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OF

Mr. HAMBLY, OF YORK, (Pa.)

IN THE CASE OF

EDWARD PRIGG,

PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

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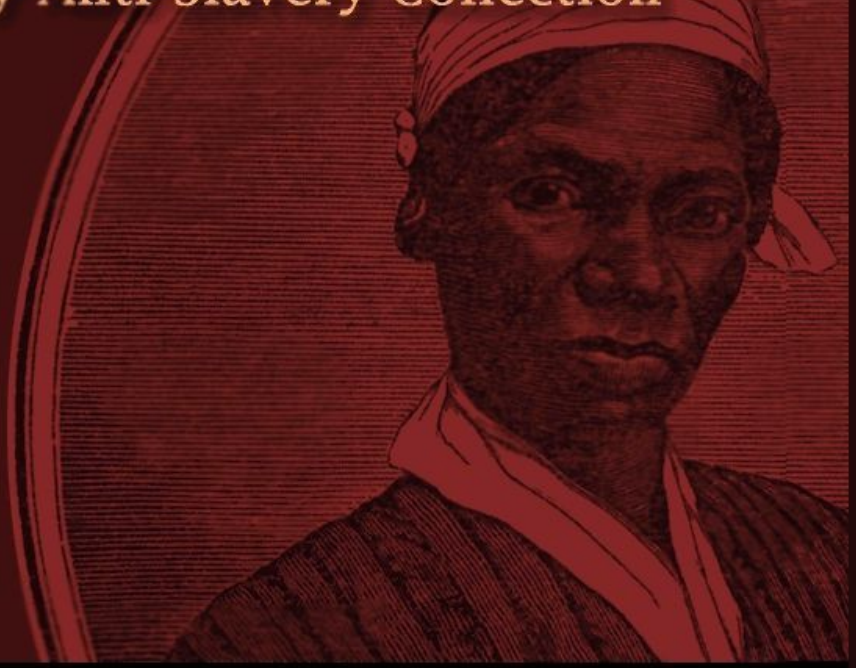

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DEFENDANT IN ERROR:

IN THE

SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

BALTIMORE:

Printed by Lucas & Deaver.

1842.

EDWARD PRIGG,

vs

THE COMMONWEALTH OF PENNSYLVANIA.

In this case, which was an Indictment against Prigg, et. al. for Kidnapping committed within the State of Pennsylvania, the interesting Constitutional question was tried whether the States have a right to legislate upon the subject of "Fugitives from Labor," or, if Congress possesses that right exclusively.

The case was raised between the States of Maryland and Pennsylvania for the purpose of settling this important question and regulating any future legislation upon the subject, and for this reason, has been thought to be worthy of publication.

ARGUMENT, &c.

MAY it please the Court:

The *final* decision of a great Constitutional question, it appears to me, should at all times be regarded as a subject for grave consideration and reflection, inasmuch, as it may affect the happiness and prosperity, the lives or liberties of a whole Nation.

Among the people of this free country, there is nothing which should be guarded with more watchful jealousy, than the Charter of their Liberties, which, being the fundamental law of the land, in its judicial construction every one is immediately interested, from the highest dignitary to the meanest subject of the Commonwealth. Any irreverential touch given to this Ark of public safety should be rebuked, and every violence chastened; its sanctity should be no less than that of the domestic altar; its guardians should be Argus-eyed; and as the price of its purchase was blood, its privileges and immunities should be maintained, even if this price must be paid again.

No one who thus appreciates this sacred instrument, can approach the subject of the final construction of a question arising out of it, although he may be the ablest member of that Profession whose duty it is to discuss its provisions before the judicial tribunals of the country, but must feel oppressed with a thought of the arduous nature of the duty he has undertaken to perform, the high responsibility he has assumed, and the possible results, either of good or evil, which may flow from his action in the matter, to his country and to posterity.

In all the solemn constitutional questions which have been adjudicated before this, the highest tribunal in the land, no one has arisen of more commanding import, of wider scope in its influence, or, on which hung mightier results for good or ill to this nation, than that which is now presented to your Honors for consideration. An all absorbing subject is incidentally involved in it—a subject, which is even now heaving the political tides of the country, which has caused enthusiasm to throw her lighted torch into the Temples of religion, and the Halls of science and learning, whilst the Forum of justice and the village bar room have equally resounded with the discussion. Its influences have been calculated by political economists, its consequences and determinations by political prophets, until all, from the statesman in the hall of legislation to the farmer at his fire side, are found arrayed on one side or the other of this great question, so that, whilst it has become "sore as a gangrene" in one region, it is the football of the enthusiast in another.

Required to discuss such a subject I must withdraw myself from both of these influences, and feeling as I do the importance of the question, and my own inadequacy to the task, I trust I may be permitted, with unfeigned diffidence, to express my regret, that I cannot substitute for myself some more able expounder of constitutional law, or, that I have not the magic power to descend into the "silent house" and wake up from the sleep of mortality some one of those gigantic minds whose powerful intellect in former days illuminated this Hall, or, failing to break the slumbers of the "honoured dead," by a justifiable felony, rifle the intellectual powers they once exerted, and self-appropriated, devote them to the sacred cause of the Constitution whilst I address myself to this subject.

It is true, there is one consideration by which I am sustained under the consciousness of my inability to do justice to this question, and that is—the conviction, that in the

superior sagacity, the accumulated legal learning and experience, and the integrity of this Court, is to be found, the sure guaranty that much as I may fail in acute and ingenious discussion of the subject, all my deficiencies will be amply supplied, and the question obtain a legal and correct decision.

Calculated as this subject is, to arouse the feelings and the prejudices of birth and education, it did not fail to produce that effect upon me, and when I approached its investigation, I did it with every feeling which the most inveterate advocate of the opposite doctrine could wish me to possess. Myself, a native of a slave-holding State, not only born amongst those who were surrounded by hereditary serfs, but a proprietor also, I could not disarm myself of feelings with which my situation in life naturally invested me, nor indeed did I care to do so, as I was bound to reason it in *opposition* to my own prejudices, and therefore not likely to be led astray by them. If then in such a state of mind, I have satisfied myself, that the construction of the Constitution which I shall contend for, is correct, I shall not fear that the deliberate judgment of your Honors will be with my respected colleague and myself in this argument, and I will even hope that we shall be able to convince the honorable and learned gentlemen who represent the Plaintiff in Error here, that this construction is most consonant with the general principles of that sacred instrument, and consequently best for the South, and best for the North, most conducive to peace and that brotherly affection which should knit us together as one family, and most advantageous to the integrity and prosperity of the whole Union.

In order to put your Honors in possession of the facts sufficiently to apprehend the origin of this question, I will in a few words relate to the Court the incidents which gave rise to this difficulty.

Some thirty years since, an old negro and his wife, the property of a gentleman in Maryland, having become as was supposed superannuated, were permitted to retire to a hut upon the estate, discharged from farther service. After a residence there of some time and when the woman was in years far past the usual period of life for bearing children she had a female child. This girl was kept and reared by them, until of mature age, and never claimed by the master at all. The owner died, and the girl having married a free man to whom she bore children was removed by her husband after the death of her parents into the State of Pennsylvania, where she bore him several other children, which being "*begotten and born*" in Pennsylvania, were, according to our laws and the adjudication of our courts, free. The residence of this negro and his wife was but a short distance from Harford county in Maryland, where she had been born. During the life of the original owner of the ancestors of this woman, the master exercised no ownership, but constantly declared he had set them free. After the birth of several children in Pennsylvania and the death of the master in Maryland, one Bemis intermarried with the heir to the estate, and in February, 1837, together with Prigg the defendant and others, came into the State of Pennsylvania and procured a warrant from Thos. Henderson, a justice of the peace, authorising Wm. McCleary, a constable of York county, to arrest and bring before him "the said Margaret and her children." They were seized before day light, in bed; the mother, father and children put into an open wagon in a cold sleety rain, with scarcely their ordinary clothes on, and conveyed some ten or fifteen miles to Henderson's house. In the mean time Henderson had learned that he had no jurisdiction by the law of Pennsylvania, and he refused when they arrived to adjudicate. It had grown late, was dark and still raining; a consultation was had among the captors and it resulted

in releasing Jerry Morgan the husband, who was told if he would go back they would meet him in the morning at Esq. Ross's where the matter should be disposed of. He went back, and as soon as he was out of sight, Prigg and Bemis crossed the line into Maryland, with the mother and children, and by the morning light they were sold to a negro trader and in a calaboose ready for shipment to the South.

Such a transaction, of course, aroused the public upon the Pennsylvania side of the line. Pursuit was made, the negroes found, and a complaint laid before the Governor of Pennsylvania of this violation both of territory and law. A demand was made of the executive of Maryland for the guilty parties, but after a long and tedious negociation, the Governor of Maryland refused to surrender them, for the reason, that no indictment had been found by a grand jury. This difficulty was at once removed and a bill found. Then commenced a series of further negociation with the Public Prosecutor first, and then with the Pennsylvania Executive for a nolle prosequi on the bill, and a request to drop the whole matter. This, neither the Attorney General nor the Executive had power to do, and finally the "demand" was acceded to, and an order given to the sheriff of Harford to assist the sheriff of York county (Penn.) to arrest the defendants—these gentlemen were however always absent when called for. Finally, an application was made by the State of Maryland to the Legislature of Pennsylvania, which passed a law on the 23d of May, 1839, authorising Prigg to surrender himself to the court in York county, his own recognizance to be taken—a special finding of the facts and law by a jury, a writ of error to the Supreme Court of that State where the judgment was affirmed, from whence it has been removed into this Court for final action. In the meanwhile the mother and

children were taken before Judge Archer, of Harford county, adjudged to be slaves and sold.*

Prigg having been convicted in the State Courts of a crime which the Statutes of Pennsylvania designate as "Kidnapping," the State of Maryland of which he is a citizen now raises the objection that the laws of our State are *unconstitutional;* and to test this question we are this day here.

On the 25th of March, 1826, the General Assembly of Pennsylvania passed an act, the first section of which renders it a felony to seduce or carry away any negro or mulatto from the State of Pennsylvania, to make them slaves.

SECTION 2 renders it a felony to sell, transfer or assign, purchase or take, any negro or mulatto for that purpose.

SEC. 3 authorizes the owner of a slave or his agent to apply to a judge, justice or alderman, who shall issue a warrant for the arrest of a fugitive from labor and bring him before *a Judge* of the proper county, &c.

SEC. 4 requires in addition to the oath of the agent, the affidavit of the claimant, legally taken and authenticated before a warrant shall issue.

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*I might add that the husband and father afraid to enter Maryland for fear of the same fate, and unwilling to leave his wife and children in slavery so long as they might by possibility be rescued, visited the Governor of Pennsylvania entreating his interference, and on his return from Harrisburg went on board a canal boat for Columbia and during the passage whilst at one of the locks, one of the hands lost his jacket. Jerry had by universal testimony of his neighbors borne a most unexceptionable character for honesty, but as he was on board the boat and only *a negro*, was seized and tied and many threats made of what should be done with him at Columbia. The poor harrassed creature believing doubtless that this was only another branch of the conspiracy which had robbed him of his wife and children, on entering the lock at Columbia made a spring for the side of the wall to escape his tormentors—he failed, fell backward into the lock, passed under the boat, and being tied, was taken out a lifeless corpse!

SEC. 5 requires a record of the proceedings to be kept in the Court of Quarter Sessions, stating the title of the claimant and the description of the fugitive.

SEC. 6 requires the Judge, upon satisfactory proof, to give his certificate authorising the removal of the fugitive.

SEC. 7 provides for the safe keeping of the fugitive if he wish to procure testimony, by committing him to prison.

SEC. 8 prescribes the fees of officers.

SEC. 9 forbids justices and aldermen to take cognizance of the case of any fugitive from slavery, under the act of Congress, under a penalty of $500.

SEC. 10 makes it the duty of the Judge when he grants a warrant, to make a record of the same and file it in the Court of Quarter Sessions.

All the provisions of this act of the General Assembly are alledged to be *unconstitutional*, and the Plaintiff in Error says are in contravention of the act of Congress and the Constitution of the United States.

The third paragraph of the second section of article 4th of the Constitution, declares "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."

Under this section some contend that the owner of a slave has a right, without reference to the municipal regulations of the State or territory where he happens to be, to seize and carry away any alledged slave. That no legislation is necessary either by Congress or the States; that the clause is perfect in itself and totally independent, and that the word "claim" means demand and surrender, without enquiry or investigation!

3d. That if legislation be necessary Congress has exclusively that power, has already acted, exercising its power

over the whole matter, and therefore all State legislation is *invalid.*

The act of Congress was passed 12th of Feb. 1793; and authorises the arrest of a fugitive from labor, and taking him before a judge of the circuit or district courts of the United States, or before any magistrate of a city or town corporate, and upon satisfactory proof the judge or magistrate shall give a certificate which shall be sufficient warrant for the removal of the fugitive.

The second section fixes a forfeiture of five hundred dollars on any person who shall obstruct, hinder, rescue or harbor such fugitive, &c.

The allegations of unconstitutionality made against the act of 1826, of the State of Pennsylvania, come ungraciously from the State of Maryland, as this identical law was passed by the legislature of that State at the instance and on the solicitation of commissioners from Maryland, who were sent to Harrisburg to have it put in this shape. But it matters not from whom the objection comes, we do not in behalf of the State of Pennsylvania, throw ourselves back upon the courtesy of the transaction, but rest composedly upon the Constitution of the Union and the laws of the land.

In the argument of this matter, it is asserted that no legislation is needed, that the constitutional provision is ample, and that under the phrase "shall be surrendered on claim" every thing which legislation can give is already secured; and that under this clause a power is contained, in virtue of which, any one may step into a crowd and seize and carry off an alledged slave "just as he would a stray horse," or any other article of personal property.

If this conclusion be correct, it is surely a strange deduction from the language used in that clause, and in direct opposition to what would seem to be impliedly its meaning.

If such be the true meaning of "claim," why does that clause say, that no State by "*any law or regulation therein,*" shall discharge from service? Why speak of "law or regulation," if none be allowed? Why allude to that which is forbidden and unlawful? Why speak of State laws or State regulations if the States dare not pass any? And why not at once use the language which obviously presented itself and say, that "escaping into another State," shall not discharge from service or labor, without adding a word about "laws or regulations?" The conclusion is preposterous and unsound, and altogether unwarranted. The language of the Constitution not only presupposes legislation, but that this legislation not only is to be or may be, but will be by the States. It was just as much as saying to the States: You may pass laws upon the subject—you may make regulations—you may prescribe the time and manner of seizure, the authorities before whom the parties shall come for adjudication—but you shall not discharge a bona fide Fugitive from Labor from that service which he owes under the Laws of the State from whence he fled. Your authorities shall say whether under the Laws of that State he owes service, and if he do, you shall hand him over.

This construction is likewise contradicted by the fact, that, not only the States but Congress, both legislated upon the subject not long after the formation of the Constitution. Congress as early as 1793—It is therefore manifestly an argument which raises a strong presumption against the position contended for, that, at that early day, when the framers of that instrument were almost all in full public life—when the debates at its formation and upon its adoption were still fresh in the memory of the whole country, that Congress should have legislated upon this very point. Had the public men of the day forgotten the meaning of this phrase? Could they forget that "claim" meant peremp-

tory surrender—that this was the meaning intended in the use of that word by the framers of the Constitution, and should go to work to legislate, where not only no legislation was necessary but not at all allowable? Such supposition is too monstrous to indulge a moment.

But again: If they had intended that neither the States nor Congress should legislate upon this subject, is it not altogether certain that they would not have used the term "claim" but would have selected other language better fitted to carry definitely the meaning which they intended to attach? What is the meaning of "claim?" "A challenge of ownership," says Plowden. A challenge of interest in a thing which another hath in possession, or at least out of the possession of the claimant. "Claim" implies that the right is in dispute or in doubt. "Claim" may be made by two or more at the same time. "Claim" has a technical legal meaning, and those who drew this instrument being eminent Lawyers and well versed in the use of language, may possibly have designed so to point the meaning of the phrase, and for that reason used that word.

This impression too, is greatly strengthened by the recollection that in the preceding clause respecting Fugitives from Justice, a much stronger word is used. "Shall be delivered up *on demand*" is the language used in reference to criminals; but Fugitives from Labor are to be delivered up "on claim." What now is the difference between these two terms? Why evidently "demand" is peremptory. It will not admit of delay—it insists upon immediate obedience. "Claim" supposes debate, litigation, the decision of a right. How is it when one seeks satisfaction for an offence? I "demand" satisfaction—I require it immediately. You shall give it me or I will force it from you. His antagonist sees by his language he is in earnest, and he must reply. But if he should say, I "claim" satisfac-

tion, debate springs up, negociation ensues, and the offence most likely takes a Pickwickian shape.

This word "demand," in fact, thrust itself upon the attention of the framers of the Constitution. It was used in the preceding paragraph in reference to criminals from Justice, and is eminently better fitted to express unconditional surrender than "claim" is.

But beside this, if the framers of this paper had designed such a purpose as that imputed to them, would they not have omitted from this clause the words "in consequence of any Law or Regulation therein"—and the clause would then have stood in an obvious shape, and every one would have understood that any fugitive from labor, escaping into another State, should not thereby be discharged from service, &c. This puts the matter I think in a very clear and strong light, and exceedingly adverse to the construction that neither the Union nor the States can legislate upon this subject.

Another reason which might here be noticed is that no one, either in the debates upon the formation of the Constitution, or at its adoption by the States, ever asserted that to be the meaning of this clause.

Mr. Madison, in the Virginia Convention, said, speaking of the Constitutional provisions and the advantages to be derived by the slave-holding States from its adoption,—We may now reclaim our slaves. Governor Randolph, in the same body, who was also one of the framers of the Constitution, says "this (clause) gives authority to the owners of slaves to vindicate their property;" and Gen. Pinckney also, in the South Carolina Convention, to the same effect. Yet not one of them claims for this clause any meaning beyond that of "reclaiming" and of "vindicating" their property.

Another most valid and substantial reason against this construction is, that it would be a violation of the very spirit of the instrument.

If, under this term "claim" the stretch of power is so very great that a man from a neighboring State can venture into Pennsylvania or Maryland, and upon his simple allegation seize, and without reference to State authorities, carry off any one whom he may choose to single out as his fugitive from labor, it is a most unheard-of violation of the true spirit and meaning of the whole of that instrument.

The same power that can upon simple allegation seize and carry off a slave, can on the allegation of service due, seize and carry off a free man. There is no power, if neither Congress nor the States can legislate to dispute the question with the seizing party.

In non-slave-holding States the presumption is, that *every man is a free man* until the contrary be proved. It is like every other legal presumption, in favor of the right. Every man is presumed to be innocent until proved guilty. Every defendant against whom an action of debt is brought is presumed not to owe until the debt be proved. Now in a slave-holding State color always raises a presumption of slavery, which is directly contrary to the presumption in a free or non-slave-holding State, for in the latter, as I said before, prima facie, *every* man is a free man. If, then, under this most monstrous assumption of power a free man may be seized, where is our boasted freedom? What says the IV article of the amendments to the Constitution of the United States?—"The *right* of the people to be secure in their *persons*, houses, papers and effects against unreasonable searches and *seizures, shall not be violated.*" Art. 5. No person shall be ——— deprived of life, *liberty* or property, *without due process of law.*

But here I am met with the remark that "slaves are no parties to the Constitution," that "we the people" does not embrace *them.* I admit that most cheerfully, but I am not arguing the want of power to "claim" and take a slave,

but to claim and take a *free man!* Admit the fact that he is a slave, and you admit away the whole question. Pennsylvania says: Instead of preventing you from taking your slaves, we are anxious you should have them; they are a population we do not covet, and all our legislation tends toward giving you every facility to get them; but we do claim the right of legislating upon this subject so as to bring you under legal restraint which will prevent you from taking a free man. If one can arrest and carry away a free man "without due process of law"—if their persons are not inviolate, your Constitution is a waxen tablet, a writing in the sand; and instead of being, as is supposed, the freest country on earth, this is the vilest despotism which can be imagined! In behalf of the State I here represent, which not only *professes*, but acts with courtesy and conciliation to her sister States, and guided by the principles of her noble and enlightened founder, never does an act by force, be it ever so right, if force can be avoided, she here puts herself upon her reserved rights, and whilst she avows her willingness to submit to Judicial decision, be it either in accordance with, or in opposition to, her views, yet boldly declares her determination, *to resist aggression upon her free soil, no matter whether that aggressor be a foreign foe, a Confederate State, or even the Federal Head!*

Is it possible this clause can have such a meaning? Can it be, that a power so potent of mischief as this, could find no one of all those who had laid it in the indictment against the King of Great Britain, as one of the very chiefest of his crimes, "that he had transported our citizens beyond seas for trial," whose jealousy would not be aroused—whose fears would not be excited, at a grasp of power so mighty as is claimed for this clause? Think you not that some one of those ardent, untiring, vigilant guardians of Liberty would have

raised a warning voice against this danger? And that too, when, only eighteen months after the formation of this Charter, although they had already in the body of the instrument carefully guarded the writ of Habeas Corpus, and provided for the trial of all crimes by Jury *and in the State where committed*, yet, as if their jealousy had been excited, to four-fold vigilance, in their amendments provided for the personal security of the subject from "unreasonable seizure", and that no one should be "deprived of liberty, without due process of law."

What was the language of the Virginia House of Burgesses when Parliament proposed to his Majesty to transport accused persons from America for trial under the odious statute of Henry VIII.?

"When we consider that by the laws of this Colony the most ample provision is made for apprehending and punishing all those who shall dare to engage in any treasonable practices against your Majesty, or disturb the tranquility of Government, we cannot without horror think of the unusual, and permit us to add unconstitutional and illegal mode recommended to your Majesty of seizing and carrying beyond seas the inhabitants of America suspected of any crimes, and of trying such persons in any other manner than by the ancient and long established course of proceedings—for how truly deplorable must be the case of a wretched American who having incurred the displeasure of any one in power, is dragged from his native home and his dearest domestic connections, thrown into a prison, not to await his trial before a Court, Jury or Judges, from a knowledge of whom he is encouraged to hope for speedy justice, but to exchange his imprisonment in his own country for fetters among strangers. Conveyed to a distant land, where no friend will alleviate his distresses or minister to his necessities, and where no witness can be found to testify to his innocence—shunned by the reputable and honest, and consigned to the society and converse of the wretched and abandoned, he can only pray that he may soon end his misery with his life."

Where! oh where! was the spirit of resistance and patriotism which dictated such wailing as this over suffering, expiring Liberty? Can it be possible, that the right con-

struction of this one word "claim" shall blot out the whole value of this Constitution? Are its blessings dashed away at one fell swoop as with the very besom of destruction? Is all the toil and labor of the Revolution lost, and all its patriotic blood spilled in vain! Can it be, that the cry, I am an American citizen, dare not be raised to stay an oppression ten thousand times more horrible than the lash of the Lictor? No! This construction must be repudiated. This high tribunal will say in an authoritative tone to the people—You cannot, like hostile bands, make incursions from one State into another; you shall not forcibly and without law, recapture and provoke reprisals.—We live in a country of laws, under a General Government of delegated powers, under an association of sovereign States, where judicial decisions give tone to public government. The law must, the law shall decide your rights, and such a construction put upon the word "claim," such an all-grasping violent power as would then be infused into the individual members of this Confederacy, would result in a sublimated tyranny, ending in anarchy.

Suppose,—a by no means impossible case,—suppose a man to be seized in the streets of Philadelphia simultaneously by a citizen of South Carolina and a citizen of Virginia, each claiming him as their slave: under the construction contended for, *each* would be entitled to carry him off upon mere allegation! He offers satisfactory evidence to show that he is entirely free, but the State authorities cannot interfere, because the States cannot legislate and give them power, and Congress cannot legislate, and if it did, could not give State officers judicial power.—*Martin vs. Hunter's Lessees.* 1 *Wheaton*, 304. What is to be done? allow these parties to wrangle it out in the streets, to settle the question with dirk and bowie knife, or execute the judgement of Solomon? No, the answer will be, hand them over to the District Court, and there let

them settle the right to property! Yes, but there you meet an unexpected difficulty. The District Court can try the right of property as between the claimants, but not the right of liberty as between them and the arrested free man; therefore it follows that because the party out of possession of the alleged slave cannot prove his right to take him, the party in possession retains him, and carries a *free* man into slavery. Possession of a slave in the absence of proof is sufficient evidence of title. 2, *Marshall Rep.* 609.

But in exercising the power of claim and of excluding the arrested party from testing the question of slave or free, do you not violate the 1st clause of sec. 2, article 4. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

In some States they sell out, for jail fees, the personal services of certain prisoners. Now suppose such an one, not a Negro, to be seized in Pennsylvania, as an alleged fugitive from labor—and undoubtedly under this clause he may be seized,—but the truth comes out that the party seized is not and never was a prisoner or sold out to service. Under this construction you can't try the question, and a free citizen goes promptly and without redress into slavery! Aye, but let that be tried, say the advocates of this doctrine, in the State to which he goes.

There are two answers to this remark: First, it is in direct violation of the spirit of that provision in the Constitution which requires trials to take place in the State where the infraction of law occurred; and secondly, what chance of fair trial would any man under such circumstances have in the State to which he is taken, where all the presumptions are against him, where the whole public opinion is against him, where he is entirely separated from his witnesses, whilst the whole *onus probandi* is thrown upon him. Better a *thousand* slaves escape than that *one* free man should be thus carried into remediless slavery!

It is true that Chancellor Walworth, in the case of *Jack vs. Martin in* 14 *Wendel*, says that the right of recaption existed at Common Law and "is guaranteed by the Constitution." Now with the greatest deference for the opinion of the learned Judge, I cannot be convinced that the right of recaption of persons ever existed here, or if it did exist, it is taken away by the amendments to the Constitution. I take the open avowed ground that in a free State every man is *prima facie* a free man who is at large. If so, he comes under that class called "people," and the right of "the people" to be secure in their persons against unreasonable seizures is guarantied by the Constitution. Aye! but *he is a slave*, say the opponents of this doctrine. But, that is not admitted. The very question at issue is, slave or free. Now, so long as he is not proved a slave, I say he is presumed free, and therefore if you seize *him* or *me* it is a violation of this constitutional privilege.

But I have further authority that this right did not exist at Common Law in this country. In the debates in the South Carolina Convention on the adoption of the Constitution, Charles Cotesworth Pinckney says,—This gives us right to reclaim our slaves, let them go where they may in America, *which is a right we never had before!* Here then is testimony, from a man not only eminent as a soldier and statesman but as a lawyer, who declares that they never had such a right as "recaption" of their fugitives, and I confess myself at a loss to know where it *is* "guarantied in the Constitution." It is a monstrous power, entirely unfit for our country, and only worthy to be compared to the famous *Lettres de Cachet* so infamously marking the reigns of the elder Bourbon Dynasty in France.

But, it is said, if this be not the true construction of this clause, and legislation be necessary, that the right appertains alone to Congress, and that the act of 1793 covers

the ground and leaves no room for the action of State legislation.

That no power to legislate upon this subject is expressly granted "in terms" to Congress must be at once conceded. It must likewise be as readily conceded that it is not "prohibited" to the States. Then, if Congress possesses this power, it must be in virtue of a concurrent authority of acting upon the subject matter, or, because this is a faculty which is necessary to the exercise of some power already granted.

That it is not the latter, is manifest; for the most laborious investigation, and the most careful search, aided by the most critical powers of mind, can show no single provision of the instrument to the exercise of which this legislative power would be necessary.

There are two kinds of concurrent power embraced by the Constitution:

1. Those which both bodies may lawfully legislate upon, and

2. Those which the States may legislate upon until Congress acts, when, the latter, being the supreme power, excludes the former.

As an instance of the former, the regulation of the militia may be cited—Congress can "organize, arm, discipline and govern," whilst to the States is reserved the right of appointing officers and the authority of training.—*Art.* 1, *sec.* 8, *clause* 16. *Houston vs. Moore*, 5 *Wheaton* 24.

An illustration of the latter class, may be found in the power to establish bankrupt laws, on which, it has been decided by this Court, that the States might legislate *until* Congress did, when the acts of the former would cease and expire.—*Sturges vs. Crowninshield*, 4 *Wheaton* 193.

In order, therefore, to ascertain whether this power of legislation be concurrent or not, we must inquire

1st. Whether it were possessed by the States previous to the formation of the Constitution, and appertained to sovereignty.

2nd. Whether granted in express terms to the Union, or prohibited to the States.

3rd. Whether it be an exertion of sovereign power by operating *beyond* the State territory, or

4th. As necessarily originating in the Union, so that no exercise of it by the States can take place, without clear, open, and undisguised conflict with the Constitution.

Now let us test this question by these rules. It is manifest that slaves and slavery were the subjects of legislative power by the States, before the Union. After the Declaration of Independence in 1776, each State, at least before the Confederation, was a sovereign, independent body. Each, had the right to enact laws which no other power could revise. Each, could make war or conclude peace, without reference to the other. Each could raise armies or maintain a navy without consulting the others; and in fine, possessed every faculty of sovereign power as effectually and entirely, as either France or England or any of the kingdoms of the Old World, and equally as untrammelled. Then, this being the case, the Union was formed, by taking away from the individual States portions of power, and vesting them in one central body, known as "the Union," in the formation of which, were, admitted maxims—1st. That it possessed nothing by implication, except what was absolutely necessary to its existence; and 2nd. That powers not delegated to the Union, nor prohibited to the States in express terms, were reserved.—*Article* 9 *and* 10 *of Amendments.*

I find, after a slight examination, which time and opportunity would not admit of being more extended, that South Carolina, as early as 1695, passed laws upon the subject of slaves and slavery, and so down to the present

time. So also Connecticut, in 1711, and Maryland, in 1715. These then are sufficient, as instances of the exercise of this power by the States, long before the Constitution was formed; and this proves the first position,—That it was possessed by the States *previous* to the formation of the Constitution. And it will not be controverted that the power is *not* "expressly" granted to the Union, *nor* prohibited to the States.

Thirdly, The exercise of this power by the States, is merely a matter of police and internal regulation, and therefore does not operate beyond the State territory; and

Lastly, The power does *not* originate in the Union—that is, the right of legislation does not grow out of the Union—the power itself, the subject matter, is not the birth of the Union—nor is its exercise a "clear, open, undisguised conflict with the Constitution," as the exercise of extra territorial power would be.

I infer then from all this, that this power is not a concurrent one; that for want of express reservation of such right, it has not the features which enable it to be exercised at the same time by both parties, as is the case with the militia laws. Nor, can the action of Congress absorb it and drive the States from it, as is the case with the bankrupt laws. It is a power which exists, and can only exist, in the States. Nor is it any answer to all this, to say that a variety of laws and regulations will be passed by different States; that the legislation will be incongruous and dissimilar. We must take the Constitution as we find it! Our duty is to *construe*, not to *legislate!* And we are told by good authority that in the construction of Constitutions, the *argumentum ab inconvenienti* will not answer—we dare not use it. The *ita scripta* rule is enough for us. If the Constitutional provision be defective, there is a Constitutional mode to amend it: let us then rather apply to that, than violently *wrest* the instrument by construction.

It is urged, however, that the passage of the act of Congress of 1793 affords a very strong argument in favor of Congressional action upon this subject; that the fact of its passage at so early a day evinces the understanding of that clause of the Constitution to have been, amongst the framers of it, that Congress alone had the right to legislate; and hence, by implication, as it were, they would convince us, that it was one of those concurrent powers which the action of the highest legislative body absorbs and takes away from the States.

This argument, if it prove any thing, will prove too much, as I shall now show:

The act of Congress authorizes the arrest of the fugitive, and requires him to be taken before any Judge of the District or Circuit Court, or before *any Magistrate of a County, City or Town Corporate.*

Now it is a principle perfectly settled by Judicial decision, that Congress cannot communicate the exercise of Judicial power to any person who does not hold the Commission of the General Government. *Martin vs. Hunter's Lessees*, 1 *Wheaton, p.* 330—"Congress cannot vest any portion of the Judicial power of the United States except in Courts ordained and established by itself." *Cons. Sec. 3, Art.* 2—The President shall commission all officers. Now, if no man can be an officer of this Government without bearing the Commission of the President, certainly no "Magistrate of a County, City or Town corporate" can be a Judicial officer of the General Government, and so cannot take authority under the act. This principle is necessarily derived from Art. III. Sec. 1, which provides that "the Judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as Congress shall from time to time ordain and establish," and of course the persons holding this power must be commissioned by the power which establishes the Courts. This

doctrine has long been held by both the Supreme and State Courts. *United States vs. Lathrop*, 17 *John.* 4; *Ely vs. Peck*, 7 *Conn. R.* 239.—The former was a case in which an action of debt was brought for a penalty under the act of 1813 for selling spirituous liquors, and gave the State Courts jurisdiction: The last case was an action against a deserting mariner, in which the State Court had jurisdiction given it by an act of Congress, but the Judges in both cases declined exercising it.—1 *Kent's Com.* 402—3.

This then being the case, that the act of Congress of 1793 gave to "Magistrates of a County" an authority which it could not give, the conclusion is irresistible, that they did not at that day understand in the legislative hall, the construction of the Constitution, as well as we do now after an interval of half a century, and therefore the argument above cited is of no avail, inasmuch as it explodes itself. Beside which, we might add, that the States have claimed the power just as openly and avowedly as Congress has done.

It is supposed, however, that the weight of judicial authority from the State Courts is in favor, very decidedly, of the exercise of this power by the National Legislature. Let us therefore examine.

In 5 *S. & Rawle*, 62, is contained the case of *Wright vs. Deacon.* This was a writ de Homine Replegiando. The case had already been tried on Habeas Corpus, and adjudicated against the party, and upon that point *decided*, whilst it *was taken for granted* that the Constitution and act of Congress gave warrant for his removal. The question was not agitated as to the constitutionality of the law of Congress, or that of Pennsylvania, and the case therefore gives no authority for this construction.

2 *Pickering* 11, *Com'th vs. Griffith*, was an indictment for an assault and battery upon a Negro, and the defence

made was that he was a slave and had fled from servitude. The Court say, "This brings the case to a single point, viz: whether the statute of the United States is constitutional or not. The Constitution, say they, does not prescribe the mode of reclaiming a slave, *but leaves it to be determined by Congress.*"

Here is taken for granted that which is far from appearing. One leap reaches the conclusion; without showing how Congress attains this power, whether expressly, by implication or how. In fact, one of the Judges dissents, saying that he thought the fugitive should be seized in conformity to State laws. Further, the unconstitutionality of the law was not attacked on the ground that Congress had no right to legislate *at all*, but merely, because in conflict with other parts of the instrument. This case, therefore, I humbly conceive, proves nothing for the Plaintiff in Error.

In 12 *Wendel*, 314, is found the case of *Jack vs. Martin*. This was a writ de Homine Replegiando, and Judge Nelson in the Court below decided that the legislative power was concurrent, and therefore the action of Congress excluded the States from legislating; and that the object being palpable—i. e., to secure the slaves of the South—it should have a construction that would operate most effectually to attain the end.

We contend that we are giving that construction to this clause most likely to produce the desired end. If heated argument and a selfish withdrawal of the whole subject matter from the hands of the States could be effected by the South, will it not produce constriction and collapse with the free States? Which is most likely to keep the peace? a tone of confidence and conciliation, or of defiance and the attempted exercise of illegal power? We must negociate and legislate upon this and every other subject with the calumet of peace rather than the tomahawk—with

the conciliatory spirit of a band of brothers instead of the animosity of deadly foes.

The case of Jack was taken up before the Court of Errors and Appeals, and the decision below sustained—not the question of constitutionality, but the question of fugitive or not, because Jack had admitted he was a slave by his pleas. But the question of constitutionality was debated, and in my judgement not a single solid reason given for that construction, but on the contrary, Chancellor Walworth says—"I have looked in vain among the delegated powers of Congress for authority to legislate upon the subject," and concludes that State legislation is ample for the purpose.

Now then, upon recapitulating these cases, what have we?

1. We have one case where the constitutionality of the law is taken for granted, by Chief Justice Tilgman.

2. We have the argument of Judge Nelson and Senator Bishop, in favor of it, and the case in Pickering, and

3. We have the decisive opinion of Chancellor Walworth, and the dissenting Judge in the case in Pickering.

For neither in Exparte Symmons tried by Judge Washington and reported in 4 *Wash. C. C. Rep.* 396, nor in the case of *Johnson vs. Tompkins*, 1 *Baldwin's Rep.*, was the question of constitutionality at all mooted or spoken of but both Judges speak in the same breath of State laws and laws of Congress, without once impugning the right of either party to legislate, or for one moment intimating a doubt as to the constitutional right of either party to pass them.

It may, however, be contended that this authority to legislate is given to Congress by the 18th clause of sec. 8, Art. 1 of the Constitution:

—"and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers

and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

Judge Story says in his Commentary, sec. 1238:

"The plain import of this clause is, that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the *express* powers. *It neither enlarges any power specifically granted, nor is* it a grant of any new power to Congress."

This case then is not embraced by the first part of the section, because it is not one of the "foregoing" enumerated powers. Nor is it included under the other term, "all other powers *vested,*" because there is no power vested, for the learned Commentator just alluded to, says it means *express* powers.

Speaking of the Constitution, we are told in *Hunter's Lessee ad. Martin*, 1 *Wheaton, p.* 326, The Government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication.

On the other hand, this instrument is to have a reasonable construction, according to the import of its terms. The words are to be taken in their natural and obvious sense—not in a sense unreasonably restricted or enlarged.

Certainly then, this phrase, "powers vested," means *express powers;* any other mode of construction would do violence to the whole instrument and overturn a whole series of decisions. If then it mean *express* power, there is none such in this case, and therefore under this clause Congress cannot exercise the authority claimed. 1 *Kent's Com.* 388, 90.—"The correct principle is, that whenever the terms in which the power was granted to Congress, or the nature of the power required that it should be exclusively exercised by Congress, the subject was as com-

pletely taken away from the State Legislature as if they had been expressly forbidden to act on it." But is that the case here?—the power is *not* granted in terms at all, and the nature of the power is such, that the States can as easily and usefully exercise it as Congress.

The truth is, the power is one of police and internal regulation, as much as ferries, turnpikes, and health laws, and in *Gibbons vs. Ogden*, 203, we are told that "no direct power is granted over these objects to Congress, and consequently *they remain* subject to State legislation. If the legislative power of the Union can reach them it must be for national purposes."

How, I ask, can legislation respecting slaves become national when only a part of the States hold them? Such legislation cannot assume a national aspect, or attain a "national purpose."

On page 204 of the same case—"So if a State in passing laws on subjects acknowledged to be within its control, and with a view to those objects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means."

Here the laws of Pennsylvania run almost in the same track with the national Legislation upon this subject, except that power is taken from Magistrates, with whom, clearly, Congress could not vest it, even admitting their right to legislate. Adopting this view, then, the legislation of Pennsylvania would appear to be constitutional.

If then this power be not expressly in Congress nor concurrently, nor necessarily appurtenant to any other power, what is the meaning of this clause?

"No person held to service or labor in any State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged

from such service, but shall be delivered up, on claim of the party to whom such service or labor is due."

It simply means this—nothing more nor less: You may legislate—you may regulate—but this one point alone you shall not touch:—You shall not discharge the fugitive from service, if he were a slave by the law of the State from whence he fled.

The result is, that no power being given to Congress to legislate, it is reserved to the States under the 10th article of the amendments:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved*—*Federalist*, *No.* 32. The State Governments clearly retain all the rights of sovereignty which they had before the adoption of the Constitution, and which were not by that Constitution exclusively delegated to the Union.—1 *Wheaton* 325.

Suppose Art. IV sec. 1, read thus—"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State"—and then stopped. Is it not apparent, that the States could by law regulate the kind and quantum of proof, the manner in which their courts should receive it; and if it was thought they could not, why in express terms reserve to Congress "the right to prescribe the manner in which they shall be proved, and the effect thereof."

Under Art. 1, sec. 4, clause 1, the times, places and manner of holding elections for Senators and Representatives shall be prescribed by the State Legislatures, but the framers of the Constitution cautiously add that Congress may make or alter such regulation, except as to place.

Art. 1, sec. 8, clause 5, the power to coin money, one of the highest attributes of sovereign power, is *expressly* given to Congress; and yet in section 10, clause 1 of Art. 1, the States are cautiously and expressly prohibited from

coining money. This has always been the highest mark of sovereign power. It is well known how irritated George II. was when Massachusetts coined money; and that he was only appeased, when told, that the Pine Tree upon it was the Royal Oak, so sacred a prerogative of royalty did he consider it. Now the construction contended for, if applied to clause 15, section 8 of Art. 1, where it is said that Congress shall provide for calling forth the militia, would exclude the Executive of a State, or any State authority, from calling them forth. All these cases show how cautious the constitutional provisions are in guarding powers it actually claims, and how silent in reference to those where it claims no right.

It is, however, supposed by some that because Congress has legislated on the surrender of criminals, that therefore there is stronger ground for claiming the right of legislating here.

I might easily question the right of Congress to legislate upon this subject, but I forbear. It is a national object, and there is a moral obligation resting certainly on these States if, as writers on national law say, the duty be questionable between *foreign* governments to surrender criminals. I think that, clearly, under the term "demand," the Executive is obliged to surrender without hesitation, whenever a criminal is demanded.

I will now show, by inference, from the Madison Papers and Debates in Convention, that this matter was expected to be left to State legislation, and that the South was not united itself upon the subject. *Vide Madison Papers, p,* 1447—*Art.* 14 being under consideration, Mr. Pinckney desired some provision in favor of slave property. And accordingly, when Art. No. 15 was reported, Mr. Butler and Mr. Pinckney moved to require "fugitive slaves and servants to be delivered up like criminals"—when it was

objected that this would require the Executive to do it at public expense.

On the 29th of August, Mr. Butler moved to insert after Art. 15, "If any person legally held to service or labor"—when (page 1589) "legally" was struck out, in compliance with the wish of some, he says, who thought the term equivocal and favoring the idea that slavery was "legal" in a moral view. Now on this the vote stood:

Yeas.	*Nays.*	*Divided.*
Connecticut,	Massachusetts,	New Hampshire,
Maryland,	New Jersey,	Delaware,—2.
Virginia,	Pennsylvania,	
N. Carolina,	S. Carolina,—4.	
Georgia,—5.		

Again, upon page 303 of *vol.* 1 *of Elliott's Debates, Article* 15 passed unanimously with this conclusion to it:—"but shall be delivered to the person *justly* claiming their service or labor." Now, who was to ascertain if they were "*legally*" or "*justly*" held? Surely not the Federal but the State Courts. The question of *legally* or *justly* held was to be tried in the States, and the manner thereof be pointed out by State legislation, excepting only it could not discharge the fugitive from service.

As if, however, to remove all doubt upon this subject, we have in the Constitution itself, an open admission that the whole subject of slaves and slavery was left in the hands of the States.

Art. 1, section 9,—"The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by Congress prior to 1808."

Now what is the meaning of this? Why, that Congress shall leave the slave trade, and all its operations, to State legislation entirely, with the exception that after 1808

they *may* stop it if they choose; but if they do not choose, it will always remain in the hands of the States, until they do see fit to close it. This to my mind, without any other consideration, is sufficiently convincing that every body at that day rightly understood this whole matter to be the subject of State legislation.

The use of the terms "legally" and "justly," in the formation of the Constitution, shows that the right was to be ascertained by competent authority, not taken for granted, and that legislative power somewhere was to exercise itself upon the matter, and by none more probably than the same power which then had it in control,—the State Legislatures.

It now only remains that I should examine two arguments urged on behalf of the Plaintiff in Error, which yet remain.

It is alleged that the Judiciary Act of 1789 vests in the Courts of the United States the whole judicial power of the Government, and that this being judicial power, which is sought to be attached to the General Government, it is impliedly embraced by that act.

One word, I conceive, will be a sufficient answer to that argument. The power asked, or rather claimed, is not Judicial, but Legislative, and therefore can by no possibility be claimed by, through, or under, the Judiciary Act.

Another argument is, that legislative construction has, with this Court, almost the authority of judicial decision. And because Congress has in its reports upon Slavery, admitted or asserted this right, their claim therefore should be regarded almost as a judicial construction.

I only answer, that if there be any one thing in this country entirely loose, uncertain and vascillating, it is legislation; and whenever the judicial exposition of our highest Courts becomes so wavering and uncertain as to

bear comparison with our legislation, we shall truly be the *pity and contempt of all civilized nations.*

I have shown now, as I conceive,

1. That "claim" does not mean peremptory demand and unconditional surrender.

2. That legislation is contemplated by the language of the clause; and that both Congress and the States have legislated.

3. That this construction was never asserted by the framers of the Constitution.

4. That it would violate its spirit.

5. That the power of recaption of persons never existed, or if it did, is restrained by the Amendments.

6. That this power is neither expressly granted to Congress nor prohibited to the States; nor is it necessary to the exercise of any granted power, nor impliedly reserved.

7. That the States possessed this power before the Constitution was formed.

8. That it is a mere regulation of police, and does not suppose the exercise of national power, and

9. That the Constitution in Art. 1, sec. 9, gives, or rather leaves, the whole subject in the hands of the States, where it originally found it.

From all which I conclude that the State laws of Pennsylvania are constitutional; that Congress has no power over the subject; and your Honors will see by reference to *page 18 of the Record, that Prigg and his associates,* having carried away these slaves in violation of the State Law, are guilty of the charge contained in the indictment.

I repeat it then, that the State of Pennsylvania, able as she is by her position and her great power, to defend her territory and her rights from aggression, feels the sacred obligation which rests upon her to "maintain the Union;" and therefore instead of complaining when she might complain, or resenting when she might resent such ag-

gressions upon her territory, such disregard of her Laws, appeals to this high tribunal our *Arbiter gentis,* not for such a decision as she would be pleased with, but, such an one as will assuredly be given, such as shall best accord with the Instrument itself, when these two great States, the real parties in this cause, will, by their prompt acquiescence, set a brilliant example before the members of this Union of the friendly settlement of every vexed question, however irritating, and forever put to flight the malevolent anticipations of disunionists, whether Foreign or Domestic.