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CONGRESS.

HOUSE OF REPRESENTATIVES.

FEBRUARY 19.

Debate on Mr. Broom's resolution for the better protection of the writ of Habeas Corpus.

(CONTINUED.)

MR. QUINCY. So long as an intention appeared to make this a party question, I had no inclination to intermeddle with it. The subject seems to me to be of too high a nature, and too deeply to be connected with the rights and liberties of us all, to be examined under those narrow and temporary views, which party spirit necessarily introduces. Since the discussion has assumed a milder aspect, I shall offer a few considerations; limiting myself to a very simple and brief elucidation of the subject, in a point of view, which no other gentleman has taken of it, as yet, on this floor.

I cannot agree with those gentlemen, who maintain that, in the arrest and transportation of Bolman and Swartwout, they can see no violation of the rights of individuals. The privileges of the constitution are as much the inheritance of the humblest and the most depraved, as of the most elevated or virtuous citizen. To be seized by a military force, to be concealed and hurried beyond the protection of the civil power, and to be sent a thousand miles for trial, in a place where the crime charged was not committed, I humbly conceive, are violations of individual rights and of the constitution. I am not, however, prepared to say, that in no possible case they can be pardoned; nor, with the gentleman from Virginia (Mr. Randolph) that in no case I would consent to indemnify a military commander for making such an arrest. A case might exist, when it might be the duty of a legislature thus to indemnify. I agree, however, that it must be an extreme case, and that the party to be indemnified must evince that he had himself no voluntary agency in producing that state of things which made such an unconstitutional exercise of power necessary to the safety of the state. I give no opinion concerning the conduct of general Wilkinson. The events which happened at New Orleans have no other relation to the subject before the House than this. They have turned the attention of reflecting men in this nation to the nature of the security they possess against similar violence, and in common with other reflecting men, it has become our duty not only to understand the nature of that security, but also to supply, as soon as possible, any deficiencies we may discover in it.

The only question is, have this people the privilege of the writ of Habeas Corpus secured to them as fully and effectually as the constitution intended, and as wise and prudent men ought to desire? I answer unequivocally, they have not. So far as relates to cases under the exclusive jurisdiction of the United States, we have virtually no writ of Habeas Corpus.—And for this plain reason, that we have none of the sanctions of the writ; we have none of those penalties, without which the writ of Habeas Corpus is a dead letter; particularly in all cases, in which the state of party passions, or of any predominant power leads to the oppression of an individual.

The writ of Habeas Corpus and the penalties by which it is enforced, and in which the great benefit of the privilege consists, are distinct things in their nature. The former was known to the English common law, and although, at all periods of English history, it was held a very precious right, yet were its provisions found wholly inefficacious against arbitrary power, until after the statute of Charles II. called by Englishmen their second Magna Charta. This statute gave penalties, unknown to the common law. If a judge refuses to grant, or an officer refuses to execute the writ, he is liable to a penalty of 500l. sterling, and similar sanctions annexed to other neglects of the precept. The House will observe, that all these penalties are securities, given to personal liberty, additional to those which exist at common law, and are not substituted for them. These penalties are annexed for disobedience to the writ, not as an indemnification for the injury. All the other remedies against the judge, or the party imprisoning, remain unimpaired.

The question recurs, does the federal constitution, by securing to us "the privilege of the writ of Habeas Corpus" assure to us those sanctions of the writ, which constitute in England its characteristic security? If the constitution had re-enacted the statute of Charles there could be no doubt. But will gentlemen seriously assert, that a penal statute of another country, can, by construction, be declared the law of this, so as to make our citizens obnoxious to its penalties? If that statute be our national law, how was it obtained? Re-enacting statute we have none. And "the U. S. as a federal government, have no common law," if we give credit to declarations daily made upon this floor; or respect the opinions of one of the highest law authorities in this nation.—I refer to the opinion of judge Chase in the case of the U. S. against Worrall. 2. Dallas 394.

This view of the subject is certainly sufficient to satisfy this House that their security for this great privilege is, at least, uncertain; and is not this reason enough, for this legislature to commence an enquiry into the nature of that security, and the additional provisions it require? This at present is the only question.

But gentlemen ask "what need of further penalties?" "If the judge refuses the writ is there not impeachment?" "Against the person illegally imprisoning another, is not an action for damages?" I answer—Both these securities for the personal liberty of the citizen existed, and do still exist in England, as fully as they do here, yet was it ever before heard that these were reasons against enacting that celebrated statute of Charles or were ever urged as evidence that its provisions were needless, or useless? The penalties of that statute are guarantees of the liberties of the citizen, additional to those which result from the law and the constitution. The principle of that statute is, to rest satisfied with nothing short of the actual liberation of the person, from illegal imprisonment, in the shortest time possible. To this end all its provisions tend. It will not leave a citizen to languish in prison, in expectation of the result of the slow progress of legislative inquisition, or for the purpose of ultimately qualifying him to receive a heavy compensation in damages. Impeachment is always a dubious, and an action for false imprisonment, often an inadequate security for the observance of the writ of Habeas Corpus. Great violations of the privilege of this writ can never happen, unless in times of great party violence. In such times, what hope of an impeachment against a judge, who abuses his authority in coincidence with the views of a prevailing party? And as to damages, is personal liberty to be estimated by money? And if it were, what certainty that the person guilty of the illegal arrest will be competent to pay the damages recovered? In the case of seizure by a military power can it ever be expected from the universal pecuniary deficiencies of the soldiers, that damages will be realized, even should the civil arm be competent to enforce an execution?

The penalties affixed by the statute of Charles, on the contrary, assure the obedience of the courts and officers of justice independent of all party influences, which may happen to prevail in the nation, and secure personal liberty by pecuniary perils, suspended over the heads of men, whose situation in society is such as, in general, makes the attainment of the penalty certain, should it be incurred. Upon the whole, those who oppose the present motion seem to me be reduced to this dilemma—either they must acknowledge that they are content that the citizens of these United States should possess less security for their liberties, than the subjects of the law of England enjoy for theirs;—or they are reduced to the necessity of adopting the doctrine that the statute penalties of another country may by construction become the law of this nation; than which, I can conceive nothing more monstrous or absurd.

In this discussion it has been my wish to avoid all notice of the party and personal invectives which have been uttered. The question is too important to be mingled with feelings and passions of these descriptions. And the circumstances of the times and of the nation, seem to me to claim from us all a contempt for these local and ephemeral distinctions.

Mr. GREGG said he did not rise to enter into a discussion of the merits of the question, but merely to move its postponement indefinitely; the propriety of which motion, he thought, must present itself to the mind of every gentleman. From the time which had been already spent in this debate, it must be evident that before it was finished, the session would be passed away. A considerable portion of the business on the table, the public interest required to be acted upon, and scarcely time sufficient remained to give it the necessary attention. Mr. G. said he should have had no objection to the resolution if offered at an earlier period of the session; and he believed even at this late period he should be willing to let it take place of other business if he considered it indispensably necessary. But as he did not believe this to be the case, he trusted the postponement would be agreed to.

Mr. NEWTON. I presume I may be permitted, notwithstanding the motion has been aried, to go fully into the subject before the House. I hope this House will not indefinitely postpone it. If ever there was a subject worthy the attention of an enlightened legislature, it is the subject before us. Every subject that regards the liberty of the citizen should be received with reverence and respect by the votaries of liberty. If we can better the situation of the people of the U. S. and keep from them under all circumstances the hand of oppression, it is our duty to do it, and to pay attention to whatever is likely to eventuate in such an issue. I shall not consider this case as the basis of an impeachment. The only true enquiry at present is whether the writ of habeas corpus is sufficiently fortified by legislative provisions? I will not commit my understanding so far as to decide on the conduct of the commander in chief.—If he has done wrong, let him be answerable to the laws of his country;—much less will I talk of indemnifying him—For this reason—because the jury before which the case may come, may, under such circumstances, have regard, not to his circumstances, but to the treasury of the U. S.

It is said that the quarter from which this resolution comes gives it a suspicious appearance. It is true I am of that class of men who may say to the gentlemen with whom this motion originates, as said of old to the Trojans—*timeo Danaos et dona ferentes.* Still I am willing to examine the proposition, tho' it comes from that quarter, to sift the good from the evil. If gentlemen submit to us a good proposition, I am ready to treat it with all the respect it merits, and I will give all the weight which they may deserve to propositions which they, feeling power and forgetting right, in past times refused to allow. God forbid that we should act on principles that we could not justify. Yes, I congratulate the mover of this resolution, that he has arisen from the long slumbering nap in which he has been involved, and that he has all at once been illuminated by the splendor of liberty. I congratulate him on this circumstance, & I assure him of my most hearty concurrence in the measure he has brought forward.

My friend and colleague from Virginia, has offered a most important amendment to this resolution. The supreme court of the U. S. after having this all important case for a long time under advisement, and after an argument from the bar, are again afloat on the ocean of uncertainty, have started some new doubts, and have asked the gentlemen of the bar to come forward with a new argument. If this is the fact, does it not shew the necessity of our attending to the subject; and of some new legislative provisions upon it? I am for defining the powers of our courts. I wish to understand the extent of their prerogatives; and particularly whether they have appellate jurisdiction in criminal cases, before whom criminals are to be brought, who are to grant writs of habeas corpus and admit to bail?

These are all considerations of importance, and constitute the reasons which induce me to vote for referring this resolution to a select committee.—But, say gentlemen, we cannot mature this subject this session. Perhaps so; but is this a sufficient reason for not commencing the investigation, for comparing our ideas on the subject, and going forward as far as we can in our progress towards a decision. I for one shall always be in favor of an enquiry into subjects that have a reference to personal liberty.

Another of my colleagues has not only stated an objection to the original resolution, but likewise to the amendment. His objection is that we are filching from the supreme court a power conferred on them by the constitution. Let us examine this question a little—Do not the judges of the supreme court, in connexion with the district judges, compose the circuits of the U. S. We say it is doubtful whether the former judges, sitting as a supreme court, have a right to take this subject into consideration. It has never been denied that they have a right in their respective circuits, at their chambers, to grant writs of habeas corpus. This has never been denied, this I say is law.

This subject has been spread over an immense extent of ground. The single point, however, at issue, is whether we will commit this resolution, in order merely to obtain correct facts and information, which shall present the subject in such a form as shall enable us to act understandingly upon it. I am not at present in favor of acting definitively upon it; but merely for enquiry. So circumstanced, I presume our proceedings cannot injure any individuals implicated in this business, as nothing we can do can have a retrospective effect. These are my reasons for voting in favor of the present motion.

Mr. SMILIE. I have but a few observations to offer on this subject. At an early stage of this debate I expressed myself in favor of the resolution. I thought it proper in itself for this reason—I had doubts in my own mind whether the writ of Habeas Corpus was secured by the penalties necessary to give it effect. I had endeavored to inform myself by conversing with professional men upon the subject; finding that they differed in opinion I thought it proper to enquire into it; but like some other subjects introduced into this House, I think it has been spoiled by the mode of treating it. I had flattered myself that it would have been considered as a subject of no one party; but as one in which all parties were equally interested. Instead, however, of treating it on its own merits, it appears to me that the mover and other gentlemen have indulged themselves in invectives against the commander in chief and on points altogether unconnected with the main subject. It is admitted by the mover of this resolution that there may be circumstances under which it might be the duty of a public officer to depart from the laws and take the responsibility upon himself. The gentleman, notwithstanding, undertook to arraign the conduct of the commander in chief without his being heard. Surely this is not the tribunal before which that gentleman ought to appear in case he has done wrong; and if it were, in justice he ought to be heard before he is condemned. Yesterday a doctrine was stated of a most extraordinary nature, though I admit it is the only doctrine on which gentlemen can justify condemning the commander in chief without a hearing. The doctrine is this—that under no necessity whatever can an officer be justified for departing from the law.

Mr. J. RANDOLPH explained. He said he believed there might be situations in which a departure from the law might be palliated, if not justified. He had no doubt of it; but he must be permitted to add, if the remarks of the gentleman from Massachusetts were intended to bear on what he said, that that gentleman had misunderstood or mistated him. He had stated a case of a known, acknowledged violation of the constitution of the U. S. by a military force—That was the thing. For instance, as if in sitting as they had done some few years since, till day dawn balloting who should be President, under the impression that all would go to anarchy and confusion, but for his superior power and wisdom, a commander, at the head of a military banditti, had stepped in to tell us who should be President. If the military had a right to put the constitution at defiance, they had as good a right in one case as in another.

Mr. SMILIE. The gentleman's explanation is perfectly satisfactory. I certainly did misunderstand him. It is well known that military men have departed, and must depart in some instances, from the laws. For instance, it is justifiable for the commander of a garrison, under some circumstances to burn the suburbs of a city. Since then it is admitted there may be a justification for a departure from the laws, such justification must depend on the degree of necessity that may exist. And my conclusion is, that as we are not acquainted with the circumstances of this case, it is premature to pass judgement on those implicated in it. On this point I coincide with the gentleman from Massachusetts. We ought entirely to consider the subject before us on its own merits. The next question therefore is, whether we are in the situation to make the proposed enquiry. On this point I am sure no gentleman will undertake to say, even were we to suspend the whole business before us, we should be able to mature and finish before the close of the session a business of this importance; and if we did, I fear it would be very incorrectly done. Inasmuch then as we cannot get through this business during the present session, it is proper in my opinion to postpone it until the next. I pledge myself that I shall then be as willing as any gentleman on this floor to take it up and give it a deliberate investigation.

Mr. J. RANDOLPH. When the gentleman from Pennsylvania made this motion, I was really apprehensive that it would have an effect different from that intended—that it would have the effect of protracting this debate. We have had a long discussion, and when every member is ready to give his vote on the subject, and most of the members, who desire it, have in all probability delivered their sentiments, a motion to postpone the subject is offered. What is the consequence? That every member who has spoken on the main question acquires the right to speak twice on this.

I am sorry for the declaration made by the gentleman from Pennsylvania. I understood him to be friendly to this measure. But how am I to reconcile his friendship with the negative vote which he means to give? For will he or any other gentleman point out a substantial difference between negativing and postponing this resolution. This is nothing more or less than an ingenious mode of quieting a tender conscience. To induce gentlemen to vote for postponing, what on principle they cannot vote against. Suppose in the case of a petition from Stephen Sayre, or Oliver Pollock, or any other of the claimants so steadily before us, a motion should be made to postpone their case indefinitely. What would the gentleman from Pennsylvania say? That there was no substantial difference between postponing and negativing it. I do confess, sir, if I was opposed to this measure, I would get up and say so—I would vote against it—I would come out manfully and decide on its merits; and I trust gentlemen opposed to it from principle will have the magnanimity to reject the postponement and try the strength of the House on the main question.

I certainly mean no disrespect to either of the gentlemen from Pennsylvania, because where I do not feel disrespect, I would not express it. But the motion made by one of those gentlemen and advocated by the other, gives an unfaithful representative of the people an opportunity of shrinking from his constitutional responsibility, and as such ought to be resisted. A gentleman goes home, and is asked, what did you do in the case of the Habeas Corpus? Did you vote for or against it? He replies—no, I did not vote against it—I only voted for postponing it indefinitely. Well, what is the meaning of this Parliamentary phrase? Though it is exactly the same as voting against a measure, yet addressed to the unlearned ear of the planter, it gives an opportunity to every man affraid to stand on his own responsibility to cheat his constituent.

With regard to improper topics and extrinsic considerations, introduced into this debate, no one can be more sensible of, or have greater reason to regret it, than myself; but if urged by me, they have been urged in self defence. I may truly say I did not begin the battle. For on the first day's discussion, when the mover was making a lengthy speech on this subject I was engaged in the Committee Room and only came into the House when about to adjourn; but notwithstanding I heard enough to convince me that principles had been broached, which, let them be broached wherever they may, will always meet my reprobation.

The gentleman from Massachusetts must certainly have labored under some strange misapprehension when he conceived that I quoted the case of the prohibition of the exportation of corn from G. Britain by royal proclamation with the view he ascribes to me. I certainly did not. I did not say that if the ministers had acknowledged a violation of law and had thrown themselves on the mercy of their country, it would not according to the usages of that country have been proper to have passed a bill of indemnity. I quoted this case to show that when the known and acknowledged friends of freedom become so intoxicated with power as to abandon the strong bulwark of the constitution, those opposed to them will turn their batteries against them—to shew that it did not become the gentleman from Massachusetts, if indeed he is the friend of freedom, to quit the true old constitutional ground, and suffer it to be taken by those in opposition. And in illustration of this observation I stated, that that cunning Scotchman, Mansfield, under similar circumstances, had taken the true ground of the constitution against Chatham and Camden, its loudest advocates, and had thus defeated them with their own weapons.

I am sorry to be obliged to trouble the House with any more of that sole declamation, which it seems is totally useless, except to serve the purpose, at various times, of replying to itself. But this declamation has even in this respect one advantage, often found wanting to the most solid argument, viz. that it is a satisfactory reply to something—that it has at least the power of answering itself—and is indeed with the properties of echo—that it is not "unheard, unknown." There has been a dispute in the world from time immemorial between wit and dulness—between imagination and judgment. So we have been told, though some who cultivate the sceptical philosophy dispute it. But this impression has been so long attempted to be made, that there is not a precise or formal coxcomb that does not on the score of dullness arrogate to himself judgment and profound wisdom. While I am willing to allow that declamation, or the powers of an effervescent imagination, are no evidences of wisdom, the House must admit that the mere dulness of a special pleader without his accuracy does not imply any pretensions to knowledge. The truth is that on this as on other subjects, it has been my misfortune to come to the House too unprepared. I knew nothing of the subject until it was brought under discussion. I got up yesterday, as I have to-day, to say what first came into my head, and in this way I hope I shall be permitted to go on.

However the gentleman from Massachusetts may have professed his anxiety to avoid committing himself by giving an opinion in the present case, he has given a broad hint of the propriety of indemnifying the commander in chief in this instance, if he has acted illegally, by the allusion which he has made to the case of captain Little, to which he might have added that of captain Murray. Let us examine the analogy of these cases, and see whether the gen-