STATE OF NEW YORK.

IN SUPREME COURT.

SETH W. BENEDICT,

ads.

DANIEL D. NASH.

HORACE DRESSER,

Atty. for Defendant.

WILLIAM H. BELL

Atty. for Plaintiff.

STATE OF NEW YORK.

IN SUPREME COURT.

SETH W. BENEDICT,

ads.

DANIEL D. NASH.

HORACE DRESSER,

ATTY. FOR DEFENDANT.

WILLIAM H. BELL

ATTY. FOR PLAINTIFF.

RECORD AND BILL OF EXCEPTIONS.

PLEAS before the Justices of the Supreme Court of Judicature of the people of the State of New York, at the Academy, in the city of Utica, of the term of July, in the year of our Lord, one thousand eight hundred and thirty nine.

Witness, SAMUEL NELSON, Esq., Chief Justice.

HALLETT, *Clerk.*

State of New York, ss:—The people of the State of New York sent to the Judges of the Court of Common Pleas, held in and for the city and county of New York, their writ of *Certiorari*, close in these words, to wit: The people of the State of New York, to the Judges of our Court of Common Pleas, in and for our county of New York, Greeting: We being willing, for certain causes, to be certified of a certain plaint in our Court of Common Pleas for our said County, against Seth W. Benedict, at the suit of Daniel D. Nash, of a plea of trespass on the case—do command you, that without delay, the plaint aforesaid, with all things touching the same, as fully and entirely as it remains before you, by whatsoever names the said Seth W. Benedict and Daniel D. Nash may be call-

ed in the same, you certify to our Justices of our Supreme Court of Judicature, at the Academy, in the City of Utica, on the first Monday of July next, together with this writ, that we may further cause to be done thereupon, what of right shall be fit to be done. itness, SAMUEL NELSON, Esq., our Chief Justice, at the City Hall, in the city of New York, this first Monday of May, in the year of our Lord one thousand eight hundred and thirty nine.

HALLETT, PAIGE, SAVAGE and SUTHERLAND,
Clerks.

H. DRESSER, *Attorney.*

At which day and place, in the return of the said writ mentioned, before the Justices aforesaid, comes the said Seth W. Benedict, by Horace Dresser, his Attorney, and the said Judges of the said Court of Common Pleas of the city and county of New York, in the said writ mentioned, send hither their return to the said writ in the words and figures following, to wit:

The answer of the Judges of the Court of Common Pleas of the city and county of New York within mentioned, to the within writ of *Certiorari.*

The execution of the within writ appears by the schedule thereto annexed.

(By the Court.) JOSEPH HOXIE, *Clerk.*
(L. S.)

We, the Judges of the Court of Common Pleas, in and for the city and county of New York, do, under the seal of our said Court, certify unto

the Justices of the Supreme Court of Judicature of the people of the State of New York, the plaint whereof mention is made in the writ hereto annexed, together with all things touching the same, as fully and amply as the same are now remaining before us, as by the said annexed writ we are commanded.

(By the Court.) JOSEPH HOXIE, *Clerk.*
(L. S.)

City and County of New York, ss.

Daniel D. Nash, plaintiff in this suit by William H. Bell, his Attorney, complains of Seth W. Benedict, defendent in the same, in custody, and of a plea of trespass on the case ;

For that, whereas, the said plaintiff is a good, true, honest, just and faithful citizen of this State, and as such has always behaved and conducted himself, and until the committing of the several grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all his neighbors and other good and worthy citizens of this State to whom he was known to be a person of good name, fame and credit, to wit, at the city of New York aforesaid. And whereas, also the said plantiff hath not been guilty, or until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned, been suspected to have been guilty of kidnapping or any other such crime. By means of which said premises, he, the said plaintiff, before the committing of the said several grievances by the said defendant

as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy citizens of this State, to whom he was in anywise known, to wit, at the city of New York aforesaid. Yet the said defendant well knowing the premises but greatly envying the happy state and condition of the said plaintiff, and contriving, and maliciously, and wickedly intending to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and among all his neighbors and other good and worthy citizens of this State, and to cause it to be suspected and believed by those neighbors and citizens that the said plaintiff had been guilty of kidnapping, and to subject him to the pains and penalties by the laws of this State, made and provided against and inflicted upon persons guilty thereof, and to vex and harrass, oppress and impoverish, and wholly ruin him, the said plaintiff heretofore, to wit, on the first day of December, in the year of our Lord, one thousand eight hundred and thirthy eight, at New York, to wit, at the city and county of New York aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause to be composed and published, of and concerning the said plaintiff in a printed book or pamphlet called or entitled "The American Anti-Slavery Almanac, for 1839," the false, scandalous, malicious, defamatory and libellous matter, accompanied with a pictorial representation or illustration thereof in the words and figures following, that is to say, "*A Northern freeman en-*

slaved by Northern hands, Nov. 20th, 1836, Sunday," (meaning thereby then and there, a statement of the feloniously kidnapping of a free citizen of one of the northern States by the plaintiff and other citizens of said State, on Sunday, the twentieth day of November, in the year of our Lord One thousand eight hundred and thirty six, and by him sold into slavery in another State.) "Peter John Lee, a free colored man of Westchester Co., N. Y," (meaning thereby that a negro by the name of Peter John Lee was one of the free and enlightened citizens of Westchester County, in this State, and a resident therein,) "was kidnapped by Tobias Boudinot, E. R. Waddy, John Lyon, and Daniel D. Nash, of New York City," (meaning thereby that the said Peter John Lee, a free citizen of this State, had been kidnapped by the said plaintiff and others, in violation of the laws of this State,) "and hurried away from his wife and children into slavery," (meaning thereby that the said Peter John Lee, a free citizen of this State, was forcibly abducted by the said plaintiff and torn from the tender ties of connubial bliss, parental joys and domestic comforts, and all the refinements and endearments of civilized society and sold into slavery beyond the limits of this State, in violation of the Constitution and laws of this State.) "One went up to shake hands with him, while the others were ready to use the gag and chain," (meaning thereby that the said plaintiff made use of stratagem to decoy, and assisted to gag and chain a free citizen of this State for the purpose of kidnapping him.) "This is not a rare case," (meaning thereby

that the said plaintiff, with the felonious intent aforesaid, had kidnapped other free citizens of this State besides the said Peter John Lee.)— "Many northern freemen have been enslaved in some instances under color of law," (meaning thereby that although the said plaintiff had forcibly taken, abducted, inveigled or kidnapped many others of the free citizens of this State and sold them into slavery, into some other State place or country, under a colorable authority, yet he had no such authority or color of authority for taking, inveigling, or kidnapping and selling into slavery into another State the said Peter John Lee as aforesaid,) and had therefore been guilty of the felonious offence of kidnapping in divers other instances, to wit, at the city of New York aforesaid.

And the said plaintiff further saith that the said defendant further contriving and intending as aforesaid afterwards, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and thirty eight, and divers other days, at the city of New York aforesaid, falsely, wickedly, maliciously, wrongfully and unjustly did publish and procure to be published, a certain other false, scandalous, malicious and defamatory libel of and concerning the said plaintiff as follows, that is to say,— "Peter John Lee, a free colored man of Westchester County, New York, was kidnapped by Daniel D. Nash of New York City, and hurried away from his wife and children into slavery," (meaning thereby then and there that the said plaintiff had been guilty of feloniously and forcibly taking or kidnapping the said Peter John

Lee, a free citizen of the State of New York and selling him into slavery into another State, and by reason thereof had thereby then and there subjected himself to the pains and penalties made and provided against and inflicted upon persons guilty thereof by the Revised Statutes of this State, to wit, at the city of New York aforesaid.

And the said plaintiff further says that the said defendant further contriving and intending as aforesaid afterwards, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and thirty eight, and divers other days, to wit, at the city of New York aforesaid, did falsely, maliciously, wrongfully and unjustly publish and cause and procure to be published, a certain other false, scandalous, malicious and defamatory libel of and concerning the said plaintiff, containing among other things certain other false, scandalous, malicious defamatory and libellous matters of and concerning the said plaintiff as follows, that is to say, "Peter John Lee, a freeman of color of Westchester Co., New York, was kidnapped by Tobias Boudinot, E. R. Waddy, John Lyon, and Daniel D. Nash of New York City, and hurried away from his wife and children into slavery," (meaning thereby then and there that the said plaintiff had assisted, aided and abetted or been accessary to the inveigling or kidnapping of the said Peter John Lee, a free citizen and resident of the State of New York, and entitled to all the liberties, immunities and franchises thereof, and who had thenceforward been deprived of the same, and that the said plaintiff had thereby

then and there been guilty of a crime punishable by the laws of this State with an ignominious punishment. By means of the committing of which said several grievances by the said dedant as aforesaid, he the said plaintiff, hath been and is greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbors and other good and worthy citizens to whom the innocency and integrity of the said plaintiff were unknown, have no occasion of the committing of the said grievances by the said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to have been and to be a person guilty of the crime of kidnapping, and have by reason of the committing of the said grievances of the said defendant as aforesaid, from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance or discourse with him, the said plaintiff, as they were before used and accustomed to have and otherwise would have had. And that the said plaintiff hath been and is by means of the premises otherwise greatly injured, to wit, at the city of New York aforesaid. To the damage of the said plaintiff of ten thousand dollars, and thereof he brings suit, &c.

And the said defendant, by Horace Dresser, his Attorney, comes and defends the wrong and injury, when, &c., and says, that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him,

And of this he, the said defendant, puts himself upon the country, and the said plaintiff likewise.

And thereupon issue was joined between the said Daniel D. Nash and the said Seth W. Benedict, and the same is *Ordered* by the said Supreme Court, to be tried at the Circuit Court appointed to be held at the City Hall, in the city of New York, in and for the said city and county of New York, on the third Monday of September next: and because the aforesaid issue so as above joined in this cause, between the parties aforesaid, was not tried at the said Circuit Court, held at the time and place last aforesaid, in and for the said city and county of New York; therefore the process between the parties aforesaid is continued until the Circuit Court, appointed to be held at the City Hall, in the city of New York, in and for the said city and county, on the third Monday of March, in the year of our Lord, one thousand eight hundred and forty one: *Afterwards*, to wit, at the day and place last aforesaid, at a Circuit Court, held in and for the said city and county, before the Honorable Philo Gridley, Circuit Judge, holding the First Circuit, the aforesaid issue so joined between the said parties as aforesaid, came on to be tried by a jury of the city and county of New York, for that purpose duly impanneled, that is to say,—*A. H. Clark, J. R. Field, Daniel Harris, Charles Crane, George Douglass, William Shannon, James Cowles, John P. Ware, Benjamin Blackledge, Hanford Lockford E. Van Sice, and David Preston*, good and lawful men of the said city and county: at which day came there, as well the said Daniel D. Nash, by

William H. Bell, his Attorney, as the said Seth W. Benedict, by Horace Dresser, his Attorney; and the jurors of the jury aforesaid, impannelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue; and upon the trial of that issue, the counsel learned in the law for the said Daniel D. Nash, to maintain and prove the said issue on his part, called and had sworn as a witness,

Timothy R. McDonough, who testified that in the fore part of December 1838, he bought of the defendant, The Anti-Slavery Almanac for 1839, at his office in Nassau street, New York; that the defendant said he was the publisher of the Almanac: the witness produced the Almanac he received from the defendant, and said it was similar to that for which the action was brought. Cross examined: The witness stated that he marked the book he received from the defendant, and has kept it since in his possession;—that he went to defendants store to find out who was the publisher, at the request of the plaintiff.

The Plaintiff also called and had sworn as a witness on his part,

William McDonough, who testified that in the years 1837, 8 and 9, he was a deputy of the Sheriff: that he knew the defendant—witness called on him in Nassau street in New York, and bought of him a pamphlet called the Anti-Slavery Almanac for 1839. Defendant afterwards said it was published in Boston and he was only an agent.

The Plaintiff's counsel further, to maintain and prove the said issue on his part, produced

and read in evidence from page 19 of the said Almanac, as identified by the said witness Timothy R. McDonough, as follows:

A NORTHERN FREEMAN ENSLAVED BY NORTHERN HANDS.

Nov. 20, 1836, (Sunday,) Peter John Lee, a free colored man of Westchester Co., N. Y., was kidnapped by Tobias Boudinot, E. R. Waddy, John Lyon, and Daniel D. Nash, of N. Y. city, and hurried away from his wife and children into slavery. One went up to shake hands with him, while the others were ready to use the gag and chain. See Emancipator, March 16, and May 4, 1837. This is not a rare case. Many northern freemen have been enslaved, in some cases under color of law. October 26, 1836, a man named Frank, who was born in Pa., and lived free in Ohio, was hurried into slavery by an Ohio Justice of the Peace. When offered for sale in Louisiana, he so clearly stated the facts that a *slaveholding* court declared him FREE—thus giving a withering rebuke to northern servility.

The counsel for the plaintiff further to maintain and prove the said issue on his part, produced and read in evidence the affidavits of William Davis and G. H. Roberts, which had been stipulated to be read *de bene esse* on the trial of the cause: which said affidavits are in the words and figures following, to wit:

SUPREME COURT.

Daniel D. Nash, *vs.* Seth W. Benedict.

City and County of New York, ss.

William Davis, of the village of St. Johnville,

in the County of Montgomery, being duly sworn doth depose and say, that sometime last spring, in the month of April or May, he saw at a house, thinks it was in Burlington County, in the State of New Jersey, a copy of the American Anti-Slavery Almanac, does not recollect the date of the same, remembers the plates or cuts in the one he saw, and that one was similar to the plate at page 19 of the American Anti-Slavery Almanac for 1839; recollects a plate in said book or Almanac under which was printed, "*A Northern freeman enslaved by Northern hands.*"— Deponent has never seen the defendant, never saw the plaintiff until last week. Does not know who wrote, printed or published the book he saw in New Jersey. Deponent thinks he saw the book above mentioned at the house of Mr. John Cox. And further this deponent saith not.

WILLIAM DAVIS.

Sworn before me, this 21st day of Nov. 1839.

W. M. MITCHELL, *Commissioner of Deeds.*

SUPREME COURT.

Daniel D. Nash, *vs.* Seth W. Benedict.

City and County of New York, ss.

George H. Roberts, of the city of Rochester, in the County of Monroe, being duly sworn doth depose and say, that he is not acquainted with either plaintiff or defendant in this suit; that on the first of January, 1839, copies of the American Anti-Slavery Almanac for 1839, were gratuitously distributed at the store of George A. Avery & Co., in the city of Rochester, as pres-

ents to children and otherwise, recollects the plate or cut at page 19 of said Almanac, and the article there under printed entitled, "A Northern freeman enslaved by Northern hands."

Deponent has also seen one copy of said Almanac at the store of E. N. Benedict, in the village of Holly, in the County of Orleans. And deponent further says, that the copies of such Almanac seen as above mentioned, were copies similar to the one to which is attached an affidavit of this deponent, dated 29th April, 1839, and sworn to before Henry Nicoll, Commissioner of Deeds, and which copies were published for the American Anti-Slavery Society," by S. W. Benedict, 143 Nassau street, as appears on the outside of said copies.

And this deponent further says, that such copies distributed in Rochester as presents, were distributed by the direction of the said Avery or by persons in his employ. And he further says, that he has no knowledge of the publication of said Almanac by the defendant, except that his name appears as publisher on the covers of the same, and the first page thereof.

And this deponent further says, that he does not know whether the copies seen by him at Rochester and Holly as aforesaid, were of the edition published as appears on the covers of such books by S. W. Benedict, 143 Nassau st. New York, or the edition which has upon its cover, as published: "New York, S. W. Benedict; Boston, Isaac Knapp." And further says, that he does not know that S. W. Benedict, wrote, printed or published the said Almanacs,

except from the fact that his name appears on the same as publisher.

GEORGE H. ROBERTS.

Sworn before me, this 21st day of Nov., 1839.

ISAAC O. BARKER, *Com. of Deeds.*

The Plaintiff then rested his case: whereupon the counsel for the defendant did then and there insist before the said Circuit Judge, that the said several matters so produced and given in evidence on the part of the said plaintiff, as aforesaid, were insufficient and ought not to be admitted and allowed as decisive evidence to go to the Jury and entitle the said plaintiff to a verdict; and, therefore, that said plaintiff should be non-suited on the ground,

1. That there was a variance between the libel as proved, and that set forth in the declaration—the declaration having, in every count, set forth a libel charging the plaintiff with a felonious violation of the Revised Statutes against kidnapping, while the one proved, only amounted to a charge of misdemeanor, or kidnapping at common law:

2. That the statute had been referred to in reference to the crime of kidnapping, but had not been properly set forth, as it was doubtful whether the plaintiff was charged with kidnapping, or as an accessary after the fact:

3. That the matter alleged to be libelous, was not so *per se*, and that unless the plaintiff had declared for and could show some special damage, he must be non-suited:

4. That every count in the declaration was founded on the supposed charge in the alleged

libel, of kidnapping *with the intent* and *for the purposes* mentioned in Part IV. Chap. I. Title III. Art. II. Sec. XXVIII. Vol. I. of the Revised Statutes—whereas the words in the al leged libel, import *no such intent* with *such purposes.*

And the said Circuit Judge did also then and there declare .and deliver his opinion to the said counsel for the said defendant, that the said plaintiff had produced evidence sufficient for the cause to go to the Jury: to which said opinion of the said Circuit Judge, the said counsel for the said defendant, did then and there, on the behalf of the said defendant, except.

The counsel for the said defendant to maintain and prove the said issue on his part, produced and offered to read in evidence, for the purpose of shewing that the said defendant had probable cause for believing the publication to be true at the time it was made, in order to rebut the inference of *actual* malice, and thus mitigate the damages—the articles in the Emancipator of March 16, 1837, referred to in thematter charged as libelous, consisting of the correspondence of Hon. William Jay and Cornelius W. Lawrence, Ex-Mayor of New York, with the Editorial relating to said correspondence: which said articles are in the words and figures following, to wit:

"KIDNAPPING BY AUTHORITY.

We commend the following correspondence, which we take from the Westchester Herald, to the careful attention of freemen. How long

will the people bear such trifling with their liberty and rights?

ABDUCTION OF PETER LEE.

To the Editor of the Westchester Herald:

Sir,—For the information of the public and especially of those citizens by whose direction I have acted, I beg the favor of you to give the enclosed correspondence a place in your paper. It will be perceived from the Mayor's letters, that the name of the city marshal engaged in the late transaction, was *Nash* and not Tompkins, as stated in the affidavits. It seems that the colored man was seized and sent to the South, under a *three years old* warrant, without the interposition of a magistrate, and without legal proof of his identity.

Yours, respectfully,

Bedford, Jan. 21, 1837. WILLIAM JAY.

To the Hon. C. W. Lawrence, Mayor of the City of New York:

Bedford, Westchester County, Jan. 4th, 1837.

Sir,—At a meeting of the citizens of this county, held in the Unionville church, in the town of Mount Pleasant, on the 20th ultimo, pursuant to public notice, the following resolutions were unanimously adopted, viz.

"Resolved, That the conduct of certain New York police officers in seizing a colored man in this county, on the 20th November last, and in hastily shipping him to the South, as appears

by the affidavits read to this meeting, was an outrage on decency and humanity.

"Resolved, That the said affidavits be forwarded by the chairman, to the Mayor of the city of New York, who is hereby respectfully requested to take measures for the removal of the officers who have so shamefully abused their power."

As chairman of the above mentioned meeting, I have now, sir, the honor, in obedience to the foregoing resolutions, to forward herewith the affidavits to which they refer. The great importance of the subject will I trust furnish an apology for the liberty I take, in troubling you with some remarks in relation to it.

The peace and good order of every community must necessarily depend in no small degree on the opinion, generally entertained of the integrity of those who are connected with the administration of justice. When legal protection is denied or mistrusted, individuals will ever be tempted to resort to violence in self-defence, and the tendency of transactions like the one to which the resolutions refer, is certainly unfavorable to the tranquillity. Two of the deponents, you will observe, after conversing with one of the officers implicated, declare their belief that the colored man was seized and sent to sea without any legal authority whatever. Indeed, the circumstances connected with the transaction, have induced a very general opinion throughout the country, that it was a most detestable outrage. One of the officers, (Lyon,) when charged with having stolen a negro, instead of denying that such a theft had been

committed, instead of explaining by what authority and for what cause the negro had been seized and sent away, excused himself by averring that he only drove the wagon, and publicly avowed that he would do so again for any body who would pay him.

Admitting that the arrest was legal, the unnecessary violence with which it was made, the indecent haste with which the prisoner was sent out of the State, and the profane and unfeeling language used by his captors in regard to him, are well calculated to excite deep disgust. It would be a reflection on the people of Westchester, to suppose that they could see without indignation a free man, (as Lee is supposed to have been,) seized by officers from a foreign county on the evening of the Sabbath, handcuffed, and (as is said) gagged, forced into a carriage, hurried to New York, and the very next day shipped for the South; and all this without application to any magistrate, or the exhibition of any legal authority. Permit me to remark, that it betrays a silly and wanton contempt of public opinion to perform legal acts in such a manner as justly to excite doubts of their lawfulness. If the officers acted under a warrant, they were inexcusable, under the peculiar circumstances of the case, in not shewing it to some of our citizens, and thus preventing those painful suspicions which now rest on an act performed under color of authority. These men, if innocent, owed it to themselves, to the character of their city, and to the feelings of the people of this county, to let it be known that they were discharging

their duty as officers of justice, and that they were not the hired tools of a vile kidnapper.

We are not ignorant that a newspaper in your city has stated, that they had a warrant from the governor issued *three years since*, for the apprehension of *seventeen* colored persons. If this statement be true, it affords cause for deep regret and alarm. Such a warrant, at a time when an able bodied man of any complexion is worth from $1,000 to $1,500 in the slave market, would in the hands of an unprincipled officer, if allowed as in the recent case to seize and ship without the interference of a magistrate, prove a source of iniquitous wealth to himself, and of most tremendous calamity to the weak and unprotected. *Any* poor friendless unknown person, might, with impunity in such case, be publicly seized and handcuffed, and sent into interminable bondage.

You will not, sir, wonder at this unqualified assertion, when you recollect that slavery is not confined to one complexion, and that there is not a member of the Common Council of your city, who, if kidnapped, would be unsaleable on account of the whiteness of his skin. It is only about two years since that a citizen of Maryland arrested in Philadelphia a young girl as his fugitive slave. Fortunately, in *that case*, a legal investigation ensued, when it appeared by the most conclusive and abundant testimony, that the alleged slave (Mary Gilmore,) was the daughter of poor IRISH parents; that her father had absconded while she was an infant, and that her mother died soon after in the Philadelphia hospital? Mr. Calhoun, the late Vice

President, has related the case of a man, "placed on the stand for sale as a slave, whose appearance *in all respects*, gave him a better claim to the character of a WHITE MAN, than most persons so acknowledged could show."—(*Niles' Register for October*, 25, 1834.) In Missouri, a boy was adjudged a slave, although the physicians testified that all the peculiarities of the negro were obliterated, or in other words, that he was a WHITE BOY. Is it not then, sir, cause for alarm to white men as well as black, if a police officer may seize whom he pleases, and send him, *instanter*, to the slave market, and then offer in justification a *three year old warrant*, crowded with names? If persons are liable to be taken in the way that Lee was, who but the officer himself shall determine on the identity of the victims, or know when the number of arrests, corresponds with that of the names included in the warrant? If a warrant like the alleged one may be issued, surely it is not to continue in force forever, nor can it be endured in a free country, that an officer by virtue of it, shall be permitted to send to sea any citizen, at the mere signal of a slave-dealer. Some mode must be devised by which the identity of the party arrested shall be established by legal proof before he can be torn from his wife and children, and manacled for life.

The request made to you, sir, by the meeting, is, of course, founded on the presumed accuracy of the statements made in the affidavits. Those statements, together with the request, will, I trust, sir, induce you as the first magistrate of the metropolis, to institute an inquiry into the

conduct of your subordinates while in this county. Should such an inquiry show the legality of the late arrest, and that the identity of Lee was established according to law, the public will rejoice to learn that their present suspicions are unfounded; and they will indulge the hope that the officers implicated, will derive some salutary hints on the mode of executing warrants, from the excitement caused by their rashness. The inquiry may also lead the legislature to consider what salutary provisions are required to prevent warrants of this description from being made subservient to a horrible cupidity. If, however, it should unhappily be found that men entrusted with power for the protection of the citizen, have exercised that power to rob him of his liberty and to consign him to hopeless slavery, you, sir, I am confident, will cheerfully aid in depriving them of the means of repeating the enormity.

I have the honor to be, sir,

Your very obed't servant,

WILLIAM JAY.

NEW YORK, Jan. 9, 1837.

SIR,—I have received your communication, under date of the 4th instant, with the affidavits, alleging that certain police officers from this city seized a colored man in the county of Westchester, &c. One of the persons charged with the offence, is said to be "John Lyon, of this city, marshal." But no such person has a warrant as a marshal or officer. I have been informed this morning that he is supposed to be

recently from your county, is not much known here, and never held any office in this city. Tobias Boudinot is another of the persons charged with aiding and abetting in the outrage. He is a constable of the third ward, elected by the people of that ward, and I have no power to remove him. Daniel D. Nash is a marshal, and holds a warrant from me. He is now absent on a mission from the sheriff of this county to Georgia. On his return to the city, I will enquire of him as to the part he took in the transaction to which you have alluded.*

In conclusion, I cannot but express my surprise that these papers have been sent to me. If these men have been guilty of the charges made against them, they are liable to severe punishment, and should be made to answer for their conduct in a court of justice.

Respectfully, your obed't servant,

C. W. LAWRENCE.

To the Hon'ble William Jay:

Mayor's Office, New York,
Jan. 10, 1837.

Sir,—Since writing to you under date of the 9th instant, I have seen Mr. Tobias Boudinot, constable of the third ward, and he shewed me a paper from the governor of this State, dated

---

* Nash has returned. We shall see whether the Mayor makes inquiry, and if so, what is the result? We shall be glad to know whether a kidnapper will be retained in office! ED. EMAN."

12th October, 1833, giving authority to the "sheriffs, constables and other peace officers of the several counties of this state to arrest and deliver over the several persons named therein to Enward R. Waddy.

Mr. Tobias Boudinot informs me that the person arrested in your county, is named in the paper before alluded to, as Henry, and that he acknowledged before witnesses that his name was Henry.

As stated in my letter of yesterday, I have no power over Mr. B. You are so well acquainted with the laws, that you must be competent to determine whether his conduct was authorized by law. It seems that Lyon and Nash went with Boudinot, and acted as his assistants, and the only authority Boudinot claims to have had, was the paper from the governor.

I have the honor to be, respectfully,

Your obed't servant,

C. W. LAWRENCE.

Hon'ble William Jay.

"KIDNAPPING BY AUTHORITY.

We wish to call attention particularly to the correspondence, under this caption, in another column. "The roving commission," as it is very appropriately termed, which Boudinot holds, at the hands of Governor Marcy, reveals a state of things most alarming and most atrocious. There is no longer any doubt that he

holds such commission, signed, sealed, and delivered by WILLIAM L. MARCY, Governor of the State of New York. Governor Marcy has himself admitted, within two weeks, to a respectable citizen of this city, that he gave such a warrant to Boudinot. The only exception he made to the statement, was, that instead of seventeen, it only authorized him to take away five or seven persons therein named. The number, however, whether five or fifty, is of no consequence. Five persons are named as fugitives from service or labor, and the warrant authorizes Boudinot, or any other man at his direction, to seize and take off, without the form or pretence of a trial, any person on whom he is pleased to lay his hand. The warrant lays no obligation on him, or his agent, when he arrests a person, to bring him before a competent tribunal, and there, by evidence, *prove* that he is one of the persons therein named. Nothing of of the kind. The whole matter is in his hands; and the Governor's warrant to arrest and take off one Harry, is in fact a warrant to arrest and take off a hundred or a thousand Harrys, if he please. Nay, every colored man he meets he may call him Harry, and forthwith, by virtue of the warrant, hurry him off to interminable and hopeless bondage. And where is the colored man's redress? He has none. Let but the opportunity come, and that warrant in the hands of the unprincipled wretch who holds it, or his agent, is the death-warrant of the liberty of every colored man in the city and State of New York. Not a man is safe, by night or by day. The sorry remnant of protection left him by

the laws and the constitution, is struck down at one blow. One dash of the gubernatorial pen has made it a dead letter—and, free-born though he be, he walks the streets of his native city, or treads the soil of his native State, at his peril. The warrant—waiting only a fitting occasion for its execution—the death-warrant of his liberty, is out against him. Untried, unconvicted, unheard, with sign and seal of Wm. L. Marcy, it is out against him. Has it then come to this? Shall the Chief Magistrate of this State, at his pleasure, strike the liberty of the people dead—aye, the humblest one of the people—with impunity? Why, to what have we come? Is the heel of despotism on our necks already?"

But to the reading of the same in evidence, the said counsel for the said Plaintiff then and there objected: but the said Circuit Judge decided that if said articles referred to in the libel, and offered in evidence were in explanation *of*, and necessary to give a construction *to* the libel, he would allow the same to be read; the counsel for the said defendant then read so much from the Emancipator of March 16, as the letter of Hon. William Jay, when the counsel for the said plaintiff again objected to the further reading in evidence of the said articles in the Emancipator: whereupon the said Circuit Judge sustained the objection of the said Plaintiff's counsel, and declared and delivered his opinion, and decided that the same should be rejected upon the trial of the aforesaid issue, as they did not *explain* the libel: to which said opinion

and decision of the said Circuit Judge, the said counsel for the said defendant did then and there, on the behalf the said defendant, except.

The counsel for the said defendant further to maintain and prove the said issue on his part, produced and offered to read in evidence, for the purpose of showing that the said defendant had probable cause for believing the publication to be true at the time it was made, in order to rebut the inference of *actual* malice, and thus mitigate the damages—an article in the Emancipator of May 4, 1837, referred to in the matter charged as libelous and set forth in the said plaintiff's declaration: which said article is in the words and figures following, to wit:

"GOV. MARCY AND THE ROVING COMMISSION.

On the 16th of March we published the correspondence between the Hon. Wm. Jay and the mayor of this city, touching the abduction of a colored man, by the name of Peter Lee, from the county of Westchester, under cover of a warrant from Governor Marcy. From this correspondence, it appeared that the "colored man was seized and sent to the South, under a three years old warrant, without the interposition of a magistrate, and without any legal proof of his identity." At that time it was not known, nor after considerable inquiry could it be ascertained what the precise character of the warrant was, whether such as to make the arrest legal or not. On the seizure of Lee, the warrant was shown to none, and in the letter of the mayor to Mr. Jay, no information was given except that it was a warrant to "arrest several

persons named therein," without specifying whether they were to be arrested as fugitives from justice or labor. The presumption, to be sure, in the absence of all evidence, would have been, that it was in accordance with the technics of law, and designed to arrest them only as fugitives from justice. This, however, was much weakened, by the clandestine, and violent, and hurried manner in which the warrant was served, and by the obvious fact, that the end aimed at in the procedure by the parties concerned, was their arrest as fugitive slaves, and not as fugitives from justice. Under these circumstances, with our eye upon the real end compassed by the warrant, and aimed at by those who procured it, rather than upon what might be presumed to be the technics of its letter, we commented in severe terms upon the conduct of the governor, in granting it, and in doing so, spoke of the persons named in it as "fugitives from service or labor." So far it will be seen we were in error, and did the governor unintentional wrong.

On the 29th of March, our remarks were copied into the Albany Argus, and accompanied with the following vindication of the governor's conduct:

"We have inquired into the case alluded to in the foregoing article, and find, as we expected, that it is a gross perversion of truth, and so far as it assails the conduct of the governor, is without a pretext of justification. The facts of the case, divested of the falsehoods which have been mingled with them to season the dish for

the morbid appetites of the abolitionists, are the following:

"Previous to October, 1833, several persons, mostly or all persons of color, committed a felony in North Carolina or Virginia, by stealing a small vessel and running away with her to New York. The crime was clearly proved against them, as well as the fact that they had fled to this State. The evidence of their guilt, duly authenticated, was laid before the governor of the State where the offence was committed; he made a requisition on the governor of New York for their delivery to *Edward R. Waddy*, duly authorised and appointed to receive them, and transmitted it with the evidence to Gov. Marcy. By the Constitution of the United States, the act of Congress, and the laws of New York, he was bound to deliver the fugitive felons to the agent of the State demanding them. The delivery was a matter of duty, and not of discretion or choice. He did what his oath of office and the duty of his station required, and no more. He issued his warrant for the arrest to the legal ministerial officers of the state.—This is all that Gov. Marcy has done.

"Now let us inquire—Could he have done less? Should he have done more? The United States Constitution says: 'A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the Executive authority from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.'—Art. 4, sec. 2. A part of the governor's official oath, is that he 'will sup-

port the Constitution of the United States.' It is scarcely to be believed that the most rabid abolitionist would expect him to violate or disregard this solemn obligation, in order to protect runaway thieves, because they were colored persons. The law of Congress in relation to the proof that the fugitives were criminals, was in this case strictly complied with, by the Executive making the demand. It is therefore very clear that Gov. Marcy could not have done less in this case than he did. Should he have done more? He did all the law required —all the law permitted him to do. It is alleged that he did not order the persons arrested before a tribunal in order to have their identity established. The law has not directed this course of procedure, nor has any tribunal been constituted for that purpose, to which he could have referred the question of identity, if he could have assumed, as the abolitionists hold he should, that the officer to whom his warrant should be delivered would violate his duty and use it as a pretext for the commission of a heinous crime—an assumption which would have been strange indeed, inasmuch as such an abuse had not been proved, or even then alleged to have taken place in a single instance in any one of the States. The laws have not required, nor could the wit of man foresee, what would be necessary to comply with the idle vagaries of distempered fanatics. Gov. Marcy acted under the same laws, issued the same kind of warrant, and pursued the same course that each and all his predecessors had done, including Gov. Jay. We allude to Gov. Jay with great

respect, and are sorry to perceive that his fanatical son, who cannot plead ignorance as an excuse for his errors, has been the willing instigator of this attack upon Gov. Marcy. He knew full well that the governor had issued his warrant against the persons named therein *as fugitive felons*, and not as *fugitive slaves;* yét he disingenuously frames his remarks so as to leave his more ignorant associates in the abolition cause to infer that the fugitives were arrested on the pretence that they had fled from slavery. The editor of the Emancipator, perhaps less censurable than Judge Jay, announces the broad falsehood that 'five persons are named as fugitives from service or labor,' &c. Judge Jay knew, and if the editor had wished to be informed, he might have known, that Gov. Marcy never did issue a warrant for the arrest of five persons, or any person as a fugitive from service or labor.

"The number of persons named in the warrant, is ingeniously wrought into an aggravating circumstance in this case. Is the governor to blame because there were several rogues instead of one or two? He could not have omitted, without disregarding his duty, to cause to be surrendered each and all the felons that were demanded. Would the case have been altered for the better, if he had issued a separate warrant for each?

"When Judge Jay affects to find fault because the warrant was used after it was three years old, he must have been aware that it did not differ from other warrants issued for like purposes. It was as to form and direction the same as all governers have issued in such cases."

It will be seen at once, that the statement above, of the editor of the Argus, entering as it does, into all the details of the case, could not have been made, except on inquiry into the facts, of the governor himself. So that the statement may fairly be regarded as virtually his.—Suppose then we examine it, and compare its several parts with the real facts in the case. In doing so, we shall not stop to bandy epithets nor to enlarge on minute and unimportant matters. We will simply say, in passing, that "the number of persons named in the warrant" was not "ingeniously wrought into an aggravating circumstance." So far from it, we said expressly in the very article quoted by the Argus, "the number, however, whether five or fifty, is of no consequence." And in respect to our "charges against the governor," we now cheerfully say, that so far as we erred in not keeping to the technics of the law in our phraseology, so far we retract all charges, and moreover add, that so far as he, in issuing the warrant, kept within the technics as well as the true intent and meaning of the law, so far, we acquit him of blame. But this is the grand point in question. How far did he do this?

The editor of the Argus assures us that he did it in all respects. Not only was it a warrant to arrest them as fugitives from justice, but "the law of Congress in relation to the proof that the fugitives *were* criminals, was in this case strictly complied with by the Executive making the demand," and the warrant itself "was, as to form and direction, the *same* as all governors have issued in such cases." Such is

the positive declaration made by authority in the case. Is it in accordance with the facts ?

In 1832, on application from the governor of Rhode Island, Gov. Throop, of this state, issued a warrant for the arrest of John L. Clark, charged with a certain offence committed in the former state. Now for the "*same*"-ness of the two warrants.

GOV. MARCY'S WARRANT.

William L. Marcy, Gov. of the State of of New York, to the sheriff of the city and county of New York, and the sheriffs, constables, and the peace officers of the several counties in the said state :

Whereas, it has been represented to me by the Governor of the State of Virginia, that *Jack Cowley*, or Cooley, Severn, George Carter, Joe, Tom Carter, Michael, Caleb, Charles, Ben Southey, Slack, Isaac, James, Ben, Henry, Southey and Ann, slaves, the property of several citizens of that commonwealth, stand charged of a felony in the county of Northampton, in the said state of Virginia, and that they have fled from justice in that state, and have taken refuge in the State of New York—and it *being sufficiently proved* to me that they are guilty thereof—and the Governor of the State of Virginia, having demanded of me that the said Jack Cow-

GOV THROOP'S WARRANT.

"Enos T. Throop, governor of the State of New York, to the sheriff of the city and county of New York, and the sheriffs, constables, and other peace officers of the several counties in the state : Whereas, it has been represented to me by the Governor of the State of Rhode Island, that John L. Clark, late of Providence, in the said state, has been guilty of frauds in abstracting from the Burrilville Bank, in that state, money, notes, and bank bills, while president of said bank, in a fraudulent manner, which said acts are made criminal by the laws of that state ; that he has fled from justice in that state, and has taken refuge in the State of New York ; and that said Governor of Rhode Island has, in pursuance of the constitution and laws of the United States, demanded of me that I should cause the said John L. Clark to be arrested and delivered into the custody of Henry G. Mum-

ley or Cooly, Severn, George Carter, Tom Carter, Joe, Michael, Caleb, Charles, Southy, Slack, Isaac, James, Ben, Henry, Southey, and Ann should be delivered to Edward R. Waddy, of the county of Northampton and State of Virginia, aforesaid, to be brought back within the jurisdiction of said state. I do therefore, by virtue of the power vested in me by the constitution and laws of the United States, order you to arrest and deliver over the said Jack Cowley or Cooley, Severn, George Carter, Tom Carter, Joe, Michael, Caleb, Charles, Southey, Slack, Isaac, James, Ben, Henry, Southey, and Ann, into the custody of the said Edward R. Waddy, for the purposes aforesaid.

Given under my hand and privy seal of the state at the Capitol in the city of Albany, this 12th day of October, in the year of our Lord one thousand eight hundred and thirty-three.

W. L. MARCY. [L S.]

A true copy* drawn by me, Deputy Keeper of the Debtors' Prison,

JAS. W. SLOVER.

N. York, 29th March, 1837.

ford, sheriff of the county of Providence, who is duly authorized to receive him into his custody, and convey him back, &c. And whereas, the said representation and demand is accompanied by an affidavit taken before a justice of the peace of said state of Rhode Island, whereby the said John L. Clark is charged with the said crime, which affidavit is certified by the said governor, &c. to be duly authenticated: You are therefore required, &c.— Wendell's Reports, vol. 9. pp. 212--221.

* This copy of the writ was obtained recently in the case of the alleged slave Ben.

The dissimilarity of these documents is manifest at a glance. The one charges the individuals in general terms with "a felony," the other specifies and describes the offence; the one says not a word of an "affidavit" accompa-

nying the "representation and demand" and "certified by the governor" as "duly authenticated," the other does, and bases compliance with the demand mainly on this fact. Which of the two is according to the intent and the terms of the law?

The law of Congress "in relation to the proof," is as follows:

"Whenever the executive authority of any state in the Union, or of either of the territories, shall demand any person as a fugitive from justice, of the executive authority of any state or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor, or chief magistrate of the state, &c., from whence the person so charged fled, it shall be he duty," &c.

And in the case of Clark, above cited, Judge Savage decided, that according to this law, in order to give the governor of the state jurisdiction in the case, "three things are requisite. 1. The fugitive must be demanded by the executive of the state from which he fled. 2. A copy of an indictment found, or an affidavit made before a magistrate charging the fugitive with having committed the crime. 3. Such copy of the indictment or affidavit must be certified as authentic by the executive." In the warrant issued by Governor Throop, all this was done. In that issued by Governor Marcy it was not

done—at least there is no evidence of it in the warrant itself. To be sure the warrant sets forth "it being *sufficiently* proved to *me* that they are *guilty*," but what has Gov. M. to do with the question of their guilt? The only question for him to decide, if they are claimed as fugitives from justice, is whether they are *charged* with guilt, and if so, whether they are charged *according to the terms of the law.* Guilty or not guilty, if not charged according to these, he may not issue his warrant. In each and every case, there must be the demand, the copy of the indictment or affidavit, and the certificate of its authenticity, from the governor, otherwise the warrant may not issue, or if it does, becomes thereby a nullity. And yet where is the evidence that these requisites existed in the present case? Had such been the fact, and had the "form and direction" of the warrant been "the same" as in other cases, evidence of their existence must have found its way into the warrant. The instrument itself, on its very face, must have told us, not of a demand and a satisfaction of guilt, but of a demand accompanied with a copy of the indictment or affidavit, and a certificate of the governor. And now, that the warrant shows nothing of the kind, what is the inference, the obvious and legitimate inference, but, 1. That the warrant is good for nothing, and 2. That Governor Marcy issued it without authority and in violation of the requisitions of the law, and thus put into the hands of the wretch who now holds it, an instrument by which, so long as its validity is not destroyed by some le-

gal decision, he may kidnap men and women, *ad libitum*, and by authority."

But to the reading of the same in evidence, the said counsel for the said plaintiff then and there objected. Whereupon the said Circuit Judge sustained the objections of the said plaintiff's counsel, and declared and delivered his opinion, and decided that the same should be rejected upon the trial of the aforesaid issue, as it did not *explain* the libel; to which said opinion and decision of the said Circuit Judge, the said counsel for the said defendant did then and there on the behalf of the said defendant, except.

The counsel for the said defendant further to maintain and prove the said issue on his part, produced as a witness *Cornelius W. Lawrence*, and offered to prove by the said witness, for the purpose of showing that the defendant had probable cause for believing the publication to be true at the time it was made, in order to rebut the inference of *actual* malice, and thus to mitigate the damages —that a certain correspondence between him and Hon. William Jay, of Westchester county, which was found in the Emancipator of March 16, 1837, and which had been offered to be read in evidence, *had actually taken place*: But to the admission of the said Cornelius W. Lawrence, as a witness to such fact, the said counsel for the said plaintiff did then and there object, which said objections were then and there admitted and sustained by the said Circuit Judge, who declared and delivered his opinion, and decided that the said testimony so offered to be given as aforesaid, should not be given or admitted in evidence on the trial of the said issue so joined between the said Daniel D. Nash and the

said Seth W. Benedict, as aforesaid: to which said opinion and decision of the said Circuit Judge, the said counsel for the said defendant, did then and there, on the behalf of the said defendant, except.

The counsel for the said defendant further to maintain and prove the issue on his part, produced as a witness, *John Lyon*, one of the persons named in the alleged libel, and offered to prove by the said witness, for the purpose of showing that the said defendant had probable cause for believing the publication to be true, at the time it was made, in order to rebut the inference of *actual* malice, and thus to mitigate the damages—that the said plaintiff and others named in the alleged libel, did arrest a colored man on Sunday, November 20th, 1836, in Westchester county, under and by virtue of *some proper authority:* But to the admission of the said testimony so offered to be given as aforesaid, the said counsel for the said plaintiff did then and there object: Which said objection was then and there admitted and sustained by the said Circuit Judge, who declared and delivered his opinion, and decided that the said testimony so offered to be given as aforesaid, should not be given or admitted in evidence, on the trial of the said issue so joined between the said plaintiff and the said defendant, as aforesaid, to which said opinion and decision of the said Circuit Judge, the said counsel for the said defendant did then and there, on behalf of the said defendant, except.

The counsel for the said defendant further to maintain and prove the issue on his part, again offered to prove by the said John Lyon, for the purposes aforesaid, in mitigation of damages—that the

said plaintiff and others in said supposed libel named, took said colored man, by virtue of a warrant issued by William L. Marcy, late Governor of the State of New York, on the requisition of the late Governor of the State of Virginia, as a proper and legal authority for the arrest—and also the fact, that the said arrest was made by such authority, was unknown to the defendant at the time of the publication : but to the admission of the said testimony so offered to be given as aforesaid, the said counsel for the said plaintiff, did then and there object : which said objection was then and there admitted and sustained by the said Circuit Judge, who declared and delivered his opinion, and decided that the said testimony so offered to be given as aforesaid, should not be given or admitted in evidence, on the trial of the said issue so joined as aforesaid : to which said opinion and decision of the said Circuit Judge the said counsel for the said defendant, did then and there, on the behalf of the said defendant, except.

Defendant's counsel further to maintain and prove the said issue on his part, produced and offered to read in evidence, for the purpose of shewing that the said defendant had probable cause for believing the publication to be true, at the time it was made, in order to rebut the inference of *actual* malice, and thus to mitigate the damages—two certain articles in the New York Sun of November 23 and 24, 1836: which said articles are in the words and figures following, to wit:

"OUTRAGE AND KIDNAPPING.

We have learnt from Mr. Gilbert Lyon, of Rye, the particulars of a most infamous outrage

which was perpetrated in that town night before last. An industrious and worthy colored man, (name not recollected,) who has been for some months in the employ of Seth Lyon, Esq., a justice of the peace, living in Byrum village, Greenwich, Conn., situated opposite Rye, N. Y., on a small stream there which divides the States of New York and Connecticut. This colored man had been employed for several years in that neighborhood—sometimes working at Rye, and then again at Byrum. Night before last, he was induced by an acquaintance at Rye to come over the bridge, under some pretence; when he was immediately seized by ten or a dozen ruffians, bound, and thrown into a waggon, which was then driven at great speed for New York. Great excitement prevails, both at Rye and Byrum, in consequence of this outrage; and both justice Lyon, of the latter place, (in whose employ the negro was,) and justice Brown, of Rye, have written to the mayor of this city on this subject. It is said that the individual who enticed the negro over the line, was paid $1 50 for so doing.

Mr. G. Lyon also informs us that he has ascertained since coming to this city, that the negro in question was arrested (probably as a runaway slave) by Mr. John Lyon, one of our city marshals, and associates, and has already been put on board a vessel for the South. If this be true, we hope Mr. John Lyon will forthwith give us some light on the subject; for, as the case now appears, it is nothing more nor less than one of bare faced kidnapping, and a daring outrage and insult upon the laws of this community."

"THE KIDNAPPING CASE.

Mr. Boudinot, a deputy sheriff, called upon us yesterday, and explained the circumstance of carrying off the negro from Rye, Westchester, on Monday night. Boudinot, it appears, employed Mr. John Lyon to drive the vehicle for him in which the negro was brought away, and of course Mr. L. had no hand in the arrest. The negro, whose name is Peter or Peters, *alias* Henry, is alleged to have run away from Northampton, Virginia, some years ago, in company with 17 others, all of whom together stole a small craft, and landed in New York. Many of them have already been taken, but Peters, as is alleged, has escaped until he was arrested as stated yesterday. E. R. Waddy, a deputy sheriff from Northampton, immediately dispatched Peters for the South. Boudi. not shewed us this authority for arresting near a score of negroes. It was a requisition from Gov. Marcy, dated Oct., 1833, in which power is given to the sheriff of New York to deliver into the custody of E. R. Waddy seventeen negroes accused of a felony, and fugitives from justice. Let every black man, therefore. who cannot give a good account of himself for at least more than three years back, look out."

But to the reading of the same in evidence, the said counsel for the said plaintiff, then and there objected: whereupon the said Circuit Judge sustained the objection of the said plaintiff's counsel, and declared and delivered his opinion, and decided that the same should be rejected upon the trial of the aforesaid issue: to which said opinion and decision of the said

Circuit Judge, the said counsel for the said defendant, did then and there on the behalf of the said defendant, except.

The counsel for the said defendant further to maintain and prove the issue on his part, produced and read in evidence, an affidavit taken on the part of the said plantiff, and stipulated by the attorneys for the respective parties, to be read *de bene esse* on the trial of the said cause: which said affidavit is in the words and figures following, to wit:

SUPREME COURT.

Daniel D. Nash, *vs.* Seth W. Benedict.

City and County of New York, ss.

Amos F. Hatfield, of White Plains, being duly sworn says, that he does not know defendant. The first time he ever knew plaintiff was at Mameroneck, in the County or Westchester, either in the month of November or December, 1836; it was cold weather; I was the under sheriff at that time of the county; Nash, in company with Tobias Boudinot, and Mr. Lyon, and one or two other persons, whose names I did not know, came to my house with a black man in their custody. I asked them by what authority they took him; they answered they had taken him by a Governor's warrant; they tr eated the man to some liquor, and made him sit up by the grate and warm himself. I saw nothing otherwise but that they treated him perfectly kind. I supposed the reason of their coming to my house was, that at that time I kept a public

house. There were a number of persons in the bar room at the time. This deponent further says, that he did not know the black man's name, never saw him before; it was in the evening; they stopped at my house, going up the first of the evening, and returned about ten o'clock with the man. Plaintiff was in company with Tobias Boudinot and Mr. Lyon. Lyon had a scar on his face, don't know his Christian name. They had a relay of horses at my house and went up to Sawpits, came with a barouche, thinks it was on Sunday, thinks the age of the colored man from 35 to 40, they said they took the colored man from Saw Pits, does not know what became of said colored man after leaving his house. AMOS F. HATFIELD.

Sworn before me, this 21st day of Nov, 1839.

W. M. MITCHELL, *Com. of Deeds.*

Counsel for the respective parties having summed up the testimony in the cause to the said jury, the said Circuit Judge did also then and there declare and deliver his charge to the said jury, that the publication of the defendant was a libel, whether it charged the plantiff with the crime of *kidnapping under the statute* or *not*, but that in his opinion the libel would admit of no other construction than a charge of felonious kidnapping under the statute—that, the action being sustained, and the defendant not having pleaded any justification, the only question was one of damages, which belonged peculiarly to the jury to decide. There could be but one opinion

as to the atrocious nature of the charge—that the defendant had selected an Almanac as the vehicle of his slander, a form and mode of publication calculated to give the most extended circulation to the calumny—and that the transaction referred to was a public one, and had occurred long before the publication was made, giving the defendant the most ample opportunity to ascertain the *truth* in relation to the charge he had seen fit to make against the plantiff: to the whole of which said charge, before the said jury retired, the counsel for the said defendant did then and there on the behalf of the said defendant, except—and also request the said Circuit Judge to charge the said jury, that the publication or supposed libel now in evidence, only imputed to the plaintiff a misdemeanor, and did not charge upon the plaintiff a violation of the statute of this state against kidnapping; and that they ought to consider the character of the offence charged in making up their verdict: But the said Circuit Judge to charge the jury as above requested, refused; and the counsel for the said defendant then and there took his exception to said refusal.

The counsel for the said defendant also then and there requested the said Judge to leave the question to the jury to say which offence the publication intended to charge, and if only a misdemeanor, the jury ought to give damages commensurate only with such a charge: But the said Judge told the said jury that the publication was clearly libelous, and in his opinion charged the said plaintiff with a felonious violation of the statute of this State against kidnap-

ping, but the question, as to the degree of crime charged in the libel and the damages they should give, was wholly within their own province; to which said opinion and decision of the said Circuit Judge the said counsel for the said defendant did then and there on the behalf of the said defendant, except.

And the said Circuit Judge, under the charge and with the direction aforesaid, left the aforesaid issue and the evidence so given on the trial thereof, as aforesaid to the said jury: and the jury aforesaid then and there gave their verdict for the said plaintiff, and $1,500 damages; and because none of the said exceptions so offered and made, to the opinions and decisions of the said Circuit Judge, do appear upon the record of the said trial, therefore, on the prayer of the said defendant, by his said counsel, the said Circuit Judge hath to this *bill of exceptions* set his seal, according to the statute in that case made, this 2nd day of April, in the year of our Lord, one thousand eight hundred and forty one.

PHILO GRIDLEY,
Circuit Judge. (L. S.)

Let this cause be argued before the Supreme Court without being argued first before the Circuit Judge. Dated April 2nd, 1841.

P. GRIDLEY,
Circuit Judge.