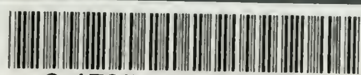
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OPINION

OF

CHIEF JUSTICE HORNBLOWER,

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FUGITIVE SLAVE LAW.

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ON THE FUGITIVE SLAVE LAW.

The following is the opinion of the distinguished Chief Justice of New Jersey, an extract from which was quoted at a late political convention in Ohio, and reported in our columns. Though it was given fifteen years ago, we are happy to say that its opinions continue to be the opinions of its venerable author, while the argument is as impregnable and unchangeable as the everlasting principles of truth and justice.

New Jersey Superior Court, February Term, 1836.

The State vs. The Sheriff of Burlington.—In Habeas Corpus: in the case of Nathan, al. dict: Alex. Helmsly, a colored man.

Upon application in behalf of the prisoner, the writ of Habeas Corpus was allowed by the Chief Justice, returnable at chambers. When the prisoner was brought up, the case presenting some difficulties, the Chief Justice remanded the prisoner with instructions to the Sheriff to have him, together with the cause of his caption and detention, at the bar of this court on the first day of this term.

By the Sheriff's return, it appears that the prisoner had been arrested on a warrant issued by Judge Haywood, of the county of Burlington, and committed to the common jail of said county at the instance of one Willoughby, acting as the agent of a man by the name of ———, in the state of Maryland, and who, as executor of a deceased person, claimed the prisoner as a runaway slave.

The case was argued by Mr. W. Halsted and by Mr. Frelinghuysen, in behalf of the prisoner, and by Mr. Clark and Mr Brown for the claimant.

The Judges delivered opinions *seriatim*: all, however, concurring in discharging the prisoner out of the custody of the Sheriff.

Hornblower, Ch. Just.—By the 3d clause of the 2d sect. of the 4th art. of the Constitution of the United States, it is declared that "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 claim of the party to whom such service or labor may be due."

Upon this subject, both the Congress of the United States and the General Assembly of this state have undertaken to legislate, and have passed conflicting laws in regard to it, not indeed in direct opposition to each other, but nevertheless conflicting, because dissimilar laws. They prescribe different modes of proceeding, and seek to enforce them by different sanctions. Both cannot be pursued at one and the same time, and one only, I apprehend, must be paramount.

By the 3d sect. of an act of Congress passed the 12th February, 1793, entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters, it is enacted that the person to whom such service or labor may be due, his agent or attorney may seize or arrest such fugitive, (without proof or warrant,) and take him or her before any Judge of the Circuit or District Court of the United States, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satifaction of such judge or magistrate, either by oral testimony or affidavit, taken before, and certified by, a magistrate of any such state or territory that the person so seized or arrested doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him, when it shall be the duty of the judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive from labor to the state or territory from which he or she fled.

This, it must be admitted, is a summary and dangerous proceeding, and affords but little protection or security to the free colored man, who may be falsely claimed as a fugitive from labor, or whose identity may be mistaken.

The provisions of the act of this state (Harr. comp. 146) are more humane, and better calculated to prevent frauds and oppression. But the question arises, which shall prevail, the act of Congress, or the law of this state?

By the second clause of the sixth article of the Constitution of the United States, it is declared that the constitution and the laws of the United States, "*made in pursuance thereof*," shall be the SUPREME law of the land, and that the judges in every state shall be bound thereby, "any thing in the constitution or laws of any state to the contrary notwithstanding." If, then, Congress has a right to legislate on this subject, the act of Congress must prevail, and the statute of New Jersey is no better than a dead letter. They cannot both be the SUPREME law of the land and constitute the rule of action in one and the same matter. The judges of this state are bound by the act of Congress, any thing in the constitution or law of this state to the contrary notwithstanding. If both acts were precisely the same in all their provisions and sanctions, yet a proceeding in conformity therewith would derive all its authority from the act of Congress and not from the law of this state. But the provisions of the two statutes are very dissimilar, and as the proceedings in this case profess to be in pursuance of the act of this state, it follows, of course, upon the supposition that Congress has a right to legislate in the matter, that the prisoner has been unlawfully committed and ought to be discharged out of the custody of the Sheriff. Upon this ground I might refrain from all further discussion, and render my judgment at once; but then I should be understood as fully admitting the right of Congress to legislate upon the subject, an admission I am by no means prepared to make, any more than I am to express a contrary opinion. I intend only to assign the reasons why I do not at once admit the supremacy of the act of Congress, reserving to myself the right of forming and expressing a final decision hereafter, if in this or in any other case such decision shall become necessary.

The 1st and 2d sections of the 4th article of the Constitution of the United States are declarative of certain international principles, agreed upon between the parties to that instrument: 1st. That full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. 2dly. That the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. 3dly. That persons fleeing from justice, and found in another state, shall be delivered up, &c. And 4thly. That persons held to labor or service in one state, and escaping into another, shall be surrendered to the party to whom such labor or service is due. By adopting the constitution, the several states became bound to carry out in practice these several constitutional principles; but whether the manner of doing so is to be regulated by state legislation, or by general acts of Congress, is the question. The framers of the constitution thought proper (and it is to be supposed that they did so for some sufficient reason) to arrange the four particulars above mentioned under two distinct sections. By the 1st, it is provided that full faith and credit shall be given in each state to the public acts, records, &c. of every other state. But it does not stop here: if it did, this provision would stand in the same catagory with those contained in the next section, and there would seem to have been no reason for the distribution of these principles into distinct sections. But it is added: "And the Congress *may*, by general laws, prescribe the *manner* in which said acts, &c., shall be proved, and the effect thereof." Then follows the 2d section, embracing the other three principles above mentioned, but *without* annexing to them, or to either of them, the right of legislation by the general government. Hence there seems to arise a fair argument that the framers of the constitution had no idea that the simple statement of these several international stipulations, would confer on Congress any legislative powers concerning them, but as they designed to subject the first particular to the control and regulation of the general government, they arranged it under a distinct section, and in express terms annexed to it the power of legislation, and then threw the other three stipulations together in another section of the instrument, without saying anything more, because no such power was intended to be given to Congress respecting them. A different construction would expose the authors of the constitution to the charge of encumbering it with a useless provision, worse indeed than useless, because, if simply writing down and adopting the several conventional principles comprehended in the second section, carried along with them a right in the general government to provide by law for the manner in which they should be executed, the express grant of such a power in the preceding section was not only useless, but calculated to create doubt and uncertainty as to the right of Congress to legislate on matters contained in the second section. For if the power of legislation is impliedly annexed to the simple stipulations of the second section, it is difficult to perceive why the same implication would not have arisen upon the simple declaration that full faith and credit should be given to the public acts of one state, in the courts of every other state. That the constitution has in express terms given the

right of legislation to Congress in reference to one of the four conventional items above mentioned, and remained silent in respect to the others, is to my mind a strong argument that no such power was intended to be given in connection with them.

Again. Are there not sound political as well as judicial reasons, for granting to Congress the power of legislation in the one case, and withholding it in the others ? No one state could prescribe the manner in which its own public acts, records and judicial proceedings should be proved in the courts of another state. The rule of evidence is *lex loci*, and every court might have required a different mode of proof. This would have been very inconvenient. It was desirable, therefore, that there should be one uniform rule throughout the country on that subject. But the manner and form in which public acts and records should be exemplified, was a matter about which Congress might safely legislate without discomposing the pride and complacency of state sovereignty, and without the danger of coming into conflict with state institutions and local jurisprudence. Not so in respect to the other stipulations. Legislation by Congress regulating the manner in which a citizen of one state should be secured and protected in the enjoyment of his citizenship in another, would cover a broad field, and lead to the most unhappy results. So, too, general acts of Congress prescribing by what persons or officers, with or without process, refugees from justice, or persons escaping from labor may be seized or arrested in one state, and forcibly carried into another, can hardly fail to bring the general government into conflict with the state authorities, and the prejudices of local communities. Such to some extent has already been the case in this and other states. A constructive power of legislation in Congress is not a favorite doctrine of the present day. By a large portion of the country, the right of Congress to legislate on the subject of slavery at all, even in the district and territories over which it has exclusive jurisdiction, is denied, and surely by such it will not be insisted that Congress has a constructive right to prescribe the manner in which persons residing in the free states, shall be arrested, imprisoned, delivered up, and transferred from one state to another, simply because they are claimed as slaves.

In short, if the power of legislation upon this subject, is not given to Congress in the 2d section of the 4th article of the constitution, it cannot, I think, be found in that instrument. The last clause of the 8th section of the 1st article, gives to Congress a right to make all laws which shall be necessary and proper for carrying into execution all the *powers* vested by the constitution in the government of the United States, or in any department or office thereof. But the provisions of the 2d section of the 4th article of the constitution covers no grant to, confides no trust, and vests no *powers* in the government of the United States. The language of the whole office of that section is to establish certain principles and rules of action, by which the contracting parties are to be governed in certain specified cases. The stipulations respecting the rights of citizenship, and the delivery of persons fleeing from justice, or escaping from bondage, are not grants of power to the general government, to be executed by it, in derogation of state authority ; but they are in the nature of treaty stipulations, resting for their fulfilment upon the enlightened patriotism and good faith of the several states.

The argument in favor of Congressional legislation, founded on the suggestion that some of the states might refuse a compliance with these constitutional provisions, or neglect to pass any laws to carry them into effect, is entitled to no weight. Such refusal would amount to a violation of the national compact, and is not to be presumed or anticipated. The same argument, carried out in its results, would invest the general government with almost unlimited power, and extend its constructive rights far beyond any thing that has ever been contended for. The American people would not long submit to a course of legislation by Congress founded on no better authority than the unjust assumption that the states, if left to themselves, would not in good faith carry into effect the provisions of the constitution.

But as I have said before, it is not my intention to express any definitive opinion on the validity of the act of Congress, nor is it necessary to do so in this case, as the proceeding in question has not been in conformity with the provisions of that act, but in pursuance of the law of this state. The counsel for the prisoner have insisted upon his enlargement, on the ground that his arrest and commitment were irregular, and unauthorized by the statute. But a preliminary, and to my mind, a very grave and important question arises. Admitting the right of state legislation on this subject (which I am not disposed to deny,) is the law of this state a constitutional one ? It authorizes the seizure, and transfer out of this state, of persons residing here, under the protection of our laws, claiming to be, and who in fact may be, free-born native inhabitants, the owners of property, and the fathers of families, upon a summary hearing before a single judge, without the intervention of a jury, and without appeal ! Can such be a constitutional law ? Neither the prisoner at the bar, nor the most wretched and obscure individual in the state, whether young or old, bond or free, can be deprived of his liberty or his property, or be subjected to any forfeitures, pains or penalties, without a trial by jury in the due course of law. If the prisoner at the bar, instead of being arrested as

a slave, had been sued for forty shillings, it could not have been recovered of him, but by a verdict of a jury. If a man had come from another state and laid claim to any chattel in the possession of the prisoner, he could not have taken it from him, but by due course of law. And yet, by this act, a man may be compelled to join issue before a single judge—a judge of his adversary's own choosing, and in a summary way, not according to the course of common law—an issue, it may be, more awful, more agonizing to his soul, than one involving his *life* and *death*—an issue, on the decision of which hangs that tremendous question, whether he is to be separated forcibly, and for ever, from his wife and children, or be permitted to enjoy with them the liberty he inherited, and the property he has earned. Whether he is to be dragged in chains to a distant land, and doomed to perpetual slavery, or continue to breathe the air and enjoy the blessings of freedom. An issue, not only involving the question whether he ever was a slave, or, if once a slave, whether he was liberated, or actually fled from his master; but, it may be, involving the identity of his person. He may be falsely accused of escaping from his master, or he may be claimed by mistake for one who has actually fled. These are questions of fact, upon proof or failure of proof of which, depend results of deep and affecting interest to the individual. If every colored man, woman and child were slaves, the danger of oppression and injustice by an unfounded or mistaken claim would be of little consequence. But such is not the fact. On the 4th July next, there will not be a slave in the state under the age of thirty-two years. All that have been born since the 4th July, 1804, are *freemen;* and by the laws and constitution of this state, every question affecting their rights to property, or of personal liberty and security, is to be *tried* and settled in the same solemn manner and by the same tribunals by which the rights of others are to be determined. By the 23d act of our constitution, the trial by jury is guaranteed and preserved to us. Who, then, shall take it away from any human being living under the protection of our laws? But, it is said, the Constitution of the United States is paramount to that of our state, and by the former we are bound to deliver up persons escaping from labor or service. Granted; and let it be executed fully, fairly, and with judicial firmness and integrity. But what does it require? That the person *claimed* shall be given up? If it did so, I admit there can be no trial, no appeal—the *claim* would be final and conclusive. But such is not the language or the meaning of the constitution. In respect to refugees from justice, the case is very different. The constitution declares that persons *charged* with crime in any state, shall on demand of the EXECUTIVE authority of that state, be delivered up (Clark's case, 9 Wend: p. 212). Here is to be an official act—the demand is made by the public authorities, founded simply upon a *charge* of crime.

The accused is to be delivered up, not to be punished, not to be detained for life, but to be *tried*, and if acquitted, to be set at liberty. Not so in the matter under consideration. The person claimed is not to be delivered up *unless* he was "held to labor or service" in another state; that is, unless he was *lawfully* held to service or labor there; nor *unless* he has *fled* or *escaped* into this state; that is, come into this state without the consent of his owner. And he is delivered up, not to the *claimant*, but only to the person "to whom such labor or service is due." Here then are facts to be ascertained, not to be taken for granted, but to be lawfully proved and judicially determined; facts which lie at the foundation of the claimant's right; facts which involve the dearest rights of a human being, and which the claimant must establish according to law, before he can acquire any right to carry away his victim. And what legislator, under our constitution, has a right to say that these facts shall be tried and definitely settled in a summary manner, and without the verdict of a jury? The Constitution of the United States does not require any such departure from first principles. It only demands that we shall deliver up to his owner *a runaway slave*, when he has been proved to be such in due course of law. It does not require us to do it without proof, nor upon less or different proof than such as would be sufficient to establish any other issuable fact in our courts of justice.

A case has been cited from 5 Searg & Rawl 62, in which it is said that the Court of Pennsylvania decided, that it would not review the proceedings before the inferior magistrate, because the Constitution of the United States requires *the slave* to be given up; and when it was urged that whether *slave* or *not slave* is a question to be settled *here*, the answer borrowed from that case was, that no injustice would be done to the prisoner, because he can assert his freedom in the place to which he may be transported, and we are bound to presume that he will there have a fair trial. So long as I sit upon this bench, I never can, no, I never will, yield to such a doctrine. What, first transport a man out of the state, on the charge of his being a slave, and try the truth of the allegation afterwards—separate him from the place, it may be, of his nativity—the abode of his relatives, his friends, and his witnesses—transport him in chains to Missouri or Arkansas, with the cold comfort that if a freeman he may there assert and establish his freedom! No, if a person comes into this state, and *here* claims the servitude of a human being, whether white or black, *here* he must prove his case, and here prove it according to law, and if our legislature have a right to create and regulate a tribunal before whom such proof is to be made, this court, unless restrained

by the same authority, have a right and are solemnly bound to review and correct its proceedings.

But without pronouncing a settled opinion that the act of this state is unconstitutional on the ground that it deprives the accused of a trial by jury, it remains to be considered whether the provisions of the statute have been complied with

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The remainder of the opinion is occupied in showing, that the proceedings under the statute of New Jersey were irregular, and that the prisoner was entitled to his discharge It is interesting to observe, that the doctrine maintained by the Chief Justice, that the constitution gives no power to Congress to legislate respecting fugitive slaves, but imposes the obligation of surrendering them on the state authorities, is most fully supported by so distinguished an expounder of the constitution as Mr. Webster. In his speech of 7th March, 1850, he thus frankly and boldly expressed himself:

"I have always thought that the constitution addressed itself to the legislatures of the states themselves, or to the states themselves. It says that those persons escaping into other states, shall be delivered up, and I confess I have always been of opinion that that was an injunction upon the states themselves. It is said that a person escaping into another state, and coming therefore within the jurisdiction of the state, shall be delivered up.

"It seems to me that the plain import of this passage is, that the state itself, in obedience to the injunction, shall cause him to be delivered up. This is my judgment. I have always entertained it, and I ENTERTAIN IT NOW."

Of course, if this "judgment" be correct, the acts of 1793 and 1850 are both unconstitutional Mr. Webster submits, indeed, to the decision of the Supreme Court, but, notwithstanding that decision, his judgment, he tells us, remains unchanged One would think others might be permitted, without insult, to hold the same judgment with himself, but it seems not. In his letter to the New York Union-Saving Committee of October, 1850, he says of the Fugitive law—"I have heard no man whose opinion is worth regarding, deny its constitutionality;" and in his Albany speech, last May, he was pleased to tell the crowd—"You can't find a man in the profession in New York, whose income reaches thirty pounds a year, who will stake his professional reputation against it."

The Chief Justice's judgment on the want of constitutional power in Congress to pass the Fugitive law, like Mr. Webster's, remains unchanged; but the following lines from a letter recently addressed by him to a gentleman in New York, shows that, unlike Mr. Webster, he freely permits others to hold the same judgment with himself:

"Be assured, my dear sir, my judgment, whatever "it may be worth, has been for years, and now is, in "perfect accordance with yours, in relation to the "unconstitutionality of the Fugitive Slave laws of "1793 and 1850. The enactment of those laws, and "the fierce and unforgiving temper in which they are "justified by 'strict constructionists,' who can find no "authority in the constitution to create a national "currency, to protect American industry, or to improve internal navigation and harbors, illustrate "the melancholy fact, that among men, interest "imaginary or real, pecuniary or political, too often "controls the judgment and overrules every principle "of virtue, integrity, humanity, and the plainest "preceptsof Christian morality."