

ARGUMENT OF BYRON PAINE, ESQ.

AN IN THE

OPINION OF HON. A. D. SMITH,

Associate Justice of the Supreme Court of the State of Wisconsin.

HABEAS CORPUS TRIAL.

BEFORE JUSTICE SMITH.

In the matter of the Petition of SHERMAN M. BOOTH for a Writ of Habeas Corpus, and to be discharged from Imprisonment.

MONDAY, MAY 29—10 O'CLOCK A. M.

[The Relator, SHERMAN M. BOOTH, was complained of for violating the 7th section of the Fugitive Act of 1850, by aiding in the escape of Joshua Glover, from the custody of Chas. C. Cotton, Deputy Marshal of the United States, on the 11th of March, 1854.]

An examination was had before U. S. Court Commissioner Winfield Smith, who required the defendant to give bail in the sum of \$2000 to appear at the next term of the U. S. District Court for trial. The bail was given, and the Relator was afterwards surrendered and sued out this writ of Habeas Corpus to be released, chiefly on the ground of the unconstitutionality of the Act.

The writ was obeyed by the Marshal, and a return made, to which was attached the warrant of commitment. The Counsel for the Relator demurred to the return, and the hearing was fixed for Monday, May 29th, at 10 A. M.

On that day the parties appeared, Charles K. Watkins and Byron Paine for the Relator, and the U. S. District Attorney, J. R. Sharpsstein, for the Marshal.

The District Attorney moved to quash the writ, on the ground that a "Justice" of the present Supreme Court of the State had no authority to issue it in vacation. The Habeas Corpus Act gives the power to any "Judge of the Supreme Court;" but the Act organizing the present Supreme Court, styles them "Justices." He claimed that under this Act the Justices of the present Court had not all the powers of the Judges of the old Court, and that the writ could only be issued by the whole Court in term time.

Mr. Watkins replied briefly, claiming that the writ was a writ of Right, and that every Judge of a Court of Record had a right to issue it by the common law, independent of statutory provisions.

After some further discussion, the motion was overruled, and Byron Paine began his argument in support of the demurrer.]

ARGUMENT OF BYRON PAINE, ESQ.

MAY IT PLEASE THE COURT:

In arising to commence the investigation of this case, I do so with those feelings of strong embarrassment which must naturally result from knowing that I undertake to deal with a question more important than any that could be presented to a judicial tribunal. It is a question in which, according to my judgement, are involved, not the liberties of Mr. Booth alone, but the liberties of the whole people. I am also not unaware that it might involve a conflict between the judicial powers of the State and Federal Government. Because the validity of a law of the United States will be called in question here, a law in relation to a subject that has lowered like a dark and gloomy cloud above our political horizon, from which have blown those winds that have tossed the public mind and heart in wild commotion, as the ocean is tossed by the

storm of heaven. A law in relation to a subject that stood like a stumbling block in the way of the formation of our Government, a subject that has cursed us in the past, curses us in the present, and looms up as our evil genius in the future, waiting to attend us to destruction. I need not add that we are to call in question the validity of a law in relation to American Slavery. And, Sir, we shall question its validity, for the reason that Congress, in passing it, transcended its constitutional power and encroached upon a right that belongs solely to the States.— And this is another reason that makes the question pregnant with importance. For under our system, composed of many independent sovereignties, joined in one whole under a general government which has certain delegated powers; any question involving a conflict between the powers of the whole and of each sovereign part, must be of vital interest. It should be approached with solemnity with anxious care, with moderation and forbearance.— But, Sir, in my judgment it should be approached unshrinkingly. I am not one of those who believe that the possibility of such conflicts should be avoided, by servile submission from the States. I am not one of those who believe that a State should forbear to assert its rights, for fear that they may be questioned elsewhere. I do not belong to that school, of late increasing among us, which seems to teach that the States are to look up to the Departments of the Federal Government, with all the submissive deference with which a serf is to listen to the commands of his master. On the contrary, I belong to that other, and as I believe, that true school, which has best studied the theory of our institutions, and which holds that the true interests and harmony and perpetuity of this Union are to be best promoted and preserved by confining the general government strictly to the exercise of those powers delegated to it by the Constitution, and steadfastly resisting all encroachments upon the rights of the States. We plant ourselves upon the doctrine of the sovereignty of the States, over all matters except those which they have delegated to the general government power to control. This doctrine is not denied in theory by any one.— It has been asserted by the Supreme Court of the United States. In the case of *McCulloch vs. the State of Maryland*, in which the constitutionality of the U. S. Bank was affirmed, the Court says: "In America the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." This doctrine is so universally admitted that I will take no time to establish it by further authorities. But the great point of the controversy upon this subject is whether the Federal Government is the exclusive judge of the extent of its own powers, or whether the States have not also the right to judge upon that matter, whenever the general Government attempts to usurp powers which they claim belong exclusively to them? And upon this point I ask leave to read one of the Virginia Resolutions drawn by Mr. Madison, and one of the Kentucky Resolutions drawn by Mr. Jefferson, in 1798, and a portion of Mr. Madison's report. If it be thought by any that it is improper to introduce these resolutions here, I can only say that in so doing, I travel in the path of precedent, and follow the Supreme Court itself, which in the *Prigg* case, which I shall hereafter have occasion to examine, sought to sustain itself by quoting the opinion of Mr. Madison.

Among the Virginia Resolutions of 1798, which I read from the 4th of Elliott's debates, we find the following:

"That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable and dangerous exercise of other powers not granted by said compact, the States, who are the parties thereto, have the right and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them. That the General Assembly doth also express its deep regret that a spirit has, in sundry instances, been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them."

The following is the first of the Kentucky Resolutions referred to:

"Resolved, That the several States composing the United States of America are not united on the principle of unlimited submission to their General Government; left that by compact, under the style and title of a Constitution for the United States and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each State to itself the residuary mass of right to their own self-government; and that whenever the general government assumes undelegated powers its acts are unauthoritative, void and of no force; that to this compact each State acceded as a State, and is an integral part;—that this Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions, as of the mode and measure of redress."

I now read from Mr. Madison's Report on the Virginia Resolutions, found in the same work:

"The Resolution supposes that dangerous powers not delegated may not only be usurped and executed by the other departments, but that the Judicial Department also may exercise or sanction dangerous powers beyond the grant of the constitution; and consequently that the ultimate right of the parties to the Constitution to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as by another,—by the Judiciary, as well as by the Executive or the Legislature."

"However true, therefore, it may be, that the Judicial Department is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government, not in relation to the rights of the parties to the Constitutional Compact, from which the Judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annihilate the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the reach of any rightful remedy, the very Constitution which all were instituted to preserve."

It will be seen from this that those men saw the difficulties in which this question is involved; that they examined it with a rigid scrutiny, and that having done so, they met it boldly and asserted the just rights and sovereignty of the States. They did not deny that the General Government is supreme within its limits, but asserted that the States are also supreme within their limits, and as a necessary consequence of that supremacy, that they must have the power to judge when their sovereign rights are encroached upon, and to adopt measures for their defense. While this doctrine has had many powerful advocates, it has also had many powerful opponents. And the most powerful of all was Daniel Webster, who assailed it in the Senate of the United States in 1830, with the whole force of his gigantic intellect. He demonstrated beyond all question that difficulties and conflicts might result from it. That cannot be denied. But the answer is that the opposite doctrine may also lead to difficulties.—If the doctrine of State Rights may lead to conflicts, the other may lead to destruction! And conflicts are, after all, not the most fatal things that may happen in human affairs. Storm is not so fatal as stagnation. It is by conflict that Liberty has always been maintained; it is for

the want of them that it has always been lost. The position taken by Mr. Webster in his great argument upon this question, is, that there is no medium ground between absolute submission to the laws of Congress that are sustained by the Federal Courts, and a direct exercise of the right of revolution by the people, which right he admits they have. This position leads by a short road to the consolidation of the powers of the nation in the hands of the Federal Government, and to the annihilation of the powers of the States. Because, whenever the General Government usurps their rights, and the usurpation is sustained by its Judiciary, according to this theory, those rights cease to exist, and the State is without redress. They may therefore all be swallowed up one after another; and if there be any one of those rights dearer and more important than another, the State has no assurance that it will not be first seized upon. It has not even the poor promise that Polyphemus gave Ulysses, while breakfasting every day upon one of his companions, that he should be the last one to be devoured.

If this theory is true, the General Government is supreme, not only in its limits, but out of them; it is sovereign over everything, and the States are sovereign over nothing. For can we conceive of a sovereign power that may be stripped of its sovereignty, without any right of resistance or defense? Such a sovereignty would be a shadow without a substance—a mere name without the thing itself. And what are the States, that their influence should be thus undervalued and their rights overlooked? Do they alone perform so insignificant functions in our system, as to make them the only parts to which the doctrine of passive obedience is to be applied? On the contrary they are sovereign and independent nations, in all things except those which have been delegated to the General Government. They have written constitutions, establishing organized governments with executive, legislative and judicial departments, and have all the various and complicated machinery of those governments in constant and successful operation. They have control over life and death, over the liberties and property, over the hopes and happiness of the people. All the great mass of ordinary legislation belongs to them. To them the people look for the enactment of such laws and the adoption of such a policy, as shall protect their rights and promote their welfare and happiness. And they are to such an extent complete and perfect governments, that if by any political change any one State should be separated from the General Government and from all the others, it could go on performing all the functions of government without re-organization and without confusion or delay. Can it be then that States, possessing such vast powers upon subjects over which it is admitted that they are sovereign—clothed to such an extent with all the attributes of independent governments, may be deprived of them all, without the power or right to do one act in their own defense? Such a doctrine never can be admitted with safety. It is a right inherent in sovereignty to defend itself. It is a reserved right of the States which they hold, not under the constitution, but as a matter of necessity, to defend themselves from destruction. And why should they not have it? Is it not justified by analogies found in all constitutional governments? In a simple government the powers are divided among various departments upon a system of checks and balances, so that each department may protect itself from invasion, and may operate to restrain the others.—The legislature makes the laws, the judiciary keeps them in their proper limits by construction, the executive executes them, but is clothed with the veto power by which he may protect his prerogatives from encroachment.

These analogies justify the position that under a system of compound government like ours, the States should have the right to judge in the last resort when their sovereign rights are encroached upon, and to take measures for their protection. It is further justified by the right of revolution which is admitted to exist in the people. This right is asserted in the Declaration of Independence; it is expressly admitted by Mr. Webster in his argument against State Rights, and it is probably not denied by anybody in this country. The people, although they have established a government, with appropriate tribunals to judge of the extent of its powers, yet retain the right to defend themselves against a perversion of those powers by the violence of a revolution. And the right for which we contend in the States, is similar in its character to the right of revolution in the people. It is true that in a single, simple government where there is no power between it and the people, there is no medium ground between absolute submission to its acts and a direct revolution. But it by no means follows that under our peculiar system, where

between the General Government and the people we have other completely organized governments, there is no halting place between absolute submission and revolution.—On the contrary I hold that it should rather be regarded as a peculiarly happy feature of our institutions that there is such a medium ground, and that when the evil spirits of usurpation and oppression enter into and possess the Federal Power, the States may interpose with such powers as they have, to arrest the progress of the evil, and to avert, if possible, the necessity of the last resort to the terrible ordeal of revolution. The same reasoning that proves the right of the people to that last resort, proves still more strongly their right to avail themselves in the first place, of every means of protection within their reach. And that the State Governments furnish such means can not be questioned by any one.

This is a subject upon which there are, perhaps, not many authorities directly sustaining the position for which I contend. Indeed it is a position that would not be likely to be sustained by the Federal courts, because it calls in question the conclusiveness of their decisions.—But the Supreme Court of the United States has itself asserted the general principle, as applicable to another portion of the reserved rights of the States. That court might, perhaps deny its application here, but it seems to me to be far more applicable to the right of the State to defend the liberties of its people, than to its right to take their property for public use. I read from the 6th of Howard's Reports, on page 531, where the court says:

"No State it is declared shall pass a law impairing the obligation of contracts; yet with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community, there inheres NECESSARILY the right and duty of GUARDING ITS OWN EXISTENCE, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the *internal domain* of the State, is, as its name imports, paramount to all private rights vested under the Government, and these last are by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the supreme law for their government, can by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the constitution; and it would imply an incredible fantasy in the States, to ascribe to them the intention to relinquish the power of self-government and SELF-PRESERVATION."

We stand, therefore, here to-day upon the doctrine of State Rights, though we do not attempt to deny that it is a doctrine surrounded by difficulties—difficulties on both sides. As to how these difficulties are to be avoided, different men give different answers. Those whose minds incline them toward consolidation, will answer that they are to be avoided by absolute submission on the part of the States. Those on the other hand, who look with jealousy upon the Federal power, will say that they are to be avoided by each carefully and scrupulously abstaining from encroachment upon the rights of the other. They might say with Judge Story, that "the part of true wisdom would seem to be to leave in every practicable direction, a wide if not an unmeasured distance between the actual exercise of the sovereignty of each." Or they might, perhaps, rather answer as one of the great political parties of the country, which has adopted the doctrines of the Virginia and Kentucky Resolutions which I have read, has answered, and say that they are to be avoided by a strict construction of the constitution by all the agents and departments of the General Government, and that it "is inexpedient and dangerous for Congress to exercise doubtful constitutional powers."

And now, Sir, I come to the application of the doctrines I have contended for to this case. And that is that whatever objections might be urged against the actual exercise of the right of resistance by the legislative or executive departments of the State, cannot be urged with equal force against the action of its Judiciary. But that this department may, to the extent that its mode of action allows it to go, interpose its power in behalf of the rights and liberties of the people, without much danger of producing a serious or forcible collision between the two systems of government. And we hold that it follows as a necessary consequence of State sovereignty that upon all

questions touching that sovereignty, the Judiciary, as one of the great departments of the State, is to decide independently of all other tribunals upon earth. And that whenever it is alleged that a citizen is imprisoned under an unconstitutional act of congress, upon a subject, the entire control of which, within its own limits, belongs to this State, it is the high prerogative and solemn duty of our Judiciary, untrammelled by anything save the constitution and its oath, to examine into the truth of that allegation; not in a cautious or defiant spirit, but carefully and solemnly; and if it is satisfied of its truth, to extend its protecting power around that citizen, trusting the consequences, whatever they may be, to the impartial judgment of the country and the world.

This is a question that could only arise in an extreme case, and, therefore, is one upon which judicial authorities in point are not likely to be abundant. But since commencing this argument, a New York Tribune has come to my hands, containing an article in which it is said that in the case of "Rittenhouse's Executives," growing out of the celebrated Olmstead affair, the following doctrines were laid down by Chief Justice Tilghman of Pennsylvania:

"The United States have no power, legislative or judicial, except what is derived from the Constitution. When these powers are clearly exceeded, the independence of the States and the peace of the Union demands that the State Courts should, in cases properly brought before them, give redress. There is no law that forbids it; their oath of office exacts it; and if they do not, what course is to be taken? We must be reduced to the miserable necessity of opposing force to force, and arraying citizen against citizen; for it is in vain to expect that States will submit to manifest and flagrant usurpations of power by the United States, if (which God forbid!) they should ever attempt them."

I have never examined the case referred to, but presume from the character of the Tribune for accuracy, that the quotation is correct; and if so, that celebrated Judge fully sustains the position for which I contend.

In the case of *Martin vs. Hunter's Lessee*, 1st Wharton's Reports 304, it appears that the court of Appeals of the State of Virginia refused to obey the mandate of the Supreme Court of the United States, and that, because it placed a different construction upon the Constitution.—The course of that court seems to be also an authority in my favor. But even if we have no judicial precedents in favor of the right of the States to protect their people against tyranny and usurpation, it is time such a precedent should be made.

The register, Sherman M. Booth, was complained of under the 7th section of the late act of Congress, commonly called the Fugitive Slave Law, for aiding in the escape of one Joshua Glover, from the custody of Deputy Marshal Colton, Glover having been arrested as a fugitive from labor. He was examined and held to bail. He was afterwards surrendered, and sent out this writ to be released from imprisonment, solely for the alleged reason that the act of congress is unconstitutional and void.

In speaking here, we feel that we have crossed the threshold of our last refuge. We believe that the State courts may protect us if they will. That by a wise and firm interposition of their powers in behalf of the liberties of the people, they may present a barrier between those liberties and that spirit of oppression that is abroad in the land. That they may perform for us the kind office of the guardian shaft, that, reared above our dwellings, points fearlessly to the clouds, and receives upon itself unscathed, the rattling thunders, that otherwise had dashed us to pieces. And our hope in this respect is justified in a degree, by the fact that we stand here at all this day, and that the United States officers are here to give account to this court concerning our imprisonment. Because it has lately been declared here by those officers, that they would not condescend to render such account at all, and that whenever they seized upon a citizen, it was little better than an impudent interference on the part of the State tribunals to enquire of them, "Why do ye so?" These doctrines fell upon the public mind like strange and unheard of signs in heaven, filling it with horror and alarm. And it is doubtless to the prompt and decided manifestation of that horror and alarm by the people, and to the resistance of our State Judiciary, that we are indebted for the fact that the U. S. officers have recoiled from their position, and have appeared here to render a reason to this court why they imprison us. And we believe that the power of the court does not stop here, but that if satisfied that the reason is insufficient, it may discharge from custody the citizen whose liberty has been

unjustly invaded, and thus afford a peaceful and bloodless remedy for the dangers that impend over us. But if we fall here, we can go no farther. Here is our "last and very summa" of our utmost toil! If the people are driven unprotected from their State courts, the cloud that will settle down upon them can be lifted only by the dread ordeal of revolution, when falling back upon their reserved rights, amid scenes of violence and blood, they arise and abolish those governments that have failed to answer the great ends for which all governments are established. Since, therefore, the stake is so great, we beseech this court, as we believe it has every inclination to do, to direct with attention to the reasons we may present, and with patience towards the imperfect and perhaps tedious manner in which we may present them, in order that, if possible, the last hope of liberty and the people may not fail.

I shall urge the unconstitutionality of the Fugitive Slave Act upon three grounds:

First, that congress had no power to legislate upon the subject at all.

Second, admitting such a power, the Act is unconstitutional in providing that any person claimed as a fugitive, may be reduced to a State of Slavery without a Trial by Jury.

Third, that it is unconstitutional because it vests the judicial power of the United States in Court Commissioners contrary to the provisions of the constitution.

There are doubtless other good grounds of objection to this act, but I shall confine what I have to say to these three, believing that if we fall upon these, there would be no hope of succeeding upon any.

And let my purpose be understood at the outset. I do not stand here to oppose that law because it is a monstrous moral deformity—detestable in its purpose and detestable in its details, sinking to the depths of depravity to punish mercy as a crime, and sinking below the depths of contempt to offer a paltry bribe against freedom, to the petty tribunals it creates. I do not stand here to oppose it because it is a violation of the "higher law." That law needs no enforcement for its own sake, at the hands of earthly tribunals. Like its Author, it is eternal and unchangeable. It is beyond all human power to impair its force or to interrupt its operation. The penalty for its violation follows the violation itself as a natural consequence, as inevitably as the night follows the day. And this is true as well of nations as of individuals. The giant oak that has been gnawed by the woodman's axe, so that the vital current is forever withdrawn from its trunk, is not more sure to wither and decay, to be eaten by the worms, and as some time either when storms break upon it, or in profound calm, to fall thundering to the earth in a thousand fragments, that shall moulder to dust and be scattered by the winds of heaven, than is the nation that forgets God, that attempts to legislate evil into good and good into evil, sure at some time to be switten from above by the hand of destruction, or to fall to pieces from its own internal corruption and decay. I say therefore that I stand not here to oppose this act, for the reason that it violates a law "higher than the constitution," but only for the reason that it violates the constitution itself.

The last objection I have mentioned is one that I first saw in the opinion of Chief Justice Shaw, of Massachusetts, in the Simms case, which was lately published in the *Sentinel*. And I there first discovered the true strength and force of the objection, from the manner in which it was attempted to be answered, or evaded. As my argument on this point will be briefer than upon either of the others, I propose to present it first.

The objection is that the Fugitive Act vests the judicial power of the United States in court commissioners, contrary to the provisions of the constitution. Let us see if this objection is not true.

The Fugitive Act requires the United States Court Commissioners to perform all the duties imposed by it, and in order that they may do so, vests in them "concurrent jurisdiction with the circuit courts." But the first section of the third article of the constitution is as follows:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and inferior courts shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

Now, it is admitted on all hands that the U. S. Court Commissioners are not judges either of the Supreme or of the inferior courts spoken of in this section. In order to constitute the courts required here, they should "hold

their offices during good behavior," and receive for their services at stated times, a fixed compensation. Whereas in fact, they are removable at the pleasure of the court that appoints them, and receive a compensation not fixed, but proportionate to the amount of services rendered.

(The Court here called the attention of Mr. Paine to the 3d clause of the 3d section of the 3d article, which provides that "Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments;"—and asked if that would have any bearing upon the objection.)

I think, your Honor, that clause does not vary it, or diminish its force. There is no doubt that congress may vest the appointment of such inferior officers either in the President, the courts, or the heads of departments. But I think there is considerable doubt whether the judges of the "inferior courts" spoken of in the 3d article, ought to be regarded as "inferior officers," in the sense in which those words are used here. In article 3d they are styled "inferior courts," but I think only relatively so, as compared with the Supreme court, spoken of in the same section. These "inferior courts" are, some of them, in fact, very important courts, and their judges are officers possessing very great and extensive powers. But even admitting them to be such "inferior officers," that congress might vest their appointment in the President, or in the courts of law, still that leaves the objection untouched. The objection goes, not to the manner of appointment, but to the character of the officer after he is appointed.

No matter what power appoints the judges of the "inferior courts" in which the judicial power of the United States is to be vested, must, after their appointment, "hold their offices during good behavior," and receive a fixed compensation, and it is not pretended that commissioners are officers of this kind. Now, how is this plain violation of the requirements of the constitution by the Fugitive Act, to be sustained? Let us see how the Supreme court of Massachusetts attempts to dispose of it.

(Mr. Paine here read at some length from the opinion of Chief Justice Shaw in the Simms case, in which in answer to this objection, it was pretended that the powers exercised by Commissioners under this act, might not be judicial. After alluding to the fact that the law of '33 gave similar powers to the magistrate, the Court said:—"It is very manifest, therefore, that their powers were not deemed judicial by the Congress of 1793, in the sense in which it is now insisted that the Commissioner, before whom the petitioner has been brought, is in the exercise of judicial powers, not warranted by the constitution, because not commissioned as a judge and holding his office during good behavior. Indeed, it is difficult, by general terms, to draw a precise line of distinction between judicial powers and those not judicial. It is easy to designate the broad line, but not easy to mark the minute shades of difference between them.")

He read still further from the opinion where the Court referred to a number of officers, whose powers were deemed partly judicial and partly ministerial, and claimed that U. S. Court Commissioners are "commonly appointed from among counsellors at law, and of some standing, and well reputed for professional skill and experience.")

It will be seen from what I have read, that Chief Justice Shaw attempted to dispose of this objection, by an intimation—for he did not venture upon a positive assertion—that the powers exercised by Commissioners in executing the fugitive act are not judicial powers. The manner in which this is attempted to be got at is a little remarkable. The Court does not say that the power is not judicial, but says, "it is difficult to draw the precise line of distinction between judicial powers and those not judicial;" and after giving some illustrations of this proposition, leaves it to be inferred from that difficulty, that this power may, after all, not be a judicial one. Now, sir, I apprehend, however difficult it may be to draw the line between judicial powers and powers not judicial, it will be still more difficult, after it is drawn, to show that the power exercised by a Commissioner in determining a fugitive slave case, is not plainly and palpably on the judicial side of that line. Mark how easily this can be shown.—Among all the arguments by which the constitutional power of Congress to legislate upon this subject at all, has been attempted to be sustained, there is only one, which in my judgment, is worthy of consideration, or attempts to come within the settled rules of construction.—That argument is, that the case of a fugitive "is a case at law arising under the constitution"—that consequently the "judicial power" of the United States extends to it, and Congress may legislate upon it in order to vest the judi-

cial power. In the *Prigg* case, in the 16th of Peters' Reports, I find on page 568, in the argument of Mr. Meredith, who contended for the power of Congress, the following language: "The constitution declares that slaves escaping from service shall be delivered up, on claim, to the person to whom such service shall be due. What is the meaning of these words on claim? They look to a proceeding of a judicial character; to an assertion of a right of property, to be made before a tribunal competent to judge and decide; and to execute that decision by a delivery of the property if the claim be established. Is not this then a part of the judicial power, which extends to all cases at law and in equity, arising under the constitution, laws and treaties of the United States?"

This was the argument of counsel, but the court took the same position. On page 576 the court says:—"It is plain, then, that where a claim is made by the owner out of possession for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties and a case arising under the constitution of the United States, within the express delegation of judicial power given by that instrument."

We find, therefore, that the counsel, in contending for the power of congress to legislate upon this subject, and the court in upholding it, placed it upon the express ground that the decision of a fugitive case, is an exercise of judicial power. What, then, becomes of the answer which Chief Justice Shaw sets up, by inference, against this objection? It fails completely, and leaves not a shadow of an answer. It leaves it clear, plain and palpable to the common understanding of everybody, that the Fugitive Act vests "judicial powers" in court commissioners, and that in doing so, it violates the constitution of the United States. And that Chief Justice Shaw was fully aware of this, is apparent from his opinion. After that part which I have read, he makes the following admission to which I invite the especial attention of the court. He says:

"At the same time it may be proper to say, that if this argument, drawn from the constitution of the United States, were now first applied to the law of 1793, deriving no sanction from contemporaneous construction, judicial precedent, and the acquiescence of the general and State Governments, the argument from the limitation of judicial power would be entitled to very grave consideration."

Sir, I would have been glad if the learned Judge had referred us to the "judicial precedents" he speaks of. I know of none such. I believe this point never was raised in any case till it was raised by Mr. Rantoul before that court, which, after substantially admitting that the objection was good, over-ruled it, in obedience to "judicial precedents" that do not exist.

"The Chief Justice speaks of 'acquiescence,' but there has been no such acquiescence. Until this law of 1850, this power was never vested in court commissioners. It is true, the law of '93 vested similar power in State magistrates, but that was in violation of a principle settled by the U. S. Supreme Court in the case of *Martin vs. Hunter's Lessee*, 1st Wheaton 304, where it was held that no part of the judicial powers of the United States could be vested in State courts. The State magistrates were not called on to act under that law often enough to constitute an acquiescence. And the State of Pennsylvania, by positive law, forbade its magistrates to act under it. And there is, in my judgment, a vast difference between vesting this power in State officers, responsible to the people of the State, and under their legislative control, and vesting it in U. S. Court Commissioners, dependent on the court that appoints them, and responsible to it alone. Be it remembered, also, that this act of 1850 requires these commissioners to be numerously appointed, for the purpose 'of affording reasonable facilities' for the recapture of fugitives. Sir, this power, in these dependent, irresponsible officers, appointed to furnish 'reasonable facilities' for the destruction of Liberty, is pregnant with danger to the people of these States. It has existed only four years, and has been met with louder condemnation than any other act that was ever passed. But even if it had been acquiesced in since the beginning of the Government, still that would not entitle it to overturn the constitution. I answer in the language of Chief Justice Marshall, in the *Bank case*: 'That a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this.'

AFTERNOON SESSION—9 1/2 P. M.

Having finished what I intended to say upon the objection relating to the judicial power, I return now to the consideration of the first, which is that Congress has no power whatever to legislate concerning the reception of fugitives from labor. In presenting this, my purpose is first to maintain what I believe to be the true construction of the constitution, fortifying that construction with such authorities as I may be able, and then to examine some of the decisions that have been made in favor of the opposite doctrine. For I am aware that such decisions have been made, and that they are regarded by many as binding and conclusive. But I shall endeavor to show that there are none which deserve to be so regarded; but that, on the contrary, they are so much in conflict with each other, and with clear and well settled principles of construction, that the character of their reasoning is so dangerous and unsatisfactory, and that they give such evidence of having been made without that rigid scrutiny which so great an issue demands, as to render them unworthy of being regarded as binding authorities by this or any other court. And if I may be allowed to test forth great things by small, I would say that in this investigation it will be found that the proceedings of the State and general governments, in relation to their respective powers, resemble those of peasant families who have gone into new country and settled in the wilderness. Each family devotes its attention at first to such improvements around its immediate household as will enable it to secure the necessities and common conveniences of life. The boundary lines of the farms are not run out perhaps for a long time; and when they are run, are made crooked, turning aside for slight obstacles, so that the land of one owner is often contained in the enclosure of another. Their first enclosures are also generally of an imperfect character, so that the animals of one depositor upon the lands of another, and all this occurs without attention or complaint. But when their children have grown up around them, and by the advance of society the land has become valuable, so that every foot is required to satisfy the demands of the increasing population, the boundary lines are run over again with unerring certainty—the crooked places are made straight, and substantial enclosures are erected, so that every owner may enjoy their own.

Thus has it been with the Federal and State governments. In setting in motion the vast machinery of the new system, each endeavoring to accomplish those objects which pressed most forcibly upon its attention, they have frequently encroached upon the rights and prerogatives of each other. The encroachments have in some instances been rectified, but in others they have been acquiesced in, and the boundary lines between the two systems have been made crooked. The subject we are to consider here belongs to the latter class. And I fear this encroachment has been acquiesced in more readily than it would otherwise have been, because it was imagined that it concerned only the rights of a class of people who were poor, persecuted, despised and outcast among us. But the time has now come when it concerns the liberties of us all, white as well as black, that these boundary lines should be re-examined, and the respective rights of the Federal and State powers in this matter should be placed on their true basis. For the people are overshadowed with clouds of prosecutions, swarming with pains and penalties as numerous as the locusts which swarmed over Egypt; and it has become of vital interest to them to know whether the power for these things is really found in the Constitution, or be nothing better than a barefaced usurpation.

And in setting out upon this investigation, it is important to determine whether we have any settled rule of construction, in the light of which we can travel to a safe and just conclusion in this matter. Judge Story, in the 1st volume of his Commentaries on the Constitution, on page 383, tells us that much of the difficulty that has arisen among the various disputants upon this instrument, has been caused by the want of "uniform rules" of construction. I call the attention of the Court to this word "uniform," because we shall find it used again by Judge Story before we finish the examination. I think there is such a safe and uniform rule, and that it is to be derived, clearly and plainly, from the Constitution itself. It is contained on all hands, that the General Government is one of limited powers, and that it can exercise none not delegated to it by the Constitution. It is well known that they who framed that government, while they wished to give it the powers necessary to accomplish the great objects committed to its care, were yet jealous of its strength, and intended to confine it to the exercise of the powers delegated to it by the instrument. We find, therefore, that the instrument

enumerates its powers in a manner as clear and plain as language will permit. After this enumeration there is a clause giving to the general power to make all laws necessary and proper for carrying into execution the enumerated powers, and all other powers vested in the general government or any of its officers or departments. But so jealous were the people of that government, that even this careful and guarded manner of expressing its powers, was not deemed sufficient, but in order to secure the reserved rights of the States from all doubt or question, they adopted the tenth amendment, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

It is clear, then, from the very face of the instrument, that congress can exercise no power, unless it is expressly delegated to it, or is necessary to carry into execution some express power. This rule is laid down by Mr. Madison in the Report to which I have already referred the court, in the 4th of Elliott's debates, on page 567, in the following clear and admissible manner:

"Whenever therefore a question arises concerning the constitutionality of a particular power, the first question, in order to determine its constitutionality, is whether the power is expressed in the constitution? If it be, the question is decided. If it be not, the next inquiry is whether it is clearly implied as incidental to an express grant, and necessary to its execution. If it be, congress may exercise it; if it be not, congress cannot exercise it."

This same rule has also been established by the Supreme court of the United States. In the case of *Marble vs. Hunter's Lessee*, in the 3d Condensed Reports on page 563, the court says:

"The Government, then, 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."

The words "necessary implication" used here, are evidently founded on the clause giving the power to make all laws "necessary and proper to carry into execution" the express powers, &c. And this is left in no doubt because in the case of *Gibbons vs. Ogden*, 5th Condensed Reports, on page 374, the same court says:

"No direct general power over these objects is granted 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; it must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given."

Now, in the light of this plain rule, let us proceed to examine the constitution. The only clause in that instrument relating to fugitives from labor is found in the 2d section of the 4th article, and is as follows:

"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!"

Is there any express grant of power to congress here? No one pretends it. The clause has been stretched upon the rack of judicial ingenuity till its joints are quivered, to extract from it a confession of such a grant, but it has remained silent as the tomb. Congress is neither expressly mentioned in it, nor any idea of it implied. No man from reading this clause would know that such a thing as Congress existed; or would suspect that it was anything more than it purports to be on its face—a mere article of compact between the States, depending for its execution entirely on their integrity and good faith. But one legislative power is spoken of in it, and that is the State. A positive prohibition to discharge from service or labor is imposed; and then, in the same sentence, a positive obligation to deliver up! To whom is this obligation addressed? Clearly to the same power that is forbidden to discharge. That is the natural and ordinary import of the language. It is addressed to the State Government because that is mentioned immediately in connection with it, and no other power is mentioned at all. The clause assumes to regulate the legislation of the State. It prescribes what shall not be done, and commands what shall be done. The prohibition is expressly directed to the State, and the obligation to "deliver up," following in the same sentence, applies to the State by the ordinary force of language, without expressly saying "shall be delivered up" by the State. If I make an agreement with another that if my horse escape into his pasture, the animal shall not be kept by him for his own use, but shall be delivered

up to me again, all men would understand the obligation to deliver, to be imposed upon the one who was forbidden to keep. Because, although it does not state expressly that he shall deliver, yet that is plainly implied. So when the constitution asserts that a fugitive escaping into a State, shall not be discharged by its laws, but shall be delivered up, it is just as plainly implied that he shall be delivered up by the State.

Suppose the words were changed so as to say, that when the fugitive escapes into a State, "the State shall not discharge him, but shall deliver him up." Could any one, by any possible mode of construction, pretend that in that case the State would not be the party to "deliver up." Certainly not. Yet the idea is precisely the same as the words now stand. And no one can tear the sentence sunder, and thrust in a third power, to fulfill the obligation imposed, without doing equal violence to the import of the words, with that which he would do, if they were in the form I have supposed.

The State is implied also by the meaning of the word "deliver." The clause assumes that except for its obligation, the State would have uncontrolled power over the fugitive. With reference to the State, the words "shall be delivered up," were therefore properly used. But if a third power was to have the right to come in and carry the fugitive away, whether the State were willing or not, that could not rightly be called a "delivering up," but would be a taking away.

It seems plain, therefore, that the true construction of this clause leaves it a mere article of compact between the States, confiding no power whatever on the General Government.

And this construction is sustained by very high authorities. In the case of *Jecker vs. Morris*, which arose under the law of '33, and is reported in the 14th of Wendell, Chancellor Walworth delivered a noble and just opinion against the constitutionality of the law. In that opinion he says:

"I have looked in vain among the powers delegated to congress by the constitution for any general authority to that body to legislate on this subject. It certainly is not contained in any express grant of power, and it does not appear to be embraced in the general grant of incidental powers, contained in the last clause of the constitution relative to the powers of congress. The law of the United States respecting fugitives from justice and fugitive slaves, is not a law to carry into effect any of the powers expressly granted to Congress, or any other power vested by the constitution in the Government of the United States, or any department or any officer thereof! It appears to be a law to regulate the exercise of the rights secured to the individual States, or the inhabitants thereof, by the second section of the fourth article of the constitution; which section, like the ninth section of the first article, merely imposes a restriction and a duty upon other States and individuals in relation to such rights, but vests no power in the Federal Government, or any department or officer thereof, except the judicial power of declaring and enforcing the rights secured by the constitution."

The next authority to which I will refer upon this point is the authority of Daniel Webster. In his celebrated 7th of March speech, in speaking of this clause he says:

"I have always thought that the constitution addressed itself to the Legislatures of the States, or to the States themselves. It says that those persons escaping to other States shall be delivered up, and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State, and becoming, therefore, within the jurisdiction of that State, shall be delivered up, it seems to me that the import of the passage is that the State itself, in obedience to the constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now."

I need not inform this court that the man who spoke those words, won, amid all his able contemporaries, the title of "the great expounder of the constitution." He won that title, not only by the power and clearness of his expositions, but because he favored the liberal, rather than the strict construction of the instrument. Another fact which is well understood, and I believe is admitted by the friends of that great man, is, that in making that 7th of March speech, his object was, not only to fulfill what he believed to be his duty to his country, but also, to use his own words, "to do his whole duty to his southern brethren," in order to secure their support as a nominee for the Presidency. Yet, notwithstanding such was his object, justice to himself and to his world-wide reputation as a constitutional lawyer, required him to admit

that this clause addresses itself entirely to the States, and confers no power whatever on the General Government. Sir, the opinion of Daniel Webster, given under such circumstances, weighs with a mountain weight in the scales that are to decide this question, and there is not enough force in all the judicial opinions that have been given on the opposite side, to start it alone, from the counter.

But the truth of this construction is made apparent, not only by the arguments of its friends, but by the admissions of its enemies. In the case of *Jack vs. Martin*, in the 14th of Wendell, to which I have already referred, Senator Bishop, as a member of the New York Court of Errors, delivered an opinion in favor of the constitutionality of the law of '93. It was the only opinion delivered, except that of the Chancellor already mentioned. In that opinion, he starts off, into an investigation of the objects of this clause, with the following extraordinary statement. He says:

"In the ABSENCE of any precise authority in the constitution, in regard to the removal of fugitive slaves, it becomes important to enquire as to the motives of the members of the convention who represented the slaveholding States, and the considerations which were likely to operate most powerfully upon them."

I shall have occasion to call the attention of the Court more particularly to the last part of this statement hereafter, but that which I wish it now to notice, is, that Senator Bishop admits that there is an "absence in the constitution" of that authority with which he seeks to clothe the General Government. And in order to find any support for that authority, he is compelled to go out of the instrument.

Mr. Meredith, who argued the *Prigg* case before the Supreme Court, in favor of the power of congress, in commenting on this clause, used the following language:

"Here, then, are two acts to be done. A claim is to be made, but the mode in which it is to be made, and the forms to be observed in making it, are not provided for. Again, a delivery is required, but FROM WHOM, and in what manner, the constitution does not prescribe."

Now, in order for congress to legislate upon this subject the constitution must "prescribe" that the delivery is to take place from the General Government. Since, therefore, it prescribes no such thing, as admitted by Mr. Meredith, it follows that the delivery is to be from the State; because by the very instrument itself, if the power is not delegated to the General Government, it is "reserved to the States respectively, or to the people."

In the same case, Chief Justice Taney delivered a separate opinion. He concurred with a majority of the court, that congress had the right to legislate upon this matter, but claimed that the States had a concurrent right. In maintaining the latter opinion he speaks as follows concerning this clause:

"The language used in the constitution does not, in my judgment, justify the construction given to it by the court. It contains no words prohibiting the several States from passing laws to enforce this right. They are in express terms forbidden to make any regulation that shall impair it. But there the prohibition stops.—And according to the settled rules of construction for all written instruments, the prohibition being confined to laws injurious to the right, the power to pass laws to support and enforce it, is NECESSARILY IMPLIED. And the words of the article which direct that the fugitive shall be delivered up, seem EVIDENTLY DESIGNED to impose it as a duty upon the people of the several States, to pass laws to carry into execution in good faith, the compact into which they thus solemnly entered with each other."

Judge McLean also delivered a separate opinion in the same case, and though he sustained the power of congress, yet in speaking of this clause he says:

"The States are inhibited from passing any law or regulation which shall discharge a fugitive slave from the service of his master, and a positive duty is enjoined on THEM to deliver him up, &c."

Here, then, is a weight of opinion in favor of the construction of this clause, for which I contend, that seems to me to be absolutely overwhelming and irresistible.—But to place it beyond all question, to make assurance doubly sure, we have the authority of the framers of the instrument themselves, manifested almost as clearly as if they had said in express words, that congress should have no power over this matter. Whence is this authority derived? In the first section of this same article 4, we find the following:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

This clause, together with several others, stood as articles of compact, among the old articles of confederation. It was never pretended that they conferred any power on the congress of the Confederation. The clause concerning the delivery up of fugitives from justices was among them. These clauses were copied from the articles of confederation into the present constitution. And it is manifest that the framers supposed that it left in their original shape, they would confer no more power on the present congress, than they conferred on the old. Therefore, after copying into the constitution this clause concerning records, &c., they proceeded to add to it the following power:

"And congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof," and so the section now stands.

They evidently supposed that without this addition, the clause conferred no power on congress. The implication from this, is almost irresistible, that they regarded the clause concerning fugitives, as vesting no power in congress, and that if they had intended to grant such a power, they would have added it expressly, as they did in the clause concerning records.

I have now finished my argument upon the meaning of the clause; and have shown, as it seems to me, that by its fair and true construction, it is a mere article of compact between the States, vesting no power whatever in the General Government. And if this is so, then the Fugitive Act is an exercise of usurped power, destructive of the rights of the States, and can impose no obligation on their judicial tribunals.

It remains for me now, in order to finish this branch of the subject, to examine some of the decisions that have been made sustaining the legislation of congress. These decisions have been made mostly concerning the law of '93. The question, however, so far as the objection I am now considering, is concerned, was the same under that law, as under the law of 1850. Almost the first case we find upon the subject, is that of *Giles vs. Hodges*, 2d Johnson, 67. It was decided in 1812. No objection was made to the law of '93, but it was treated as constitutional without question from any quarter. We find, also, in the 2d Pick, page 11, the case of the *Commonwealth vs. Griffith*.—In that case the law was objected to as unconstitutional because it provided that the person claimed might be seized without warrant. It was alleged that this infringed the right of the people to be secure from unreasonable searches, &c. This objection was overruled by the court. But the question of the power of congress to legislate upon the subject was neither raised nor decided. This case was decided only a few years after the Missouri Compromise, which followed one of the great excitements upon this question. It will be seen that the court, following the lead of the politicians, decides that the constitution was a "compromise." It says in that instrument we agreed to treat slaves as property, though it admits that "the words of it were used out of delicacy," so as not to offend some in the convention, whose feelings were abhorrent to slavery." This looks very much like an admission that the words do not mean slaves, but this point I shall not urge. Of these two cases, I shall only say that they are not authorities against the objection I am now urging, because that objection was not raised in them.—On the contrary, by acquiescing in the validity of the law, without raising those objections, which have since agitated the highest tribunal of the States and nation, those cases furnish evidence of the assertion I have made here, that this legislation of congress had been acquiesced in, without that rigid examination its importance demanded. They are instances where the crooked boundary lines, between the two systems, were allowed to stand without complaint.

The decision of the Massachusetts Court, in the *Simms* case, already referred to, rests upon the decisions that had been previously made. I shall therefore confine my further examination to those decisions, and if their reasoning can be answered, of course the superstructure reared upon them, falls when the foundation is undermined.

I suppose the only decisions that stand in our way, are the opinions delivered in the case of *Jack vs. Martin*, in New York, and in the *Prigg* case, before the Supreme Court of the United States. I propose, therefore, to examine these at some length. But it may, perhaps, be proper in the first place to say, that the case of *Jack vs. Martin*, before the New York Court of Errors, is not an authority against us. Chancellor Walworth delivered an opinion against the constitutionality of the law, and Senator Bishop, one in its favor. But the Chancellor, not

withstanding his opinion, voted to affirm the decision of the court below, on the ground that by the pleading, the fugitive admitted himself to be a slave. This was the only point decided in the Court of Errors. The vote of the court was unanimous, but how many were of the same opinion as the Chancellor, and how many of that of Senator Bishop, does not appear. For aught that appears in the report, all except Senator Bishop, may have believed the law to be unconstitutional.

I have said that I should endeavor to show that these decisions were in violation of well settled rules of construction. I shall now proceed in that attempt, and shall point out the rules that I claim have been violated.

In the first place, let me invite the attention of the court to the further consideration of the implied powers, that congress may legitimately exercise. In all the cases where its powers have been called in question, we see much about "implied powers," and it is therefore important to determine what kind of implied powers is may rightfully claim. And upon this subject I understand the rule to be, that it can claim none, except such as are implied, as incidental to some express power, and necessary to its execution. The authorities sustaining this rule I have already referred to. They lay it down in express terms. And I think it is to be derived, with equal clearness, from the whole course of reasoning in those cases which have been regarded as stretching the power of congress even beyond its utmost verge. Take, for instance, the bank case. The court there admits that Congress can exercise no powers not delegated to it, but claims that there is nothing in the constitution excluding implied powers. It then goes on to show what kind of implied powers it means. It says that it would have been impossible to specify all the "means" by which the government might carry into execution the powers granted, and that the instrument therefore expresses only the great powers, leaving congress at liberty to adopt such means as were necessary to their execution, and claiming that the power to adopt those means, was incidental to the express power. The court entered into a shrewd argument to show that congress might even go to this extent,—that it might even adopt the means necessary to carry into execution its express powers. It also claimed that the means need not be "indispensably necessary," but if they were ordinarily necessary and proper for the end, the degree of necessity was to be judged of by the legislature, and not by the court. The court then says that although the power to incorporate a Bank is not among the enumerated powers of the government, yet that it has the great powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies." It then proceeded to argue that a Bank was a necessary and proper means to carry into execution those great express powers, and placed its conditionality upon that ground, and on that alone. This decision has been regarded by a great portion of the American People, as having carried the powers of congress virtually beyond their just limits. I have, therefore, alluded to it at some length, to show that even in that case, the only kind of implied powers claimed for congress, were such as were incidental to the execution of express powers. There must be an express power pointed out in the first place, before the doctrine of implied powers can be called into action at all. They must show a visible express trunk in the instrument itself, on which the proposed implied power is to be grafted, as incidental to its execution.

Now I shall endeavor to show that the decisions upon which I am commenting, violate this rule. And that they go out of the instrument into an investigation of the objects of the clause, and the "motives" for its insertion, and from an argument of convenience, imply in Congress a power,—not incidental to the execution of any other,—but an independent, substantive power, to carry this clause in execution.

I do not urge before this court, that it is not proper in any case, to go into an investigation of the objects of a clause in order to construe it. This may be done where its meaning is doubtful. It may be done in construing the constitution as well as other instruments. Where a power is given, the extent of which is doubtful, the objects of it may be required into, in order to give it a just construction. Neither do I contend that when a power is given, it should receive a narrow and illiberal construction, that might defeat its purpose. It should be construed fairly and reasonably. But what I contend for, is this: that so far as the constitution is concerned, the objects of a clause can only be required into in order to construe a "given power," and not to give a power. In the case of

Gibbons vs. Ogden, 5th Con. R., on page 583, the court says:—"If from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction." This language is confined to the construction of a "given power." It would be applicable in construing the powers "to regulate commerce,"—"to declare war," or any other express power of doubtful extent. But it affords no sanction for any court, admitting that the words of a clause confer no power on Congress, to enquire into its objects, for the purpose of implying in Congress as a matter of convenience in its accomplishment, an independent power to carry it into execution. Because the instrument expressly excludes from Congress such implied powers; and therefore to enquire into the objects and intention of a particular clause, in order to imply from those objects and intentions, a power in the General Government to execute it,—not given by the words, nor incidental to a given power, would be to make the intention of a particular clause, defeat the manifestation of the whole instrument. It would open to the General Government the boundless and unexplored regions of implication, from which it might draw whatever power it desired.

Another rule of construction violated by these decisions, is that the intention of an instrument is to be gathered from its words. And that they are never to be departed from, except to avoid a difficulty that cannot be otherwise avoided. In the case of *Ogden vs. Saunders* 12th Wharton 332, in an opinion delivered by Chief Justice Marshall, this rule is laid down as follows: "To say that the intention of the instrument is to prevail; that this intention must be collected from its words, &c.,—is to repeat what has been already said more at large and is all that can be necessary."

In the case of *Sturges vs. Crowninshield*, 4th Con. R., page 412, the Court says: "Before discussing this argument, it may not be improper to premise, that although the spirit of an instrument, especially of a constitution is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."

I shall show that these decisions leave the words of the instrument and go, without cause, into a historical investigation to arrive at its intention.

There is another rule that when there is no ambiguity there is no room for construction. This is laid down in the 1st Story's Commentaries on the Constitution, page 224, as follows:

"When its words are plain, clear and determinate, they require no interpretation, and it should be admitted, if at all, with great caution, and only from necessity, to escape some absurd consequence, or to guard against some fatal evil." And after alluding to some instances, where questions might arise from the doubtful meaning of words, he says:—"Whenever such questions arise, they will probably be settled, each upon its own peculiar grounds; and whenever it is a question of power, it should be approached with extreme caution, and affirmed only on the most perspicacious reasons."

Now, sir, I contend that there is no ambiguity in this fugitive clause, as to the power that is to carry it into execution. There has always been a great question in the minds of many, whether the words applied properly to slaves.—There might be some ambiguity upon that, but that has not arisen in any of these cases. There is no ambiguity on any other point. The words are plain and clear. The fugitive is not to be discharged by the State, but is to be delivered up. But it is said the clause does not prescribe by whom he is to be delivered up, and therefore there is an ambiguity. I think I have already shown to the court, that the plain, natural import of the words is, that he is to be delivered up by the State. But admit that this is not so, and that the words simply require a thing to be done, without saying whether the General Government, or the States shall do it,—and this is the most that can be claimed. Is there any ambiguity then, as to which shall do it? Clearly not! There might be, if the presumptions were equal in favor of the two powers; but this is not so. The General Government must show its authority,—the States need not.—If the words do not prescribe which power may execute the clause, of course they do not give the General Government authority to execute it. Therefore the States come in by the 10th amendment, and bear of this power, as they do all others, not delegated to the General Government.—Looking at the whole instrument, therefore, there is no ambiguity as to which this power belongs.

And now let us proceed to the decisions themselves.

And in the first place, I will ask the attention of the court again, in the manner in which Senator Bishop, in the 14th Wendell, sets out, upon his enquiry into the objects of the clause. I have already referred to it once, but it is so remarkable as to be worthy of a second examination. He says:

"In the absence of any precise authority in the constitution, in regard to the removal of fugitive slaves, it becomes important to enquire as to the motives of the members of the convention who REPRESENTED THE SLAVEHOLDING STATES, and the considerations which were likely to operate most powerfully upon them."

Sir, we could hardly have hoped that they who had determined to sustain this power, would have so frankly admitted the dangerous rule by which they were to arrive at the conclusion! The Senator says that the authority he seeks is not in the instrument. He starts, therefore, in pursuit of it, and where does he go? Does he enquire into the motives of the people who adopted the constitution? Does he even enquire into the motives of the convention that framed it? Not at all. He goes to "the motives of those members of the convention who REPRESENTED THE SLAVEHOLDING STATES!" So one-sided and dangerous a rule of construction was never broached in any tribunal before. It bears the seal of its condemnation on its own forehead! If the rule laid down in this bold avowal, is to prevail, all others must be overthrown, and all safety is at an end. But the Senator practiced upon his rule. (Mr. Paine here read at length from the opinion and then proceeded.) It will be seen from what I have read that he comes to the conclusion that the object of this clause, was to secure the recapture of fugitive slaves—that he thinks the States would fail to abide by the obligation if left to them—that congress can accomplish its object more effectually, and more for the convenience of the owners, than the States, and THEREFORE the clause should be so construed as to give congress the power! This is the sum and substance of the argument, and I submit that it is a plain and palpable violation of all those settled rules to which I have called the attention of the court.—The Senator, at the beginning, professes an intention to abide by the rule as to incidental powers. But he points out no power to which he claims this is incidental. On the contrary, he implies it as an independent power in the General Government, because he thinks that government can execute the clause better than the States. Upon the propriety of making such an investigation into motives, as was made by the Senator, I refer the court to the 2d of Story's Commentaries, page 333, where, in speaking of this doctrine, he says:

"Such a doctrine would be novel and absurd. It would confuse and destroy all the tests of constitutional rights and authorities. Congress could never pass any law, without an inquiry into the motives of every member, and even then they might be re-examinable. Besides, what possible means can there be of making such investigations? The motives of many of the members may be, say, must be, utterly unknown, and incapable of ascertainment by any judicial or other inquiry; they may be mixed up in various manners and degrees; they may be opposite to, or independent of each other. The constitution would thus depend on processes utterly vague and incomprehensible, and the written intent of the legislature upon its words and acts, the *lex scripta* would be contradicted or obliterated by conjecture, and parol declarations and fleeting reveries and heated imaginations. No government on earth could rest for a moment on such a foundation. It would be a constitution of sand, heaped up and dissolved by the flux and reflux of every tide of opinion. Every act of the legislature (and for the same reason also every clause of the constitution) must therefore be judged of from its objects an intent, as they are embodied in its provisions."

Judge Nelson, who delivered the opinion of the Supreme Court of New York, in this same case of *Jack vs. Martin*, in the 13th Wendell, says: "It is material to look into the objects of this clause of the Constitution, the evil to be guarded against, and the nature and character of the rights to be protected and enforced in order to comprehend its meaning, and determine what powers, and to what extent may be rightfully claimed under it." If it were admitted that the general government was to do, whatever is to be done, to execute the clause, this rule might be correct. But when it is admitted that the words vest no power in that government—to enquire into the objects of the clause to determine whether Congress has the power to execute it or not, I have already attempted to show, is a violation of the settled rules of construction and of the constitution itself.

But the Judge accordingly proceeded, and made a similar but rather stronger argument of convenience, than was afterwards made by Senator Bishop in the Court of Errors. (Mr. Paine here read at some length from the opinion.) It is plainly and palpably nothing more than an argument of convenience. The Court thinks the States would not execute the clause faithfully—that it would have been unwise to have left it with them—that Congress can accomplish it more effectually—therefore they intend to give Congress the power, and therefore Congress has the power! That is all there is of it! A mere argument of convenience, from which the court implies in Congress a power, not incidental to some other, but independent, standing by itself.

And now we come to the *Frigate* case, decided by the Supreme Court of the United States, which has stood like a lion in the way of everybody, I believe, except those who have carefully examined it. On page 610, 16th Peters, the Court in its opinion delivered by Judge Story, says:

"Before, however, we proceed to the points more immediately before us, it may be well—in order to clear the case of difficulty—to say that in the exposition of this part of the constitution, we shall limit ourselves to those considerations that appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature."

It will be perceived here, that the court scented the danger afar off, and like a prudent man, began in season to prepare a way of escape. It was conscious that it was about to violate the settled rules of construction, and therefore it proceeded:

"It will, indeed, probably be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And perhaps the safest rule of interpretation after all will be found to be, to look to the nature and object of particular powers, duties and rights, with all the lights and aids of contemporary history, and to give to the words of each, just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

Lyander Spooner, who contends that the clause does not apply to slaves at all, asserts that the words "consistent with their legitimate meaning," contain a deliberate falsehood thrown in by the court, to cover up its fraud.—Because if their construction was "consistent with the legitimate meaning" of the words, it would have been unnecessary for the court to have broken away from all the settled rules to arrive at it. It might not be considered respectful for me to go to the extent that Mr. Spooner did, but I must say that it seems evident that those words as used by the court, and a similar expression used by Judge Nelson, were thrown in *seu silvas*, to break, as far as possible, the force of the violence they were about to perpetrate on the established rules of construction. The court evidently meant to say, that if, from the object of a clause, it appeared that congress could execute it better than the States, they would so construe it as to give congress the power, *unless the words absolutely forbid it*. This was clearly all that was meant by the words, "consistent with their legitimate meaning." Because the court did not attempt to show that there were any words in the clause, which, either by their "legitimate" or illegitimate meaning, vested any power in congress, or even indicated the existence of such a body.

It will be remembered by the court that Judge Story, in his Commentaries, to which I have referred, says that the difficulty that has arisen among the various interpreters of the constitution, was for the want of some "uniform rule" of construction. But here he asserts that no uniform rule can be applied to it!

I think I have now shown that these decisions assume an ambiguity in this clause when there is none, that they abandon the words without just cause, to seek for the intention in a historical investigation, and then infer an independent power in congress to execute it, from a mere argument of convenience. I think I have shown that in doing so, they violate and overturn the settled rules of construction, and leave no safety to the States against legislative and judicial usurpations of all their powers. I cannot express my condemnation of this mode of construction in any better manner than by quoting from the Commentaries of Judge Story, who delivered this very

opinion in the *Prigg* case. I read from the first volume, beginning on page 387:

"The constitution was adopted by the people of the United States, and it was submitted to the whole, upon a just survey of its provisions as they stood in the text itself. In different States and in different conventions, different and very opposite objections are known to have prevailed, and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections and win local favor. And there can be no certainty, either that the different State Conventions, in ratifying the constitution, gave the same uniform interpretations to its language, or that even in a single State Convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it.

"Some may have interpreted its language strictly and clearly; others from a different habit of thinking may have given it a large and liberal meaning. It is not to be presumed that even in the convention which framed the constitution, from the causes above mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself, and the judgment of no one could, or ought to be conclusive upon others.

"Is the sense of the constitution to be ascertained, not by its own text, but by the *probable meaning*? to be gathered by conjectures from scattered documents, from private papers, from the table-talk of some statesmen, or the jealous exaggerations of others. *In the Constitution of the United States to be the only instrument which is not to be interpreted by what is written, but by probable guesses ASKED FROM THE TEXT?* What would be said of interpreting a statute of a State Legislature, by endeavoring to find out from private sources the objects and opinions of every member—how every one thought, what he wished, and how he interpreted it? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed as to the probable meaning of the framers or of the people, what interpretation is to be followed? These and many questions of the same sort might be asked.

"It is evident that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the text, but the words are to be bent and broken by the probable meaning of persons whom they never knew, and whose opinions and means of information may be no better than their own. The people adopted the constitution according to the words of the text, in their reasonable interpretation, and not according to the private interpretation of any particular men.

"The text was adopted by the people in its obvious and general sense. We have no means of knowing that any gloss short of this sense was either contemplated or approved by the people; and such a gloss, tho' satisfactory to one State, might have been the very ground of objection in another. It might have formed a motive to reject it in one and to adopt it in another. The sense of a part of the people has no title to be deemed the sense of the whole. Motives of State policy or State interest may very properly have influence in the question of ratifying it, but the Constitution itself must be expounded as it stands, and not as that policy or that interest may seem now to dictate."

More scathing words of rebuke for the mode of construction adopted in these cases than these used by Judge Story, could not well be uttered. He is one Story when seeking as a judge to sustain a usurped power, but entirely a different Story, when writing as an independent author, with no purposes but those of truth to subserve. See, also, how strongly he denounces a resort to the argument of convenience, which is all that these decisions rest upon. He says:

"On the other hand, a rule of equal importance, is not to enlarge the construction of a given power beyond the force of its terms, merely because the restriction is inconvenient, impolitic, or even MISCHIEVOUS!

"Nor should it ever be lost sight of that the government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is, *per se*, tantum, THE ESTABLISHMENT OF A NEW CONSTITUTION. It is doing for the people what they have not chosen to do for themselves. It is usurping the function of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience, ought here to be of no weight. The only sound principle is to declare the *lex scripta est*, to follow and to obey."

And now, Sir, I propose to examine more closely the reasoning in the *Prigg* case, and attempt to show that it is entirely unsatisfactory and insufficient to support the decision of the court. In the first place, I shall contend that, admitting it to be proper to go into a historical investigation of the motives of members, in order to get at the intention of the constitution, still the court has assumed positions as the basis of its reasoning, which such an historical investigation does not warrant. It states at first that "the true design of this clause, was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing or abolishing the rights of the owners of slaves. It then proceeds to argue in favor of the right of congress to legislate, on the ground that the object was to afford to the owner the greatest possible facilities for recovering his slaves. As it proceeds in this argument, it charges the object of the constitution, from the simple design of preventing the States from destroying by legislation the rights of the owner, into the much more extensive design of furnishing to the owner the greatest possible certainty of recapture, and the most complete protection against all interference with his rights, not only by legislation, but also by the acts of private individuals. [The case is reported in the 16th Peters U. S. Reports, page 539.] On the 614th page the court, in speaking of the obstacles which the master may meet, says:

"He may not be able to lay his hands upon his slave.— He may not be able to enforce his rights against persons who either *secrete, or conceal, or withhold the slave*. He may be restricted by local legislation as to the mode of proofs of his ownership; as to the courts in which he shall sue, and as to the actions which he may bring, or the process he may use to compel the delivery of the slave. Nay, the local legislation may be utterly inadequate to furnish the appropriate redress, by authorizing no process in *rem*, or no process mode of re-possession of the slave, leaving the owner at best, not that right which the constitution designed to secure, a *specific delivery and re-possession of the slave*, but a mere remedy in damages; and that perhaps against persons utterly insolvent or worthless."

It is here expressly assumed by the court, and its whole reasoning is based on this assumption, that the object of the constitution was to ensure to the owner, "the re-possession of the slave" against any and all obstacles. It is conceived that this is a very different object, from that of preventing the States by legislation, from setting the slave free. And a historical investigation shows, beyond all doubt, that the latter was the only object had in view in inserting the clause in question in the constitution.

The very authorities referred to by the court, prove this position. Judge Wayne, on page 548, quotes the following statement of Judge Iredell, in the North Carolina Convention. Judge Iredell was a member of the convention which framed the constitution, and in speaking of the clause under consideration, in the State Convention, he said:

"In some of the Northern States they have emancipated all of their slaves. If any one of our slaves go there and remain there a certain time, they would, by the present laws be entitled to their freedom, so that their masters could not get them again. This would be extremely prejudicial to the inhabitants of the Southern States; and to prevent if this clause is inserted in the constitution."

Mr. Madison, in the Virginia Convention, said:

"Another clause secures us that property which we now possess. At present, if any slave elopes to any of those States where slaves are free, he becomes emancipated by their laws."

He then quoted the clause in the constitution, showing that under it, such emancipation could no longer take place.

These quotations show clearly that the evil complained of was the emancipation of the slaves by the laws of the States to which they escaped, and that the object of the clause was to prevent that emancipation. There is not the slightest historical evidence, that at the time the constitution was adopted, any one supposed that it imposed a duty on the people of the Free States, to become active in seizing upon and transporting back fugitive slaves.— Or that they designed to furnish slaveholders with any protection against any of the numerous dangers to which that peculiar species of property is always exposed, other than the one specifically named, that is, the discharge from service or labor by the law of the State, or a legal hindrance to his taking the slave away.

The people of the Northern States had, at that time been come favorable to the policy of emancipation by law, and

regarded slavery as a great evil and wrong, but their sentiments had not gone so far as to occasion individual interference. It is a historical fact, alluded to in the opinion of Chief Justice Shaw, that under the confederation, fugitive slaves were given up as a matter of comity.—There was no article requiring it. Mr. Butler, of South Carolina, in a speech in the Senate, at the time this act was passed, treated it as a matter of astonishment, that the whole power of the Union had to be called in to accomplish what "our simple ancestors" performed without compulsion. He said that for five or six years after the adoption of the constitution, this clause was universally obeyed, and needed no legislation from any quarter, to carry it into execution. These facts, and the fact that among all the numerous drafts that were presented, in the convention that framed the constitution, there was none containing any clause about fugitives from labor, and that no such was proposed until nearly the close of the convention, and that it was adopted in its present shape, without comment or opposition, show that there was no such solicitude about this matter as these decisions pretend. They show that the object of the clause was only to protect the slave-owners from the effect of the laws of the Northern States, and not against any other danger.

The design was to prevent the State from throwing over the slave the broad and impenetrable shield of its law, to protect him from the power of his master. Against all other dangers, the love of liberty in the bosom of the slave, the humanity or the fraud of third persons, the master was left to protect himself as best he might. And when the court argues the question as though the object were to furnish him a remedy against all dangers, it goes much farther than there is anything either in or out of the instrument to warrant it in going. It confines its views to only one side. It labors to arrive at such a construction as shall best suit the convenience and accomplish the purposes of the slave-owners. Yet the court has itself told us that this is one of the provisions which were "matters of compromise of opposing interests and opinions." If that was the case, then in the historical investigation, there would be no justice in searching out the extreme views and purposes of one side only, and giving such a construction as would best accomplish them. On the contrary, the opinions and purposes of both sides should be equally considered. And if, as the court asserts, it was natural for the slave-owners to desire to remove as many obstacles as possible, we may, with equal justice, assert on the other hand, that it was natural for those who held "opposing opinions," to desire to remove as few as possible. If one side desired slavery, the other desired liberty. The people of the free States were hostile to slavery. They had exercised the right of emancipation by their laws, an act which they never would have done in relation to any other property, showing that they regarded the claim of property in a human being as without any foundation in natural right and justice. They believed in the language of Senator Bishop, in the case of *Jack vs. Martin*, that slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man.

Since such were their sentiments, the natural inference certainly is, that if for any purpose they consented to surrender a portion of their right to act against that system, they desired to surrender as little as possible, and intended to surrender no more than was clearly implied in the instrument by which the surrender was made. And there seems to be far more reason to believe that the free States would not have consented to the union with this clause, if they had supposed it granted to congress the power to make slave-hunters of their people and to jeopardize their liberties, than to believe that the South would not have consented to the union without this clause. The court asserts that the latter is true, but the assertion does not seem to be well-founded. Indeed, it cannot be possibly conceived why the South should have refused to enter the Union without this clause, when it is expressly admitted that under the old confederation they could not compel the delivery of their slaves, and consequently would have been in no worse a position by coming in, than by remaining out. An historical investigation shows, then, both by the express statements of slave-owners and by the natural desires of the people of the free States, that the only object of the clause was to prevent the States from giving to the slaves that escaped into them a legal right to their liberty.

How is this object to be accomplished? Clearly as fol-

lows: The court holds that the owner may, by virtue of the constitution, seize upon his slave wherever he finds him in the United States. If this is so, the only means by which the slave could be legally discharged would be to resort to some State law for the protection of liberty. If he did so resort, it would be the duty of the tribunal before which the process was returned, on proof that he owed service or labor to the claimant in another State, according to its laws, not to discharge him, but to "deliver him up" to the claimant again, that is, to allow the claimant to take him away. By this means the object of the clause is accomplished. The State does not, by any of its laws, discharge him, but the owner is allowed to maintain over him such jurisdiction as he can. And that is all the right he has in the slave States, so far as the master and slave are concerned. If he can hold him by force, he holds him, and if the slave can escape, he does so.

But it is said that the words "he shall be delivered up on claim," &c., require positive legislation to prescribe the manner in which the claim shall be made. It is argued that the word "claim" necessarily implies legislation "to protect the right and enforce the delivery" of "the property claimed." The Court says on page 615: "A claim is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time an equally expressive definition, was given by Lord Dyer, as cited in *Stowell vs. Zoach*, *Plowder 336*; and it is equally applicable to the present case; that "a claim is a challenge by a man of the property or the ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

But a moment's examination seems sufficient to convince any one that the word "claim," could not have been used in the constitution, in its technical legal sense. The court has decided and the fugitive law provides that the owner may seize upon his slave without process. He, certainly, after that, can make no "claim" in its technical sense, because by the definition just cited, a "claim" is of something "that is wrongfully detained" from the claimant.—And consequently if the definition and reasoning of the court are correct, there never could be a legal "delivery up," in a case where the slave was seized without process, because the "delivery" is only to take place "on claim," and there can be no claim after seizure, because the property is already in possession.

Take then, the case where the slave is not in possession of the owner. Can he make a technical claim then? Clearly not. The court says, on page 616—

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person."

Now, there is no "other person" in a free State, against whom the claim can be made. For by the law of that State, the fugitive is not a subject of property, and consequently no citizen in the State can assert any right to him, or have him in possession, but he may go at large where he pleases. He may be hidden in the forests or the swamps, or fleeing from place to place, to find some spot where his wearied feet may rest in peace. In this event, then, against what "other person" shall the claim be made? There is none. And, therefore, by the reasoning of the court, a constitutional delivery can never take place. Because it can only take place "on claim," and no claim can be made. Where the slave is seized without process, it cannot be made, because the property is already in possession, and no longer "detained," and it cannot be made when the slave is out of possession, for there is no "other person" against whom to make it.

Neither a free State, nor any of its citizens, nor the United States could have the fugitive in possession. Consequently no technical legal claim could be made against any person for his delivery. And in the practice under the Fugitive Law, no claim is made against "another person." These considerations seem clearly to show, that even the interest of the slave owners requires that the word "claim," in this clause, should not be construed in its technical legal sense. The error of the court was in treating the case as though the slave were recognized as property in the free States. And this view is sustained by the opinion of Judge Wayne. On page 646 he says:

"The case of a fugitive slave is not like that of a contest for other property, to be determined between two claimants by the remedy given by the tribunals of the State where the property may be. It is not a controversy between two persons claiming the right to a thing, but the assertion by one person of a right of property in another, to be determined on principles peculiar to such relation."

This shows, then, that the word "claim" should be construed in its more enlarged and ordinary acceptation, which is merely, as said by Judge Wayne, "an assertion by one person of a right of property in anything, in the sense in which a man uses it when he says he 'claims' the clothes which he wears, the house in which he lives, or his horse which is running on the commons. This construction, which seems to be the only true one, does not imply any necessity for legislation to provide for the enforcement of a legal claim. And it is perfectly consistent with the position taken above, that the only "delivery up on claim" was to be, that when the slave resorted to the State laws to obtain his liberty, the tribunal resorted to, should, on proper proof, refuse to set him free, but "deliver him up" to the person claiming him, that is, asserting a right to him. And the word "deliver" does not necessarily imply anything more than merely allowing a thing to be taken. This is both its ordinary and legal definition. This construction accomplishes the design of the clause and prevents the State laws setting the fugitive free. The other goes far beyond this and makes the State become a positive instrument for the hunting of slaves.

The free States had possessed and exercised the right of manumission to the fugitives. The slave States asked them to surrender that right, and they consented to do so and not to interfere in the struggle between the oppressor and his victim. This is one thing. But from this to go so far as to exert the power of the State in hunting down the slave, is entirely another. And it is a thing which the free States never would have consented to in those days. Mr. Atherton, in the New Hampshire Convention, a portion of the debates of which are reported in the 2d volume of Elliott's Debates, while speaking of the provision prohibiting Congress to abolish the slave-trade prior to 1808, said: "We do not think ourselves under any obligation to perform works of supererogation in the reformation of mankind; we do not esteem ourselves under any necessity to go to Spain or Italy to suppress the Inquisition of those countries; or of making a journey to the Carolinas to abolish the detestable custom of enslaving the Africans; but, Sir, we will not lend the aid of our ratification to this cruel and infamous merchandise, not even for a day. There is a great distinction in not taking a part, in the most barbarous violation of the sacred laws of God and humanity, and our becoming guaranties for its exercise for a term of years. Yes, Sir! It is our full purpose to wash our hands clear of it."

It is impossible to suppose, that people who held those sentiments, who were thus jealous of consenting to restrict, for a short time, the power of congress to abolish the slave-trade, would ever have consented to this clause, if they had believed it would make them slave-hunters and active instruments in building up and preserving that system of oppression, which they thus bitterly denounced. The court, therefore, not only unjustifiably went out of the instrument to search for its intention in an historical investigation, but after having done so, it confined its view to one side, and assumed, as its intention, something which such an investigation does not warrant, and which the clause itself does not require.

I next propose to show that the reasoning of the Judges is based upon assumption, is unsatisfactory in itself, and that its various parts are in conflict with each other.

The opinion of the Court is delivered by Judge Story. It commences on page 608 of the 16 Peter's Report. It first states the facts, and then goes into a consideration of the clause of the constitution. It says the slave-owner, if left to himself, would be subject to many inconveniences, and meet with many obstacles in recovering his slaves. From these facts it concludes, that legislation from some quarter is necessary to protect his rights. The question then is, which is to legislate, congress, or the State government. This was the great question at issue. The Court takes it up on page 614, and disposes of it in the following manner:

"If, indeed, the constitution guarantees the right, and if it requires the delivery on the claim of the owner (as cannot well be doubted,) the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national constitution, and not in that of any State. It does not point out any State functionaries or any State action to carry its provisions into effect. The States cannot, therefore, be compelled to enforce

them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the States are bound to provide means to carry into effect the duties of the national government nowhere delegated or intrusted to them by the constitution. On the contrary, the natural if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution. The remarks of Mr. Madison in the *Federalist*, (No. 43.) would seem in such cases to apply with peculiar force. 'A right,' says he, 'implies a remedy; and where else would the remedy be deposited, than where it is deposited by the constitution?' meaning, as the context shows, in the government of the United States."

It seems difficult to believe that such reasoning as this emanated from so high a source, as the Supreme Court of the United States. It is submitted that from the beginning to the end, it begs the question at issue, and assumes in almost every sentence, that the constitution gives congress the "right," or "imposes on it the duty" to legislate in this matter, when that is the very point to be proved. In the first sentence it asserts that if the constitution guarantees the right and requires the delivery, "the natural inference certainly is that the general government is clothed with the appropriate authority and functions to enforce it." But assertion is not argument. And it certainly was a point of sufficient importance to be worthy of some reasons showing why such was "the natural inference." If the constitution requires the States to deliver, then it certainly is not the natural inference that congress has any such power. And where a clause assumes, as does this clause, to regulate State legislation, and prohibits certain things, and commands others in the same sentence, it would seem to be the natural inference that the same power which was prohibited from doing the one, was commanded to do the other, for the manifest reason that no other power is spoken of at all. The State power is expressly mentioned. It is competent to discharge the duty imposed. Chief Justice Taney says the words "seem evidently designed" to impose the duty upon the State. Mr. Webster said such was "the import of the passage." To infer, then, that another power not mentioned is to perform this duty, seems to be an unnatural and not a "natural inference," and one that requires very strong reasoning and proofs to substantiate it. The bare assertion of the court, therefore, in contradiction to the natural import of the words, can be entitled to no weight.

The next sentence seems to be quite as clear, and just as applicable to the point, as the observation of Hadfield, that "statute laws are statute laws." The court gravely tells us, that "where the end is required, the means are given; and where the duty is enjoined, the ability to perform it, is contemplated to exist on the part of the functionaries to whom it is entrusted." These are certainly very luminous propositions, and such as nobody ever would dispute. But the question was not whether where an end is required of a certain power, that power has the means to accomplish it, or where a duty is entrusted to a functionary, whether he has the ability to perform it, but it was as to what power the end is required of, and to what functionary the duty is entrusted. And this being the question, the observation of the court seems about as satisfactory as it would to say that two and two make four.

It then says, "the clause is found in the national constitution, and not in that of any State." What of that? That proves nothing. The national constitution regulates both the legislation of the General and of the State Governments. The fact, therefore, that a clause is found in it alone, raises no inference at all that it relates to the national government only. But that is to be determined by examining the clause itself. And when we do this, we find that although it "be found in the national constitution, and not in that of any State," yet it speaks only of State legislation, and not at all of national. And this raises a strong inference that the State was the power designed to legislate in this matter, while the other raises none at all that the national government was so designed. It says further—"It does not point out any State functionaries, or any State action to carry its provisions into effect." Neither does it point out any national functionaries, nor any national action to carry its provisions into effect. And if that raises an inference against the State power, it raises the same against the national. The next sentences proceed:

"The States, therefore, cannot be compelled to enforce

them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the constitution."

To the first part of this sentence we say, neither can congress be compelled to enforce the provisions of this clause. In the last part the court again assumes the point in issue, to wit, that this duty is one of "the duties of the national government." The next sentence is one which it seems astonishing that a court like that could have uttered. It shows either that it did not comprehend the point at issue, or that it believed others could not comprehend it. It says:

"On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution."

What an important discovery! What a triumph of logic! The supreme court of the United States, by dint of laborious reasoning, has arrived at the profound "conclusion that the general government should fulfill all the duties imposed on it by the constitution, unless the constitution positively forbids it to do so!" It seems to think that the instrument might very naturally contain such a prohibition, but in the absence of such a one, then the court considers it quite clear, that the general government should fulfill its duties! As though somebody had been urging before it the converse of that proposition, and claimed that the general government ought not to fulfill its duties! whereas, the only question was as to what its duties were, and not whether it ought to fulfill them, for the negative of the latter question no man would assert. When, therefore, the highest court in the nation, on a great constitutional question before it, coolly assumes this point in issue, and offers to the world, instead of reasoning, common-place truisms, in no way applicable to the point, and about which there is no dispute, "the natural if not the necessary conclusion" is, that the proposition it maintains is not susceptible of a reasonable support.

The last sentence in the above extract seems to be not only a specimen of false reasoning, but also of disingenuousness. It quotes from Mr. Madison the following remark, which it says applies "with peculiar force." "A right," says he, "implies a remedy; and where else would the remedy be deposited, than where it is deposited by the constitution?" And the court adds—"meaning as the context shows, in the government of the United States." Now, the question before the court was not as to whether "a right implies a remedy," but where the remedy was deposited, and consequently the latter part of the quotation from Mr. Madison, was the only one applicable to the point. And when the court asserts that his "meaning" was that the remedy was "deposited in the general government," it seems to have designed to convey the impression that the remark of Mr. Madison was made in reference to the fugitive clause under consideration. For if not, then what matter was it what his meaning was? If Mr. Madison only meant that the remedy to some right was deposited in the general government, would the court therefore infer that the remedy for all rights was deposited there? It must either have designed to make this wild and filigree inference, or else to have misrepresented Mr. Madison as speaking of this clause. But when we turn to the *Federalist*, No. 43, we find that the remark quoted by the court, was made in reference to that clause in the constitution which says that "The United States shall guarantee to every State in the Union, a republican form of government, &c." Here the constitution expressly deposits the remedy in the general government. The quotation of the court, therefore, was either disingenuous to Mr. Madison and the public, or else it had no more bearing on the point than would the quotation of the hundredth psalm.

This extract has been given and examined sentence by sentence, to show how unfairly the court assumes the point to be proved.

Another instance, on page 618, shows further its deliberate unfairness, or else its incapacity to understand the force of an objection. It says:

"But it has been argued that the act of congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore it is void. Stripped of its artificial and technical structure, the argument comes to this,—that although rights are exclusively secured by, or duties are exclusively imposed upon the national govern-

ment, yet, unless the power to enforce these rights, or to execute these duties, can be found among the express powers of legislation enumerated in the constitution, they remain without any means of giving them effect by any act of congress."

The last part of this extract is either a wilful or ignorant misrepresentation of the objection. It says the objection is made "although the duties are exclusively imposed on the national government." That is false! Nobody ever made such an objection. It is a "man of straw" raised by the court. The real objection is that the duty is not "imposed on the national government," either "exclusively" or at all. The moment it is shown that any duty is imposed on the national government exclusively, then it is admitted on all hands that that government possesses all the powers necessary to the performance of that duty. The objection is that the duty does not belong to congress at all. The court most unfairly states and argues it as though it were admitted to belong to it, and then objects that congress could not execute it for want of express words granting it the power to do so.

To such miserable perversions it is driven when it seeks to constitutionalize a usurped power.

The reasoning is unsatisfactory in itself. It is so because it is based upon assumption, as already shown.—It is unsatisfactory because it is forced, capricious, and unnatural. Take, for example, the following specimen, in which it is argued that the States cannot legislate for the delivery of fugitives from labor, because the trial under a State law to determine whether the person claimed really owed service or labor, would necessarily occupy some time, and be a discharge *pro tanto*, from service, under the State laws, and consequently against the design of the constitution. On page 612 the court says:

"The slave is not to be discharged from service or labor, in consequence of any State law or regulation. Now certainly without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any State law or State regulation which interrupts, limits, delays or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates *pro tanto* a discharge of the slave therefrom. The question can never be, how much the slave is discharged from; but whether he is discharged from any, by the natural and necessary operation of State laws or State regulations. The question is not one of quantity or degree, but of withholding or controlling the incidents of a positive and absolute right." The court says this is not "indulging in any nicety of criticism upon words!" This remark must remind us of the old saying that the wicked flee when no man pursueth.

Judge Wayne, in the opinion delivered by him, takes the same position. On page 646 he says:

"If, then, in a controverted case, a person charged as a fugitive, shall be discharged under a remedy legislated by a State, to try the fact of his owing service or labor, is he not discharged under a law or regulation of a State? It is no answer to this question, to say that the discharge was not made in virtue of any law discharging the fugitive from servitude, and that the discharge occurred only from the mode of trial to ascertain if he owed service and labor. For that is to assume that the provision only prevented discharges from being made by the States by enactment or law declaring that fugitive slaves might be discharged. The provision will not admit of such an interpretation."

On page 648 the same Judge says:

"Would not a postponement of the trial of a fugitive owing service or labor for one month, be a loss to the owner of his service equivalent to a discharge for that time? And if a State can postpone by legislation, the trial for one month, may it not do so for a longer time? And whether it be for a longer or a shorter time, is it not a discharge from service, for whatever time it may be? It is no answer to this argument to say that time is necessarily involved in the prosecution of all rights," &c.

Now, a more strained and unnatural construction it would seem impossible to place on any constitutional clause. The constitution says the fugitive shall not be discharged from service by a State law, but shall be delivered up. The court says that if the State legislates expressly to cause him to be delivered up, that is a violation of the constitution, because time would be spent in ascertaining if he owed service and labor, and that he would be so far discharged. As though the design of the constitution was to save to the slave-owner the time spent in asserting his claim, notwithstanding it requires him to make the claim. Could not the court see that the same

objection would exist against the legislation of congress? Judge Wayne says on page 645, that one great object of the constitution was "that all kinds of property, as well as that which was common in all of the States, as that which was peculiar to any of them, should be protected in all of the States, as well from any interference with it by the United States, as by the States." If, then, it is a discharge from service and labor, for the States to legislate a mode in which the claim shall be asserted, it is equally a discharge for congress to legislate the same thing. For if congress can legislate on the matter at all, it certainly can provide for an appeal from one tribunal to another, or a postponement of the trial, and consequently, according to the reasoning of the court, it can discharge fugitives from service; against which slaveholders would not admit, and in direct contradiction to what Judge Wayne says was "a great object" of the constitution. He asks "if in a controverted case, a person charged as a fugitive, shall be discharged under a remedy legislated by a State to try the fact of his owing service or labor, is he not discharged under a law or regulation of the State?" No! Most emphatically not. That is, he is not discharged from service. It may be a discharge of a free man from the custody of one who has no right to hold him. But it is because he is a free man, and does not owe service, and consequently does not come within the constitutional requirement. And to pretend that such a discharge, under a State law, on the ground that the man was a freeman, and not a slave, was the thing designed to be prevented by the constitution, is a monstrous absurdity. Such discharges may take place, and have taken place, under the laws of congress. Yet there is quite as much evidence to show that the slave-owners did not intend to grant congress the power to discharge their slaves from service, as that they desired the Free States to surrender that power.

The constitution forbids the States to pass laws "impairing the obligation of contracts." But that they may not pass laws and establish tribunals to enforce them, nobody would for an instant pretend. Yet just as good an argument could be made in favor of such a statement, as that of the court now under consideration. The State law provides that the trial for the enforcement of a contract may be postponed, and appealed from one tribunal to another. Is not that impairing its obligation *pro tanto*? Precisely as much as a postponement or appeal in the case of a fugitive, would be a discharge from service. And if the court, in a case brought to enforce a contract, should decide that no contract existed, it would be just as much impairing the obligation of a contract by a State law, as to discharge from custody a person claimed as a slave, on the ground that he was free and not a slave, would be discharging a person held to service. In the one case the obligation of a contract would not be impaired, because there was no contract. In the other a slave would not be discharged from service, because no slave was before the court. The only discharge would be that of a free man from illegal restraint.

The fact that time is necessary for the investigation of all rights, is a complete answer to this forced construction, the assertion of Justice Wayne to the contrary notwithstanding. For it shows conclusively that the object of the clause was, not to save the time of a trial, but to prevent the State from setting free one, who, after a trial, was confessed to be a slave. Time must always be consumed in determining the question whether the person claimed owes service or not, and this whether the remedy is legislated by the State or national government. And he is not discharged from service during that time, by the law, in either case. He is not discharged from actual service, because he had himself escaped from that, and is brought before the court by the master, to ascertain if he shall be taken back. He is not discharged from the obligation to serve, because the law under which the proceedings are had, commands the enforcement of the obligation so soon as it is proved to exist. The time spent, therefore, under any law, to ascertain if an obligation exist, in order to enforce it, if it does exist, is not a discharge *pro tanto* from the obligation, by the law; but is a withholding of a legal remedy, arising from necessity, until it can be ascertained if the case be one to which the remedy properly applies. The court, therefore, in advancing so far-fetched and strained a construction, has, without furnishing any valid reason to sustain its position, only exhibited a wanton and ferocious haste to hurry men into bondage, without time to inquire whether they were bond or free.

The reasoning is also unsatisfactory because it is chiefly founded on: convenience, and that not a conven-

ience for preserving liberty, but for maintaining slavery. Whoever reads the opinions in this case, will see that the chief argument to sustain the right of congress to legislate, is, that it would be more convenient for the slave-owner, than it would under State legislation. If there is any force in the views already presented as to the object of the clause, this argument must be entirely unsatisfactory to the people of the free States. They may reply that the object was not to devise the most convenient and speedy way to re-capture fugitives, but simply to consent to not interfere and set them free by law. They may reply further that the argument from convenience is not for a court to use, but for the legislature; that the court is to decide not what would be the most convenient law, but what is the law. They may reply further that if the argument from convenience were a legitimate one, there are other people in the nation besides slave-owners, and other interests besides slavery. And that if the convenience of slave-owners required congress to legislate to preserve slavery, the convenience of freemen required the States to legislate to preserve their liberties. And their present condition makes manifest the truth of this. Congress, under the control of the slave power, in its eagerness to grasp the slave, has trampled down the freeman. It has overthrown the writ of *habeas corpus*, the trial by jury, and the constitution, and left the people of the free States liable, at any moment, to be made slaves by the decision of a court commissioner. This is boldly admitted by those Judges who sustain the law, as I shall hereafter show. And the people at the free States hold their liberties, not by the boasted safeguards of the constitution, but only by the honesty of bribed commissioners, and the veracity of interested and professed slave-hunters! By as much, therefore, as it is more important to preserve the liberties of freemen, than it is to perpetuate the slavery of slaves, is the argument of convenience stronger in favor of State, than national legislation, in this matter. But the supreme court on this point, as on all others, has paid no regard to the interests or convenience of liberty.

The reasoning is further unsatisfactory because it seeks to justify the exercise of this power by congress, from the fact that it has exercised another power, claimed to be of a similar nature, that of legislating for the surrender of fugitives from justice. The constitutionality of this latter legislation they say "has never been questioned." That fact, however, does not prove its constitutionality. The court admits that it "is not so readily susceptible of being brought into controversy in courts of justice," as the law for the re-capture of fugitives from labor. In truth, no instance is given in which it ever was thus brought into controversy. The object, the administration of justice and the punishment of crime, was one in which all the States and the world are deeply interested. And it was natural that the State executives, influenced by this consideration, and in obedience to the positive command of the constitution, should generally have surrendered up fugitives from justice, without inquiring very rigidly as to the authority of that legislation, which regulated only the manner in which it should be done. But if this legislation is to be used to justify the other, it will occasion its rightfulness to be inquired into. And when this is done, the same objections exist against the exercise of the one power, as of the other, by congress. There is no express power granted to it to legislate for the surrender of fugitives from justice; neither is it necessarily incident to any express grant. And it is believed that the supreme court has recognized a principle, which destroys the constitutionality of that law, if carried out. That principle is that the general government cannot vest any of its authority in State officers. The court established that principle in the case of *Martin vs. Hunter's Lessee*, 1 Wheaton, 304. The same doctrine is also taught in the 3 Story's Commentaries, 114, 115, 385, 683.

These authorities were referred to by Mr. Johnson, Attorney General of Pennsylvania, in the *Prigg* case. And the doctrine was substantially admitted by the court in that case. Now apply that principle to the law of '33 for the surrender of fugitives from justice. That law requires the State executive to cause the fugitive to be arrested and given up on demand. This is clearly in conflict with the principle, because it vests authority in, and requires the action of a State officer, and that officer the highest. The court argued against the power of the States to legislate for the re-capture of fugitives from service, on the ground that they could not be compelled to exercise it. It was not a good argument, because the same objection existed against the power of congress. It is conceiv-

ed that no legislative body can be compelled to legislate unless it pleases. But to the law of congress for the surrender of criminals, a valid objection exists, and that is, not that congress could not have been compelled to legislate, but that after legislating it is unable to enforce the law. Suppose the State executive refuses to deliver up the criminal on a requisition? How can congress compel him to act? Not at all! The national judiciary has established the principle that State officers are not responsible to the national government. And therefore the State executive may surrender the criminal on demand, or not, just as he pleases. And they have in several instances refused to surrender, and yet no attempt was ever made to compel them. And this shows the necessity of having the State legislate in the matter, so that the officer who is to execute the law may be held to some responsibility. And as a matter of practice the States do legislate upon it. We have a statute in this State prescribing the manner in which fugitives from justice shall be delivered up. And the act of congress on that subject stands as a dead letter, creating no more obligation than existed without it, from the requirement in the constitution alone.

It was strongly urged by the court that the contemporaneous exposition of the framers of the constitution, was in favor of the legislation of congress. But the fact seems to be equally strong in favor of the other side, that in both of those laws the execution was entrusted almost entirely to State officers. That fact shows that they considered the State, after all, to be the party that was to deliver up. And that being established, it follows, from the principle just referred to, that the manner of doing it should be legislated by that power to which the officers are responsible, so that its execution may be enforced.

The principle itself, and the fact that the law of '33 was in violation of it, are expressly admitted in the opinion of Justice McLean. On page 664 he says:

"It seems to be taken as a conceded point in the argument, that congress had no power to impose duties on State officers, as provided in the above act. *As a general principle this is true*, but does not the case under consideration form an exception? Congress can no more regulate the jurisdiction of the State tribunals, than a State can define the judicial power of the Union. *The officers of each government are responsible only to the respective authorities under which they are commissioned.* But do not the clauses in the constitution in regard to fugitives from labor and from justice, give congress a power over State officers on these subjects? The power in both cases is admitted or proved to be exclusively in the federal government."

And then, in the same manner, as it had been sought to justify congress in legislating for the re-capture of fugitives from labor, on the ground that it had legislated for the surrender of criminals, Judge McLean attempts to justify it in imposing the duty on State officers in the one case, because it had done so in the other; or in other words, he seeks to justify one unconstitutional act by another. After referring to the 1st section of the act of '33, relating to fugitives from justice, and pointing out the great fact that it made it the duty of the State executive to cause the person demanded to be arrested, &c., and saying that this had never been questioned, he proceeded to ask:

"Now, if congress may, by legislation, require this duty to be performed by the highest State officer, may they not, on the same principle, require appropriate duties in regard to the surrender of fugitives from labor? Over these subjects the constitutional power is the same."

It is so clear, then, that this law is in violation of a plain principle established by the court, and also by reason, that Judge McLean is compelled to admit it. And in what way does he get rid of the difficulty? He asks very innocently if this law "is not an exception" to the rule. Why did he not answer his own question? Why did he not show some reason why this was an exception? Why congress could legislate on these subjects in a manner directly in violation of those principles which govern its legislation on all others? Why did he not do this, except it be that no such reason existed? He asks:—"But do not the clauses in the constitution in regard to fugitives from labor and from justice give congress a power over State officers on these subjects?" No! They do not! If you assert they do, show it! You have been compelled to go out of the constitution in order to raise a pretence that they give congress any power at all! Where, then, can you find the power for it to act in a manner in which it could not act, to promote a purpose, the power to promote which was expressly granted to it in the constitution? It cannot be found. And not a shadow of an argument has

been, or can be offered to justify the pretence that this case is an exception to the established principle. There is no possible reason why, if congress has power over State officers on these subjects, it has not power over them on all others. The law for the surrender of criminals, therefore, instead of furnishing any support to the other, furnishes the contrary. For it is liable to the same objections, and brings additional evidence that congress regarded the State as the proper authority to execute the requirement of the constitution. And that fact being established, it follows, as already remarked, from the principle that the State officers are not responsible to the general government, that the State also should legislate, so that the law may be obeyed.

The reasoning is further unsatisfactory, because it is founded on a gross insult to the honor and good faith of the States. In order to lay a foundation for the right of congress to legislate, the court assumes that the States would violate the constitutional requirement. On page 623 it says:

"One State may require the owner to sue in one mode, another in a different mode. One State may make a statute of limitations as to the remedy in its own tribunals, short and summary; another may prolong the period and yet restrict the proofs. Nay, some States may utterly refuse to act upon the subject at all; and others may refuse to open their courts to any remedies in *rem*, because they would interfere with their own domestic policy, institutions, habits," &c.

Judge McLean also said on page 632:—"If the effect of it depended, in any degree, upon the construction of a State by legislation or otherwise, its spirit, if not its letter, would be disregarded." And the same position was assumed all the way through. Now to suppose the States could not understand the spirit of the constitution, was an insult to their intelligence. To assume that, understanding it, they would refuse to obey it, after having entered into a solemn obligation, and taken a solemn oath to do so, was an insult to their honesty and good faith. And they were both insults which the national court had no right to offer. And having offered them, and made them the basis of its reasoning, the insulted States have a right to reject that reasoning, as resting on an unsound foundation.

The court intimates that it would have been a great want of wisdom in the framers of the constitution, to have left the States to legislate under these clauses, because they were the parties to be bound by them. There is no force in this intimation. It was the doctrine of many of the most prominent men who framed the constitution, that it was a compact between the States, as independent sovereignties. That is the doctrine of the Virginia and Kentucky Resolutions endorsed by the Democratic Party. That some of its provisions are matters of compact between the States, is evident, and has been admitted by the Supreme Court. Now, in all cases of compact between independent sovereignties, there is nothing to rely on for the fulfillment of the obligations imposed, but the integrity and good faith of the parties. Therefore, for the States joining together in a union, to have manifested the same confidence in the honesty and good faith of each other, that nations always manifest in each other, who are not joined in any union, would have afforded no reason to impute to them a want of wisdom or foresight.

The reasoning is further unsatisfactory, because its various parts are in conflict with each other. The opinion of the court is delivered by Judge Story. In that it is contended, not only that congress has the power to legislate, but that this power is exclusive. Five of the other Judges deliver separate opinions, and one, Justice Baldwin, concurs with the judgment for a special reason, "but dissented from the principles laid down as the grounds of the opinion." Three of the Judges, Chief Justice Taney, Justice Thompson, and Justice Daniel, in their opinions, deny that the right is exclusive in congress, but urge strongly that the States have also a concurrent right to legislate on the subject. Chief Justice Taney delivered a very able argument in favor of this position. His remarks on this point have already been quoted, showing that the very words of the clause "seem evidently designed" to impose the duty on the States to legislate. Their arguments to prove this cannot be answered. But all those arguments are directly in conflict with the idea that congress has a right to legislate, and with all the arguments urged in favor of that right.

They who assert the right of congress, do so only by pretending that the words which say the fugitive "shall be delivered up," are addressed to the national Government. When, therefore, Chief Justice Taney and those who contend for the concurrent right of the States, prove that

those words were addressed to the States, they destroy all foundation for the right of congress. There is a direct conflict between their reasoning and that in the opinion of the court.

It will be remembered that much is said about the argument drawn from contemporaneous construction. They who use this argument, confine their view entirely to the contemporaneous construction of Congress, and overlook that of the States. Now it appears from these very cases, that a number of the States, among which were New York, Pennsylvania and Maryland, regarded this as a matter to be controlled by the State, and passed laws in good faith to carry this clause into execution. Thus showing how baseless was the assertion of the Court that they would not execute it. The contemporaneous construction of the States was in our favor, and that of Congress as much for us against us. The opinion of Chief Justice Taney sustains this position. He says that the construction placed on this clause by the Court, "had not entered the minds" either of Congress, or of the States, when the law of '93 was passed.

(Mr. Paine here read at some length from the opinion.) The court contended that if this matter was left to the States, the remedy would fail. Chief Justice Taney claims that unless the States may legislate, the act of congress would be entirely ineffectual, and "scarcely deserve the name of a remedy." He cuts up root and branch the reasoning by which the court sustains the power of congress. I yet he concurs in the opinion that congress has the power. By what other process of reasoning, different from that of the court, he arrives at the same conclusion, he does not explain. He concurs in the reasoning of the court, so far as to give congress the power, and then overthrows that reasoning so as to retain the power in the States. He seems to have supposed that the clause was addressed to both governments, and that both state and nation, were bound to use all diligence in hunting fugitive slaves.

Three of the Judges contend for the concurrent right of the States. One dissents from the reasoning in the opinion of the Court. It leaves, therefore, a bare majority of one in favor of the exclusive right of Congress. Now take the following extract from the opinion of Judge McLean, one of that majority, and see what strange inconsistencies they fall into in supporting their opinion. On page 660, he says:

"Does the provision in regard to the reclamation of fugitive slaves vest the power exclusively in the general government? This must be determined from the language of the constitution and the nature of the power."

"The language of the provision is general. It covers the whole ground, not in detail, but in principle. The States are inhibited from passing 'any law or regulation which shall discharge a fugitive from the service of his master,' and a positive duty is enjoined on them, to deliver him up, 'on claim of the party to whom his service may be due.'"

He then proceeds to argue that the power is exclusive in congress. After asserting that the constitution "enjoins a positive duty on the States," to deliver up the fugitive, he immediately contends that they have no power to deliver him up. How a Judge of the Supreme Court of the United States could assert such a plain and apparent contradiction, it is difficult to comprehend.

There are then three Judges who claim a right in the States to legislate, one who dissents from the reasoning of the Court, and one of the five others who declares that the Constitution "enjoins a positive duty on the States to deliver up the fugitive." There seems to be about as strong support, therefore, as far as numbers are concerned even, for the opinion that the States have a right to legislate, as there is for the opinion that the right is exclusively in Congress. And when it is shown that they have a right, it follows that they have the whole right, for, as already said, the very reasoning which proves their right, destroys the right of Congress.

Such are the reasons by which the supreme court sustains the law of '93, with one exception. They say that the case of a fugitive is a case arising under the constitution, and consequently comes under the judicial power of the United States. And that therefore congress may legislate so as to carry the judicial power into effect.

After all its reasoning to show that congress had the power by virtue of the supposed intent of the clause itself, it makes one attempt to bring itself within the old rules, and to show that this power is incidental to the vesting of the judicial power. The attempt is clearly far-fetched, and by its circumlocution is a tacit admission that there was no other way to sustain the power. But that the fugitive act is "necessary and proper" to the vest-

ing of the judicial power, cannot be maintained. If this were a case to which the judicial power extends, congress might prescribe the manner in which the case should be brought before it. That is all that is necessary to the vesting of the judicial power. But the act goes far beyond this, giving remedies against individuals, inflicting penalties, and enacting many other provisions, that are not in the least necessary to the vesting of the judicial power, or at all connected with that subject. The judicial power of the United States extends to suits between citizens of different States. It would extend to an action of ejectment brought by an owner residing in another State. Congress, in order to vest the power, may prescribe how the case shall be brought before the court. But would that give it the power to punish criminally a party who had committed and injury to the property, or to give to the owner a right of action against him for a penalty? Clearly not. Yet such a power would seem to be just as necessary to the vesting of the judicial power, as does a large part of the Fugitive Act.

But I think the true answer to this argument is, that so far as the proceedings of the owner are concerned, that a fugitive case is not a case at law or equity arising under the constitution, to which the judicial power extends, at all. What I have already said on the meaning of the word "claim," in this clause, goes to show this. The only kind of judicial proceedings contemplated by the clause, seems to be a resort by the fugitive to State laws, to obtain his liberty. The prohibition on them to discharge him, was the chief object of the clause, and the requirement of delivery naturally follows it, meaning no more than that the state tribunals, after proof that the person claimed, was a fugitive, should not interfere with the possession of the owner, but allow him to take the fugitive away. I believe this was the only delivery ever contemplated. No case at law arises under the constitution in the proceedings of the owner. It is like the owner of a horse running at large. He may seize the animal wherever he finds it. But he cannot sue it. He cannot begin a "case at law" by which the horse is to be caught. Let it not be supposed that by this comparison I intend to sanction the idea that a man can be the subject of property like a horse. God forbid! I only wish to argue it on the footing on which the slave laws place it. In the same way the owner is in pursuit of his property, not detained from him by any body whom he can sue, but running at large on his own responsibility. The courts have decided that he may seize it wherever he finds it, and this seems plain enough, admitting it to be property. If this right of property is secured by the constitution there is no reason why he should not take it away as soon as he gets possession, except the protection of the people of the state. This requires that the state should have the right to prevent him from doing it, until he had given the person claimed, an opportunity to sue out a writ de homine replegiendo, to test the question whether he was a slave or free. This was the provision of the New York law on this subject. Under this view of it, no case at law arises under the constitution. When the person claimed sued for his freedom, it would be a case arising under a state law. It could only be brought before the judicial tribunals of the United States, by virtue of their appellate jurisdiction, when it was claimed that the state law discharged the fugitive in violation of the constitution. It would go up in the same manner as a case, where it was claimed that a state law impaired the obligation of a contract.

I have now finished my examination of these decisions, and have shown, as I think, that the reasoning by which this power is attempted to be sustained, entirely fails. If it be true, that the reason of the law is the soul of the law, according to its own maxim, then in my judgment the decisions that have sustained this power, fell still-born from the lips that uttered them, and were never animated with the breath of life. And this Fugitive Act stands out in all its horrible deformity, originating in usurpation, a fit source for so monstrous an offspring.

The court here adjourned until Tuesday at 10 o'clock.

TUESDAY, MAY 30,—10 A. M.

MAY IT PLEASE THE COURT:

I yesterday urged the unconstitutionality of the Fugitive Act, on the ground that it vested judicial power in court commissioners, thus subjecting the liberties of the people to irresponsible, dependent officers, contrary to the plain provisions and obvious intent of the constitution. I also urged that congress had no power to legislate upon the subject at all, but that the clause in the constitution is a mere article of compact between the States, depending on them alone for its execution. I attempted

to show that the decisions by which this power had been sustained in congress were contrary to all settled and safe rules of construction; and that if they are to be followed, the constitution would be the mask and not the measure of its powers. That it would be like the painted scenery on the stage, used to hide the designs of the actors till they were ready to begin, and then shifted and changed to accommodate the character of the proposed performance.

I wish now to call the attention of the Court to another branch of this objection, and that is to the extent of the criminal jurisdiction of the United States. When we look into the constitution to find how far that jurisdiction extends, we learn that congress has the power to "provide for the punishment of counterfeiting the securities and current coin of the United States—to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, and to declare the punishment of treason." We find that no other criminal jurisdiction whatever is delegated to it in the instrument. These offences are of a flagrant character, either aimed at the existence of the national government, or such as are committed out of the jurisdiction of the States, and beyond the reach of their power to punish. From the nature of the offences—from the cautious and specific manner in which the power to punish them is granted, a very strong implication arises that the intention was that congress should have no power to punish other offences. Because if it was to have implied criminal jurisdiction, these specific grants seem to have been useless. Take for example the case of treason. That is a crime levelled at the very existence of the government. It would seem that if any power was to pass by implication, it would be the power to punish this crime. But the framers of the instrument did not so understand it. After defining what should constitute treason, they add the express words that "congress shall have power to declare its punishment." The object seems to have been to leave no uncertainty in this matter, but to mark the boundaries of the criminal jurisdiction of the general government so plainly that there could be no danger of their being passed over.—They feared the gigantic strength of that government, and designed to guard the people against a jurisdiction that might oppress them by multiplying crimes, and pains and penalties—that being the manner in which the worst forms of tyranny had always been developed.

This is the view taken by one of the Kentucky Resolutions, drawn by Mr. Jefferson, adopted by the legislature of that State, and since endorsed by the Democratic Party. The resolution is as follows:

"Resolved, That the constitution of the United States, having delegated to congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offences against the law of nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments of the constitution having also declared 'that the powers not delegated to the United States by the constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people,' therefore, also, the same act of congress, passed on the 14th day of July, 1798, and entitled, 'an act in addition to the act entitled an act for the punishment of certain crimes against the United States,' as also the act passed by them on the 27th day of June, 1798, entitled, 'an act to punish frauds committed on the Bank of the United States,' (and all other their acts which assume to create, define or punish crimes other than those enumerated in the constitution,) ARE ALTOGETHER VOID AND OF NO FORCE; and that the power to create, define and punish such other crimes is reserved and of right appertains, solely and exclusively to the respective States, each within its own territory."

This doctrine, therefore, seems to have a very considerable weight of political authority, if it has not any judicial. But I am aware that a different practice has been adopted by the government, and that it has exercised the power to punish a number of other crimes besides those enumerated in the constitution. This power has been claimed under the general grant of incidental powers.—I find no case in which this point has been raised or determined judicially. But Chief Justice Marshall alludes to the penal code of the United States, in the Bank case, by way of illustration. It will be seen that he admits that there is "plausibility" in the position of the Kentucky Resolution. He says:

"All admit that the government may legitimately punish any violation of its laws, and yet this is not among the enumerated powers of congress. The right to enforce

the observance of law by punishing its infraction, might be denied with more plausibility, because it is expressly granted in some cases.

The several powers of congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

"Take, for example, the power 'to establish post-offices and post-roads.' This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post-office or rob the mail. It may be said with some plausibility that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and a post road. The right is, indeed, ESSENTIAL to the beneficial exercise of the power, but not absolutely necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court.—To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment."

Now I shall not deny that there is great force in this reasoning, nor that there is some ground to believe that the government might claim the power to punish, as incidental to the execution of the express powers, even against the strong implication arising from the specific manner in which the power to punish certain crimes is delegated. I still think all such power might easily be left to the States, and that they being equally interested in the accomplishment of the objects of the constitution, would pass all the criminal laws necessary. But admit that this is not so, and that the general government is to have an implied power to punish other crimes than those enumerated. What is the limit of that power? Where are the bounds at which it must stop? If they are to exercise this implied power at all, the utmost extent to which it should be carried is this: The express power, to which the power to punish is claimed as incidental, should be first pointed out. And the act to be punished should be one aimed at the execution of the power, or one tending to hinder and impede the operations of the general government or some of its departments. The power to punish should be clearly and plainly incidental to the express power, and necessary to its execution.—This rule should be rigidly adhered to. For there is far more reason to believe that the Kentucky Resolution contains the true doctrine, than that congress may exercise criminal jurisdiction upon loose implication. And this is the only extent to which Chief Justice Marshall carries the power, as shown by his illustrations. He says the power to punish robbing the mail, is "essential to the beneficial exercise" of the express power to "establish post-offices and post-roads." So the power to punish perjury was essential to the proper operation of a court in administering justice.

Let us see, then, what is the character of the Fugitive Act in this respect. In spite of all the care of the founders of our government, to guard us against the exercise of an unwarranted criminal jurisdiction, we have been a law that brings under its ban, all things that are lovely and of good report. A law, that not only in spirit, but by its letter, would seize upon our mothers, who, by teaching us from our earliest years, to do to others as we would that others should do to us, lead us to and a wandering fugitive to escape from a doom to which no human being would wish to be consigned himself. A law that would punish our wives and children, who, by their gentle affection and prattling innocence, make the home of man a place of refuge and delight, amid all the cares and sorrows that may overwhelm him in life. Because the holy feeling cradled in his heart by the love of his wife and children, leads him to try and save a fellow-being from being dragged a way to a condition where he has no wife and no children, but where they are torn from him, and sold into eternal separation, as ruthlessly as the butcher tears the young animal from its anxious dam! A law that would punish our teachers, all who instruct and enlarge our minds, and inspire us with the love of knowledge and of truth. Because all this leads us to rescue a brother man from the grasp of the oppressor, who would reduce him to a state of bondage, where the whole power of society is brought to bear on him, to shut out from his mind every ray of truth, and to enslave his soul in impenetrable ignorance and night. Yes, Sir! all that can inspire our

heart with a just, a generous, humane or noble feeling, comes under the pains and penalties of this act, because all this "aid," not only "indirectly" but "directly," to use the language of the act itself—in the escape of every fugitive that comes among us.

Where, then, is the warrant for the exercise of a criminal jurisdiction of so detestable a character? Echo may answer, but the constitution answers not! It gives no sanction to it. It is not among the express powers—it is not incidental to the execution of any of them.

The Fugitive Law punishes the harboring or concealing of a fugitive, or aiding in his escape from the owner. Is this an act that interferes with the execution of any express power of the general government, or hinders the functions of any of its departments? Clearly not! It no more interferes with the operations of that government than the stealing of a horse. Where is the difference?—One man steals the horse of a slaveholder who comes in to our State; another aids his slave to escape from him. Where is the difference between the two acts so far as they affect the general government? There is none.—And that government has just as much jurisdiction to punish the one act as the other. It would be the same as tho' that government should claim the power to punish the stealing of a letter from the possession of the owner, after it had left the post-office, or before it was put in, as necessary to the operations of the post-office department. It will be remembered that the power for congress to legislate on this matter at all, was claimed as incidental to the vesting of the judicial power. This is the only possible ground on which any such legislation can be sustained for a moment. But is the criminal jurisdiction exercised in the act, necessary to the vesting of the judicial power? Cannot congress vest the judicial power without punishing the harboring or concealing of a slave? The question needs only to be asked, in order for every one to see that the pretence that the one power is necessary to the other, is an absurdity. The claim is too wide between them, for any connection to exist.

If a slave-owner should come here from another State, with horses of the value of five hundred dollars, and a man should steal them from his possession, he might reply them by a writ from the United States Court. The judicial power of the United States would extend to such a case, and congress might vest that power, and say how the case should be brought before it. But would it have the power to punish the man for the theft? No one pretends it. Yet this is just as clearly incidental to the vesting of the judicial power, as the punishment of the harboring of a fugitive. Such harboring may take place before any judicial proceeding is commenced; the aiding in the escape may take place after all judicial proceedings are over.

These are acts not interfering with the functions of the judiciary, but with the rights of the owner, if he has any rights. And there is no possible reasoning which will give congress a criminal jurisdiction, as incidental to the vesting of the judicial power, to punish those acts, which will not at the same time give it jurisdiction to punish all acts in violation of any right, that may be brought in controversy before the national tribunals.—Let us see if they who were instrumental in passing this act, would be willing to submit it to the legitimate consequences of the reaching by which it is to be sustained. Take the first clause in the same section with the fugitive clause in the constitution. This provides that, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Now it is a notorious fact that this clause has been systematically and outrageously violated by the South, for many years, and is to this day. No man whose sentiments are known to be opposed to slavery can go there, without being driven out by violence. The States of South Carolina and Louisiana have also passed laws, by which they seize and imprison a certain class of the citizens of Massachusetts, whenever they enter those States. And when Massachusetts sent its authorized agent to South Carolina, to test the constitutionality of those laws, he was chased out by a mob! These acts and these laws were plain violations of the constitution. But we never heard an intimation from the general government that it had any power, or even any disposition, to defend the people of the free States against these outrages! Not a word! Not a syllable!

(The court here asked Mr. Paine if he thought the general government had any power to legislate under this clause?)

I do not, Sir! I hold it to be a mere clause of compact, like the fugitive clause, conferring no power whatever on the general government. It might be said that no law could be passed to carry its provisions into effect, in the

first instance. But violations of it might be punished.—And suppose congress should pass a law punishing with fine and imprisonment, any person who should "aid, abet and assist, directly or indirectly," in imprisoning any citizen of any State on account of the color of his skin, or in mobbing any authorized agent of a state who went to another state, to test a constitutional question in the federal courts! Why, sir! we should hear "a clamor such as heard till now was never," about state rights, and usurpations by the Federal Power! Our southern friends would be ready to hurl the Union into a hundred fragments, before they would submit to such dangerous encroachments. It would be an encroachment, there is no doubt about it. But it would be no more so, than the criminal legislation in this Fugitive Act. The same reasoning by which this is to be sustained, would sustain a law such as I have supposed.

I hold therefore, that in this Act, congress has usurped criminal jurisdiction, without a shadow of right or reason. And usurpations of this character are doubly dangerous, and should be watched, if possible with a double vigilance. I know that the people are too apt to acquiesce in usurpations by governments. Especially are they too apt to do this, when these usurpations are clothed with judicial sanction. That is what makes these the most dangerous.—They are wolves in sheep's clothing. They are the most dangerous, because least calculated to challenge that examination and resistance, that usurpations should always meet. Acquiescence has ever been the great error of the people. They forget that eternal vigilance is the price of liberty, and that this vigilance is to be exercised in unmasking tyranny under the forms of law. They become absorbed in the pursuit of the shining gold and glittering silver, and do not perceive that the iron out-work of despotism is being woven gradually around them, until their liberties are undermined and destroyed. They regard as a false wizard, him who warns them, and cry peace! peace! when there is no peace.

I have said these usurpations of criminal power are dangerous. And who can say it is an idle fear when the doctrine of "constructive treason" has already been revived, by the federal courts, and attempted to be put in execution against the people, and this under the instructions and encouragement of the government! Who can say there is no cause of alarm, when those courts speak in terms of contemptuous scorn of state officers, calling them "tuppenny magistrates," and threatening them with indictments and prosecutions for daring to resort to the legal remedies furnished by the laws of a sovereign state?—Who can say that there is no danger, when those courts tell us that the slave hunter with one of their warrants in his pocket, may range at will through our state, washing his hands in the blood of our people, and wreaking upon our men, women and children, whatever crimes his passions may prompt, and that by this single warrant the arm of State power is paralyzed,—striken down nerveless and helpless to defend its people? Who can say that we are safe, when, after a slave hunter is arrested for a crime here, the Federal courts step in and set him free, to repeat his offences with impunity. Who can accuse us of unfounded fears, when those courts at the same time they say and do all this, tell us that they "have not yet got a quarter of the power, the constitution intended they should have"! Great God! If these are the results, when they have not a quarter of their power, what may we expect when they have got it all!

Sir, this criminal jurisdiction of the United States not expressly delegated in the constitution, should be fenced around with walls of brass, and with triple bars of iron. It is a viper whose length is hidden from the sight. It may appear frozen and harmless to some, but let it be warmed into life by the acquiescence and encouragement of the States, and it will drag forth fold upon fold from the slinky obscurity of implication and construction. And at last it will rear its sparkling crest aloft, and with baleful lightnings flashing from its eyes, and its forked tongue darting nimbly in every direction, it will hiss in the scorn and insolence of power, at the namings of the people whom it crushes in its convolving folds.

THE TRIAL BY JURY.

And now I come to the last of the objections I have to urge. It is, that admitting that congress has the power to legislate, and that a fugitive case is one to which the judicial power extends, still the law is unconstitutional, because it provides that any person claimed, may be reduced to a state of slavery without a trial by jury.

When the resolutions that were adopted by the meeting on the court house square on the 10th of March, were first proposed by the committee, they were to the effect, that

Glover was entitled to a fair and impartial trial, and that the people there would do what they could to secure him such a trial. Standing in my place in the crowd, I moved that they be so amended as to read that he was "entitled to a fair and impartial trial by jury," and the motion was adopted. I noticed that at the examinations subsequently had before the Commissioner, the District Attorney of the United States, while reading these resolutions, dwelt upon that claim with a peculiar emphasis, amounting as I thought to a sneer,—as though to claim a trial by jury for a person arrested as a fugitive, if not high treason, was still a crime of not less magnitude. Sir! the responsibility for that claim in these resolutions, does not belong to any of the defendants who have as yet been prosecuted. It belongs justly to me. And I am willing to bear its consequences now and hereafter. The pledge that I then made I repeat here. I will, so help me God! so long as I have a tongue to speak, never fail to assert the right of every man, woman and child, in the State of Wisconsin, without regard to color, rank or condition in life, to a right of trial by jury in all questions touching liberty or life. If this be treason, make the most of it,—if it be any crime less than treason,—make the most of it!

And now to the extent of my ability, I shall proceed to fulfil my pledge here today. And if I could have faith that any prayers of mine, could furnish me other aid, I would ask for the tongues of angels,—I would invoke the genius of liberty to inspire my lips,—when I attempt to speak in behalf of this great birth-right and best privilege of all who have lived within the protecting influence of the English common law! The trial by jury, whenever and wherever it originated, sprung from the people. It had its origin in their honesty, their justice, their humanity and truth.—And never among all the inventions of men, has any mode of trial been devised, which administers law, so effectually for the promotion of these great qualities, as the trial by jury. The people have clung to it with a tenacity that showed how truly they estimated its value. As the Ark of the Covenant, containing the testimonies of God, was borne by the twelve, chosen from the twelve tribes of Israel, from the wilderness onward to the land of promise,—and as the waters divided before it and allowed the people to pass through dry shod,—so has the trial by jury, the ark of the covenant containing the testimonies of liberty, been borne by the twelve, onward from the remote ages of barbarism to the present advanced state of civilization,—and so during all that toilsome march, the waves of tyranny have divided before it and allowed the people to pass through unscathed. And all the strife and discord in private life,—and all the mutations of governments,—and all the silent yet mighty workings of corruption, the trial by jury has vindicated its character as a shield of the innocent,—a merciful judge of the guilty, and a staunch and incorruptible defender of the liberties of the people. And now when in the very house of its friends, a deadly blow is aimed at this great right,—when in the full blaze of the light of civil liberty it is sought to be stricken down by the hands of an American Congress,—society should stand up as one man, and say in the language of a popular song:

Woodman! spare that tree,
Touch not a single bough!
In youth it sheltered me,
And I'll protect it now!

They should say this not from mere motives of gratitude for a past protection which they need no more, but because the trial by jury still is and ever will be, the best safeguards for all their dearest rights. Because it is a tree, that if preserved from the spoiler, will flourish in immortal vigor, so that their posterity may repose in peace and safety beneath its branches, when a thousand generations shall have passed away!

I sir, for one, was filled with rejoicing, when I learned that our Supreme court, had determined to preserve this great right, unimpaired to the people, even where property alone was concerned. That decision vindicated the Constitution against legislative innovation, and I regarded it as a good omen. The praises of the trial by jury have been "hymned by loftier harps than mine." And it might perhaps justly be regarded as a work of supererogation to say any thing, or to refer to what others have said in its praise. But there is a quality in human nature that leads us not to appreciate property, those blessings we have always enjoyed. But now that we are losing it,—now that we have lost it,—it may not be altogether amiss to contemplate the magnitude of the loss.

Judge Story in the 3d volume of his Commentaries speaks of this right as follows:—

"It seems hardly necessary in this place to expatiate on the antiquity or importance of the trial by jury in criminal cases. It was from very early times, insisted on by our

ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes the fundamental articles of Magna Charta, in which it is declared, "*nemo homo captivus, nec imprisonetur, aut exulet, aut aliquo modo destruetur, &c; nisi per legale iudicium parium suorum, vel per legem terre.*" No man shall be arrested, nor imprisoned, nor banished, nor deprived of life, &c. but by the judgment of his peers, or by the law of the land. The judgment of his peers, here alluded to, and commonly called in the quaint language of former times, a trial *per pares*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of like condition and equality in the State. When our more immediate ancestors removed to America, they brought this great privilege with them, as their birth-right and inheritance, as a part of that admirable common law, which had interposed barriers on every side, against the approaches of arbitrary power. It is now incorporated into all our State Constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognized and confined it in the most solemn terms.

So long, indeed as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fail. * * * * * Mr. Justice Blackstone, with the warmth and pride becoming an Englishman, living under its blessed protection has said:—"A celebrated French writer, who concludes that because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury."

Chancellor Kent in the 2d volume of his commentaries, page 9, writes as follows:

"The Constitution of the United States, and the Constitutions of almost every State in the Union, contain the same declaration in substance, and nearly in the same language. And where express constitutional provisions on this subject appear to be wanting, the same principles are probably asserted by declaratory legislative acts; and they must be regarded as fundamental doctrines in every State, for all the colonies were parties to the national declaration of rights in 1774, in which the trial by jury, and the other rights and liberties of English subjects, were pre-emptorily claimed as their undoubted inheritance and birth-right. It may be received as a self-evident proposition universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or disseized of his freehold, or liberties or estate, or exiled, or condemned, or deprived of life, liberty or property, unless by the law of the land, or the judgment of his peers. The words, *by the law of the land*, as used in *Magna Charta* in reference to this subject, are understood to mean *due process of law*, that is by indictment or presentment of good and lawful men, and this, said Lord Coke, is the true sense and exposition of those words."

And now without alluding further to the writings of any body, to show the value of this right, let us consider the means by which it is secured. In the ordinance of 1787, for the government of the Territory north west of the Ohio, there were certain articles of compact between the States "and the people of the Territory," made unalterable, unless by common consent. In the second of these, we find the following provisions:—"The inhabitants of said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury: No person shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, &c."

Now, Sir, it is well known that the authors of this celebrated instrument, intended to secure by it forever, to the people of the Northwest Territory, the great rights enumerated in those articles made unalterable. They intended to plant the tree of liberty so deep, that no storm occurring on the surface could sweep it away. They intended that every man, who, in all coming time, should make his home in that territory, should purchase with the soil itself, as one of the "privileges and appurtenances thereto belonging," the right of trial by jury, and the other rights there enumerated. They intended to do this, and it has been fondly hoped, especially by the people of that territory, that they had done it.

I will read a few authorities upon the force and effect of the Ordinance. Daniel Webster in his speech on Mr. Foot's resolution concerning the public lands, delivered in the Senate in 1830, spoke of this instrument as follows:

"At the foundation of the Constitution of these new northwestern States, we are accustomed Sir, to praise the

law givers of antiquity; we help to perpetuate the fame of Solon and Lycurgus; but I doubt whether one single law of any law giver, ancient or modern, has produced effects of more distinct, marked and lasting character, than the Ordinance of '87. That instrument was drawn by Nathan Dane, then and now a citizen of Massachusetts. It was adopted as I think I have understood, without the slightest alteration; and certainly it has happened to few men to be the author of a political measure of more large and enduring consequences. It fixed forever, the character of the population in the vast regions northwest of the Ohio, by excluding from them involuntary servitude. It impressed on the soil itself, while it was yet a wilderness an incapacity to bear up any other than free men. It laid the interdiction against personal servitude, in original compact, not only deeper than all local law, but deeper also than all local constitutions. Under the circumstances then existing I look upon this original and seasonable provision as a real good attained. We see its consequences at this moment, and we shall never cease to see them, perhaps, while the Ohio shall flow."

I now refer the court to the case of *Spooner vs. McConnell*, in the 1st McLean's Reports, page 337.

(Mr. Pease here read at considerable length from the opinion of Judge McLean, holding that the articles of compact in the ordinance are still in force, except where they have been altered by common consent; that the adoption of a State constitution, with provisions repugnant to those of the ordinance, and entering the Union as a State, would constitute the common consent necessary to the alteration; and intimating that such provisions as were subsequently guaranteed in the Federal constitution, might be considered as practically superseded.)

There is also a very able opinion of Chief Justice Stowe and Judge Lamson, of our old supreme court, delivered by the latter, in the case of *Novecomb vs. Smith*, reported in Chandler's Reports, sustaining the validity and binding force of the ordinance. These opinions are based upon the fact that the people of the Territory were not parties to the constitution, and therefore gave no consent in that to the alteration of the articles of compact.

But it is said in these opinions, that the adoption of a State constitution, with provisions repugnant to the ordinance, constitutes the common consent necessary to its alteration. This appears to be plain. The State constitution, after its adoption, and the entry of the State into the Union, supersedes the ordinance,—but how far? It seems to me, only so far as it stands in its place. And it stands in its place only so far as the ordinance operated as a restriction on the local government. The State constitution is a restriction on the local, and not on the general government. I hold, therefore, that there is nothing in the adoption of a State constitution, that gives any consent to the removal of the restriction imposed by the ordinance on the power of congress. It is admitted by all who hold that the ordinance has ever been in force at all, since the adoption of the Federal constitution, that it limited the powers of congress, while the people were under the territorial government. Suppose, then, the people adopt a State constitution, re-enacting the provisions of the ordinance. Is there anything in this, that can possibly be construed into a consent that the general government shall be released from its restrictions? It seems to me not.

I hold, therefore, that the right of trial by jury was secured to the people of this State by the ordinance of '87, and that they have never consented that it should be taken away. I have said thus much upon that instrument, because it is sometimes claimed that the language of the constitution, in relation to trial by jury, applies either to a civil or criminal case, and that a fugitive case is neither the one nor the other. But the language of the ordinance is broad and general, and applies to any proceeding by which a person may be "deprived of liberty."

Now, Sir, I am aware, though I was not till a short time since, that the supreme court of the United States has held that the ordinance was superseded entirely by the federal constitution, and that it has never been in force since the adoption of the latter instrument. This was held in the case of *Strader et al. vs. Graham*, 10th Howard, 82. It was a suit for helping away slaves, that went up from the Court of Appeals in Kentucky. The counsel cited a large number of cases where even the courts of slave States held the ordinance to be in force, and that if an owner allowed his slave to go into a State formed out of the Northwest Territory, he becomes free by virtue of the ordinance. Judge McLean held that the question of its validity did not arise before the supreme court, and claimed that all said by the court about that point, was ex-

tra-judicial. Judge Catron also said that the State courts "for thirty years" had held some parts of the ordinance to be binding, and he did not wish to disturb those decisions, when their "opinion might be disregarded by the State courts, as *obiter* and a *dictum* uncalled for!" But the court, notwithstanding this question was not necessarily in the case, decided that the ordinance was superseded by the constitution, and that the people of the Territory were parties to the latter instrument.

I think this decision is not generally known by the people of the Northwest. For we still see frequent allusions to the beneficial results of the ordinance of '87. But, Sir, if this decision is true, those who make these allusions are deceived. Daniel Webster was laboring under a great delusion. That instrument which he thought produced such "lasting" consequences, that we "should never cease to see them while the Ohio should flow," lasted less than two years. It had ceased to have any effect, more than forty years before Mr. Webster pronounced his speech in its praise.

Sir, I do not regard this decision as an authority. I believe with Judge McLean that it was extra-judicial, and with Judge Catron that it was "a dictum uncalled for."—The only effect it should have, in my judgment, is to convince the people of the Northwest Territory, that their rights, though of the most important character, though guaranteed by the most solemn compacts, are not safe in the supreme court of the United States, whenever they come in conflict with the interests of slavery. Yes, that court will even go farther than is necessary, to construe those rights away!

But, leaving the ordinance, let us come to the constitution. And I contend that the right of trial by jury is guaranteed here with equal clearness. It is guarded with even the most anxious solicitude. In the 7th amendment it is declared that—"in suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved." Admitting, then, that the claim of the master is a "case at law, arising under the constitution," as so tended by the supreme court, then the right of trial by jury is expressly secured by this clause. In the 6th amendment, the jury trial is secured in criminal cases. But the 5th amendment covers the whole ground. A part of it is as follows:

"Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

It is here provided that no person "shall be deprived of life, liberty or property without due process of law."—The words, "in a criminal case,"—in the clause preceding this, do not extend to this clause; but it stands by itself, without being necessarily affected by those words, any more than the one that follows it. The words are broad and general, and fully cover the proceedings of a fugitive slave case. And I have already referred the court to the construction of the words "due process of law," which are held to include all the essential rights secured by the common law, among which the trial by jury is one.

The words of this amendment seem evidently designed to be general, and to cover all proceedings by which the people may be deprived of liberty. Because, after this the 6th amendment provides expressly for criminal cases, and the 7th for civil cases. And the words of this 5th amendment seem fully to justify the broad statement of Chancellor Kent, already quoted, that—"It may be received as a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or dispossessed of his freehold, or liberties or estate, or exiled or banished, or deprived of life, liberty or property, unless by the law of the land, or the judgment of his peers." That is to say, unless he has a trial by jury.

It is said that this is a proceeding *ex vi* gentis, and that these provisions of the constitution do not apply. I answer that it was for the very purpose of protecting as against just such proceedings *ex vi* gentis, by which our liberties could be destroyed without "due process of law," that these safeguards were inserted in the constitution.

And now, in view of all these safeguards, by which our fathers evidently supposed they had fenced round the liberties of the people with adamantine walls, that would bid defiance to the fiercest storms of tyranny, let us look at the practical operation of this Fugitive Act. A person is found in our State in the possession of liberty. He enjoys actual freedom, and our law presumes him to be free. All the people here stand on the same footing in this respect. A man comes from another State, and claims

him as a slave. He is arrested by a warrant, taken before a U. S. Judge or Commissioner, and after an examination which is a mere mockery, not only of all the substance, but of all the forms of law, he is decided by such judge or commissioner to be a slave, and is delivered up. Keep the simple facts in view! He is a freeman when seized. He is a slave when he leaves the court room or commissioner's office—made so by the decision of one man! There is no room here for the evasions of ingenuity. The destruction of the jury trial is complete. That of those cities that were buried forever beneath volcanic fire, was not more so. Where then are the safeguards of the constitution? Where are all the solid ramparts, by which we believed our liberties were protected? Are they all swept away by this act? Are they, indeed, so feeble as to vanish before the breath of the slave power, as magic castles disappear before the waving of the enchanter's wand? They are, if this act is to stand, for one or the other is to fall. And what answer is made to this? None at all! It stands unanswered and unanswerable!

When I first obtained the opinion of Chief Justice Shaw in the Sims case, I read in the *opinions* at the beginning, that the fact that this act makes "no provision for a trial by jury in favor of the alleged fugitive, does not make it unconstitutional." I then perused the opinion with feelings of intense curiosity and anxiety, to see by what reasoning this proposition was to be sustained. I came to it at last, and will now read it. It is not long. It is, like the proceedings under this act, of a very "summary character." The Chief Justice says:

"Since the argument in court this morning, I am reminded by one of the counsel for the petitioner, that the law in question ought to be regarded as unconstitutional, because it makes no provision for a trial by jury. We think that this could not have varied the result. The law of 1850 stands, in this respect, precisely on the same ground with that of 1793, and the same grounds of argument which tend to show the unconstitutionality of the one, apply with equal force to the other; and the same answer must be made to them."

Here we have this great right disposed of in a paragraph. The massive bulwarks of the constitution, are overturned by a single exhalation of judicial breath! And how disposed of—how overturned? Why, the Chief Justice tells us that the "same answer must be made" to this objection to the present act, that was made to it, when urged against the law of '93. Well, Sir, no answer was ever made to it when urged against that law. The question of a jury trial was not raised in the *Prigg* case. And Judge Story said afterwards, as we are informed by his son, that the supreme court had never decided that point, but it was still an open question before that court. The answer of Chief Justice Shaw, therefore, is about as satisfactory as was the answer of a defendant to a bill in Chancery, which I have read at a late public trial. It was a *Creditor's Bill*, and the defendant wished to evade a disclosure. He answered, therefore, somewhat in this wise: that to the first interrogatory his reply was, that he had no information; to the second, his answer was that he knew nothing of the matter; to the third his "answer was the same" as his answer to the first; to the fourth his answer would be found embodied in his answer to the first and second, and so through all the interrogatories! There never was any answer to the objection against the law of '93, for want of a jury trial, and Chief Justice Shaw tells us the "same answer is to be made now. Sir, I turned away from that opinion sick at heart, at the manner in which the great rights of a nation could be lightly construed away and disregarded by tribunals that were instituted and sworn to protect them!

I read in this Court yesterday, the able opinion of Chancellor Walworth in the case of *Jacks vs. Martin*, in which he asserts the right of every person claimed as a fugitive to a trial by jury. Let me now call the attention to that part of the opinion of the New York supreme court in the same case, relating to this point. It will be remembered that it was delivered by Judge Nelson, and that it sustained the power of congress to legislate on this subject. This gives its admissions upon this point a double force. On page 324 of the 12th Wendell, the court says:

"It has been said that under the law of 1793, a *freeman might be seized and carried away into captivity*, and hence the necessity of the law of the State, giving to him a trial by jury on the question of freedom. This argument is plausible and the justice of it difficult to deny;—but even so it is, it tends only to prove the defectiveness of the law of congress, not the authority of the State."

Here then we have both those judges who derided, and those who maintained the power of Congress to legislate,

admitting that the "law is defective," and that the objection for want of a trial by jury is a "sound" objection. If this is the "answer," to which Chief Justice Shaw referred, we are willing to take this, and to have the "same" one made to the present Act. But sir, it is sometimes said that the person claimed, may have a trial by jury in the State to which he is taken as a slave? I should think that this pretence would blister the tongue of the freeman who could utter it! Is that the protection which this State furnishes to its people? When they ask for bread, will she give them a stone? When they are seized to be carried away as slaves, and demand a trial by jury to determine their right to liberty,—will she say, she is unable to give it, but they may get one from the slave State; or in other words, that they may get better protection as slaves, under the laws of a slave State, than we can furnish to our freemen? It is only with feelings of the utmost amazement that I can listen to this pretext.—that I can learn that there are men, who, in order to secure to the slave holder, the speedy possession of his slave, are willing that freemen should be dragged away into captivity, with no chance of regaining their liberties, except such as the laws of the slave States give their slaves. If that is the extent of our protection from the States, the sooner the people learn it the better, for they will then take the protection into their own hands.

But they tell us also that a fugitive from labor, is no more entitled to a trial by jury where he is seized, than is a fugitive from justice. The distinction between the two cases is so palpable, that this needs no answer, but I will answer it. A fugitive from justice is not "deprived of his liberty," when arrested in the State to which he has fled, in the sense in which those words are used in the Constitution. Those words mean not a mere taking into custody for the purpose of being tried, but some judicial determination upon the party's right. A man arrested by a sheriff for a crime against the State, is deprived of his liberty temporarily for the purpose of a trial. But this is not such a deprivation as is meant by the Constitution. Otherwise no man could be arrested for any offence without the aid of a jury. In arresting and delivering up a fugitive from justice, therefore, there is no abridgement of the party's right, but it is a mere arrest for the purpose of taking him to be tried where the crime was committed, in obedience to a long settled principle of criminal law.—The prosecution is begun in another State, and the arrest here is no decision on the guilt or innocence, but a necessary preliminary step to such a decision elsewhere. But will the fugitive from labor be "owed service and labor" with him, the question whether he "owes service and labor" or not, is to be judicially determined in the State to which he has fled. The question of his right to liberty is to be passed upon judicially in that State. And so this Fugitive Act treats it. It makes provision for a trial here, to determine that question, and requires the Judge or Commissioner to pass upon it, though its provisions on this subject are so lamentably partial, oppressive and unjust, to have excited the abhorrence of the civilized world. Yet even those, wicked as they are, show the distinction between these cases. The proceedings against a fugitive from labor are not preliminary steps to any proceeding in another State. They are begun here, and end here. The party's right to liberty is judicially decided here, and if it is decided against him, he is made a slave by it. The fugitive from justice is delivered up to a sovereign State, which has no pretence to subserve against him, but to administer to him as it does to its own people, justice according to its laws. The fugitive from labor, on the other hand, is delivered up as a chattel, to the absolute control of his claimant, to be taken where he wills, subject to his selfish passions, and all his irresponsible power.

The distinction is so plain that no mind can fail to perceive it. The fugitive from justice has no trial by jury where he is seized, because he has no trial at all, and his right to liberty is not decided upon. The fugitive from labor is entitled to a trial by jury, because he must have a trial of some kind; his liberty is passed upon, and the effect of the proceedings in a state of liberty to one of slavery, is to reduce him from a state of liberty to one of slavery. And if making a man a slave is not "depriving him of liberty" then I am unable to know what it is.

And now I have presented the three objections on which we rely as fully as I had intended. To me they seem conclusive. They seem to show, beyond all doubt, that the Act of congress under which the Relator is held, was not only an entire usurpation of power, but was an exercise of it in palpable violation of the constitution, and is therefore null and void. It may be said this position is contrary to precedent. There is great force in the

doctrine of adhering to precedent, where rights of property might be unsettled by departing from them. In these matters it is sometimes said that it is more important that the law should be settled, than how it is settled. But it seems to me that in matters relating to personal liberty alone, this doctrine cannot apply with equal force. The only consequence in departing from a bad precedent there, would be that better justice would be done afterwards, than had been done before. And this could not be an evil.

The decision of the Somerset case, in England, was contrary to precedents established by high authority, but Lord Mansfield was finally compelled to decide that the constitution of England was higher than judicial decisions. So we may say here, the constitution is the highest precedent we can have. But this doctrine, even if the court should feel bound by the *Prigg* case, affects only one of our objections. The other two stand unanswerable, their validity admitted on all hands. There are no precedents against them. I hold therefore, that our demurrer is sustained: that the matters and things set forth in the return of the Marshal do not justify in law, the detention of the Belator, and that he is entitled to be discharged.

Let no man say that in advancing these doctrines I show myself an enemy to the constitution and Union of these States. Sir, I believe I feel as warm an attachment to them both, as is consistent with the duty of a man to feel for institutions formed by man. It is the constitution for which I have contended here. I have contended also for the Union, for it is only by maintaining the rights of the States, that the Union can be preserved. He who bares his breast in battle to defend his country against outward force, does well! But he who resists inward corruption and tyranny does better; for it has ever been the latter danger before which liberty has fallen!

And now in conclusion let me refer again to the existence of that power among us to which I alluded when I began. It is a fact of settled history that the early policy of the founders of our government, was to cherish and extend liberty, and to discourage and limit slavery. It is a fact of history equally well settled, that when by the invention of the cotton-gin, slave labor became more valuable, this policy was reversed. And then it was that began the separate, distinct existence of that power in this nation, since known familiarly as the slave power. And its influence from that time onward, upon the physical, intellectual and moral prosperity of the country, might be aptly compared to that of one of the Furies of Hell, upon the physical world, as described by Tasso. He says:

"Where she passes, the green trees Fade,—the sick Sun turns pale,—the living springs Stagnate, and cankers blight the flowery leas."

I have said this power adopted the policy of extending and perpetrating slavery. Adopting the Vices of a past age as its virtue—saying like the fallen archangel—"evil I be thou my good!"—it has pursued this policy with a tenacity equalled only by the fell nature of the purpose itself. Eagle-eyed, sagacious, vigilant, unscrupulous and bold, neither the laws of God, nor the hopes and happiness of men have stood in its way. Set in violation of the one, and to the destruction of the other, it has gone on, building broader and more broad, its bloody altar, on which to hallow a human race, with all its mighty burden of earthly and immortal hopes! Laughing at plighted faith, mocking at right, poisoning the morals, darkening the intellect, blotting the prosperity of the people, and blighting the very physical earth beneath it, it has gone on like the genius of desolation, rioting in corruption, and reveling amid decay and death! I a belated influence has not been confined to its own limits. It has spread abroad through the whole land like a moral pestilence and contagion. There have been none so high and none so low, that they have escaped its influence. It has expurgated the literature of the nation. It has shackled the press. The blood of a martyr to the freedom of the press, cries to Heaven from the soil of a neighboring State, for vengeance against this power. It has entered the church, turning the light of religion into darkness, and turning the words of blessing and love to the poor and lowly, into words of cursing and hate. I have seized on the political parties of the country, and made them play such fantastic tricks before high heaven, as make the angels weep! Some of the concessions made to it have doubtless been external. But its great evil has been within—in the perverting influence it has exercised on the public heart. This has been so great, that the time has been within my recollection, when a man could not stand up on Bunker's Hill, and proclaim the truth for

which they fell, whose heroic dust reposed beneath his feet, without subjecting himself to personal violence. I have myself seen a man mobbed in the District in Ohio, since represented in congress by Joshua R. Giddings, for denouncing slavery not half so severely as it has since been denounced by the representative from that District, in the very Halls of Congress. This perverting influence has been so great, that there is even yet among us, especially in our cities, a class of fawning parasites of power, who meet all arguments on this subject by some heartless sneer at the color of the race who have been the chief victims of this oppression. A class who plume themselves on being wiser than others, because they have advanced so far as to see that the Declaration of Independence is a lie—liberty a delusion—and equality the visionary dream of fanatics and fools! But it is useless to multiply details of the perverting influence of the slave power. All have seen it. Church and State, Priest and People have bowed before it, as plainly as the trees of the forest, the shrubs, the grass, and the waving grain, bend forward in the direction in which the driving gale sweeps along the Earth.

But it may be asked why I allude to this now? I do it in order to draw from it a two-fold conclusion. First, that it weakens very much, if it does not entirely destroy, the force of those decisions that have been made in favor of this power, while its influence on the public mind was so mighty and universal. We must remember that judges are, after all, but men. That although as a matter of theory, they are sometimes supposed to be above the reach of prejudice or passion, yet in practice it is often found to be different, and that they are influenced by the same prejudices and passions as other men. And I think the facts to which I have alluded, furnish just reason to believe, that a perverting influence that has reached and controlled almost every other class and department in the nation, has not been unfelt in the judiciary. I say it frankly and fearlessly,—I believe it has been felt there, and that is the only hypothesis on which I can account for such decisions as those I have examined.

An illustration of the manner in which that influence acted on the Northern Judiciary, may be found in the fact that Chancellor Walworth after his opinion against the law of '33, was nominated by one of the Presidents for a Judge of the Supreme Court of the United States, but was rejected by the Senate, on account of that opinion, while Judge Nelson, who decided the other way, was afterwards nominated and confirmed, and is now enjoying his reward, and from all accounts deserving still further at the hands of the slave power.

The other conclusion which I wish to draw from this fact, is that it strengthens ten fold the force of those arguments in favor of resisting the encroachments of the general government and maintaining the reserved rights of the States. It is through that government only, that the slave power can act directly on the people of the free States. Through that it can and does act upon them. Through that it can and will act upon them, to the utmost extent that its powers can be stretched.

We are accustomed to look upon our country as having already attained a very great degree of power and importance. This is in a sense true. But we have only to travel forward for a century or two, at the sober pace of reason, unassisted by the wings of imagination, in order to behold it bestirring this continent like a Colossus—possessing a power compared with which, that it now possesses would be like the pigmy compared with the giant. Emergencies will doubtless arise in the course of its national existence that will call into being vast armies and navies. And if the general government is under the control of the slave power, these armies and navies will be under its control. And who can doubt that that power is capable of conceiving the fell purpose of annihilating liberty through all these States, and extending over them its own horrible institutions? Who can doubt that after conceiving this purpose it will carry it into execution by the iron arm of military power? It will do this, not with the avowed purpose of overthrowing the constitution, but pretending that it sanctions their sacrilegious design. They will do it in the execution of so-called laws, passed in accordance with those precedents against which I have contended here. The contemplation of such a destiny for our country, fills the soul with darkness and gloom! When it shall come to pass, the great experiment which our fathers began in this New World will have failed! The light which they kindled, and which burned so brightly—shining like a beacon to the nations afar off—will have been extinguished! Liberty! the fairest, divinest guest that ever came from heaven to dwell with mortal man.

will have fled, sorrowing away forever, leaving the long train of coming generations to mourn her flight!

But let us hope that this destiny may not await us!—That among the inscrutable ways of Providence, some one may be opened by which this cap will pass from our lips. Let us maintain to the last some hope that liberty may not be entirely destroyed—that the cause of humanity may not entirely fail! And though the clouds are gathering faster and blacker above us, we are not altogether without reason for such a hope! For a number of years past there has been another reaction going on in this country against the influence of the slave power. And though the tide has ebbed and flowed—though in the actual conflicts, that power has retained possession of the battle field, yet the reaction against it has steadily increased and accumulated strength until the present day. The free-men of the North who have long reposed in conscious strength, with a generous forbearance towards the wrongs and insults of their deadly foe, have at last become aroused by provocations that could not be borne. They are marshaling their hosts for the coming conflict, between the two great antagonistical elements, liberty and slavery; that is to settle which shall finally fall before the other.—The trampling of the gathering hosts is already heard.—The murmuring of the rising storm is wafted upon every gale. The North is snatching asunder the bands that have bound it in subjection to the slave power, as Sampson broke the withs of tow! The last link that binds it, is the judicial sanction that power has received! *Let that be broken, and the people are free!* Can it not be broken? Can this great want of the public heart not be satisfied? Can we not have one decision in all this land, that shall vindicate liberty and law? I could almost believe that the angels in heaven, would bend forward over its battle-ments in eagerness to hear such a decision! That unborn generations would anticipate their time of life, and listen from the great womb of futurity, to the announcement of such a decision. But whether these things would be, or not, this I know, that it would be received by all the friends of humanity and law throughout this land, with such a thrill of heartfelt joy, as was never felt by a people before. Their hearts would be filled with new hopes,—hopes that this would be but the beginning of a more glorious end. Hopes that there is to be a return to the true principles and wise policy of our fathers; that the Constitution as it stands is to be vindicated and maintained,—that Courts are to be places where liberty is favored & human rights protected, and not where judges are to exercise their ingenuity, to evade & overturn the great safeguards of the Constitution and trample on the liberties of the people! Their hearts would be filled with new and glorious hopes, that this Temple of Liberty, which our fathers builded, is to be purified. That the traffickers in the blood and bones of immortal man, shall be driven from its sacred precincts; and that with a broad continent for its broad foundation, and the blue heaven that bends above us for its arch, it shall be inhabited by one great band of brothers, with no spot where the darkness of bondage shall remain,—but that all over, from ocean to ocean, and from the eternal ice mountains of the north, to the burning zone, it shall be illumined by the light of liberty, as the Celestial City, is lighted by the glory of God!

I am aware that I owe an apology to the Court and to all engaged in the case, for occupying their time so long. The only excuse I can offer, is the vital importance of the question; or at least my sincere conviction of its importance; and the fact that we were obliged to meet, and overcome if possible, the current of decisions, which, so far as they were of any force, has been against us. And thanking the Court most earnestly, for its kind attention and indulgence, I have finished what I had to say.

[ARGUMENT OF DIST. ATTY SHARPSTEIN.]

WEDNESDAY, MAY 31—10 A. M.

Mr. SHARPSTEIN replied to Mr. PAINE's argument.—We give the synopsis of his argument—which consisted chiefly in reading authorities—as furnished by himself for the press.

Mr. SHARPSTEIN said he had noticed in an evening paper that the name of Judge Miller was mentioned in connection with his own, in an article which related to these proceedings. In justice to Judge Miller he would say that he had held but one conversation with him within four weeks, and that was had since these proceedings were commenced, and that no allusion was made by either party to this proceeding, nor was the subject of Habeas Corpus mentioned by either the Judge or himself.

He then read the provisions of the Revised Statutes, and claimed that a State Judge or court could only obtain jurisdiction to hear, determine, remand, or discharge upon Habeas Corpus in cases where the application, writ and service were in strict conformity with the provisions of the Statute, and that the provisions of the common law were abrogated so far as they conflicted in any way with these Statutory provisions. That the appearance of parties could not be construed as a waiver. That the order of the court was either valid or absolutely void, R. S., Chap. 124, 11 Kent's Commentaries, 26. In support of the sufficiency of the warrant of commitment he cited 1 Hill, 377, Wharton's Precedents 504.

He then proceeded to notice the points raised by counsel upon the constitutionality of the Fugitive Slave Law. They were the same with those raised in the Sumner case, by Mr. Kenton, upon which the opinion of Commissioner Curtis, and of the supreme court of Massachusetts had been delivered, and published in the Law Reporter, 1852. He submitted to the court that the first point raised by Mr. Kenton, in the Sumner case, might have more or less weight in that case, and yet have no force when applied to the present case. That the law might be unconstitutional in that respect, and still valid in other respects.—If so, the question whether the power which the commissioner is called upon to exercise under the act of 1850 is proper or improper, does not arise in this case. Under the act of 1850 the commissioner acquires the power to hear and determine a case arising under that act, but his power to arrest and hold to bail offenders against the laws of the United States, is given by the act of 1853, 3 R. S. At Large, 516, and it is by virtue of the latter act, and he held this Reitor to bail. But he would not urge this point, as he considered the constitutionality of the act of 1850 in this respect settled by the adjudications of the courts, and cited the opinion of the supreme court of Massachusetts in the Sumner case.

In reply to the points raised by the counsel denying the power of congress to legislate upon this subject, he cited 1 Johns Rep. 67, 5 Serg. & Rawle 62, 12 Wend. 311, 2 Pick 11, 10 Pet. S. C. Rep. 539.

The act of 1793 was subject to all the objections raised against the act of 1850. Under that act Magistrates and Justices of the Peace were authorized to exercise all the powers with which commissioners are now clothed, and the supreme court in the case of Prigg vs. Commonwealth of Pennsylvania, held that these Justices of the Peace might properly exercise those powers. But the Justice is not authorized to give a trial by jury, nor is the examination provided for in that act, free from any of the objections which are raised against the act of 1850. The judicial functions exercised by the commissioner in the extradition of fugitives from labor, are not essentially different from those exercised by the Executive of the State in the extradition of fugitives from justice. And it would be just as proper for the Executive of the State to reply that he would not deliver up a fugitive from justice, on the ground that the State demanding him would not give him a trial by jury, as for the State authorities to reply to the claim made for the delivery of a fugitive from labor, that the State from whence he fled, has not provided a trial by jury for him, or that he will be unable to obtain it if delivered up. It is no valid reply to either demand, and has just as much force when applied to the one case as it has when applied to the other. In conclusion he held that the decisions of the courts covered every question raised by the Reitor in this case, and that all parties are bound by them alike.

Mr. WATKINS replied in a brief but forcible speech, sustaining the positions already taken by Mr. PAINE.

Mr. PAINE followed, reviewing the authorities cited by Mr. SHARPSTEIN, and contending that instead of over-throwing the positions he had taken, they sustained them.

At the close of his remarks Justice SMITH announced that he would hold the subject under advisement for one week, and then deliver his opinion and make an order in the case.

OPINION OF HON. A. D. SMITH,

Associate Justice of the Supreme Court of the State of Wisconsin.

WEDNESDAY, JUNE 7—11 A. M.

On the 27th ult., application was made to me by Sherman M. Booth, the petitioner, for a writ of Habeas Corpus, to be directed to Stephen V. R. Ableman, who it was alleged, restrained the petitioner of his liberty. Assoc.