

Hon. James G. Blaine, Speaker of the
House of Representatives:

I have the honor herewith to present
my opinion, as one of the Justices of the Supreme
Judicial Court, in answer to the question
submitted to us by the Order of February
13. 1861.

If the statutes of this State referred to
in the question propounded to us are not in
conflict with the laws of the United States for
the rendition of fugitives from service or labor,
then it is not necessary for us to express any
opinion in regard to the constitutionality
of those laws. But as some of my associates
entertain opinions on this question to which
I cannot assent, I have thought it proper to
state the reasons which bring my mind to
a different conclusion.

I assume that every man is presumed
to be free, and that slavery nowhere exists
except by positive provisions of statute. The
law of slavery is therefore bounded by the

territorial
jurisdiction of the State governments by which
it is established. If the master voluntarily
carries a slave into a free State, or permits
him to go there, the slave thereby becomes
free. These propositions are familiar, and are
supported by numerous authorities.

It follows, that, if a slave escapes into a
free State, without the consent of his master,
he ^{also} thereby becomes free while remaining there,
and the master has no right to recapture
him, unless there is some provision in the
Constitution of the United States for that purpose.
Before the American Revolution, when slavery
existed in the Colonies, they had laws for the
mutual surrender of slaves. But slavery
was so glaringly inconsistent with the princi-
ples upon which they became independent,
that it was abolished, or laws were passed
for that purpose, in nearly half the Colonies,
before the Constitution of the United States was
adopted. And it is undeniable, as a histori-
cal fact, that the general expectation then
was, that the other Colonies would soon
do the same. The feeling against it

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continuance was strong, in the South, as well as in the North. Under these circumstances, was any provision made in the Constitution of the United States, for the capture of fugitive slaves?

It is not pretended that there is any provision of the kind, except the following: "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 claims of the party to whom such service or labor may be due." Art. IV. sec. 2.

If the question were new, I should be clearly of the opinion that this provision could not be applied to slaves.

All provisions of law which are subversive of natural rights, are to be construed strictly. The language here used describes various classes of free persons, and has been applied to apprentices, and to seamen. That such is the proper application of it, no one will deny.

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But it does not describe a slave. A slave is not held to service or labor under the laws of a slave State. Those laws make him an article of property, to be bought, and sold, like other chattels. They do not require him to labor. No service or labor is "due" from him, "under those laws." They take no cognizance whatever of the purpose for which he is owned. If killed by another, the master can recover, not for the loss of service, but for the market value. The language of the Constitution therefore describes free persons, - but not slaves.

And though it is said, and I have no doubt truly, that the framers of the Constitution meant to apply this language to slaves, they did not mean to use language that could properly be applied to slaves. There was no inadvertence, or mistake. They meant to use language that could not be applied to slaves, because they believed that slavery was speedily to be abolished.

The original proposition, as reported in the Convention, was - "no person held to servitude or labor, &c." But on motion of

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Governor Randolph of Virginia the word "service" was substituted for "servitude" by a unanimous vote, — "the latter being thought to express the condition of slaves, and the former the obligations of free persons." Madison Papers. And this was in accordance with the principle laid down by Mr. Madison in the Convention, "that it was wrong to admit into the Constitution the idea that there could be property in man."

If they deliberately excluded the idea, they thereby excluded the fact. The proposition that the former could be excluded, and the latter retained, is manifestly absurd. A claim under a statute, as well as under a deed, must be restricted to its terms. It is our duty to take the language actually used, according to its proper and ordinary signification, and apply it to the persons described by it, and to no others. A rule quite as strict as this has often been applied to uphold some great wrong. It ought not to be thought improper to invoke it in behalf of the greatest of rights — a man's right to himself.

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But if this provision of the Constitution is to be applied to slaves, I am of the opinion that its only force ^{is} ~~is~~ to make the local law of the slave States extra-territorial as to the fugitive slave, for the purpose of his capture, so that he shall carry his status with him, wherever he ~~might~~ ^{may} escape. This places that species of property in precisely the same condition ~~x~~ as that of other property, as to the right of recapture. The owner of a fugitive slave from Virginia, and the owner of a stray horse from New Hampshire, would come into this State with precisely the same right to retake their property. The owner of the horse could remain here, and hold his property under our laws. But the owner of the slave, finding no law here by which he could hold him in bondage, would have to carry him into a slave State. And if we concede that the Constitutional provision applies to slaves, its whole force is exhausted in this right of capture and extradition, which the free States are prohibited from annulling "by any law or regulation therein."

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But though the owners of these two kinds of property come into this State with the precisely the same right of capture, — the property itself is within the jurisdiction of our laws. And by our laws, the slave, and the horse, are by no means regarded as in the same condition.

The horse is presumed to be property, without any proof; and the owner may take him, without legal process, wherever he can find him. If another man claims him, he may have to bring his suit therefor. This he may do in the State Courts. He might have been authorized by Congress to bring such suit in the Courts of the ~~Courts of the~~ United States; but under our present laws he cannot do this, unless the horse is worth more than five hundred dollars.

The slave is not presumed to be property, without proof. He is prima facie free, and is a citizen, until adjudged to be a slave. Being a person, he may claim for himself the protection of our law; and the master must litigate the case, not with some other claimant, but with him. In the absence of any provision made by Congress,

this question would have to be determined in our State Courts. ~~But~~ As "between citizens of different States," it was competent for Congress to provide for its trial in the Courts of the United States. Constitution, Art. III, sec. 2. ^{And,} ~~But~~ if Congress ^{at all,} undertakes to provide for the case, I affirm that a person so claimed has a right to a trial, according to the rules of the common law, in some Court of the United States. And any law that subjects him to the loss of his liberty without such a trial, is, ^{in my opinion,} unconstitutional, and void.

There are several ways in which Congress could have done this.

They might have provided that the claimant should bring his suit in the Circuit Court, or the District Court of the United States, in the Circuit or District within which the alleged slave should be found. As this would give him a jury trial, according to the course of the common law, in the vicinity of the place of capture, there would be little danger that the citizens of the free States would be kidnapped and enslaved under its provisions.

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Or Congress might have provided that, on proof before some court of competent jurisdiction in a slave State, ~~that~~ that a person claimed as a slave has escaped into a free State, the Governor of the former State might require the Governor of the latter to cause such person to be arrested and delivered up to the authorities of the State from which he is alleged to have escaped, then to have the claim against him tried and determined by due course of law.

This would be objectionable to the people of the free States, as they would be liable, under its provisions, to be carried away to a distant State for trial. But as they would not be deprived of liberty without an actual trial, before a Court, according the established principles of the common law, they could not complain of any violation of the constitution. The proceedings would be analagous to those for the rendition of fugitives from justice.

But though the provisions of the Constitution for the surrender of fugitives from labor, and fugitives from justice, are similar, the statutes for the two cases are widely different.

The fugitive slave, and the fugitive from justice, are both "delivered up." But the latter is delivered up for a trial; - The former is delivered up without any trial, either before, or afterwards. The criminal is delivered to the Court of the State where the crime is ^{to have his case determined by due process of law;} - alleged to have been committed, the alleged slave is delivered to a private claimant, who may sell him at auction the moment he crosses the line of a slave State. In the former case, the hearing is merely preliminary, for the purpose of holding the accused to answer to the charge. In the latter case, the hearing ^{and decision} before the magistrate are final, from which no appeal can be taken, and which cannot be revised, even on a writ of habeas corpus. 7. Cusk. 285. To say, therefore, that because the constitutional provisions are alike, the statutes must both be constitutional, is a manifest non sequitur.

By the statutes of the United States, the person claimed as a fugitive slave has no trial, before any Court. If delivered up, it is in fact without any trial.

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By the Constitution of the United States, the judicial power is vested in the Supreme Court, and in such inferior Courts as may be established by Congress, "The judges of which 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." Art. III, Section 1. Congress can establish no Court with judicial power finally to try causes between citizens of the United States, except in conformity with this provision.

A citizen of this State, if claimed as a fugitive slave, instead of being carried before such a Court, may be carried before "Commissioner" appointed by the Circuit Court, who, upon proofs taken ex parte, without notice, perhaps months or years before, may determine the case, "in a summary manner," and give a "certificate" to the claimant which "shall prevent all molestation by any process issued by any Court, Judge, ~~or~~ magistrate, or other person whomsoever." Statute of 1850, § 6. And this Commissioner, instead of being a "judge",

"holding his 'office during' good behavior," and having a stated "salary, not liable to be diminished", so that he may be independent of pecuniary influences, is liable at all times to be removed from his office, and receives for his services "a fee of five dollars," which is doubled in case he orders the person so claimed to be delivered up to the claimant.

One would suppose that a Court so careful of the rights of property as to declare a law like ours for the seizure of intoxicating liquors to be unconstitutional and void, might find it difficult to reconcile such provisions with the constitutional rights of citizens. But ^{whatever} ~~the~~ ~~may be~~ ^{the opinions of} ~~the~~ the Courts of other States, I cannot believe that such a tribunal is a Court, having judicial power under the Constitution of the United States to determine such a question, nor that such proceedings are all the trial which a citizen may claim before he shall be deprived of his liberty. Constitution, Amendments, Art. IV, V, and VII.

I am aware that the Supreme Court of the United States have decided that these statutes are not repugnant to the Constitution. As that is the proper tribunal to determine that question, in all our official relations we are bound by their decision, ^{until it shall be reversed.} If it were not so, there would be a conflict of authority within the same jurisdiction. But while, in regard to the constitutionality of the laws of the United States, we yield to the authority of the Supreme Court, if we believe the decisions of that Court to be wrong, it is our privilege, if not our duty, so to declare, in order that such decisions may be overruled, or ^{that} the laws ^{may} be repealed. ~~by Congress~~ No weight of authority, and no lapse of time, can establish that which is wrong, or prevent it from ultimately being overthrown.

Conceding, then, that for the present we must govern our official conduct by the laws of the United States relating to fugitives from labor, as if they were constitutional, and applied to fugitive slaves, the question remains, whether our own statutes are in

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in conflict therewith?

The statute of 1793 provides that the alleged fugitive may be taken before any judge of the Circuit or District Courts, "or before any magistrate of a county, city, or town corporate." As such magistrates are or may be officers of the State, section 53 of Chapter 80 of our Revised Statutes undoubtedly prohibits them from exercising any such jurisdiction. The language used renders it apparent that this section was not originally drawn by one acquainted ^{with} ~~the~~ technical terms of ~~the~~ law. But in its popular sense it would be understood as an injunction upon all such magistrates not to take official cognizance of any case under the Act of 1793. So understood, no one pretends that it is unconstitutional. Prigg v. Pennsylvania, 16 Peters 539.

But some of my associates are of the opinion that the prohibition is personal, and not merely official, because such magistrates have no official authority under the Act of 1850; and they think the Act of 1850 repeals the Act of 1793. I am of a different opinion.

The Act of 1850 is not entitled an act to repeal the statute of 1793, but an act to amend it, and "supplemental to it." This indicates no intention to repeal, - but the contrary.

The Act of 1850 contains no repealing clause. Nor does the one cover the whole ground of the other, so as to repeal it by implication. The claim^{to recapture the fugitive} depends not upon any statute, but entirely upon the constitution. The Act of 1793 gives ~~xxx~~^a remedy, before certain magistrates. The Act of 1850 gives another and entirely different remedy, before other and entirely different magistrates. The one is "supplemental" to the other, and, in these provisions, is not inconsistent therewith to any extent. Both may stand; and in those States where the magistrates designated by the statute of 1793 are not prohibited, they may still act.

The Act of 1793 was, however, amended. That made the person who should "obstruct or hinder" the claimant, or knowingly "conceal the slave," liable for a certain penalty. The Act of 1850 imposes a different penalty for the same offence, much more severe. The latter being

inconsistent with the fourth section of the former, thereby repeals that section. Norris v Crocker & al. 13 Howard 429. In this case the question was distinctly raised, and neither the eminent counsel, nor the Court, intimated any opinion that any other part of the statute of 1793 was repealed by the Act of Sept. 18, 1850.

The statute of 1793, so far as it gave jurisdiction to certain ^{State} magistrates to act in the rendition of fugitive slaves, being still in force, the statutes of this State were, in my opinion, intended only to prohibit them from taking any official cognizance of any such cases. As to their construction, I concur entirely in the opinion submitted by my associates, Judges Appleton and Kent. And therefore I do not think either of the provisions referred to is repugnant to the Constitution of the United States, or in contravention of any law of the United States made in pursuance thereof.

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