So far is it from being true, therefore, that those orders were the vivifying principle which gave life and vigor to the Berlin decree, that the acquiescence of neutrals in the execution of that decree against them was expressly assigned in the preamble, as the cause of issuing the orders. In their very nature as well as in the language, they appear to be simply a retaliating measure, diametrically opposed to the decree. The plain English of the decree is, addressing itself to America: "You shall not in future be permitted to sell your property in France or her dependencies or to bring it into the territory under any circumstances whatever, unless, you at the same time prove that you never bought it of England or of any of her colonies, upon pain of confiscation. Though the property may be bonafide yours now, if it ever belonged to a man owing allegiance to the British government, it is contaminated, and I will seize and confiscate it for my own proper use and behoof, wherever I can lay my hands upon it treaties and laws of nations to the contrary notwithstanding." Such was virtually the language of the decree, and the emperor immediately proceeded to carry this outrageous threat into execution. After submitting to this species of commercial warfare for twelve months, England issues her orders in council, which are in substance addressed to her enemy, and not, like the decrees, to a friendly neutral. They are to France: "Well, as you were really in earnest in what we first supposed to be mere gasconading, as you will not suffer the Americans to trade with you in articles purchased from us or our colonies, and as they quietly submit to your assumed power of regulating their commerce, we will not allow you to receive the productions of your own colonies or of the countries in subjection to you."—This is actually the whole substance and amount of the orders in council, about which a great noise has been made, and which Bonaparte has said was a declaration of war against us, while his partizans tell us that his conduct towards us has been marked by nothing but "liberality and friendship."

The conclusion of the whole matter is, that the French decree of Berlin, executed against us for twelve months without opposition, occasioned the orders in council, which led to further acts of aggression on the part of France, and ended in the tame surrender of all our rights upon the ocean, rights which we might to this day have enjoyed with honor and profit to ourselves, had a firm and manly opposition been made by our government to that insulting outrage, by which Bonaparte took upon himself to regulate our commerce for us, by insolently declaring to whom, and in what manner we might be permitted to carry it on.

REPORT
OF THE
ATTORNEY GENERAL
Of the United States, in the case of the Mandamus lately issued by the Judges of the Circuit Court of the U. S. for the district of South Carolina.

Sir,

I have read and considered the papers and documents referred to me relative to the case of a *mandamus*, issued by the circuit court of the United States for the district of South Carolina to compel the collector of the port of Charleston to grant clearances to certain vessels.

The first question that naturally presents itself, is, whether the court possesed the power of issuing a *mandamus* in such a case?

A *mandamus* in England is styled a prerogative writ, and in that country is awarded solely and exclusively by the court of King's Bench.

The constitution and laws of the U. States establish our judicial system. To these we must refer in order to ascertain the jurisdiction of the respective courts, the extent of their powers, and the limits of their authority.

The "Act to establish the judicial courts of the United States," passed on the 24th September, 1789, declares and defines the jurisdiction of the several courts thereby created, and among these the jurisdiction of the circuit courts. Upon a careful and attentive perusal, it will be found to delegate to the circuit courts no power to issue writs of *mandamus*. In the thirteenth section of that act this authority is expressly given to the supreme court of the United States. In like manner it is specially provided by the act of the 3d of February, 1801, that the supreme court shall have power to issue writs of *mandamus*. This last act having been repealed and the former revived, the question must rest on the true construction to be given to the original act.

The eleventh section defines and limits the jurisdiction of the circuit courts. It is specially appropriated to this single object—There are no expressions in this section which can fairly be interpreted to confer the authority of issuing writs of *mandamus*. Nor can the power be either implied or inferred from any language it contains. It is true, the proceeding by *mandamus* in England is on the crown side, as it is termed, of the court of King's Bench. But it is a prosecution relative to a civil right to enforce it, and to obtain prompt redress;—and not to punish criminally as in the case of an offence. The provision therefore, that the circuit courts "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where the act otherwise provides, &c." cannot warrant such a proceeding. Besides the same act does provide that the supreme court shall issue writs of *mandamus*—An authority given perhaps because its jurisdiction extends all over the United States.

The fourteenth section, immediately succeeding that which gives this authority in plain and positive terms to the supreme court, solely, if not exclusively, (and the affirmative frequently, and in this case justly, I think implies a negative) contains the following provision: "All the before mentioned courts of the United States (including the supreme, as well as the circuit and district courts) 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." This clause cannot affect the case, I conceive. The mandamus is a writ, which we have seen is specially provided for by law. This section was evidently not designed to give any additional jurisdiction to either of the courts, but merely the means of executing that jurisdiction already granted to them respectively. The issuing of a *mandamus* in the case under consideration was an act of original jurisdiction. Precisely as much so, as it would have been in the supreme court, to have exercised the power in the case of Marbury vs. Madison. In that case the supreme court declared, that to issue a mandamus to the Secretary of State, would be, to exercise an original jurisdiction, not given by the constitution, and which could not be granted by Congress. The constitution having enumerated or declared the particular cases in which the supreme court should exercise original jurisdiction, though there were no negative expressions, the affirmative they considered implied them. It was on this principle alone they refused to exert their authority.

The practice I believe, has uniformly been, so far as I can trace it from the books of reports, that have been published, or from recollection and experience on the subject, to apply to the supreme court for a *mandamus*. This court it is true have determined not to issue the writ, when it would be an act of original jurisdiction. But this I apprehend, can afford no ground for the circuit court's assuming an authority, which the supreme court have declined, unless by a legislative act the power be delegated to them. This power is not inherent nor necessarily incidental to a court of justice, even of general jurisdiction. For in England but a single one of several courts having general jurisdiction, possesses the authority. Neither the chancery, the common pleas, nor the exchequer, though classed among the kings superiour courts, and having general jurisdiction over the realm, can exercise this power. It is the peculiar privilege of the king's bench alone. Our circuit courts have merely a local and subordinate jurisdiction. Their analogies therefore with the four courts of England, having general and superior jurisdiction, must be very weak, and still weaker their claim, to the pre-eminent distinction of the king's bench, which possesses solely the exclusive authority of issuing the mandamus.

For these reasons I am induced to believe from the best consideration I have been enabled to give the subject, that the circuit court of South Carolina had not authority to issue a mandamus to the collector of the port of Charleston.

It is scarcely necessary to remark that when a court has no jurisdiction, even consent will not give it, and much less will the mere tacit acquiescence of a party, in not denying their authority.

Independent of this serious and conclusive objection to the proceeding adopted by the court, there are others entitled to consideration. For supposing the court did not err in the exercise of jurisdiction, and admitting the British doctrines on the subject without restriction or limitation could be extended to this country there are legal exceptions to the course they have pursued, supported by English authority.

In the first place, the law gave the collector complete discretion over the subject. According to the opinion he might form, he possessed competent authority to grant or refuse a clearance. And I apprehend where the law has left this discretion in an officer, the court, agreeable to the British practice and precedents, ought not to interpose, by way of *mandamus*.

Secondly. In this case there was a controling power in the chief magistrate of the U. States. There was in fact, an express appeal given to the President by the very words of the act of Congress, which authorises the collectors to detain vessels, "until the decision of the President of the United States be had thereupon." By the *mandamus* the reference to the President is taken away, and the collector is commanded to clear the vessel without delay. Agreeably to the English authorities under such circumstances, it is not the course I believe to issue a *mandamus*.

Thirdly. The parties it seems had their legal remedy against the collector, and it is not usual, if not unprecedented, to grant a *mandamus* in such a case.

Fourthly. A *mandamus* is not issued to a mere ministerial officer to compel him to do his duty. The court will leave the parties to their remedy by action, or even by indictment. In England, in a very late case, they decided that they would not grant a *mandamus* to a ministerial officer, such as the treasurer of a county for the proper remedy was by indictment.

I am aware of a precedent in which it seems to be admitted that a *mandamus* may issue to the commissioners of excise, to compel them in a proper case to grant a *permit*. This case is more analogous to the one now before us than any other, I have been able to discover, after a diligent research. But in this instance the point was not made, nor the question argued. Besides, the commissioners of excise in England form a board for superintending the collection of that branch of the revenue. They constitute in many respects a court of inferior jurisdiction, which in particular cases takes cognizance in a summary way, of offences against the excise laws. A mandamus might be granted to such a tribunal when it would not be issued to a mere ministerial officer, acting under them in the collection of the revenue.

It results from this view of the subject that the mandamus issued by the circuit court for the district of South Carolina, was not warranted by any power vested in the circuit courts by statute; nor by any power necessarily incident to courts, nor countenanced by any analogy between the circuit courts and the court of king's bench, the only court in that country possessing the power of issuing such writs. And it further appears that even the court of king's bench, for the reasons assigned, would not, agreeable to their practice and principles have interfered in the present case by *mandamus*.

It might perhaps with propriety be added that there does not appear in the constitution of the United States any thing which favors an indefinite extention of the jurisdiction of courts, over the ministerial officer within the executive department. On the contrary, the careful discrimination which is marked between the several departments, should dictate great circumspection to each, in the exercise of powers having any relation to the other.

The courts are indubitably the source of regal redress for wrongs committed by ministerial officers, none of whom are above the law. This redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and an obvious distinction, between a course of proceeding, which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the President, and prescribing the course, which he and the agents of any department must pursue. In one case the executive is left free to act in his proper sphere, but is held to strict responsibility; in the other all responsibility is taken away, and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial, and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department. If in case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but can previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution perhaps defeated, which makes it the duty of the President to take care, that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling by mandamus all the executive officers, all subordinate to the President at least, whether charged with legal duties in the treasury or other department, to execute the same according to the opinion of the judiciary and contrary to that of the executive. And it is evident that the confusion arising will be greatly increased by the exercise of such a power, by a number of separate courts of local jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the supreme court. So many branches of the judiciary, acting within their respective districts, their courses might be different, and different rules of action might be prescribed for the citizens of the different states, instead of that unity of administration which the constitution meant to secure by placing the executive power for them all, in the same head.

What too becomes of the responsibility of the executive to the court of impeachment, and to the nation? Is he to remain responsible for acts done by command of another department? Or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred, that the constitution of the U. States, by the distribution of the powers of our government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principles of the English law, which would authorise either to enter into the deparment of the other, to annul the the powers of that other, and to assume the directions of its operations to itself.

These remarks are respectfully submitted to your consideration. They are made with due deference to the opinion of the court, with one of the judges constituting which I am personally acquainted, and for whose character I feel the sincerest regard.

Yours very respectfully,
(Signed) C. A. RODNEY.
July 15, 1808.

The PRESIDENT *of the U. States.*

PHILADELPHIA, July 29.

From our Correspondents.

"NEW-YORK, July 24.

"Capt. Howard, a passenger in the ship *Thalia*, *Silliman*, arrived at Hurlgate from Falmouth, E. (from whence he sailed the 6th June) informs, that he saw three Spanish deputies in England—they came from St. Andero, to request of the English a supply of arms and clothing. They informed, that the French at St. Andero and in the province of Catalonia had been massacred. At Madrid, the populace assaulted the French troops, but the French got the better, and the troops afterwards withdrew out of the city. Prince Murat, it was said, had two horses killed under him. Capt. H. confirms the intelligence that Cadiz had offered to surrender to the English. The old king still reigned under Bonaparte and Murat, and was going to reside at Fontainbleau. The Prince of Austurias was to be sent to Besancon.—The British Packet Windsor Castle, for Falmouth and New-York, was to sail the day after the Thalia. The Lord Hobart Packet, from New-York, had arrived. The ship Union, Jacobs, for New-York and Philadelphia, sailed about the same time from London. The ship Otis, of New-York, went from London to Liverpool to load with salt. The ship Alknomac, of this port, was at Falmouth, not unloaded. The ship Science, Howard, from London to New-York, had been captured and sent into Bayonne. No property *had been condemned in France*, which had been under seizure. Off Cape Hatteras, capt. S. fell in with a British homeward bound fleet, and soon after was informed by a vessel he spoke, that several French privateers were cruising on the coast, which induced him to bear away for the sound to get into New-York.

INDIAN WAR.

ST. LOUIS, May 26.

SIR—The bearer hereof is a chief among the Delawares who reside on Apple creek in this territory. He has been selected by the Delawares, Shawnees, Miamies, &c. in your territory to be the bearer of the substance of a speech which I lately made to the Shawnees and Delawares at this place, with respect to the Osage nation.

The Osage have killed one of our citizens more than 13 months since, and have failed to deliver the murderer, they have beaten, maimed, wounded and otherwise insulted and mal-treated others; they have stolen a large number of our horses, they have wantonly killed and destroyed our cattle, they have plundered our frontier inhabitants of their clothes, household furniture, &c. destroying such articles as were not portable, and from late information received by the traders who have recently returned from their villages, it appears that they evince a hostile disposition towards us, and consequently that other and exaggerated depredations may be expected. I have in several late conferences with the Shawnees, Delawares, Kipapoos, Soos, Sauks, Jaways, &c. declared the Osage nation no longer under the protection of the U. States, and set them at liberty to adjust their several differences with that abandoned nation in their own way, but have prohibited their attacking them except with a sufficient force to destroy or drive them from our neighborhood. The White Hair, the great Chief of the Osage, is now with me, he has found it impracticable to govern this nation, and therefore repaired to this place for protection. The traders have been ordered to leave their villages, as have also the hunters and all other white persons to quit their country; a considerable number had already arrived, and the others are daily expected. Under these circumstances I hope that you will permit the Indians in your territory to take their own measures for attacking the Osage. It is possible that a part of the militia of Louisiana will be employed on this service. The expedition will move about the 20th of September.

Accept the assurance of my most friendly regard.

MERIWETHER LEWIS.

His Excellency, Wm. H. Harrison,
Governor of Indiana Territory.

ST. ALBANS, (Vt.) July 14.

Insurrection.—The following deposition has been sworn to before Justice Hathaway.—Some account of the affair mentioned was published several days since.

I, JOHN WHITTEMORE, Lieutenant of the detachment of militia under the command of Capt. Hopkins, being duly sworn, testify and say—That on the morning of the 22d day of June, I was at the garrison at Alburgh, on Missisque bay, where we had in custody nine barrels of potash, which had been seized by order of the Collector for the District of Vermont. The number of men in the garrison at that time amounted to twelve, the residue having been on duty at a distance from the garrison; that about 2 o'clock in the morning of that day, about 30 men armed, made an attack upon us, and secured the sentries, probably intending to take the potash while the soldiers were asleep. They required us to deliver the property we had in store, or they would take it by force, and expressed a determination to take it away at all events and to kill every man in the garrison, unless the potash was surrendered. On our refusing to deliver it up, they commenced a fire upon us, which we returned. The fire was kept up on both sides, until our cartridges on hand were spent, (the residue being at our quarters)—when we were under the necessity of surrendering. They then took the nine barrels of