# Supplement to the New-York legal observer, containing the report of the case in the matter of George Kirk

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SUPPLEMENT.

THE NEW-YORK LEGAL OBSERVER.

EDITED BY SAMUEL OWEN, Of the New-York Bar.

Coke

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**CANADA.**

MONTREAL:—R. C. CHALMERS.—QUEBEC: THOMAS CARY TORONTO:—ALFRED B. TOWNLEY.

SUPPLEMENT TO THE NEW-YORK LEGAL OBSERVER, CONTAINING THE REPORT OF THE CASE IN THE MATTER OF GEORGE KIRK, A FUGITIVE SLAVE, HEARD BEFORE THE HON. J. W. EDMONDS, CIRCUIT JUDGE.

ALSO THE ARGUMENT OF JOHN JAY OF COUNSEL FOR THE SLAVE.

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NEW-YORK: LEGAL OBSERVER OFFICE, 41 ANN-STREET.

Supreme Court, N. Y.—In the matter of George Kirk, a fugitive slave.

Supreme Court, N. Y.

[FIRST CIRCUIT.]

Before the Hon. J. W. EDMONDS, Circuit Judge.

*In the matter of* George Kirk , *a fugitive slave.*

A fugitive slave can be retaken and returned to service, only on the demand of his owner, or his agent or attorney.

The power of legislating on the subject of fugitives from service is exclusive in the government of the U. S., and it is not competent for state authorities to add to, or interfere with the subject.

The statute of the state of New-York, 1 *Rev. Stat.* 659, § 15, which allows the master or commander of a vessel, in case a slave shall have concealed himself on board his vessel and thus escaped to this state, to recapture such fugitive, and take him before the mayor or recorder, for the purpose of obtaining a warrant for his removal from the state, is repugnant to the constitution of the U. S., and therefore void.

On the 22d October, 1846, on a petition presented by Lewis Napoleon, setting forth that a colored boy, whose name was unknown, was closely confined on board the brig Mobile, lying at the foot of Maiden Lane, and bound in chains, the circuit judge allowed a writ of habeas corpus, returnable forthwith in the oyer and terminer then sitting—which was duly

served, and the boy brought before the court, when the following return was made to the writ:

I, Theodore Buckley, master of the brig Mobile, do return to the annexed writ of habeas corpus, that a colored man calling himself *George* , the person now present, at the time of the service of said writ was under my restraint, and that I claim to hold him under my restraint, as a fugitive from service in the state of Georgia, under and by virtue of the laws of which state he is held to labor and service as the slave of Charles Chapman, of Bryan county, in said state of Georgia.

And I do further return, that said George covertly and *privately, against my knowledge and consent, with a view to effect his escape from the service to which he was lawfully held, under and by virtue of the laws of the state of Georgia, secreted and concealed himself on board the brig Mobile, of which I am master, while lying at the port of Savannah, in the said state of Georgia; that said vessel sailed from said port on the thirteenth of October instant for the port of New York, without any knowledge on my part of the concealment on board said vessel of said George; that while on the high seas on her said passage, in latitude* 34 *deg.* 10 *m.* N., *longitude* 75 *deg.* W., the said vessel being at the time without the jurisdiction of the state of Georgia, to wit, on the fifteenth day of October, one thousand eight hundred and forty-six, the said George was discovered concealed in the fore steerage of said vessel, covered with a sail; and, on being questioned, admitted that he was the slave of the aforenamed Charles Chapman, and that he had secreted himself on board of said vessel with a view to effect his escape from the service to which he was lawfully held, under and by virtue of the laws of said state of Georgia, as the slave of the said Charles Chapman.

I do further return, that the state of Georgia is an independent and sovereign state, having full power and authority to govern and regulate all matters of internal social polity of said state, not by the terms or spirit of the federal compact surrendered to the government of the United States; that, for more than one hundred and fifty years past, the said state of

Georgia, as a colony of Great Britain, and in connection with her sister colonies, by her declaration of independence as a sovereign state, has continually and without interruption held and possessed a certain internal domestic institution called slavery; that the existence of such institution has been from time to time, by competent authority, recognized as a right reserved and secured to said state, and within the spirit, meaning and guaranties of the said federal compact; that the said institution was authorized and provided for by the laws of Great Britain, whereof the first settlers and the colonists of said Georgia were and always continued to be loyal subjects, until the year one thousand seven hundred and seventy-six, when the said colonists, by an overt act, declared themselves to be, in common with the inhabitants of divers other colonies and provinces, free and independent of the said government of Great Britain; that the said colonists did not, in consequence of said declaration of independence, in fact or in design, remit or relinquish their right to regulate 457 and govern their own internal affairs and social polity; but, on the contrary, did thereby design and intend more fully and freely to assert and maintain said rights.

That in and by the said institution so held, possessed and enjoyed by the said state by long usage and of right, and under the paramount law of the land—that is to say, under the constitution and laws of the United States—certain persons, of whom the said George is one, have been and are held to labor and service within the said state of Georgia, and are held and owned as property, and protected and guarded by the laws of said state, and the happiness and well-being of said persons are secured by said laws.

That, nevertheless, for many years last past, divers malicious and evil disposed persons, residents of other states, regardless of the laws of the land, and treating with contempt the constitutional and rightful exponents of said laws, have assailed said institution, and have sought by fraud, violence, and other devices known to the wicked, wrongfully and seditiously to cause insurrections among those persons, and thereby to cause the citizens of said state of Georgia to be exposed to robbery, assassination and general anarchy; and although these evil designs and attempts have hitherto been hindered and checked by the firmness and loyalty of the national government of the United States, yet the said

evil disposed persons have organized, and in many instances have executed, a system of robbery; and, in disregard of the word of God denouncing such doings, have feloniously abducted and carried away, and encouraged the escape of divers such persons from the possession of their lawful owners. That the said state of Georgia, in discharge of its political duty as a government of and for the people of said state, has, under the constitution of the United States, from time to time passed and enacted various laws to the end that the people of said state should be protected against the wicked acts and designs of such evil disposed persons, and that the property of the good people of said state should be protected and preserved to the said citizens under the law of the land, and in and by which said laws it is, among other things, enacted as follows:

§ 24. “It shall and may be lawful for every person to take, apprehend and secure any runaway or fugitive slave; and they are hereby directed and required, within forty-eight hours after such taking, apprehending and securing, (otherwise such person to be construed and taken as a harborer of such runaway or fugitive slave,) to send such slave, if convenient, to the master or other person having the care and government of such slave, if the person taking up or securing such slave knows, or can without difficulty be informed, to whom such slave belongs.”

§ 34. “If any person shall conceal, harbor, hide, or cause to be concealed, harbored or hidden, any slave or slaves to the injury of the owner or owners thereof, such persons so offending shall, on conviction, be sentenced to be imprisoned in the penitentiary, at hard labor, for any period of time not exceeding two years. Provided, nevertheless, that on the trial for this offence, the person charged with it shall be acquitted if he or she had an apparent well founded claim to the slave or slaves so harbored and concealed; and on every conviction for concealing or harboring a slave or slaves, the owner or owners of such slave or slaves may recover damages by civil suit for the loss of the labor and services of such slave or slaves, notwithstanding the said conviction.”

§ 35. “If any person shall remove and carry or cause to be removed and carried away out of this state any slave or slaves, or out of the county where such slave or slaves may be, without the consent of the owner or owners of said slave or slaves, any person so offending shall, on conviction, be sentenced to undergo an imprisonment in the penitentiary, at hard labor, for any period of time not exceeding seven years.”

I do further return, that Charles Chapman, of Bryan county, state of Georgia, is interested in the detention of said George.

Theodore Buckley.

*Sworn in open court, this* 23 *d day of October* , 1846.

Henry Vandervoort , *Clerk of Oyer and Terminer.*

*J. Bowditch Blunt* , of Counsel,

To this return, Mr. John Jay, for the petitioner, interposed a general demurrer, and Mr. Blunt joined.

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*John Jay* and *J. White* , for the demurrer, made the following points.

I. The common law of all non-slaveholding states is, that foreign slaves are no longer such after their removal into a non-slave-holding state. *Somerset's case* , 20, How. St. Fr. 79. Story's Com. Laws, p. 92, and cases. *Forbes* v. *Cochran* , 2 B. and Cr. 448.

II. The question, therefore, first presented is, how far is the operation of this common law abridged by the constitution and laws of the *United States?*

The constitution provides, “no person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be

discharged from such service or labor, *but shall be delivered up* ON THE CLAIM OF THE PARTY to whom such service or labor may be due. Art. 4, sec. 2, sub. 3.

The law of congress authorizes the owner, his *agent or attorney* , to seize the fugitive, take him before judge or magistrate, and upon *proof* , oral or by affidavit, of the service due, it shall be the duty of the judge &c. to grant a warrant to the party or agent to remove. Story's Laws U. S., vol. 1, p. 285, 12 Feb. 93.

III. The judge must be satisfied from the “proof” of three things:

1st. That by the laws of Georgia the negro is held to service or labor;

2d. That the person to whom the service or labor is due, desires to reclaim the fugitive;

3d. That the negro is a fugitive.

IV. Neither of these three things are shown, because,

1st. The allegation is, (in the return,) that by the laws of Georgia the negro is held to labor *as a slave.*

Foreign laws cannot be proven in this way.

2d. There is no allegation that the negro *is* a slave—no terms of servitude set forth.

3d. The claim made is in derogation of the natural right of the negro, and must be clearly proven.

4th. It does not appear that the negro left *without the consent of the owner.*

5th. He is not claimed by *Chapman, or by his agent or attorney.*

V. Concede, therefore, that the negro was the property of Chapman; the defendant has no right, in fact, to the custody, because,

1st. He shows no authority to act for Chapman.

2d. He claims no interest in the negro.

The right to the service is a personal right, given by positive municipal law; and the court and a stranger cannot exercise or claim it, because excluded both by the constitution and the law of 1793.

VI. Neither has the defendant the right to the custody by the federal law or court—by the law of this state or of Georgia.

1st. He cannot claim under the first, because he is neither owner, agent or attorney.

2d. Nor under the second, because our law does not recognize the institution of slavery, except under the compulsion of federal legislation and the federal constitution. Beyond their actual and positive requirements, it knows no slave and no slavery.

3d. The third gives no right here, because the laws of Georgia were designed to operate upon the citizens of Georgia within the jurisdiction of Georgia. Beyond the limits of the state they have no binding obligation.

4th. Our courts administer foreign laws *ex comitate* —but such law has no force here *ex proprio vegou* , nor will it be administered if violative of justice, *natural right, morality* , or *settled policy* ; as the law of Georgia is violative of each and all, it will not be administered.

VII. The negro when discovered was without the *jurisdiction of Georgia, and every other state of the union.* The respondent could not, therefore, have arrested him by virtue of the law of Georgia. He was beyond its operation. Nor by any law of the federal government,

*for there is* none. The defendant was guilty, therefore, *of a trespass* , and his claim to the custody of the negro is founded in *tort.*

VIII. If the defendant is the agent of Chapman, he must be the general agent, as no special agency for the purpose of this reclamation is shown.

If this be so, then, as he voluntarily brought the negro to this port, it was the act of the principal, and the negro was *ipso facto* free. *Commonwealth* v. *Aver* , 18 Pick., 143.

But no agency is shown, and none will 459 be presumed, as the law of this state has no intendments against human liberty.

Mr. *Blunt* , in reply, insisted,

1. That the respondent is, under the laws of Georgia, the agent of the master of the slave; and under the constitution of the U. S. and the laws of congress, has a right to retake him and return him to Georgia.

2. That under the state statute, 1 *Rev. Stat.* 659, § 15, the respondent has a right to the custody of the boy, in order to take him before the mayor or recorder, to the end that he may obtain a certificate to warrant his returning him to the state of Georgia.

On the 27th October, Judge Edmonds delivered the opinion of a majority of the court.

By the U. S. constitution, art 4, § 2, a fugitive from service can be claimed only by the party to whom the service is due.

By the act of 1793, 1 Story laws of U. S., 285, in case of the escape of a person held to labor, the person to whom such service may be due, his agent or attorney, is empowered to seize or arrest such fugitive and take him before a proper officer, to the end that a warrant may be obtained for removing him to the state from which he had fled.

As I read and understand this statute, it clearly contemplates that the right to reclaim a fugitive slave shall not be exercised except by due process of law, and never *vi et armis.* Such, at least, was the contemporaneous interpretation by congress of this provision in the constitution, and would forbid to the owner—and if to him, then surely to his agent or attorney —the right by strong hand, by fastened hatches, blows and hand-cuffs, to enforce a reclamation. And such a construction seemed to me most consonant with the principle of our institutions, which forbids that any one shall be deprived of life, liberty or property, except by due course of law.

The supreme court of the United States, however, seem, in the case of *Prigg* v. *Com. of Penn.* , 16 Peters 539, to have intimated a different opinion, though as that point was not necessarily before them, and as the question submitted to them by consent was the constitutionality of a law of Pennsylvania, and the power of its legislature to pass any law upon the subject, it may well be doubted whether their remarks were not *obiter dicta.* But if they are otherwise—if pertinent and decisive, they are still carefully guarded with the qualification, that the party may “claim and re-take his wife, child or servant, wherever he happens to find them, so it be not in a riotous manner or attended with a breach of the peace;” “and the owner may seize and re-capture his slave whenever he can do it without any breach of the peace or any illegal violence.”

The general language of the return in this case, and the right assumed under it, might justify the resort to illegal violence in seizing and retaking the slave. The right to retake him or to hold him in durance, is in the return founded on the asserted fact that he is “a fugitive from service in the state of Georgia, under and by virtue of the laws of which state he is held to labor and service as the slave of Charles Chapman, of Bryan county, in said state,” and the fact that he had concealed himself on board the vessel for the purpose of escaping from such servitude. If this fact alone, without any qualification, without any averment that the restraint was without illegal violence, would justify this restraint then they would of necessity justify restraint in a riotous manner or by a breach of the peace.

That could not be defended in the owner, and of course not in his agent or attorney.

If it were otherwise, the master of the vessel, in this case, would be justified in holding the slave, at the point of the bayonet, with closed hatches and with chains.

But it is unnecessary to dwell upon this consideration, for the master of the vessel cannot justly be regarded as the agent or attorney of the owner. It is not pretended that he has any express authority from the owner. The facts of the return preclude the idea. It is contended that the authority is implied from the laws of Georgia.

To this claim there are several very conclusive answers.

1. The laws of Georgia do not operate beyond her territory. From the first moment that the respondent discovered the boy on board his vessel and began the exercise of his control over him, until the 460 present time, he has been without the jurisdiction of Georgia, beyond her territory and beyond the operation of her laws.—And to allow this claim would be in effect to call upon the magistrates of this state, within our territory, to execute the laws of Georgia, not to enforce a right which had become perfect within her territory, but one that had had no beginning even till her boundaries had been passed. I am not aware that the obligation of one state to give full faith and credit to the public acts, records, and judicial proceedings of every other state, has ever been carried to that extent. How can it be, without subjecting the territory of every state to the jurisdiction of at least twenty-seven independent sovereignties?

2. The laws of Georgia do not of themselves contemplate any such agency. It is true that by those laws any person may apprehend a fugitive slave and return him to his master. But this confers no special authority upon the respondent to the exclusion of every body else. “Every person” may do it, and how can it be said that this makes him more than any other person the owner's agent? “Every person may just as well be such agent as the respondent.

But that statute in its very terms is intended to operate within the territory of Georgia, and not beyond it. Or why the provision that within forty-eight hours after the apprehension, the slave shall be sent back to his master? If the manucaptor in Maine should detain him forty-eight months or forty-eight years, could the jurisdiction of Georgia reach him with its penal inflictions? Why the provision that he who harbors the slave shall be confined in the penitentiary? Could a citizen of New-York be condemned to the penitentiary of Georgia for harboring the slave in New-York?

It is evident that the statute was calculated only to operate within the territory of Georgia, and the sovereign authority of that state would doubtless be not a little surprised to learn that so wide a range of authority was claimed for its enactments.

Numerous dificulties would spring from the establishment of the principle contended for. Though in this case there is no reason to apprehend that ought would be done that conscience and the law would not sanction, yet it is worth while to consider the effect of the decision in case it should be drawn into a precedent.

How long may the master of a vessel, under such circumstances, detain the slave within our borders? Days, months, or years? What security is to be afforded that the slave will be returned to the person entitled to his service, and not be sold elsewhere into bondage? What is there to prevent our own free citizens from being carried away into slavery? Our protection would be very imperfect, if the law should be so established.

As then the respondent cannot with propriety be regarded as the agent of the owner, and as such owner does not present a claim to the services of this boy, either by himself or by his agent or attorney, the prisoner cannot be held, under the constitution or laws of the United States, as a fugitive from service, and must be discharged, unless he can be held under the laws of our own state.

Our Rev. Stat., 1 R. S. 659, § 15, contain a provision that whenever a person of color, owing service in another state, shall secrete himself on board a vessel and be brought into this state in such a vessel, the captain may seize him and take him before the mayor, &c., who may inquire into the circumstances and give a certificate, which shall be a sufficient warrant to the captain to carry or send such person of color to the port or place from which he was brought. And on the argument, it was suggested that, *non constat* , the respondent held him in custody for the purpose of taking him before an officer under such statute.

It has been well questioned on the argument, whether our legislature had any authority to enact such a statute.

In *Prigg's case* , 16 Pet. 617, Story J. says, the legislation of congress, if constitutional, must supersede all state legislation upon the same subject, and by necessary implication prohibit it. For if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the states have a right to interfere.

In *Houston* v. *Moore* , 5 Wheat., 1, it is expressly held, that where congress have exercised a power over a subject given them by the constitution, it is not competent 461 for state legislation to add to the provisions of congress.

In *Prigg's case* , 16 Pet., the court held that the power of legislation on the subject is exclusive in the national government, and cite with approbation the language of Chief Justice Marshall in *Sturgiss* v. *Crowninshield* , 4 Wheat. “Wherever the terms in which a power is granted to congress, or the nature of the power require that it should be exclusively exercised by congress, the subject is as completely taken from the state legislatures as if they had been forbidden to act.”

And after discussing the evils that might arise from state interference, conclude, surely such a state of things never could have been intended under such a solemn guarantee of right and duty.

The nature and objects of the provision imperiously require, that to make it effectual it should be exclusive of state authority.

But still the police power is left to the states, so that the rights of the owners be in no just sense interfered with.

And whether the provisions of our Revised Statutes are constitutional or not, depends upon this question—whether it was intended, and would necessarily operate, merely to advance and enforce the rights of the owner, or to secure the state from the depredation and evil example of the fugitive? If the former, the statute cannot be sustained. Yet in this case it is invoked solely for the benefit of the owner, and the statute provides not that the fugitive shall be removed from our territory—which would be all that would be necessary if our own welfare alone was consulted—but that he shall be delivered up to the master of the vessel, to the end that he may be carried back to the port from which he was brought.

The constitutionality of this provision of our Revised Statutes may, therefore, well be questioned.

But it is not necessary to decide that point. It is enough that it is no where in the return alleged that the respondent claims, or did claim, to hold the slave for any such purpose. The claim, as has already been stated, is founded solely on the fact that George is a slave; and that fact is set forth in the return in such general terms, that at one moment it is urged as sufficient to justify a claim to hold him as the agent of the owner, and at another as the captain of the vessel; at one instant as justified by a well defined provision of our national constitution, and at another by a doubtful local statute.

The fact set out in the return does indeed support the one claim as well as the other. But that circumstance of itself shows that the averment is too defective to be available under either aspect. Besides, the fact would justify a still broader claim, that, namely, of any person who should please, within our territory, to arrest him as a fugitive from service.

If the respondent was in fact holding the boy in pursuance of this statute, and for the purpose of taking him before the mayor, that his liability in servitude might be adjudicated upon, he ought so to have averred on his return, and this, not merely as matter of form, but as matter of substance, that the prisoner might have taken issue upon it.

To seize him and take him before the mayor, &c., would require a very brief period of time; yet, consistently with the truth of the return, he may have been detained for days after his seizure and after his arrival in this port. If, on an issue joined, such should appear to be the fact, any court or jury might—nay, would be bound in common fairness to declare, that he had not been held for any such purpose.

In a case involving personal liberty, where the fact is left in such obscurity that it can be helped out only by intendments, the well established rule of law requires that intendment shall be in favor of the prisoner.

We have not in the return any thing to warrant the idea that the respondent was holding the slave for the purpose of taking him before the mayor, under the state statute, except the facts that he was a slave, that he had concealed himself on board the vessel and was there held in durance.

And those facts would just as well warrant the idea that he held him as the agent of the owner, under the laws of the United States, or held him for the purpose of selling him into bondage elsewhere.

This claim, resting as it does on a doubtful statute, and unsupported by the facts, must also fall to the ground. And the respondent is left before us to be regarded as one having

no authority in the 462 matter, but as preferring a claim to the custody of this boy, simply because he has admitted himself to have been a slave.

To allow the claim in this case, would justify his being surrendered to any other stranger who might demand him, in order to transport him into closer and more enduring bondage, or to conceal him beyond the reach of his lawful master.

The court then instructed the clerk to enter an order on the minutes, directing the slave to be discharged.

On the same day, Mr. *Jay* presented a petition to the circuit judge, setting forth that after the discharge of the slave by the oyer and terminer, he had been seized by the authority of the master of the vessel and taken before the mayor, for the purpose of obtaining the certificate under the Rev. Stat. to warrant his reconveying him to Savannah—and praying the allowance of a writ of habeas corpus, directed to the mayor, who held him in custody, for the purpose of inquiring into the propriety of granting a certificate.

To this second writ the following return was made.

*To the Honorable* John W. Edmonds , *Circuit Judge for the first judicial circuit of the state of New-York:*

The return of Andrew H. Mickle, mayor of the city of New-York, to the writ of habeas corpus directed to him, and allowed by the circuit judge above-named, on the twenty-seventh day of October, A. D. 1846, to inquire into the cause of the detention of a colored boy named George Kirk—shows:

That on the same twenty-seventh day of October, A. D. 1846, the application in writing, whereof a true copy is hereunto annexed, was made to the said Andrew H. Mickle as mayor of the said city of New-York, by Theodore Buckley, in said application mentioned, setting forth that he, the said Buckley, was master of the brig “Mobile,” an American

vessel, belonging to the port of New-York. That on the thirteenth day of October instant the said vessel sailed from the port of Savannah, in Georgia, bound for the port of New-York. That on the fifteenth day of October instant, in latitude 34 deg. 10 m., N., and longitude 75 deg., W., the said Buckley discovered a colored man secreted in the fore-steerage of said brig covered with a sail. That upon examination of said negro, he admitted that he was the slave of Charles Chapman, of Bryan county in the state of Georgia, and that he had secreted himself on board of said brig while lying at the port of Savannah, in said state of Georgia, with a view to escape from the service to which he was lawfully held under the laws of said state.

The said application farther set forth, that the said Buckley arrived at the wharf in the port of New-York, with said colored man on board, on the 22d day of October instant, and that said colored man was taken on that day from the custody of said Buckley by a writ of habeas corpus, and at the time of presenting such application was in the city prison.

The said application farther set forth, that said colored man did secrete himself on board of said brig Mobile, while lying at the port of Savannah aforesaid, without the knowledge or consent of the said Buckley, the master and commander of such brig, and that by so doing he subjected the said Buckley to the penalties of fine and imprisonment under the laws of Georgia; wherefore the said Buckley prayed that a certificate might be furnished to the said Buckley, to carry or send such colored person to the port of Savannah aforesaid.

That the said Buckley duly verified, by his oath before the said mayor, the said application.

That in the afternoon of the same twenty-seventh day of October, A. D, 1846, the said colored boy, named George Kirk, was brought before the said mayor, at his office in the city hall of the city of New-York, by the said Buckley and persons by him authorized to aid and assist him as his agents in that behalf. That there appeared before the said mayor, at the said time and place, Nathaniel B. Blunt, esquire, counsel for the said Buckley, and John Jay, esquire, counsel for the said colored boy. That thereupon the said mayor, at

the request of the said Buckley, and in discharge of the duty imposed upon him in that behalf by the laws of the state of New-York, was about to proceed, in conformity with the law, to inquire into the circumstances stated in the application 463 aforesaid, for the purpose of determining judicially under the law whether the certificate applied for should be given as authorized by the law, when it was agreed by and between the parties to the said proceeding and their counsel, that the inquiry should be postponed until the hour of six o'clock in the afternoon of the same twenty-seventh day of October, A. D. 1846, and that until such hour the said colored boy should remain in the charge and under the control of the said mayor and be detained by him. That this latter arrangement was assented to by the parties and their counsel.

That the said mayor thereupon took the charge and control of the person of the said colored boy, and before the hour appointed for the inquiry aforesaid, there was served upon the said mayor the writ of habeas corpus hereunto annexed, and to which this is a return.

And the said Andrew H. Mickle insists, that by reason of the facts hereinbefore stated, it is his duty, under the law, to make the inquiry aforesaid, in the exercise of an authority judicial in its nature; and that, for the purpose of such inquiry and until the termination thereof, he is entitled to have the said colored boy before him and subject to his orders, and that the said boy is now in the charge and under the control of said mayor.

But whether, on the foregoing facts, the said colored boy is subject to any order of the circuit judge, by whom the said annexed writ of habeas corpus was issued, the said mayor submits to the decision of said judge.

In witness whereof the said mayor hath hereunto subscribed his name, this twenty-eighth day of October, A. D. 1846.

A. H. Mickle , *Mayor.*

*State of New-York, city and county of New-York* , ss.

Theodore Buckley being duly sworn deposeth and saith, that he is the master of the brig Mobile, an American vessel, belonging to the port of New-York. That on the thirteenth day of October instant the said vessel sailed from the port of Savannah, state of Georgia, bound for the port of New-York; that on the fifteenth of October instant, in latitude 34 deg. 10 m., N., and longitude 75 deg., W., this deponent discovered a colored man secreted in the fore-steerage of said brig, covered with a sail. That on examination of the said negro, he admitted that he was the slave of Charles Chapman, of Bryan county, state of Georgia, and that he had secreted himself on board of said brig, while lying at the port of Savannah, in said state of Georgia, with a view to escape from the service to which he was lawfully held under the laws of said state.

And deponent further saith, that he arrived at the wharf in the port of New-York with said colored man on board, on the 22d day of October instant, and that said colored man was taken on that day from the custody of deponent by a writ of habeas corpus, and is now in the city prison.

And deponent further says, that said colored man did secrete himself on board of the said brig Mobile, while lying at the port of Savannah, in the said state of Georgia, without the knowledge or consent of this deponent, the master and commander of said vessel; and that by so doing he subjected this deponent, under the laws of Georgia, to the penalty of fine and imprisonment; wherefore deponent prays that a certificate may be furnished to this deponent to carry or send such colored person to the port from which he was brought.

And further says not.

(Signed,) Theodore Buckley.

Sworn to before me, this 27th day of October, 1846.

(Signed,) A. H. Mickle , *Mayor.*

To this return a general demurrer was interposed, and a joinder in demurrer.

The demurrer was argued before the circuit judge by Mr. Jay and Mr. White as counsel for the petitioner, and by Mr. McKeon, district attorney, on the same side, and by Mr. Blunt as counsel for the master, and Mr. J. T. Brady as counsel for the mayor.

The points taken were,

1. That the provision of the Rev. Stat. under which the proceedings before the mayor had been instituted, had been repealed by the act of 1840.

2. That, if not repealed, the statute was void, as repugnant to the constitution of the U. S., which conferred the power of legislation on this subject exclusively up-on congress.

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Edmonds *Circuit Judge.* —When this boy was before me on a former occasion, no principle of law was involved, but mainly a question of fact, arising out of the return. On the present occasion it is quite otherwise. The question now presented, is the constitutionality and consequently the validity of a statute of our state.

It is not from any choice on my part, that I am called upon to consider this question. If my wishes had been consulted, the case would have remained with the mayor, until he had decided it; and even then, I should have been much better pleased, if the review of his decision, had been committed to some functionary whose other duties would have allowed him more leisure than I can command to examine it. But the party had a right to bring the matter at once before me; under our statute, I was bound to allow the writ of *habeas corpus* , even if I had been fully convinced of the legality of the imprisonment; and the return made to the writ, necessarily raising the question to which I have alluded, it becomes my duty to consider and decide it—a duty from which I am not at liberty to shrink,

and which I hope I may be able to discharge, without partaking of the excitement which has surrounded the question from the beginning.

It is conceded on the record that George is a slave, owing servive to a master in Georgia; that without the consent of his owner, and without the knowledge of the officers or owners of the vessel, he concealed himself on board the brig Mobile, in the port of Savannah, for the purpose of securing a passage to New-York; that his being on board was not discovered by the officers of the brig until they had been at sea two days on their return voyage, and had got without the territory of Georgia; that as soon as he was discovered, he was arrested and confined until his arrival in this port, and that on his arrival, the master of the vessel took him before the mayor, to the end that he might obtain from the mayor a certificate which should warrant him in returning the boy to the port of Savannah; that the owner of the slave does not demand him under the constitution and laws of the United States, but he is demanded by the claimant, simply by virtue of his station as master of the vessel, and by virtue of a provision of our statutes.

Such are the facts of this case. The law applicable to it, is to be found in §15 1 Rev. Stat. 659, which enacts that whenever any person of color, owing labor or service in any other part of the United States, shall secrete himself on board of a vessel lying in any port or harbor of such state, and shall be brought into this state in such vessel, the captain or commander thereof may seize such person of color and take him before the Mayor or Recorder of the city of New York. The officer before whom such person shall be brought, shall inquire into the circumstances, and if it appear, upon proper testimony, that such person of color owes service or labor in any other state, and that he did secrete himself on board of such vessel without the knowledge or consent of the captain or commander thereof, and that by so doing he subjected such captain to any penalty, such officer shall furnish a certificate thereof to such captain or commander, which shall be a sufficient warrant to him to carry or send such person of color to the port or place from which he was so brought as aforesaid.

It must constantly be borne in mind that the question before me does not grow out of, nor is it in any way connected with an attempt on the part of the owner of the slave to enforce his rights under the constitution of the United States and the law of congress of 1793, but arises solely out of a state statute, which authorizes another person, in no respect connected with the owner of the slave, nor acting by his authority, to re-transport him from our territory to the place where he had been held in bondage, and where again he may be returned to bondage.

In other words, while the constitution of the United States gives to the party to whom the service or the labor may be due, the right to reclaim his servant, and the law of congress extends that right to the agent or attorney of such party, it is claimed that the state legislature has a right to interpose and extend the right to a third, person, not acting for or by authority of the owner, but merely because he was the commander of a vessel on which the slave may have concealed himself, and because by such concealment, the commander may have become liable to a penalty.

Such is the authority which the mayor 465 has been called upon to exercise, and which it is insisted has not been, and cannot be conferred upon him by the state legislature.

Two objections are raised to this claim of authority.

1. That the provision of the Revised Statutes authorizing the proceeding has been virtually repealed by an act of our legislature, passed in 1840.

2. That if it has not been repealed, it is repugnat to the constitution of the United States, and therefore inoperative and void.

The conclusion to which I have arrived on this point renders an examination of the first unnecessary.

The section of the Revised Statutes under consideration is part of Title VII. of chap. 20 of the First Part, which is entitled, “Of the importation into this state of persons held in slavery, of their exportation, of their services, and prohibiting their sale;” and is a revision of the act of 1817, entitled “An act relative to slaves and servants.”

The 30th section of the act of 1817, which contains the provision which has been incorporated into this 15th section of the Revised Statutes, is preceded by a recital that “whereas persons of color owing service or labor in other states, sometimes secrete themselves on board of vessels while such vessels are lying in the ports or harbors of other states, and thereby subject the commanders thereof to heavy fines and penalties.” And it is worthy of observation, that the act of 1817 as well as this title of the Revised Statutes, aims at prohibiting the exportation as well as the importation of slaves, and that while the act of 1817 abolishes slavery after the 4th of July, 1827, the Revised Statutes declare that every person born in this state shall be free, and every person brought into this state as a slave, except as authorized by this Title, shall be free.

It may well be questioned whether, as this slave was brought into this state in a manner not authorized by the Revised Statutes, he did not thereby, under our law, become *ipso facto* , free, and whether this proceeding before the mayor is not, therefore, in effect, a proceeding to carry a free citizen into bondage. But I do not consider that point, as it was not raised before me in the argument, was not discussed, and is not necessary to the decision of the question before me.

The broad question discussed, and which I am called upon to decide, is, whether our state legislature have authority to pass this law.

The point has never, as far as I can learn, been decided, or even agitated in our state, and it is presented to me not only as a new one, but in the imposing form of requiring from me a decision that a law of our state is repugnant to the constitution of the United States, and therefore void. Fully aware of the diffidence with which courts should always entertain such

questions, I approach this with all the caution becoming the gravity of the case, yet with a lively sense of what is due to personal liberty and the fraternal relations existing among the members of the union.

As I have already mentioned, the statute under consideration was first enacted in 1817, and was subsequently re-enacted and went into effect as part of the revised statutes, in 1830. In 1834, the supreme court of this state, in *Jack* v. *Martin* , 12 Wend. 311, held that the law of congress, in regard to fugitive slaves, was supreme and paramount from necessity—that so far as the states are concerned, the power, when thus exercised, is exhausted, and though the states might have desired a different legislation on the subject, they cannot amend, qualify, or in any manner alter it—that though the act of the state might not be in direct repugnance to the legislation of congress, it does not follow that it is not in legal effect; that if they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other so far as they do differ; that a fair interpretation of the terms in which the provision of the constitution is expressed, prohibits the states from legislating upon the question involving the owner's right to this species of labor; and that while the law of congress, thus passed, exists, the power of the states is suspended, and, for the time, is as inoperative as if it had never existed.

The case of *Jack* v. *Martin* , was carried to our court for the correction of errors and the judgment of the supreme court was affirmed. Though the reasons given for the decision in the court of last resort, 466 as reported, in 14 Wend. 507, differ from those given in the court below, the positions of the supreme court, as I have extracted them, were in no respect disturbed, but have ever since remained, and are now the law of the land, governing the courts and citizens of this state.

In 1842 the supreme court of the United States in *Prigg* v. *Pennsylvania* , 16 Peters 539, had the same question before them. It arose out of various statutes which that state as well as New-York and other northern states had from time to time been enacting on the

subject of slavery, and which contained among other things, provisions very like ours in regard to slaves who had absconded from other states.

*Story* J., in deliverering the opinion of the court, declares that the law of congress may be truly said to cover the whole ground of the constitution, not because it exhausts the remedies which may be applied, but because it points out fully all the modes of attaining the object which congress have as yet deemed expedient or proper to meet the exigencies of the constitution. And he adds:

If this be so, then it would seem upon just principles of construction that the legislation of congress must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it. For, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were by way of compliment to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case the legislation of congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. This doctrine was fully recognized by the court in *Houston* v. *Moore* , 5 Wheat. 1, where it was expressly held that where congress have exercised a power over aparticular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject.

This is the supreme law of the land, which I am bound to obey, and is applicable to the case before me in this aspect, that while confess, in the exercise of its constitutional power over fugitives from service, has given the right to retake and reconvey them to the place of service, to the party to whom the service is due, his agent or attorney, the state legislation adds to the provision of congress on that subject, by conferring the power of recapture and reconveyance upon the commander of a vessel on board of which the fugitive may have concealed himself.

If it may add, may it not diminish? And if state legislation once begins, where is it to end, and what bounds are to be set to it, but state discretion? Well, indeed, did our supreme court repudiate the idea that the framers of the constitution intended to leave the regulation of this subject to the states, when the provision itself obviously sprung out of their fears of partial and unjust legislation by the states in respect to it.

While this construction of the constitution—though recent in its promulgation, yet old as the instrument itself—was conceded on all hands during the argument before me, it was contended that our statute did not fall within its destroying influence, because it was only a police regulation, and therefore legitimately within the scope of state authority.

In 16 Peters 625, *Story* J. qualifies the decision of the supreme court of the United States, by saying that they were not to be understood in any manner to doubt or interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and is distinguishable from the right and duty secured by the provision of the constitution under consideration.

It becomes, therefore, material to inquire what is the police power here alluded to, and does our statute justly and properly fall within its scope?

In 16 Peters, the same learned judge speaks of this power as conferring full jurisdiction on the states to arrest and restrain runaway slaves, and remove them from their borders and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. 467 The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases the operations of this police power, although designed essentially for other purposes, for the protection, safety and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere

with or obstruct the just rights of the owner to reclaim his slave, or with the remedies prescribed by congress to aid and enforce the same.

In *New-York* v. *Milne* , 2 Peters, 139, Mr. Justice *Barbour* , in delivering the opinion of the court, applies this test to determine the nature of the power: Did it belong to the state before the adoption of the constitution? has it been taken from the states and given to congress? or does it fall within that immense mass of legislation which embraces every thing *within the territory* of a state not surrendered to the general government? And the power then under consideration was held to be of that “mass,” because its place of operation was within the territory, and therefore within the jurisdiction of the state; because the person on whom it operates was found within the same territory and jurisdiction; because the persons for whose benefit it was passed were the people of the state; because the purpose to be attained was to secure the protection of that people, and because the means used were just, natural and appropriate to those ends.

Complaint was made during the argument, that this police power was exceedingly vague, uncertain and undefinable, and hence, I suppose, an inference was to be deduced that I ought to regard the claim of power with little favor at least. In the very nature of things it must be difficult, in few, or perhaps in many words, to define the power; for it comprehends an immense mass of legislation, inspection laws, quarantine laws, health laws, internal commerce, roads, ferries, &c.

Yet, immense as is this mass, and various as are the interests embraced in and affected by it, it seems to me that the rules laid down by the supreme court of the United States, as I have already quoted them, and the tests which they provide, are plain and simple and easy to be understood, and in their application to this case entirely decisive and satisfactory in the result to which they lead us.

To apply, first, the rules given us in the case of *Prigg* , in 16 Peters:

The police power “extends over all subjects within the territorial limits of the state,” yet our statute does not confine its operation within our limits, but provides, in case the fugitive is from another state, for the return of the fugitive back to the place whence he fled.

We “may remove slaves from our borders to secure ourselves against their depredations.” To transport the slave to Canada or Connecticut would effect this purpose, yet that is not allowed by our statute. He must, in compliance with its command, be returned only to his place of bondage.

“The rights of the owners are not to be interfered with or regulated.”

Yet, what is a compulsory return of the slave, with or without his owner's consent, to the place whence he fled, but an interference with or regulation of the master's right to control his movements and govern his person?

The state regulation is, “not to interfere with the remedy prescribed by congress.” Congress has limited the power of recaption to the owner, his agent or attorney, but our state law has removed that limitation. Congress has protected the rights of the owner, by securing the reclamation to him and those appointed by him, yet our statute gives to the commander of the vessel the power of transporting the slave beyond even the reach of the owner.

Such is the result of the rule furnished us by Judge Story. The application of Judge Barbour's tests will be found equally satisfactory and conclusive.

Is the power exercised in this statute one “embracing a matter within the territory of the state, not surrendered to the government, and which can be most advantageously exercised by the state?” It cannot be most advantageously exercised by this state. It, cannot, indeed, be exercised at all without the consent of the state from which the slave fled. Suppose that any slave state should forbid the return to its territory of a fugitive

slave, could our law commanding his return be enforced? It could be only enforced by the national government.

But to proceed with his tests:

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We are to look at the place of its operation to see that the statute operates within the territory of New-York: yet the main object of this statute plainly is, not the removal of the slave from our borders, but his return to the place whence he fled, involving of necessity the operation of our statute, without our territory and without our jurisdiction. Could it be more so if it provided that every vagrant arrested in our streets should be transported to and abandoned in the streets of Savannah?

We are next to look upon the person on whom it operates, to see that he is within the same territory and jurisdiction; yet this statute must, of necessity, operate both on the slave and the commander of the vessel more out of the state than in it.

We are next to look at the persons for whose benefit it was passed, to see that they are the people of our state. Yet this statute does not confine the power of recaption to the commanders of vessels, being citizens—it confers it on all commanders, reside where they may.

We are next to turn our attention to the purpose to be attained, to see that it is to secure that very protection and provide for that very welfare. The argument is, that this statute had its origin in the desire to protect our citizens from the evil example of having slaves among us; yet that very statute prohibits the removal of slaves from our territory by high penal enactments; and surely if the welfare of our citizens and their security from the evil example of slavery were the object in view, it could be attained as well and far more easily by transporting the slave to a free state, which it prohibits, than to a slave state, which it absolutely commands.

And lastly, we are to examine the means by which these ends are to be attained, so that they bear a just, natural and appropriate relation to those ends. There is no special pleading, no refinement of reasoning, that can disguise from a common understanding the fact that the whole object of the statute was, to allow the commander of the vessel to protect himself by retaking and returning the fugitive; and the means used, namely, the examination and adjudication by the mayor, and his certificate, were natural and appropriate to that end, and to none other. If any other end had been in view—if the protection of our people at large had been aimed at—there would have been something compulsory in the law, something rendering it obligatory on the captain to afford us the desired protection. But every thing is left to his discretion. If he pleases he may retake, and, after retaking, if he pleases, he may return the slave to the place whence he fled. If the captain should chance not to be a citizen of this state, it would be difficult to discover how it could benefit this state; yet under no circumstances would it be difficult to see how it could benefit the owner to have his fugitive servant placed again within his reach. In every aspect in which I view this statute, I cannot help regarding it as intended and calculated to aid in returning a fugitive slave to his master; and it seems to me that the claimant in this case, and his counsel, have so understood the law, and have acted accordingly. Else why was the boy confined on board the vessel after her arrival here? Why does the captain plead his obligation to the laws of Georgia, when those laws compel him to return the boy to his owner? Or why, when George was making every effort, with the assistance of numerous friends, to escape from the state, did the captain invoke the aid of the police to arrest those efforts; and why does he now press this claim, but that he may do that which the constitution and laws of the United States declare shall be done only by the party to whom the service is due, or his agent or attorney? I do not allude to these considerations for the purpose of even implying a censure upon the commander of the vessel or his owners; but solely with a view of drawing from his acts, and those of his very respectable counsel, the consolation justly flowing, that he and they do, in effect and from necessity, understand our statute precisely as I do, namely, in the language of the United

States supreme court, as by way of compliment to the legislation of congress, prescribing additional regulations, and what they deem auxiliary provisions for the same purpose.

It must have occurred to all who have given this subject much consideration, as it has to me, to observe the extreme watchfulness with which this provision of our national constitution has been regarded 469 by our courts. It is not worth my while to pause and inquire into the cause or the propriety of this. It is enough to know that whenever any state legislation, attempting to intermeddle with the question, has come before our highest courts, it has without ceremony been swept from the statute book. Our statute regulating and controlling the master's right of reclamation, and allowing to the alleged slave the benefit of the writ of *homine replegiando* , fell before the decision of our supreme court in *Jack's* case. The laws of Pennsylvania, running through a period from 1780 to 1826, and containing a provision like that now under my review, were overturned by the supreme court of the United States in *Prigg's* case; and I only discharge my duty—obey, indeed, merely one of its plainest and most simple dictates—by declaring that the rule of law thus laid down by the highest judicial tribunals in the country, and whose decisions I am bound to respect and to enforce, is applicable to the statute in question, and being applicable, renders the statute null and void, and the arrest and detention of Kirk under it improper.

It will be observed that I have omitted to discuss many considerations which were pressed upon me during the argument. The view which I have taken of the case rendered their discussion unnecessary, but I will briefly allude to one topic, because, if the danger apprehended were to ensue, it would be the only cause of regret which I should experience growing out of this case. I allude to the penalty which it is averred may fall upon the captain in case of his return to Georgia. I cannot persuade myself that there is any cause for the fear.

The slave was concealed on board his vessel without his knowledge or consent. He was not discovered until the limits of Georgia had been passed, and to have returned then to Savannah would not only have vitiated the captain's insurance, but have rendered him

liable in an action to the boy; and since his arrival in this port, he has resorted to every means which our law allows to return him to his place of servitude. And if he shall be finally defeated in his attempts, it will not be from any want of effort on his part, but from a determination on the part of the authorities of this state, to avoid state usurpation, and to maintain the constitution as it has been interpreted by the highest tribunals in the country. It cannot be that under such circumstances, he can have any thing to fear from the penal enactments of Georgia.

If however, contrary to all just calculation, those fears should yet be realized, our regard for the individual may not warp the law from its uprightness, though it may well excite our regrets that its integrity cannot be maintained without the infliction of unmerited suffering. This boy must at all events be discharged; the law allows it and the court awards it.

ENGLISH CASES.

In the Queen's Bench.

[PRACTICE COURT.]

Before Sir J. T. COLERIDGE KNIGHT.

Sarah Auster v. Holland.

STAYING PROCEEDINGS—ACTION IN THE NAME OF NOMINAL PLAINTIFF WITHOUT HIS AUTHORITY.

By deed of seperation between husband and wife the husband covenanted to pay an annuity to a trustee for the use of the wife. The annuity being in arrear, and the trustee refusing, upon indemnity to sue the husband, an action was commenced in the trustee's name, but without his authority, for the recovery thereof. Under these circumstances the court refused to stay proceedings at the instance of the defendant.

Gray had obtained a rule calling upon the plaintiff and her attorney to show cause why the writ of summons and all subsequent proceedings should not be set aside with costs to be paid by the attorney, upon an affidavit of the defendant stating that he had been informed by the plaintiff that the action was commenced without her authority, and continued against her express directions. The affidavit negatived collusion between the plaintiff and defendant.

By the affidavits in answer it appeared that differences having arisen between the defendant and his wise, they agreed to separate, and that a deed had been executed, whereby the husband covenanted with the plaintiff to pay her, in trust for 470 his wife, an annual sum by monthly payments. Several payments being in arrear, the plaintiff was requested by the wife to commence an action to recover them, and was at the same time offered an indemnity against all consequences by the wife's father. The plaintiff, however, declined to proceed, whereupon this action was commenced in her name. A correspondence had taken place upon the subject, and from the defendant's letters it appeared that he had tendered a sum which had not been accepted.

*Lush* now showed cause.

The defendant had no right to a stay of proceedings. An indemnity has been offered to the plaintiff, and she makes no application, and it is quite clear that if she did, proceedings would only be stayed until security were given. *Spicer* v. *Todd* , 2 C. & J. 165. Even if the plaintiff had given the defendant a release, the court would not permit the defendant to plead it. In *Chambers* v. *Donaldson* , 9 East. 471, where husband and wife were living apart under sentence of separation, an action was brought by the wife in the husband's name for breaking and entering the house of the wife and taking her goods, and an application similar to the present having been made by the defendant, upon an affidavit stating that the action had been commenced without the husband's authority, the court refused a rule. Upon the authority of that case this rule must be discharged.

*Gray* was then called upon to support the rule. There is nothing to lead to the supposition that there has been any collusion between the plaintiff and defendant. The case differs also from *Chambers* v. *Donaldson* , 9 East., 471, in this, that if money were now brought into court, there would be no one competent to give a valid discharge; for payment to an attorney who sues without the plaintiff's authority, is no answer to an action. *Hubbard* v. *Phillips* , 14 Law J. (Exch.) N. J. 163, is a direct authority in favor of this application, for it was there held that where an attorney has commenced an action without the authority, either plaintiff or defendant may apply to stay the proceedings and to make the attorney pay costs.

Coleridge , J.—I think that it sufficiently appears that there is collusion between the plaintiff and the defendant.—The plaintiff must know that, except by using her name, the wife has no remedy at law, and though an indemnity has been offered he has refused to accept it; moreover, she herself makes no application to court, so that it can hardly be surmised that the use of her name can be attended with any hardship to her, and I do not see that it can be productive of any to the defendant. Looking, therefore, to all the circumstances, I think that this rule should be discharged, and with costs, because all the facts were not stated in the affidavits upon which the rule was obtained

*Rule discharged with costs.*

ELDON ANECDOTES.

TRIAL BY JURY

The greatest objection to trial by jury appears to me to be founded upon the fact that men of low condition serve as jurymen. No man can have gone a circuit without seeing twelve men upon a jury who if they did not implicitly follow the direction of the judge, would be quite incompetent to form an opinion upon any case at all complicated in the facts which constitute it. The lower orders of jurymen, too, are easily corrupted. I remember at an

alehouse, where some of us dined upon a Sunday after seeing Corby, in Cumberland, a person whom Serjeant Bolton treated with a good deal of milk-punch, told the Serjeant that he was upon the jury at Carlisle, and would give him verdicts wherever he could. Another juryman told me that he gave the Serjeant all the verdicts he could, because he loved to encourage a countryman: he and the Serjeant were Lancaster born.

Coming down the steps from the Exchequer into Westminster, I followed two common jurymen, when I was a law officer of the Crown, and I overheard one say to the other, 'I think we have given the Crown verdicts enough; we may as well give them no more.' I touched them upon the shoulders and told them they should have no more trouble, for I should challenge them in all cases that remained.

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In the publication of the case in the matter of *George Kirk* , a fugitive slave, which appeared in our December number, we fully intended to have published an abridgment of the argument of Mr. Jay for the demurrant: we were compelled, however, by a press of matter, to omit it. We now give me entire speech of Mr. Jay, and we have no doubt but it will be read by our readers with great interest.

So great an interest attached to the case during its progress, and so important was the decision, that we regret that the arguments of the other learned counsel engaged in it, Messrs. White, Blunt, Brady and McKeon, has not been fully reported and published in a volume.

Court of Oyer and Terminer.

[FIRST CIRCUIT]

Before the Court of Oyer and Terminer.

*In the matter of* George Kirk , *a fugitive slave.*

*John Jay* , in support of the demurrer.

*May it please the court:* —I approach the argument of this case with great diffidence, for it involves constitutional questions of deep interest to the citizens of this state, as well as the personal liberty of this fugitive boy; and I fear that, deeply as I may feel upon this subject—and I do feel deeply—my inexperience, and the very brief time afforded for preparation, will prevent, my doing it justice.

But, while I doubt my own abilities, I have perfect confidence in the constitutional strength of our position, that George is entitled to his immediate discharge—and however imperfect may be the argument I shall have the honor to present to this court, I am well assured that its imperfections will be supplied by the learning of my associate, and by the soundness of your honors' judgment; and I venture to trust that the arguments I am about to offer will be listened to with kind attention, and that your honors will allow them the full weight they may deserve from their force of reason or of authority, without reference to the imperfect manner in which they may be presented and enforced.

The circumstances which have led to the application now made to this court are happily of unusual occurrence in our free city, and have naturally given rise to great excitement among our citizens. The brig Mobile arrived a few days since from Savannah, and while lying at the wharf, soon after her arrival, a fierce struggle was observed to occur upon her deck, between a colored boy and three men, who attack, overpower and iron him—and, for the purpose of escaping observation and avoiding interference, the vessel was then loosened from the wharf and anchored at a distance. On the petition of a colored man, the circuit judge granted a writ of habeas corpus, returnable before this court; and the officer who was directed to serve it found the boy, bruised and handcuffed, on board of the brig. Theodore Buckley, master of the vessel, makes a return to the writ, claiming to hold him under his restraint, as a fugitive from service in the state of Georgia, under and by virtue of the laws of which state, the return alleges, he is held to labor and service as the slave of Charles Chapman, of Bryan county, in the said state. That he covertly and privately,

against his knowledge and consent, with a view to effect his escape from such service, secreted himself on board the brig Mobile, of which the respondent is master, while lying at the port of Savannah. That the said vessel sailed from the said port on the 13th October instant for the port of New-York, without any knowledge on his part of the concealment of George on board said vessel; that while on the high seas on her said passage, in latitude 34 deg. 10 m., N., and longitude 75 W., the said vessel being at the time without the jurisdiction of the state of Georgia, to wit, on the fifteenth of October, 1846, the said George was discovered concealed in the fore-steerage of said vessel, covered with a sail; and on being questioned, admitted that he was the slave of the aforenamed Charles Chapman, and that he had secreted himself on board of said vessel with a view to effect his escape from the service to which he was lawfully held, under and by virtue of the laws of said state of Georgia, as the slave of the said Charles Chapman. The respondent further returns, that the state of Georgia is an independent and sovereign state, having fall power and authority to govern and regulate all matters of internal 11 polity not surrendered to the government of the United States by the terms or spirit of the federal compact. That for more than one hundred and fifty years past the state of Georgia, as a colony of Great Britain and in connection with her sister colonies, has continually and without interruption possessed a certain domestic institution called slavery; and that in and by the said institution so held, possessed and enjoyed by the said state, by usage and of right, and under the paramount laws of the land, that is to say, under the constitution and laws of the United States, certain persons, of whom the said George is one, have been and are held and owned as property, and protected and guarded by the laws of said state.

Then comes an averment, which, as the return has once been heard by the court, I need not read at length, for it does not touch the legal and constitutional points involved in the case: that divers malicious and evil disposed persons, in other states, have assailed the institution of slavery, and have organized a system of robbery; and, in disregard of God's word, have encouraged the escape of divers slaves from the possession of their lawful owners; and that in consequence of such wicked acts and designs, the state of Georgia,

in discharge of its duty, has enacted various laws, three sections of which are embodied in the return.

The *first* gives authority to any person to apprehend and secure any runaway or fugitive slave, and directs such person, within forty-eight hours after such taking and securing, to send the slave to the master, if he can be ascertained; otherwise, such person to be construed and taken as the husbander of the runaway.

The *second* imposes the penalty of imprisonment in the penitentiary, at hard labor, for a term not exceeding two years, upon any person convicted of concealing or hiding any slave to the injury of the owner; and gives to the owner, in addition, the right to recover damages by civil suit. And the

*Third* , which is probably supposed to apply to the case in hand, is in these words. “§ 35. If any person shall remove or carry, or cause to be removed and carried away out of this state, any slave or slaves, or out of the county where such slave or slaves may be, without the consent of the owner or owners of said slave or slaves, any person so offending shall, on conviction, be sentenced to undergo an imprisonment in the penitentiary, at hard labor, for any period of time not exceeding seven years.”

And the respondent closes with an averment under oath that Charles Chapman of Bryan county, Georgia, is interested in the detention of the said George.

To this return the counsel for the boy have put in a general demurrer, upon which issue has been joined, and the question now to be decided, is, whether upon this statement of facts, admitting them to be true, Captain Buckley has a right here to detain him as a slave.

From the language of the return in reference to the state laws of Georgia, and the setting forth of the sections of certain acts bearing upon the subject, it is evident that the respondent relies upon their recognition by this court, as in part at least establishing his right to hold George in custody. It is of importance therefore to settle in the first place, by

what law this case is to be decided. If this boy is to be deprived of his freedom, it must be done by due process of law, and while we admit the averment in the return that Georgia is an independent sovereign state, capable of making laws for the goverance of her own citizens—and extending in their operation over her own territory, we claim that New-York also is a sovereign and independent state, with the like capacity as regards her citizens and her territory; that the laws of Georgia, however binding may be their force within her own limits, are beyond those limits, a dead letter, and that this court in determining whether this boy is to be restored to freedom or remanded to slavery, are to be governed solely by the laws and institutions of this state, modified and restricted as they are in certain specified cases by the constitution of the United States and the laws of congress in conformity thereto, without the slightest reference to the institutions or laws of Georgia, under which it is contended by the respondent that he is held to labor as a slave.

The first points then to which I will ask your Honors' attention are these—that the common law of England prevails in this state, as in others of our confederacy— 12 the common law recognizes no slave and no slavery, and that the comity of nations does not extend to the recognition by the courts of non-holding states of the system of slavery or of the artificial rights and duties supposed to grow out of it, and that consequently the respondent can have no right to hold this boy in slavery in the city of New-York, unless that right is given to him by the constitution of the United States; and these several points I will briefly present in their order.

Slavery formerly existed in this state, and during the period of its colonial history in a rigorous and revolting form; but after the era of our independence, as Mr. Chancellor Kent observes, the principles of natural right and civil liberty were better known and obeyed, and domestic slavery speedily and sensibly felt the genial influence of the revolution.*

* Kent's Com. 255.

The first act of amelioration was passed in 1781,† and gave freedom to the slaves who served in the army; the second in 1788,‡ was intended to prevent the further importation of slaves, and to afford facilities for their manumission. In 1799 the legislature commenced a system for the gradual abolition of slavery,§ which was enlarged and improved in 1810.# In 1813 the previous acts were digested anew;¶ and at length in 1817,** provision was made for the complete abolition of slavery in about ten years thereafter.

† Act of March 20, 1781, ch. 1, sec. 6.

‡ Act of February 22, 1788, ch. 40.

§ Act of March 29, 1799, ch. 62.

# Act of March 30, 1810, ch. 115.

¶ Act of April 9, 1813.

** Act of March 21, 1817, ch. 137.

After the arrival of that period, the 4th of May, 1827, domestic slavery became extinguished in the state and unknown to the law, except in the case of slaves brought within our borders by persons as travellers, and who did not reside or continue hero for more than nine months. This provision which was adopted in 1817, as an act of comity on the part of the state, was abolished by the repealing act of May 25, 1841, which wiped from our statute book the last trace of domestic slavery as recognized by state authority within our borders, and the controlling principles of the common law in reference to human liberty were restored to their original purity, unshackled by partial legislation.

That the common law of England belongs to us as it belonged to our fathers before the separation from the mother country, will scarcely be questioned.

Chief Justice Ellsworth, in one of his earliest decisions in the supreme court, said, “the common law of this country remains the same as it was before the Revolution.

Chief Justice Marshall, in the case of *Livingston* v. *Livingston* , said, “when our ancestors migrated to America they brought with them the common law of their native country so far as it was applicable to their new situation, and I do not conceive that the Revolution in any degree changed the relations of man to man or the law which regulated them.”

Mr. Duponceau, in his “Dissertation on the Jurisdiction of courts in the United States,” says, “I consider the common law of England the *jus commune* of the United States,” and Chief Justice Taylor, of North Carolina, in the case of *the State* v. *Reed* ,* said, “a law of *paramount obligation to the statute* was violated by the offence— *common law* founded upon the law of “nature and confirmed by relation.”

* Hawkes' N. C. Rep. 454.

The decisions of the federal courts abound in recognitions of the common law, asserting its paramount binding power;† and the entire system so far as it is applicable to our situation and government has been formally adopted by the constitution of this state, as it has been by the constitution of Massachusetts, New-Jersey, and Maryland.‡

† See the subject of the common law and slavery ably discussed in Mr. T. D. Welds' learned essay on the power of congress over the District of Columbia.

‡ Kent's Com. 472.

Now what is the common law of this state in regard to slavery?

The best evidence of the common law is to be found in the decisions of courts of justice; and when we turn to these sources to discover what it declares in this present case, we find that it knows no slave and no slavery, and that its principles annihilate slavery

wherever they touch it. It has been well called a universal, unconditional abolition act. Wherever slavery is a legal system, it is so only 13 by statute law, and in violation of common law. The declaration of Lord Chief Justice *Holt* , that, “by the common law, no man can have property in another,” is an acknowledged axiom, and based upon the well known common law definition of property—“The subjects of dominion or property, *are things* , as contradistinguished from persons.”

This was definitely settled in the famous case of *Somersett* ,* a case familiar alike to the student of law or of history.

* 20 Howell's State Trials, 79. Loft's Reports, 1. Hay. State Tr., xi. 339.

Somersett, as your honors will remember, was a negro slave, and had been carried by his master from America to England, and there confined until he could be sent to the West Indies. He was discharged by the court of kings's bench, on habeas corpus, after a very able and elaborate argument, and the decision of the judges in his case has ever since remained unshaken.

Lord Mansfield then declared—and that declaration of itself would be a sufficient answer to the claim of respondent, that this court should here regard this boy as a slave because he is made such by the laws of Georgia—“The state of slavery is of such a nature that it is incapable now of being introduced by courts of justice, from any principles natural or political; it must take its rise from positive law: the origin of it can in no country or age be traced back to any other source—a case so odious as the condition of slaves must be taken strictly.”

“In consequence of that decision,” says Mr. Christian, the editor of Blackstone, “if a ship laden with slaves was *obliged* to put into an English harbor, all the slaves on board might and ought to be set at liberty.”†

† Black. Comm. 425, in Not. Ed. 1798.

In the more recent and well known case of *Forbes* v. *Cochran* ,‡ the court of king's bench decided that thirty-eight slaves, who had escaped from a plantation in East Florida to an English ship of war on the high seas, became thereby free. Mr. Justice Holright, in his opinion, said, “The law of slavery is a law *in invitum* , and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the place only, does not continue.” And Mr. Chief Justice Best declared—“Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local law, they have broken their chains, they have escaped from their prison and are free.”

‡ 2 Barnwell & Cresswell, 448.

In the case of *Knight* v. *Wedderburn* ,* tried in Scotland in 1778, it was argued, in behalf of the claim of Mr. Wedderburn to the services of his slave, whom he had brought from Jamaica, that Knight was still a slave, that the right of property would be sustained in every country where the subject of it might come, and that the *status* of persons attends them wherever they go. But the court decided that the dominion assumed over the negro under the law of Jamaica *being unjust* , could not be supported in Scotland to any extent.

* 20 Howell's State Trials, 3 note.

So that, in all of these decisions, the fact that slavery in the British colonies had been established and then existed by the authority of parliament, did not prevent the judges from entering into an examination of the character of the system and pronouncing it immoral and unjust; and at the time when they declared the law in the case of *Somersett* , hundreds of slaves, brought from the West Indies by their masters, were held as such in England, and were by that decision made freemen. So that the fact so particularly stated

in the return to this writ, that slavery has existed for one hundred and fifty years in Georgia by legislative enactment, and that its existence is now recognized by the constitution of the United States, affords no reason whatsoever why this court should regard its character with greater leniency than if slavery were unknown in the United States, and this boy were claimed under color of some foreign law.

That slavery is a mere municipal regulation, 14 and founded upon and limited to the range of territorial laws, was distinctly stated by Judge Story in the case of *Prigg* v. *Commonwealth of Pennsylvania* ,* on the authority of the cases I have cited; and I may say that, as a lawyer, I have felt no little pride in the fearless integrity exhibited by the courts generally in the slave-holding states of this country, in maintaining the dignity and purity of the common law in its regard to human liberty, whenever the positive law of the state allowed them to apply it; and I have been more than once reminded, in reading their decisions, of the pleasing testimony borne by Sir William Best, in the case of *Forbes* v. *Cochran* ,† to the superior morality of the English judges in reference to slavery and the slave trade, to that of the economists and politicians who recommended to the legislature the protection of the traffic.

* 16 Peters, 611.

† “It (slavery) is a relation which has always, in British courts, been held inconsistent with the constitution of the country. It is matter of pride to me to recollect that, whilst economists and politicians were recommending to the legislature the protection of the traffic, and senators were framing statutes for its promotion and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right and disdaining to bend to the lower ground of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject of property. As a lawyer, I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride.”

In the case of *Marie Louise* v. *Marot* ,‡ decided in Louisiana, Mr. Justice Matthews declared, that the fact of a slave having been taken by her owner to France, where slavery was not tolerated, operated on her condition so as to produce immediate emancipation.

‡ 9 Lous. R., 473. 2 Barn. & Cress, 470.

“That such is the benign and liberal effect of the laws of that state,” added the judge, “is proven by two witnesses of unimpeachable character; and being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery.”

The same doctrine was re-affirmed in *Smith* v. *Smith* ,§ and is now the settled doctrine in the slave-holding states of the union—and whether the slave is taken by his master to New-York or to France makes no difference. Mr. Justice Story, in his conflict of laws, after referring to Somersett's case as establishing the principle that as soon as a slave lands in England he becomes *ipso facto* a freeman and discharged from his state of servitude, says, “Independent of the provisions of the constitution of the United States for the protection of the rights of masters in respect to domestic fugitive slaves, there is no doubt that the same principle pervades the non-slave-holding states in America.”*

§ 13 Lous. R., 441.

* Conflict of Laws, 92.

Before proceeding to show that under the constitution of the United States the respondent has no right to restrain George of his liberty, it is proper to show that the comity of nations cannot be applied to this case so as to allow this court to recognize, even were they disposed to do so, the domestic institutions and laws of Georgia, upon which the respondent relies. It will no doubt be strenuously urged by the learned counsel, that although the laws of Georgia may not be admitted here *ex proprio vigore* they ought to be admitted *ex comitate* —that if the general principle be sound, that distinct nations should cherish friendly relations and encourage frequent intercourse, and mutually recognize

for mutual convenience each others laws, such is peculiarly the duty of these states, members of the same family, and bound together by a common compact. I admit the truth and force of the reasoning in regard to all proper objects of comity—but I deny that this is one of them—for we must remember that the object of our fathers in adopting the constitution, and forming a more perfect union, was to establish justice and secure the blessings of liberty, not to strengthen and uphold slavery.

There are many well settled principles in regard to the comity of nations which forbid its application here.† In the first place, comity is not to be exercised in a doubtful case, and where doubt exists, the court will prefer the law of its own

† See this subject ably discussed in the printed argument of Mr. Loring, in the case of the *Commonwealth* v. *Aves*, decided in Massachusetts in 1836.

15 state.* Again, comity is practically founded on the consent of nations, and the need of reciprocating good offices. Mr. Hargrave, in his elaborate argument in the Somersett case said, that most of the European states, like England, disregarded the *lex loci* in respect to slaves, and gave them entire liberty—and Mr. Chancellor Kent remarks,† that there is no such thing as the admission of slaves or slavery in the spirit of the civil law, or of the laws and usages of the West Indies, either in England or in any part of Europe. In the case of *Fulton* v. *Lewis* ,‡ decided in the Maryland court of appeals, which was another instance of the high integrity of which I spoke as characterizing many decisions in the slave-holding states of the union, the slave of a St. Domingo master who had fled to that state, was pronounced free, although he had been sold since his arrival. There is no such consent of nations, therefore, on the subject of slavery to form the basis of comity.

* Story's Conflict of Laws, 29, 271.

† Kent's Com. 203.

‡ Hen. & John. Rep. 564.

In the next place, there is no room here for reciprocity between New-York and the southern states. We have no slaves, thank God, whom—

Mr. Blunt , (counsel for Captain Buckley,) Do you mean to say there are no slaves in New-York.

Mr. Jay. I do say so certainly, and I cite Mr. Chancellor Kent as my authority.

Mr. Blunt. As a matter of fact then, I would have you to know that there are slaves in this state.

Mr. Jay. If there are slaves in this state, I did not know it, and I am sorry to learn it. Mr. Chancellor Kent expressly declares in the chapter I have quoted, that slavery is extinguished in New-York, and such was the intention of the law.§ If any slaves remain unemancipated it is through some unforseen exception; but even if the fact be as the learned counsel states it, the few aged slaves that may be left do not afford an opportunity for a reciprocal comity. But we have free colored men in regard to whom the southern states do not practice the comity which is our due. In defiance of the provisions of the constitution of the United States that the citizens of each state are entitled to “all the privileges and immunities of citizens in the several states,” their rights are openly violated by the laws and practice of the south. Their color is made presumptive evidence of their being slaves, and free colored men who are called to the south by business or family claims, are arrested as fugitive slaves. The burthen is thrown upon them, when far from home, and perhaps friendless and penniless, of proving their freedom, and in default of such proof they are liable to be sold, and some of them have been sold under the laws of these states for the payment of their jail fees.

§ The national census of 1840, shows four slaves in New-York. These were probably brought to the north by southern masters, who were then allowed to hold them in this state for nine months. The state census of 1845 does not return a single slave.

Again, the merchants of New-York and New-England find it convenient to employ persons of color on board of their ships. The moment their vessels touch at Charleston, or Savannah, or Mobile, or New-Orleans, they are searched, those free persons are taken out and imprisoned by public authority, but at the expense of the captains, until the vessels are ready to sail. These proceedings are greatly to the detriment and prejudice of the owners' interests, and of the commerce of the nation, as well as a gross violation of the rights of colored seamen.

I am well aware that the southern states claim the right to pass these laws on the ground that they are necessary police regulations, but one of their own judges, the Hon. William Johnson, of South Carolina, in the case entitled, *exparte Henry Elkinson* , a subject of her Britannic Majesty, v. *Francis Delisseline* , sheriff of Charleston district,* contained in a report of the House of Representatives to which I will refer your Honors, said, “of the unconstitutionality of the law under which this man is confined, it is not too much to say that it will not bear argument.” Mr. Wirt gave an opinion to the same effect which is published in the same document.† That report was founded as the memorial of 150 merchants of Boston, protesting against this infringement of their rights by the laws of the southern states,‡ and

* Contained in Report No. 80, H. of Rep., 23d Congress, 3d Session, p. 20.

† Pages 35, 36.

‡ Laws of derogation of the rights of northern men are found in Prince's Dig. of Laws of Georgia, 465, 467. Laws of N. C. 1830, ch. 30, ch. 981. 1826, ch. 21, p. 684, ch. 362. Miss. Rev. Code, p. 387, § 80, 377, § 341. Virg. Laws, 1830, ch. 39. S. C. Laws, 1820, p. 322, 1823, p. 361. 1 Martin's Dig. 678, as quoted by Mr. Loring in his argument.

16 the extent to which they have sometimes suffered, appears from a remark of Judge Johnson, in the decision referred to, that in one case “not a single man was left on board the vessel to guard her in the captain's absence.”

Here, then, are clear violations, both of the rights of northern merchants and of our free citizens of color; and if it should be denied that persons of color are citizens in the meaning of the constitution, I will quote an act of congress distinctly recognizing them as citizens.*

* Act of congress, passed Feb. 28, 1803.

Mr. Blunt. I do not deny it.

Mr. Jay. It may be urged that the good understanding which has existed between this state and Georgia, while differences have arisen with some of the northern states, entitles Georgia to the exercise of a comity which others could not so reasonably claim. But it is impossible for this court to make any distinction of this kind; and if such a distinction could be made, is Georgia entitled to it?

I remember well her services and her struggles in the war of our revolution, when no state of the old thirteen, suffered more severely. I remember her generous conduct towards Massachusetts in the hour of peril, and the many interesting associations which closely connect her with our common history; and of all the slave-holding states there is no one containing more distingushed gentlemen—to whom, altho' never within her borders, I am personally indebted. But, may it please the court, standing here as counsel for this boy, whom it sought to reduce to slavery by the exercise of a discretional comity, I cannot forget that Georgia has enacted these odious laws, so oppressive to our colored citizens and our northern merchants; and that in 1831 the legislature of Georgia passed an act which was duly approved by her governor,† and which, I believe, still disgraces her statute book, offering a reward of five thousand dollars for the abduction “of the editor or publisher of a certain newspaper called the Liberator, published in the town of Boston and state of Massachusetts.”

† Dec. 26, 1831.

I cannot forget that it was in the streets of Savannah, the very city whence this vessel comes, that Mr. John Hopper, a member of this bar, well known to your honor the circuit judge as a lawyer of intelligence and worth, the son of the venerable gentleman who has been well called the Clarkson of America, was a few years since mobbed and well nigh murdered, because he was suspected of being an abolitionist. A police officer of this city, who was concerned in that outrage, was promptly punished on his return to New-York, by dismissal from his office; but I have not heard that the authorities of Savannah ever vindicated their honor by punishing their own aggressors upon an unoffending stranger.

There is another argument against the exercise of comity in this case, possessing great weight, and no small degree of historical interest. How far slavery shall be recognized by the free states, has already been settled by positive agreement. The constitution was a compromise, the result of long deliberations and mutual concessions; and the history of that compromise, as given in the debates of Mr. Madison, show how unwillingly the north sacrificed her principles for the sake of union. On the subject of slavery she made three distinct concessions. First, she consented to the continuance of the African slave trade for twenty years—although this was one of the grievances of which they had complained in the declaration of independence. Mr. Pinckney declared—“South Carolina can never receive the plan if it prohibits the slave trade.”*

* Madison Debates, 1388, 9.

Great was the disgust of the north at this concession, and even in the Virginia convention it was stigmatized as an infamous and detestable thing. “Such a trade,” said Mr. Mason, “is diabolical in itself, and disgraceful to mankind.”

Secondly, the constitution allowed the slaves to form the basis of representation, although they were claimed and held as property. To this there was equally strong opposition at the north. Mr. Governeur Morris, of this state, said that “he would never concur in upholding domestic slavery. It was a nefarious institution.” * * 17 “He would add that domestic slavery

is the most prominent feature in the aristocratic countenance of the proposed constitution. The vassalage of the poor has ever been the favorite offspring of the aristocracy. And what is the proposed compensation to the northern states for a sacrifice of every principle of right—of every impulse of humanity? They are to bind themselves to march their militia for the defence of the southern states against these very slaves of whom they complain."*

* Madison's Debates, p. 1261 '2 '3 '4 '5 '6.

Mr. Gerry refused to sign the constitution for the reason that three-fifths of the blacks were to be represented as if they were freemen.†

† Idem, 1595.

In the legislature of Maryland, Mr. Martin, one of the delegates to the convention which formed the constitution, asked, "what peculiar circumstances should render this property (of all others the most odious in its nature) entitled to the high privilege of conferring consequence and power in the government to its possessors, rather than *any other* property; and why should *slaves* , as property, be taken into account, rather than horses, cattle, mules, or any other species?"

Mr. Smith, in the convention of New-York, said, "he could not see any rule by which slaves were to be included in the ratio of representation—the principle of representation being that every free agent should be concerned in governing himself, it was absurd to give that power to a man who could not exercise it. Slaves have no will of their own—the very operation of it was to give privileges to those who were so wicked as to keep slaves. He knew it would be admitted that this rule of apportionment was founded on injustice; but it was the result of accommodation, which, he supposed, we should be under the necessity of admitting if we meant to be in union with the southern states, although utterly repugnant to his feelings."

Thirdly, the constitution forbade discharge by the free states of fugitives from slavery, and provided that they should be delivered upon the claim of the party to whom their service was due. By that provision the whole north was made a hunting ground for slave catchers, who may recapture their fugitive slaves wheresoever they may find them. How was it before the adoption of the constitution? Mr. Madison, in the Virginia convention, said, “at present, if a slave elopes to any of the states where slaves are free, he becomes emancipated by their laws, for the laws of the states are *uncharitable* to one another in this respect.”

General Pinckney, in the South Carolina convention, said, “we have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could, but, on the whole, I do not think them bad.”

Mr. Justice Story, in *Prigg* v. *Commonwealth of Pensylvania* ,* and Mr. Justice Wayne, in the same case,† mention this fact, and quote the language of southern gentlemen; and Mr. Justice Story, in his Conflict of Laws, speaks of the “many sacrifices of opinion and feeling” involved in the adoption of the constitution. The stipulation respecting fugitives was exceedingly obnoxious to the people of the north. It tainted with oppression their air, which might otherwise have been at this day, like that of England, too pure for slaves to breathe. It openly violated the command of scripture—“Thou shalt not deliver unto the master the servant who hath escaped from his master unto thee. He shall dwell with thee where he liketh it best; thou shalt not oppress him.” Our free states afford no resting-place for the weary fugitives, who are not safe until, having crossed the boundary of our republic, they rest on British soil.

* 16 Peters, 612.

† Idem, 648.

It is clear, therefore, that the constitution having been a compromise—a bargain between the north and south, framed upon concessions and adopted after long hesitation, the north has already surrendered all that she intended; as Mr. Pinckney said the south got all she could, and there is nothing left for comity to demand.

The ratification of the constitution at the north was nearly defeated by concessions 18 embodied in it—had it been supposed that further concessions were to be claimed, and on the score of comity, it would not have been ratified at all; and good faith towards our own citizens must forever forbid our courts of justice from going one jot further than the constitution has already gone, or yielding one tittle of what still remains to us of the common law.

In addition to the arguments already advanced against the recognition of the laws of Georgia, cited by the respondent, it is well established that the principle of comity never applies to contracts or laws which offend our morals, or contravene our policy, or violate public laws, or offer a pernicions example.*

* 2 Kent's Comm., 457. Story's Conflict of Laws, 95. 6 Mass. R., 366.

It is unnecessary to enter into a discussion of these points to show that slavery is violative of justice and natural right—of sound morality and settled policy. The case of Somersett was mainly argued and determined on these grounds, and without delaying the court by reading authorities, I will refer them to the opinion of Chief Justice Best, in *Forbes* v. *Cochran* ,† where that dstinguished judge prouounced slavery a wicked system, for the abolition of which every Englishman was bound to labor; to the opinion of Judge Sedgwick, in *Greenwood* v. *Curtis* ,‡ and Judge Story's approving remarks thereon.§ To the testimony of Judge Marshal, in the *case of the Antelope* ,# and to the decision of chief Justice Shaw, in the *Commonwealth* v. *Aves.* ¶

† Barn. & Cress., 471.

‡ 6 Mass. R., 366.

§ Story's Conflict of Laws, 215, note.

# 10 Wheaton, 420.

¶ 18 Pickering, 205.

I know well that great names may be cited to show that slavery is not a curse, but a blessing; that it is the special gift of God to the people of the south, to be cherished with thankfulness and guarded with religious care. Among its happiest characteristics, according to its defenders, is that it supplies the want of an order of nobility, and the other appendages of an hereditary system of aristocracy. It is a system by which the black man is to work and live in poverty and ignorance, while his master is to enjoy elegant leisure, and revel in the luxuries furnished by servile labor.

Such authorities require no refutation before this court, although it would be easy to cite the testimony of slaveholders themselves—of Washington, Jefferson, Henry, Pinckney, Randolph, and many others. If there is truth in the principles of our Government, there is no truth in slavery. If liberty be an essential right, slavery is an essential wrong, and the detention of this boy in our city, as the slave of the respondent, until the sailing of his vessel, though it were but a single week, would have a demoralizing and pernicious influence.

Mr. Blunt. Am I to understand the gentleman as saying that the detention of this boy for one week in New-York city as a slave, would have a contaminating influence?

Mr. Jay. I do say so, and if the counsel wish, I will quote authorities for the assertion.

Mr. Blunt. I only want to know the fact; I thank the gentleman for the admission.

Mr. Jay. I hope the counsel will not misunderstand me. I do not say that this boy will exercise a contaminating influence, but that his continuance here *as a slave* will have such an influence; and as the remark seems to have excited surprise, I will read a single paragraph from Thomas Jefferson, the father of democracy, on the corrupting influence of slavery, not only upon the master himself but upon all who witness its operation.

The Court. We think it unnecessary.

Mr. Jay. I agree with your Honors that it is unnecessary to cite authority to show that the presence in our midst of a slave—a man degraded to the condition of a chattel to be bought and sold—is not only repugnant to our law and disgusting to our feelings, but injurious to that honest simplicity of character which it is our aim to encourage among our happier citizens, who born to freedom and uncontaminated by the taint of slavery, know that it is honorable to labor, and that not ill-gotten wealth, but honest independence, confers dignity—who are taught to regard it not only as dishonest, but as mean and contemptible in the highest degree for one man to live in idleness on the unrequited whip-extorted labor of others.

Having thus shown that by the common 19 law of this state, which forbids the recognition of the laws of Georgia cited by the respondent, this boy is free, unless the constitution of the United States has given to the respondent the right to detain him, let us see what authority is given by that instrument or by the laws of congress in conformity thereto.

By § 2, of the 4th article, “No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up *on the claim of the party to whom such service or labor shall be due.* ”

By the act of February 12, 1793,* the person to whom service is due, his agent or attorney, is authorized to seize the fugitive and take him before a judge or magistrate, and upon

proving orally or by affidavit that the party claimed is a fugitive from service, to which he is held under the laws of the state from which he fled, that the person to whom the service is due, wishes to reclaim him, and has appointed the claimant his agent or attorney for that purpose, the magistrate will grant a warrant for his removal.

* 1 United States Statutes, 302.

All state legislation respecting fugitives was expressly decided in *Prigg* v. *The Commonwealth of Pennsylvania* ,† to be unconstitutional—the right to legislate on this subject being exclusive in congress. So that whatever claim the respondent makes to this boy he must make under the constitution and this single act—which being in derogation of human liberty are to be construed strictly.‡ He cannot claim under the provision of the constitution, however large the interpretation which has been given it, for the reason that by his own admission he is not the person to whom the service is due, the return alleging that it is due to Mr. Chapman.

† 16 Peters.

‡ *Butler* v. *Hopper.* 1 Washington, C. C. 501. *Ex parte* Simmons, 4 Washington, C. C. 396. *Commonwealth* v. *Aves.* 18 Pickering, 222–3.

He cannot justify the detention of the boy under the act of '93, even if he were in a position to avail himself of it—which is not the case. That act gives to the party entitled certain powers over a fugitive, upon a compliance with its requirements. The respondent has not complied with them. He did not arrest George and take him before a judge for the purpose of obtaining a certificate. He secreted him on board of his vessel and removed the vessel from the wharf. He has not sought this investigation, but he has shunned the light, and has only been brought before your Honors by the strong arm of the law.

But had he gone before a judge, under the act of '93, this return does not show the requisite proof to entitle him to a certificate.

*First* , He is to prove that by the laws of Georgia this boy owes service or labor.

There is no averment in the return that George owes service or labor to any one, but merely that he is held to labor or service " *as the slave* of Charles Chapman." The objection is not captious or technical, but real, fundamental and substantial. A few years since, the legislature of New-York passed an act providing for the appointment of agents, at the expense of the state, to travel through the south, and recover free colored citizens who had been kidnapped. George may be, for ought that appears on the return, a free citizen of New-York, who, having been kidnapped and carried to Savannah, was there held *as a slave* , without being a slave or owing service.

The claim of the respondent is in derogation of personal liberty, of natural right, and of common law. The proof must in every particular agree with the requirement. This court has no intendments in favor of slavery, and will only yield to the exact compact. Claim a slave in such manner as the constitution recognizes, and he may be given up; but let us discover the slightest flaw in your detoured, and we will avail ourselves of it to vindicate the honor of the state and the rights of the fugitive. The presumption here is, that the boy is free—not as in Georgia, that he is a slave. The return says that he admitted himself to be a slave. Be it so; under what circumstances was that admission made—was he free to go and come when he made it? Was it a voluntary confession, with no one by to control him? It was a confession made under duress, and altogether worthless.

But had it been a voluntary confession, a man cannot confess himself into slavery—he 20 cannot make a contract to become a slave which our laws will recognize, for such a contract is wanting in the first essentials to validity; and certainly his confession cannot have more weight than his contract.

*Secondly* , The act requires proof that the person claimed as a slave is a fugitive. Where is the evidence that he has fled from his master, supposing him to be a slave? How does this captain know that the master had not given him permission to leave his service? We

do not want suppositions, however reasonable—inferences, however strong—we require positive proof.

*Thirdly* , he must show that the master wishes to reclaim him, and that he is the authorized agent or attorney of the master for that purpose. There is no evidence before the court that the master wishes to reclaim him, and if he does wish it, the respondent has no authority to act for him. The right to the service is a personal right, given by positive municipal law, and a stranger cannot claim or exercise it. If the respondent is the agent or attorney of Chapman, where is the proof of his appointment? It does not appear from the return that the respondent is even acquainted with Chapman, or knows him to be the owner of the boy; but only supposes it from the boy's confession; and he has not the shadow of a claim to his service or his custody.

He points us it is true, to the laws of Georgia, which make it lawful for any one within the jurisdiction of that state to arrest and secure a fugitive, but that law as we have seen, this court cannot recognize, and the arrest in this case was not made within the limits of Georgia, but upon the high seas—beyond its jurisdiction, and where no law of the federal government authorized his arrest by this respondent, being neither the owner, agent, or attorney.

If by any legerdemain the laws of Georgia had clothed this respondent with the authority of the master, even then the boy would be entitled to his freedom, for the respondent brought him here voluntarily, and the act of the agent is the act of the principal.

He did not return to Georgia, although within two days' sail of Savannah, but brought him to New-York; and if the excuse of convenience or business would justify the bringing the boy here, the same reason would suffice if the vessel were bound hence for Boston or Liverpool before her return, for his being carried as a slave wherever the respondent might wish to go.

But the respondent had no authority whatever, to lay his hand upon the boy, and I respectfully submit to the court that his present claim is founded *in tort.* That as the law of nations does not recognize slaves as property; and as the constitution, except with that restriction upon the several states, in regard “to *persons held to service* found within their borders,” recognizes the common law by which a slave touching a free soil or a vessel under free flag, becomes *eo instanti* a freeman; this boy when discovered by the respondent on the high seas, was free. His chains had fallen, and from that moment no one under the constitution and laws of the United States had a right to replace them or to exercise any control over him unless it were his former owner, should he succeed in catching him. The respondent may have a claim upon this boy for his passage money, if he did not oblige him to work during the passage, and such reasonable claim we are willing to pay, but he had no more right to lay his hands upon him, and confine and iron him, than he has to lay his hand upon any free colored man of our city.

There are several averments in the return disconnected from the law of this case, upon which I had intended to remark, but I have already too long claimed the attention of the court.

I trust that I have clearly shown that the common law governs in this state, to the entire exclusion of the slave laws of Georgia, whatever may be the purpose for which this court are asked to recognize them—that the respondent can only claim under the constitution and federal law which must be strictly interpreted, and which give him no warrant in the matter.

That his exercise of authority over the fugitive was an usurpation in the commencement, and that its continuance in our port was a violation of personal right and an offence against the dignity of the state—and that the boy now before the court is entitled to his immediate discharge.

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