; S. C. 2 Wall. Jr. 521; Ex parte Jenkins, Id. 539; U. S. v. Morris, 2 Amer. Law Reg (O. S.) 348; Ex parte Sifford, 5 Amer. Law Reg. (O. S.) 659; Matter of Ralph, Morris, 1; Matter of Peter, 2 Paine, 348.

[2] Re Bull, 4 Dill. 323.

[3] U. S. v. Jailer, 2 Abb. (U. S.) 265, 277, before BALLARD, J. See Ex parte Jenkins, 2 Wall. Jr. 521; Id. 539; U. S. v. Morris, 2 Amer. Law Reg. (O. S.) 348; Ex parte Robinson, 6 McLean, 355; Ex parte Trotter, cited in 2 Abb. (U. S.) 277; Thomas v. Crossin, 3 Amer. Law Reg. (O. S.) 207.

If the relator is to be discharged by me, it is not because he is excusable, upon general principles of law, for taking the life of his assailant when it was necessary to save his own, but because he was *authorized* and is *justified* by the law and process under which he acted to do all that he did. If he was not *authorized* and is not *justified*, by that law and process, in all that he did, he is not imprisoned 'for an act done in pursuance of a law of the United States, or of a process of a court or judge of the same;' and I cannot discharge him, but must remand him. I can discharge only an officer who relies on the law and process of the United States as his sole authority and complete justification." The learned judge then proceeded to examine the authorities, and, upon a consideration of them, concluded that a homicide committed by an officer in a struggle which ensues upon his endeavoring to effect a lawful arrest, which is brought about and rendered necessary by the resistance of the person whom he attempts to arrest, is a *justifiable* homicide, in contradistinction from homicide *se defendendo*, which writers upon the common law of crimes denominate *excusable* homicide; and he therefore concluded that, in the particular case, the process justified and authorized the homicide; that the relator was hence imprisoned for an act "done in pursuance of a law of the United States, or of the process of a court or judge of the same," and was hence entitled to his discharge.[1]

(2) *Arrests by United States Deputy Marshals at Congressional Elections.* It has been held that section 2021 of the Revised Statutes of the United States, which provides for the appointment of special deputy marshals to attend at the election of representatives and delegates in congress, and section 2022, which defines the duties of such deputies, among other things, to keep the peace and preserve order at the polls, are authorized by section 4 of article 1 of the constitution of the United States, and are hence valid. And where such deputy marshals had arrested a person for creating a disturbance at a poll at such election, and another person for circulating fraudulent tickets, and such deputy marshals were subsequently indicted in a court of the state for an assault and battery and intimidation of voters, the indictment being predicated upon the acts stated, they were released by a court of the United States on *habeas corpus*.[2]

§ 12. WHETHER THE STATE'S ATTORNEY SHOULD HAVE NOTICE. Although, in cases where the writ of *habeas corpus* is issued under this statute, the state's attorney is not entitled as of right to notice, and the statute does not require it to be given, yet a proper respect for the state authorities, and for the rights of the state in the premises,—at least, a decent spirit of comity,—suggests that this be done,[3] especially in view of the general practice in the state courts of notifying the state's attorney in *habeas corpus* cases where the prisoner is held under the state's process.

§ 13. OFFENSES AGAINST STATE LAWS COMMITTED UNDER MERE COLOR OF FEDERAL PROCESS. A person who makes use of legal process for the purpose of committing a crime is none the less guilty of the crime committed. Thus, if a person makes use of legal process for the purpose of obtaining possession of personal property, *animo furandi*, he is guilty of larceny.[4] It is obvious that a person may make use of federal process for the mere purpose of doing an act which is a crime under the laws of the state, though not a crime under the laws of the United States. The circumstance that he would be amenable to punishment for contempt of the federal tribunal, whose process he has thus abused, would not, on principle, oust the jurisdiction of the

[1] U. S. v. Jailer, 2 Abb. (U. S.) 265.

[2] Matter of Engle, 1 Hughes, 592, before BOND, Circuit Judge.

[3] See the judicious observations of the late Judge BALLARD on this point in U. S. v. Jailer, 2 Abb. (U. S.) 265, 267.

[4] Com. v. Low, Thatch. Crim. Cas. 477.

state courts to punish him for the crime. Accordingly, where a private person makes use of the process of the federal courts for the purpose of committing a larceny, as where he enters into a conspiracy with others to sue out a fraudulent writ of replevin upon a worthless bond, for the purpose of getting possession of property which he is not entitled to have, and of spiriting it out of the state, and is arrested and prosecuted therefor by the state authorities for larceny, it has been held by a learned federal judge that he is not entitled to be discharged by a federal court on *habeas corpus*.[1] It was said that there is a clear distinction between such a case and the case of an officer justifying under process which, though erroneously sued out, is valid on its face. This rule does not extend to the protection of the *party* who sues out the process. As against him, it may be shown to be void by reason of extrinsic facts not disclosed on its face.[2] But where a person got possession of the body of another person in Nebraska, under a requisition from the governor of Illinois, for the ostensible purpose of taking him to Illinois, there to answer for a crime, but, instead of so taking him to Illinois, took him, without any other warrant or process, to England, and was thereafter, for the doing of this act, indicted in a court of Nebraska for kidnapping, he was discharged from imprisonment under such indictment by a federal judge, on grounds which are reasoned at length in an opinion, but which are not all clear. He was supposed to have been imprisoned "in violation of the constitution or of a law or treaty of the United States," within the meaning of the act of 1867 as embodied in section 753 of the Revised Statutes of the United States.[3] But this seems to be as clearly a *non sequitur* as though he had gotten possession of the body of the prisoner under process of state extradition, and had then taken him out and murdered him.

§ 14. UNDER THE ACT OF 1842. This statute was entitled "An act to provide further remedial justice in the courts of the United States." It enacts as follows: "That either of the justices of the supreme court of the United States, or judge of any district court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of any foreign state, and domiciled therein, shall be committed or confined or in custody under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption set up or claimed under the commission, or order or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said writ, and due proof of the service of notice of the said proceedings to the attorney general or other officer prosecuting the pleas of the state, under whose authority the petitioner has been arrested, committed, or is held in custody, to be prosecuted by the said justice or judge at the time of granting said writ, the said justice or judge shall proceed to hear the said cause; and if, upon hearing the same, it shall appear that the prisoner or prisoners is or are entitled to be discharged from such confinement, commitment, custody, or arrest, for or by reason of said alleged right, title, authority, privileges, protection, or exemption, so set up and claimed, and the laws of nations applicable thereto, and that the same exists in fact and has been duly proved to the said justice or judge, then it shall be the duty of the said justice or judge forthwith to discharge such prisoner or prisoners accordingly. And if

[1] Ex parte Thompson, 1 Flippin, 507.

[2] Savacool v. Boughton, 5 Wend. 173; Loder v. Phelps, 13 Wend. 48; *Adkins* v. Brewer, 3 Cow. 206; Whitney v. Schufelt, 1 Denio, 594; Rogers v. Mullinar, 6 Wend. 597; Taylor v. Trask, 7 Cow. 249; State v. Weed, 21 N. H. 262.

[3] U. S. v. McClay, 4 Cent. Law J. 255.

it shall appear to the said justice or judge that such judgment or discharge ought not to be rendered, then the said prisoner or prisoners shall be forthwith remanded: Provided, always, that from any decision of such justice or judge an appeal may be taken to the circuit court of the United States for the district in which the said cause is heard; and from the judgment of the said circuit court to the supreme court of the United States, on such terms and under such regulations and orders, as well for the custody and arrest of the prisoner or prisoners, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus* returned thereto, and other proceedings, as the judge hearing the said cause may prescribe; and, pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against said prisoner or prisoners in any state court, or by or under the authority of any state, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be deemed null and void."[1]

It has been thought necessary to quote the statute as originally enacted, in order to give the reader a connected idea of its purposes. In the Revised Statutes of the United States, its various provisions are broken up and scattered through sections 753, 762, 763, 764, 765, and 766, and are so blended with other statutory provisions relating to this writ, that it would not be practicable so to separate them as to show the manner in which the provisions of this statute have been distinctively retained in the Revision. It is sufficient to say that, so far as the writer can see, all these provisions have been retained, including, perhaps, its most exceptional provision, which provides for an appeal to the supreme court of the United States. This provision is found in the Revision at section 763, clause 2, and section 764. So far as the writer knows, this is the only statutory provision now existing which provides for an appeal to the supreme court of the United States in *habeas corpus* cases. This statute did not reach the case of persons enrolled in the armies of the late confederate states. These persons did not, in contemplation of law, cease to be citizens of the United States, and did not become aliens within the meaning of this statute.[2]

§ 15. UNDER THE ACT OF 1863. The next act of congress regulating the use of this writ in the national courts was the act of March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases." This act authorized the president to suspend the privilege of the writ of *habeas corpus* in certain cases; provided that lists of prisoners should be furnished by the secretary of state and the secretary of war to judges of the United States; provided the manner in which such prisoners might be discharged. These provisions, contained in the first three sections of the act, appear to have related to matters growing out of the exigencies of the then existing war, and are not necessary to be recited here. The four succeeding sections of which the act consisted related to the removal to the circuit court of the United States of prosecutions commenced against persons on account of acts done under the authority of the United States during the late rebellion, to procedure after such causes are so removed, and to the limitation of such actions.[3] A person arrested after the passage of this act, and under its authority, was entitled to be discharged on *habeas corpus*, if not indicted or presented by the grand jury convened at the first subsequent term of the circuit or district court of the United States for the district. The omission to furnish a list of the persons arrested, to the judges of the circuit court and

[1] Act of August 29, 1842, c. 77; 5 St. at Large, 539.

[2] Ex parte McCann, 5 Amer. Law Reg. (N. S.) 158.

[3] See Rev. St. § 643.

district court, as provided in the act, did not impair the right of the person so arrested, if not indicted or presented, to his discharge.[1]

§ 16. UNDER THE ACT OF 1867. The most important statute regulating the use of the writ of *habeas corpus* in the national courts is the act of February 5, 1867, *c.* 28.[2] In addition to the subjects to which the writ had been extended by previous statutes, it was by this statute further extended, in one sweeping clause, "to all cases where any person may be restrained of liberty in violation of the constitution, or of any treaty or law of the United States." It will be perceived that this language works a decisive innovation upon the act of 1789. We shall see that, as construed by the federal circuit and district judges, it entirely sweeps away the proviso of that act, which compelled the judges of the federal courts to stay their hands in the use of this writ whenever it should appear that the prisoner was held under state process. By the act of 1789 the state courts were left conclusive judges of the limits of their own jurisdiction, subject only to revision by the supreme court of the United States under the writ of error where federal questions might be involved. Their judgments, however erroneous, conclusively established the law of the particular case, until thus reversed in a direct proceeding.[3] The act of 1867, on the contrary, extended the writ to all cases where the prisoner, though held under state process, might, in the opinion of the federal court or judge issuing the writ, be held in violation of the constitution, or of any treaty or law of the United States. Thus, the federal circuit and district courts, and the judges of such courts, if the interpretation which has been put upon this statute is correct, have been clothed by it with a species of superintending jurisdiction over the state courts, without reference to their character or dignity. This will more clearly appear by the instances which I shall now give of questions which have been raised and decided by single judges, or by benches of two judges, in the federal courts of original jurisdiction, by this summary process.

§ 17 EXAMPLES OF QUESTIONS DECIDED ON HABEAS CORPUS UNDER THIS STATUTE. (1) *Effect of Ousting Clause in Fourteenth Amendment.* Under this statute the chief justice of the United States, in a summary proceeding by *habeas corpus*, assumed to pass upon the grave question of the validity of the acts of all state officials, who, having previously taken an official oath to support the constitution of the United States, had engaged in the late rebellion, or given aid and comfort to the same.[4] The circumstance that he decided that the provision of the fourteenth amendment, prohibiting such persons from holding office, was not self-enforcing, but needed the aid of an act of congress, and consequently that such persons were rightly in office, and the further fact that, previously to arriving at this conclusion, he had had the advantage of consulting with his associates of the supreme bench upon the question, does not detract from the gravity presented by the spectacle of a single judge deciding such a question in such a proceeding.

(2) *Validity of State Laws.* It has been held, in the circuit court of the United States for the district of California, that where an alien prisoner is held in custody under execution of a judgment rendered by a state court convicting him of an offense created by a state statute, and claims to be released on *habeas corpus*, on the ground that the statute under which he is convicted was passed in violation of the constitution of the United States, and of the provisions of a treaty between the United States and the nation of which he is a subject, the circuit court has jurisdiction, on a writ of *habeas*

1 Ex parte Milligan, 4 Wall. 3, 117.
2 14 St. at Large, 387.
3 Ante, § 6.
4 Cæsar Griffin's Case, Chase, Dec. 367; S. C. *sub nom.* Re Griffin, 25 Tex. Supp. 624.

corpus, to inquire into the validity of the statute and judgment, and, if it finds it to be in violation of such constitution and treaty, to discharge the petitioner from custody. The court proceeds upon the ground that a statute of the state creating an offense, passed in violation of the constitution of the United States, or of a treaty with a foreign nation, is void, and that a judgment convicting a party of an offense created by such void statute is also void, and not merely erroneous and voidable. It is, therefore, not necessary that a prisoner so convicted should be remitted to a direct proceeding in the supreme court of the United States for the purpose of testing the validity of the state statute.[1]

(3) *Validity of State License Laws.* It is assumed, from what has preceded, that if a citizen of one state prosecuting business in another as a traveling merchant, agent, drummer, or commercial traveler, should be proceeded against in the latter state, for violating the license laws of such state, and imprisoned in such proceeding, a federal court or judge would, under the writ of *habeas corpus*, inquire whether such license laws of the state were in conflict with that provision of the constitution of the United States which confers upon congress the power to regulate commerce among the several states, and by implication denies the same power to the states;[2] and, if it should be of opinion that the state law was in conflict with such provision, would discharge the prisoner, thus exercising the grave power of passing upon the validity of the laws of the states. This was done in a recent case in the circuit court of the United States for California, though it was held that the law under which the prisoner was held in custody was not in conflict with the constitution of the United States, and he was accordingly remanded.[3]

(4) *Validity of State Fisheries Laws.* The fourth article of the constitution of the United States provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states. The legislature of Virginia, in 1874, passed an act prohibiting persons, other than citizens of Virginia, from taking or planting oysters in the waters of the commonwealth, under a penalty. It was held that a person indicted and imprisoned under this statute was deprived of his liberty in violation of the constitution of the United States, and might be released, on *habeas corpus*, by a judge of a court of the United States under the act of 1867.[4]

(5) *State Laws in Violation of Treaties—Anti-Chinese Legislation.* The present constitution of California contains the following provision: "No corporation now existing or hereafter formed under the laws of this state shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision."[5] In pursuance of this constitutional ordinance, the legislature of California passed an act amending the Criminal Code so as to add a section providing that "any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employe, assignee, or contractor of any corporation now existing or hereafter formed under the laws of this state, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolians, is guilty of a misdemeanor, and is punishable by a fine of not less than $100, nor more than $1,000, or by imprisonment in the county jail of not less than 50 nor

[1] Re Wang Yung Qui, 6 Sawy. 237.

[2] Upon the validity of such state laws, see Welton v. Missouri, 91 U. S. 282; Cook v. Pennsylvania, 97 U. S. 566; Hinson v. Lott, 8 Wall. 152; Woodruff v. Parkham, Id. 123; Brown v. Maryland, 12 Wheat. 419.

[3] Re Rudolph, 6 Sawy. 296. See, also, Ex parte Touchman, 1 Hughes, 601, where a similar conclusion was reached. Compare Wood v. Maryland, 12 Wall. 418.

[4] Ex parte McCready, 1 Hughes, 598. This decision has been in part overruled by McCready v. Virginia, 94 U. S. 391.

[5] Const. Cal. art. 19, § 2.

more than 500 days, or by both such fine and imprisonment."[1] The second section of the fourteenth amendment to the constitution of the United States provides that "no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The title of the Revised Statutes of the United States relating to "CIVIL RIGHTS" contains the provision that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, and give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like pains, penalties, taxes, licenses, and exactions of every kind and nature."[2] The fifth article of the treaty between the United States and the Chinese Empire, known as the "Burlingame treaty," recognizes "the mutual advantage of the free immigration and emigration of the citizens and subjects" of both countries, "respectively, from one country to the other, for purposes of curiosity or trade, or as permanent residents." The sixth article provides that, "reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." It is thus apparent—and too apparent to be made clear by any argument, illustration, or suggestion—that the provision quoted from the constitution of California, and the act of the legislature of that state passed to enforce this provision, were in flagrant violation of the constitution of the United States, of the civil-rights law, and of the Burlingame treaty between the United States and the Empire of China. Nay, it is certain beyond all peradventure that the authors of this ordinance and this legislation knew them to be such, and passed them in the full face of such knowledge. A person who was prosecuted and imprisoned for the violation of this statute was beyond all doubt "in custody in violation of the constitution," and "of a law" and "treaty of the United States." The constitutional ordinance and the legislation filled out the whole limits of the clause quoted from section 753 of the Revised Statutes of the United States. Upon the statement of such a case to a federal court or judge, it would be his bounden duty to discharge a person so held in custody on *habeas corpus*. This was done by Mr. Circuit Judge SAWYER and Mr. District Judge HOFFMAN in 1880, sitting in the circuit court of the United States for the district of California.[3] Each of these learned judges delivered a long and able opinion—a thing which may have been proper, considering the extraordinary nature of the case and the temper of the times, but which was wholly unnecessary to convince any lawyer of the entire propriety of their action. Indeed, the case before them is one so obvious as to decide itself upon a mere statement.

(6) *Arrest of Bankrupts under State Process.* Under a provision of the late bankrupt law,[4] where proceedings in bankruptcy were commenced against a person, he was thereafter not rightfully amenable to arrest under state process for debts which were dischargable in bankruptcy; and, if so arrested, he was entitled to be discharged on *habeas corpus* sued out before a federal circuit or district court or judge;[5] but where the debt for which the bankrupt was arrested was a debt such as was not dischargeable under the bankrupt act, he would not be so discharged.[6] In exercising this power, it was held by one judge that it is the duty of the court issuing the *habeas corpus* to hear evidence, and determine upon its merits, the question whether the debt in respect of which the bankrupt had been arrested under the state process, was, in fact, a debt dischargeable in bankruptcy; that is, where the affidavit on which the

1 Cal. Act of February 13, 1880.
2 Rev. St. § 1977.
3 Parrott's Chinese Case, 6 Sawy. 349.
4 Rev. St. §§ 5107, 5117.
5 Re Williams, 11 N. B. R. 145.
6 Re Alsberg, 16 N. B. R. 116.

order of arrest was procured in the state court charged that the debt was contracted through fraud, that the *habeas corpus* court should, upon independent evidence, try that issue.[1] But abler and more experienced judges held, on grounds too clear for controversy, that such an issue cannot properly be tried before a single judge, on affidavits, in a summary proceeding by *habeas corpus*, but that it ought to be left to be contested before a jury in the state tribunal; and, accordingly, that the judge issuing the *habeas corpus* would not look further than to see that the affidavit, on which the order of arrest was procured in the state court, set forth facts showing that the debt was one which was not dischargeable in bankruptcy.[2]

(7) *Other Cases where the Prisoners have been Remanded.* Several other cases have been found where the federal judges have been appealed to without success to enlarge prisoners under the provision of the Revised Statutes of the United States, which we are considering. They have refused to do this where the prisoner had been committed by an examining magistrate of a state upon a charge of assault with intent to commit rape;[3] where a negro had been tried, convicted, and sentenced to a term of imprisonment for violating a law of the state which forbade the intermarriage of whites and negroes;[4] where the prisoner, an alien, had been indicted, tried, and convicted of a crime and imprisoned therefor under the sentence of a judge of a court of a state, who, though not possibly a judge *de jure*, was a judge *de facto*,—the circumstance intervening that the conviction had been affirmed by the supreme court of the state;[5] and where the prisoner was held in custody under process of contempt issued by a state court in the course of a suit pending therein, although the suit related to the property of Indians, over which, in consequence of special treaties and acts of congress, the state court had no jurisdiction.[6]

18. PROVISIONS FOR REVISING THE DECISIONS OF THE INFERIOR FEDERAL COURTS OR JUDGES ON HABEAS CORPUS. Such being the extensive powers exercised by the federal circuit and district courts and judges by means of the writ of *habeas corpus*, it becomes important to inquire what provision the law has afforded for revising their decisions, if erroneous. And, first, it may be observed that the only appeal which is allowed in all cases, generally, is an appeal "from the final decision of any court, justice, or judge, inferior to the circuit court," in which case "an appeal may be taken to the circuit court for the district in which the cause is heard: (1) In the case of any person alleged to be restrained of his liberty in violation of the constitution, or of any law or treaty of the United States; (2) in the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined or in custody by or under the authority or law of the United States, or of any state, or process founded thereon, or for or on account of any acts done or omitted under any alleged right, title, authority, privilege, protection, or exemption set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."[7] The only appeal which is allowed to the supreme court of the United States, so far as the writer can see, is an appeal "from the final decision of such circuit court

[1] Re Alsberg, *supra*, before BRADFORD, J.

[2] Re De Voe, 2 N. B. R. 27; S. C. 1 Lowell, 251; 7 Amer. Law Reg. (N. S.) 690; Re Volk, 3 N. B. R. 278; S. C. 3 Ben. 431. See, also, Re Kimball, 2 N. B. R. 354; S. C. Id. 4to, 74; S. C. Id. 114. Compare Re Glazier, 1 N. B. R. 336; S. C. Id. 4to, 73; Re Seymour, Id. 29; S. C. 1 Ben. 348.

[3] Re Taylor, 12 Chi. Leg. News, 17.

[4] Ex parte Kinney, 3 Hughes, 9.

[5] Re Ah Lee, 6 Sawy. 410; S. C. 2 Crim. Law Mag. 336.

[6] Ex parte Forbes, 1 Dill. 363, before DELAHAY, J.

[7] Rev. St. § 763. Ex parte Bridges, 2 Woods, 428, is an example of an appeal from a district to a circuit court under the first clause of this statute.

* * * in the cases described in the last clause of the preceding section;"[1] that is, in the cases of prosecutions of aliens for acts done under the sanction of their own sovereign or the law of nations, or under color thereof. This last provision, as elsewhere stated, was intended to preserve the right of appeal in such cases as that of McLeod, which grew out of an act done as a belligerent pending the Canadian rebellion.[2] The act of 1867, *c.* 28,[3] which extended the writ of *habeas corpus* 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,"[4] provided for an appeal to the supreme court of the United States in the following language: "From the final decision of any judge, justice, or court inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the supreme court of the United States, on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings, as may be prescribed by the supreme court, or, in default of such, as the judge hearing the said cause may prescribe; and, pending such proceedings or appeal, and until final judgment be rendered therein, and after final discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty, in any state court, or by or under the authority of any state, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be null and void."[5] Under this provision an appeal was taken from a judgment of the circuit court of the United States to the supreme court in the celebrated case of McCardle,[6] the circuit court having refused to discharge him from military custody, under the writ of *habeas corpus*. A motion to dismiss the appeal was made in the supreme court and denied.[7] The case was then argued at the bar upon its merits; the argument was concluded on the ninth of March, 1868, and the cause was taken under advisement by the court. While the cause was thus under advisement, and before the court had time to consider the decision proper to be made, congress repealed that part of the statute above quoted which gave an appeal to the supreme court, by a repealing act in the following words: "That so much of the act approved February 5, 1867, entitled, etc., as authorizes an appeal from the judgment of the circuit court to the supreme court of the United States, or the exercise of any such jurisdiction by said supreme court on appeals which may have been, or may be hereafter, taken, be and the same is hereby repealed."[8] This act had the effect of ousting the jurisdiction of the supreme court of the United States in the case of McCardle,[9] and it left no direct appeal to that court in *habeas corpus* cases, except in the single case provided for by section 764 of the Revised Statutes—the case of prosecutions of aliens, as above stated. But it did not have the effect of determining or impairing the general appellate jurisdiction which the supreme court of the United States had previously exercised over inferior tribunals of the United States, by means of the writ of *habeas corpus* aided by the writ of *certiorari;* and this jurisdiction extends as well to *habeas corpus* proceedings in the inferior courts of the United States, or before the judges of such courts, as to other proceedings which may be appropriate for its exercise, *in case such habeas corpus proceedings result in the remanding of the prisoner.* Accordingly, in the subsequent case of Yerger, where the questions involved

1 Rev. St. § 764.
2 Ante, § 14.
3 14 St. at Large, 385.
4 See Rev. St. § 753.
5 14 Rev. St at Large, 386.
6 6 Wall. 318; S. C. 7 Wall. 506.
7 Ex parte McCardle, 6 Wall. 318.
8 Act of March 27, 1868, (15 St. at Large, 44.)
9 Ex parte McCardle, 7 Wall. 506.

were in many respects similar to those which were involved in the case of McCardle, the circuit court of the United States having refused to discharge the prisoner on *habeas corpus* from the military custody in which he was held for trial before a military commission on a charge of murder, the cause was removed to the supreme court of the United States by its writ of *habeas corpus*, aided by its writ of *certiorari*. The supreme court, after argument, affirmed its jurisdiction thus to re-examine the decision of the circuit court.[1] A proceeding by *habeas corpus* is deemed a civil proceeding; and hence it cannot be re-examined in the supreme court upon a certificate of division of opinion in the circuit court, as criminal cases can; but, in such a case, judgment is entered in accordance with the opinion of the presiding judge, and thereafter it may be re-examined upon such certificate by the supreme court;[2] but whether it may be so examined where the decision of the presiding judge is in favor of *discharging* the prisoner is not clear. It remains, however, that no provision exists in the federal law for re-examining in the supreme court the decisions of the inferior federal courts or judges on *habeas corpus, in cases where the prisoner is discharged.* These decisions may result in declaring invalid the police regulations of a state, or even provisions of the state constitution, as will appear from cases already cited; and yet the state has no appeal, writ of error, or other means of bringing the question of the validity of its own constitution and laws to the final determination of the supreme court of the United States,—the tribunal which was established by the constitution for the determination of such questions. A statute which grew out of a temporary emergency, perhaps out of a party exigency, has deprived the federal jurisprudence of this necessary measure; and the most weighty considerations suggest the re-enactment, and perhaps the extension, of that clause of the act of 1867 which gave appeals to the supreme court of the United States in *habeas corpus* cases.

SEYMOUR D. THOMPSON.

St. Louis, Mo.

[1] Ex parte Yerger, 8 Wall. 85.

[2] Ex parte Mulligan, 4 Wall. 110, 114; Ex parte Tom Tong, 17 Cent. Law J. 89.

Ex parte CASEY.

(*District Court, N. D. New York.* September 21, 1883.)

1. HABEAS CORPUS—POWER AND AUTHORITY OF COURTS TO MODIFY, AMEND, OR SET ASIDE JUDGMENTS, ETC.—ADJOURNED SITTINGS.
   A court has ample authority to set aside, modify, or amend its judgments, orders, and decrees at the term at which they are rendered.
2. SAME—CASE STATED.
   The petitioner, after being convicted and sentenced by the court, and after stay allowed for an appeal, was a second time brought before the same judge, on an adjourned day of the same term of court, and the first judgment having been set aside, received the same sentence from the court, except that there was a substitution of penitentiaries. *Held*, that the court had full power to set aside or amend its judgment, which was rendered on a previous day of the same term, and that no injury had been done the petitioner, and none of his rights invaded.

Habeas Corpus.

H. C. Clagett, for petitioner.

Martin I. Townsend, U. S. Dist. Atty., opposed.