DOCUMENTS

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1861.

OPINIONS

OF THE SEVERAL

JUSTICES OF THE S. J. COURT,

ON THE CONSTITUTIONALITY OF THE

PERSONAL LIBERTY LAWS

OF THE

STATE OF MAINE.

AUGUSTA:
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1861.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
March 6, 1861. }

Laid on the table on motion of Mr. McCRILLIS of Bangor, and 1,000 copies ordered to be printed for the use of the Legislature.

CHARLES A. MILLER, *Clerk.*

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, February 13, 1861.

ORDERED, That the Justices of the Supreme Judicial Court be requested to communicate forthwith, to the House of Representatives, their opinion, in writing, upon the following question:

Are section twenty of chapter seventy-nine; sections thirty-seven and fifty-three of chapter eighty; and section four of chapter one hundred and thirty-two of the Revised Statutes of the State of Maine, or either of them, repugnant to the Constitution of the United States, or in contravention of any law of the United States made in pursuance thereof?

Read and passed.

CHARLES A. MILLER, *Clerk.*

NOTE.—The following are the sections of the Revised Statutes referred to in the foregoing order:

Section 20 *of Chapter* 79. When he (the County Attorney) is informed that any person has been arrested in his county and is claimed as a fugitive slave under the provisions of any act of Congress, he shall immediately repair to the place of his custody; render him all necessary legal assistance in his defence; and summon such witnesses as he deems necessary therefor; and their fees and all other necessary legal expenses therein shall be paid by the State.

Section 37, *Chapter* 80. The keepers of the several jails in this State shall receive and safely keep all prisoners committed under the authority of the United States, except persons claimed as fugitive slaves, until discharged by law under the penalties provided by law for the safe keeping of prisoners under the laws of this State.

Section 53, *Chapter* 80. No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this State, shall arrest or detain, or aid in so doing, in any prison or building belonging to this State, or to any county or town, any person on account of a claim on him as a fugitive slave. Any of said officers violating any of the aforesaid provisions, or aiding and abetting any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or be imprisoned less than one year in the county jail.

Section 4, *Chapter* 132. They (Judges of Municipal and Police Courts and Justices of the Peace) shall have jurisdiction of assaults and batteries, breaches of the peace and violations of any statute or by-laws of a town where the offence is not of a high and aggravated nature, and offences and misdemeanors, jurisdiction of which is conferred by law; and may cause affrayers, rioters, breakers of the peace and violators of law to be arrested; and may try and punish by fine not exceeding ten dollars, and may require them to find sureties for keeping the peace; but they shall not take cognizance of any case relating to a person claimed as a fugitive slave, nor aid in his arrest, detention or surrender, under a penalty not exceeding one thousand dollars, or imprisonment less than one year.

[*Section* 53, *Chapter* 80, is the provision usually referred to as the Personal Liberty Law.]

OPINION OF JUDGES TENNEY AND CUTTING.

Hon. JAMES G. BLAINE,

Speaker of the House of Representatives:

To the foregoing question, we the undersigned submit the following as our answer thereto:

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, but shall be delivered up on claim of the party to whom such service or labor may be due.—*Constitution of the United States, Art.* 4, *section* 2, *division* 2.

It has been decided by judicial tribunals of the highest character, that it was the appropriate business, not of the legislatures of the several states, each for itself, but of the congress of the United States by suitable legislation, to render the foregoing provision, practically effectual, where cases should require it;—and the acts of congress, approved February 12, 1793, chapter 51, and September 18, 1850, chapter 60, are not repugnant to the constitution of the United States;—and by authority, in our judgment, are to be treated as valid, and as paramount to the laws of individual states of this Union.

In the act last referred to above, in section 5, after pointing out the duty of marshals and deputy marshals, touching the service of legal process, for the apprehension and detention of fugitives, it is provided, that all good citizens are hereby commanded, to aid and assist in the prompt and efficient execution of this law, whenever their services may be required for that purpose.

Section 53 of chapter 80 of the revised statutes of this state, provides that no sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this state shall arrest or detain, or aid in so doing, in any prison or building, belonging to this state, or any county or town, any person, on account of a claim on him as a fugitive slave. Any of said officers violating any

of the aforesaid provisions, *or* aiding or abetting any person, claiming, arresting or detaining any person as a fugitive slave, shall forfeit, &c.

Section 4 of chapter 132 of the revised statutes of this state, treats of the jurisdiction of justices of the peace, and provides, that they shall not take cognizance of any case, relating to a person, claimed as a fugitive slave; *nor* aid in his arrest, detention or surrender, under a penalty, &c.

It is the right of the legislature of the state, to define the powers of those who hold office under it, in the exercise of its sovereignty, with such qualifications and exceptions as it shall deem proper; and it is beyond the right of congress, to extend or limit this power, in any officer of the state.

The acts, which are forbidden in the first part of section 53 aforesaid, are those which it was contemplated, might be attempted, in connection with the imprisonment of a fugitive slave in any building named, over which the United States had no control; and by the issuing of legal process, and the execution thereof; and the provision of section 4 aforesaid, prohibiting justices of the peace, from taking cognizance of any case, relating to a fugitive slave, is simply a denial of jurisdiction of these officers, in cases of the kind, and are not obnoxious to the charge of being in violation of the laws of the United States, before mentioned.

But the latter portion of said section 53, prohibits the officers referred to, from "aiding or abetting" a person who is discharging his duty under the laws of the United States, when such acts, if done, are not understood to be of an official character, but independent of any thing, which would appertain to the respective officers referred to. The fact, that persons hold such offices, makes it criminal in them, to do the acts, which have no relation to the duties connected therewith, according to the last part of said section.

The provision in the 4th section of chapter 132, forbidding justices of the peace to aid in the arrest, detention and surrender of a fugitive slave, is not a restraint of the exercise of official power in these magistrates. When they are prohibited from taking *cognizance* of the cases named, their judicial authority, therein, was exhausted, and the action afterwards referred to, was in no respect different from that in one who had no such office.

By section 5, of the laws of United States, chapter 60, "all good citizens" are commanded to aid and assist in the prompt and effi-

cient execution of that law. This embraces persons, who hold the offices specified, under state authority, and they are not exempt from obedience to this law, when no act of an official character is required, or commanded. And from the view which we have taken, the laws of the United States and those of this state are not in harmony.

The conclusion to which we come is, that the part of section 53 of chapter 80 of the revised statutes of this state, making it criminal, in any of the officers named or referred to, in that section, to aid and abet any person, claiming, arresting or detaining any person as a fugitive slave; and the part of section 4 of chapter 132, of the revised statutes of this state, forbidding justices of the peace, to aid in the arrest, detention or surrender of a fugitive slave, are in contravention of the law of the United States, made in pursuance of the constitution of the same in chapter 60, section 5, approved September 18, 1850; and that the other parts of the two sections last named, and section 20 of chapter 79, and section 37 of chapter 80 of the revised statutes of this state, are not in contravention of any law of the United States, or the constitution thereof.

JOHN S. TENNEY,
JONAS CUTTING.

FEBRUARY, 1861.

OPINION OF JUDGE RICE.

To Hon. James G. Blaine,

Speaker of the House of Representatives:

The undersigned, one of the justices of the supreme judicial court, in response to the order of the House of Representatives, passed February 13th, 1861, would remark that the order in its terms, is exceedingly broad and comprehensive, and would necessarily involve such an amount of labor as to preclude the possibility of its being performed "forthwith." Looking, however, at the provisions of our statutes referred to in the order, I presume that it was not the intention of the House that the examination should extend further than to that provision of the constitution having reference to the return of fugitives from service or labor, and the statutes passed by congress to carry it into operation. Thus far only will my examination extend.

The constitution of the United States, Art. 4, § 2, clause 3, provides that "no person held to service or labor in any state under the laws thereof escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Historically, it is well known that the "persons" referred to in the above provision were slaves.

Under this provision of the constitution, the congress of the United States, on the 12th of February 1793, passed an act providing, among other things, that "in case of the escape of such 'person,' the person to whom such service or labor may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor and to take him or her before any judge of the circuit or district court of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made; and upon proof to the satisfaction of such judge or magistrate, either by

oral testimony, or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the state or territory from which he or she fled."

It will be observed that under this statute, the only state officers who are authorized to act are magistrates of a county, city or town corporate, and that those magistrates are only authorized to grant a certificate on certain proofs being made before them. This statute continued in force, without modification, until 1850.

In 1842, the constitutionality of certain statutes of the state of Pennsylvania, designed to facilitate the restoration of fugitives from service, came under the examination of the supreme court of the United States, in the case of Prigg *vs.* Com. of Penn., 16 Pet. 539. In that examination, the act of 1793, for the rendition of fugitives from service, was also made the subject of careful consideration by the court. In delivering the opinion of the court, Mr. Justice Story, speaking of this statute, said, " we hold the act to be clearly constitutional in all its leading provisions, and indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated. As to the authority conferred upon state magistrates, while a difference of opinion has existed and may still exist on the point, in different states, whether state magistrates are bound to act under it; none is entertained by this court, that such state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation."

This view of the constitutionality of the act of 1793 has been distinctly affirmed by the supreme courts of Pennsylvania, New York and Massachusetts, and reaffirmed by the supreme court of the United States; and has been acquiesced in by all departments of the national government, and has long been deemed settled law both by courts and jurists.

The court also express the opinion in the case of Prigg, above cited, that the jurisdiction of the United States, under that clause of the constitution, is exclusive; and that the states have no constitutional authority to legislate upon the subject.

In 1847, Pennsylvania revised her legislation upon this subject, and (manifestly in view of the suggestion of the court in Prigg's case,) provided that "no judge, alderman or justice of the peace in the state, should have jurisdiction, or take cognizance of a case of a fugitive from labor, or grant any certificate or warrant of removal of any such fugitive from labor under the act of 1793."

In 1850, Sept. 18, congress passed an act to amend, and supplementary to, the act of February 12, 1793. By this statute, the whole subject of the former act is revised. Commissioners, appointed by the United States courts, are substituted for magistrates, and marshals and their deputies, are made ministerial officers for the execution of the law; and detailed and specific provisions are made to carry into practical operation the article in the constitution for the rendition of fugitives from labor.

Is this act constitutional? Though more full, minute and particular in its details, and also more harsh and highly penal in some of its provisions than the statute of 1793, its general character is substantially the same.

Objection has been made that the act of 1850 does not provide for trial by jury, and that it denies the privilege of the writ of *habeas corpus*, and is therefore, in those respects, unconstitutional.

These objections, in my opinion, rest upon a misapprehension of the object and design of the provision of the constitution referred to, and of the office or function of the writ of *habeas corpus*.

One of the most prominent and important elements of that invaluable common law right, trial by jury, is that the party shall be entitled to a trial by a jury of his vicinage; that his rights shall not be determined by strangers, but by men of his own county, in his own neighborhood.

Citizens and slaves are amenable to the laws of the states in which they live, and the questions, whether a citizen has committed a crime, in one instance, or a person is a slave in the other, can only be determined by the laws of the state in which the parties live. By a principle of comity, civil contracts, entered into in one state or nation, are ordinarily enforced by the judicial tribunals of other states or nations. This principle, however, does not extend to the enforcement of the penal laws of other states, nor to the determination of the *status* of persons therein, whether bond or free. Such questions are determined by each state or nation for itself, within its own jurisdiction.

But it sometimes happens that persons charged with crimes, or claimed as slaves, flee or escape from the jurisdiction in which they are thus charged or claimed. To meet this contingency, on the formation of our constitution, the provisions for the rendition of fugitives from justice, and from service, were inserted in that instrument. These provisions are found side by side in the constitution, and present the same general characteristics. The fugitive from justice is to be delivered up on demand of the executive authority of the state from which he fled. But how is he to be demanded? On this point, the constitution is silent, its terms being general. But the answer is found in the statute enacted to carry into effect that provision of the constitution.

So, too, the fugitive from service or labor, is to be given up on claim of the party to whom the service or labor may be due. But how claimed? Here again the constitution is silent, its terms, as in the other case, being general. But here, also, the statute, made in pursuance of the constitution, answers, and points out in detail the manner in which the claim must be made.

The object of the constitution, and of the laws designed to carry it into effect, is not to try and determine the question of guilt or innocence in one case, or of freedom or slavery in the other, but simply to arrest and bring within the jurisdiction parties who had fled or escaped therefrom, to the end that they may be disposed of according to the laws of that jurisdiction. In other words, these provisions of the constitution, and the laws made to carry them into operation, were designed to afford process for the arrest of parties demanded or claimed, which should not, like ordinary state process, be confined to state or county lines, but which should extend over the whole territory of the United States. The process is in its character preliminary. Just as reasonable would it be for a party arrested on a warrant, within the limits of a state, to demand a trial by jury at the place of his arrest, to determine the question whether he was legally arrested. Such a course would paralyze the arm of the best organized and most efficient civil government existing.

The law for the return of fugitives from service, like the law for the return of fugitives from justice between the states, and like the treaty stipulations between this country and England and France for the return of fugitives from justice, does not provide for the manner in which the parties returned shall be disposed of after

they have been restored to the state or nation from which they escaped or fled. Each and all of these laws and treaty stipulations have a common object, which is to return the fugitive to the jurisdiction from which he may have fled or escaped, and there leave him subject to the local law.

Nor is the provision in the constitution for the return of fugitives from service new. In the articles of confederation between the "United Colonies of New England," adopted September 5th, 1672, was the following provision. "It is also agreed that if any servant run away from his master into any other of these confederated jurisdictions, that in such case upon certificate of one magistrate in the jurisdiction out of which the said servant fled, or upon other due proof, the said servant shall be delivered either to his master or any other that pursues and brings such certificate or proof."—*Anct. Char.* 724.

This ancient New England fugitive slave law contains no provision for trial by jury, but leaves the returned fugitive to be dealt with according to the laws of the jurisdiction from which he fled. Like the fugitive slave law under the constitution, and for which it furnished a copy, it simply provided for a return of the fugitive.

It is not easy to perceive wherein the failure to provide for trial by jury constitutes a stronger objection to the law for the return of fugitives from service under the constitution, than in the other cases already referred to. It cannot, unless we impugn the integrity of the governments to which the fugitives are returned, and charge them with failing to provide laws by which their condition can be determined and their rights protected.

Then as to the denial of the writ of *habeas corpus*. The protection against unlawful restraint afforded by this prerogative writ is justly deemed of the highest importance. Its character, however, is not always fully understood. Its office is to examine and determine whether parties under arrest are unlawfully detained. On it the principal question of guilt or innocence, bond or free, is not determined; but whether the process by which the party is held has been issued by competent authority, in conformity with law, and is sufficient in form.

There is no provision in the act of 1850, which contravenes this right. The statute points out the manner in which the claim for the return of a fugitive shall be made; the proofs required to establish the claim, and the form of the certificate which shall be

given; and then provides that such certificate shall be conclusive of the right of the person or persons in whose favor it is granted to remove the fugitive to the state or territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whatever.

A person, therefore, who is held lawfully for the purpose of being returned, could not have been discharged on *habeas corpus*, if the law had been silent upon the subject. The only question to be settled on this writ is, has the person claiming to hold the alleged fugitive such process as the law prescribes, as matter of fact. That question may be examined in this class of cases by the state courts in the same manner as other cases where parties are claimed to be held under process issued by the United States. If on examination of the return to the writ, it appears that he has not the certificate prescribed by the act, the fugitive must be discharged, because he would then be unlawfully held; if, on the other hand, the process is found to be in conformity with law, the fugitive must be remanded to custody as in other cases.

It is not, however, my purpose to examine the constitutionality of the statute in detail. The general features of the law of 1850, as has already been remarked, are similar to those of the act of 1793. The constitutionality of the latter statute has been settled beyond all doubt. This fact would of itself, so far as the statutes are in legal effect the same, settle the constitutionality of the act of 1850. In addition to this, however, its constitutionality has been distinctly affirmed by the highest judicial authority.—7 *Cush.* 285; 5 *McLean's C. C. R.* 469; 1 *Blatchford's C. C. R.* 635; 21 *Howard U. S. R.* 506.

Assuming then, that the act of 1850, c 60, for the rendition of fugitives from service, is constitutional, I propose to compare some of the provisions of this act, with those provisions in our statute to which the order of the House has called the attention of the court.

The act of the United States of September 18, 1850, authorizes the courts of the United States to appoint commissioners with authority to take cognizance of cases arising under that statute. In the fifth section of the act of 1850 is found the following provision: "and the better to enable the said commissioners when thus appointed to execute their duties faithfully and efficiently, in

conformity with the constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint in writing under their hands, any one or more suitable persons from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus*, of the proper county, when necessary to ensure a faithful observance of the clause of the constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law whenever their services may be required as aforesaid for that purpose."

The duty of a citizen to aid the civil officer when necessary for the execution of legal process is neither novel nor unreasonable, but is as old as civil government, and in many cases absolutely necessary to preserve the public peace, and maintain the supremacy of the laws. The statutes of all civilized nations are full of such requirements.

Article 6, § 2, of the constitution of the United States, provides that "this constitution, and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of the state to the contrary notwithstanding."

The allegiance which every American citizen owes to government is duplex—being due to the government of the United States and to some particular state. Within its jurisdiction his allegiance to the United States is paramount and absolute. From his obligation to obey all laws made in pursuance of the constitution of the United States, no state can absolve him, and for rendering obedience to such laws, no state can rightfully subject him to punishment. When any law of the United States, made in pursuance of the constitution, commands, it is his duty to obey; and any law of any state which commands to the contrary is repugnant to the constitution, and of no binding effect.

Outside of the jurisdiction which the constitution confers upon the government of the United States, the allegiance of the citizen

is due to the government of his particular state. Between these jurisdictions, theoretically at least, there can be no conflict.

Section 53 of chapter 80 of the revised statutes of this state reads as follows:

"No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this state, shall arrest or detain, or aid in so doing, in any prison or building belonging to this state, or to any county or town, any person on account of any claim on him as a fugitive slave. Any of said officers violating any of the aforesaid provisions, or aiding or abetting any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or to be imprisoned not less than one year in the county jail."

Thus it will be perceived that while good citizens are, in certain contingencies, commanded to aid and assist in the execution of the law of the United States, in the section of our own statute above cited, whole classes of citizens—all the officers of this State, without distinction or exemption, are forbidden under severe penalties, to do the very acts which the law of the United States commands them to do. In terms, these laws are in direct and irreconcilable conflict.

But it has been suggested that the provisions of our statute above cited were originally based upon the suggestion of judge Story in Prigg's case, that it was competent for the legislature of states to prohibit their own officers from discharging the duties assigned them by the law of the United States of February 12, 1793, and that the prohibition in the 53d section of chapter 80 of the revised statutes, refers to the action of our state officers "in their official capacity" only, and not to them as private citizens.

In my opinion, the act of this state can not properly receive such a construction.

The act of congress of 1793 authorized one class only of state officers to participate in its execution, to wit: magistrates of a county, city or town corporate. By the amendatory act of 1850, the act of 1793 was wholly revised, as has been already stated, and commissioners substituted for the magistrates of counties, cities and towns.

A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must on principles of

law, as well as in reason and common sense, operate to repeal the former.—7 *Mass., R.* 142; 12 *do.* 536; 10 *Pick. R.* 39.

There was then, when our revised statutes were enacted, no existing law of the United States which authorized the officers of this state, in their official capacity, to take cognizance of, or in any way to aid or assist in the execution of the law for the restoration of fugitive slaves. Nor had the legislature of this state ever conferred upon the officers of the state such authority.

In such a state of things, to prohibit our state officers, under severe penalties, from doing what they had no authority to do, and what I am not aware they had manifested any particular desire voluntarily to do, without authority, would certainly be a work of supererogation on the part of the legislature.

It is undoubtedly competent for the legislature to limit and define the jurisdiction of the officers of the state. But the language of section 53, chapter 80, revised statutes, unlike that of Pennsylvania before cited, is not appropriate for that purpose, but is appropriate language when applied to individual citizens and designed to prohibit them from performing, or participating in, acts deemed improper and criminal. To speak of a ministerial or judicial officer as *abetting* in his official capacity, would be a gross and palpable misapplication of terms; while to speak of an individual as abetting the commission of crime, would be a legitimate and appropriate use of language.

But the prohibition in the 53d section is not limited to judicial and executive officers, such as judges and magistrates, sheriffs and marshals, but includes all other officers of the state, whatever may be their functions. As applied to judicial and executive officers, the construction contended for, as I have already shown, is wholly inappropriate. But when applied as this statute would require, to all other officers of the state, the impropriety of the language becomes still more glaring. Thus, to say that in addition to the officers specifically named in the statute, any minister of the gospel duly appointed and commissioned to solemnize marriages; any selectman or assessor; any inspector of beef and pork, lime and lime casks, and the like, aiding and abetting "in his official capacity" any person claiming, arresting or detaining any person as a fugitive slave, shall forfeit a sum not exceeding a thousand dollars, &c., would present an incongruity of language and of ideas so strong as to repel any such construction as is contended for.

But should it be said that the words "or other officer of this state" should be stricken out, or construed to mean other officers whose official functions are similar to those specifically named in the statute, the objection already named is not obviated, as with these additional amendments, by construction the section would be simply insensible and aimless; while without such constructive amendments it has a plain and obvious meaning.

That such is not the true construction of § 53, c. 80, is still further apparent from the fact that the act of 1855, c. 182, of which the 53d section is a revision, contained in express terms the precise qualifications which are now sought to be engrafted upon this section by construction; and also a distinct additional section, providing that nothing in the act should be construed to hinder or obstruct the marshal of the United States, his deputy, or any officer of the United States from executing or enforcing the law of the United States of September 18, 1850.

Those qualifying terms were most material, and rendered that act innoxious at least. They were wholly omitted in the revision.

It is a well settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. 1 *Pick.* 43.

The prohibitory and penal provisions in section 53 of chapter 80 of the revised statutes, and more especially those in the last clause of the section, applying as they do to a class of persons in their individual, and not in their official capacity, are, in my opinion, clearly in contravention of the provisions of the act of congress of September 18, 1850, c. 60. The section referred to (§ 53, c. 80) contains no provision for the prevention of kidnapping, or to secure the rights of freemen, but was manifestly intended to obstruct and hinder the restoration of fugitive slaves, and is in both its letter and spirit repugnant to Art. 4, section 2, clause 3, of the constitution of the United States.

As to section 20, of chapter 79, and section 37, of chapter 80, of the revised statutes, I perceive nothing therein which renders them obnoxious to the charge of being in contravention of any law of congress, or repugnant to the constitution of the United States.

The last clause of section 4, c. 132 of the revised statutes, so far

as it relates to the jurisdiction of justices of the peace, in cases relating to persons claimed as fugitive slaves, is simply nugatory, there being no existing statute which gives them such jurisdiction, and it being a well settled principle of law, that nothing is to be presumed in favor of the jurisdiction of justices of the peace. So far as it prohibits them from rendering aid as private citizens, it is open to the same objections which exist against the provisions of section 53, c. 80.

Respectfully yours, &c.,

RICHARD D. RICE.

AUGUSTA, February 20, 1861.

OPINION OF JUDGES APPLETON AND KENT.

Hon. James G. Blaine,

Speaker of the House of Representatives:

The questions proposed by the house of representatives, involve the inquiry whether certain sections of the revised statutes of this state, are in conflict with the acts of congress of 12th February, 1793, and of 18th September, 1850, commonly called the fugitive slave laws. In as much as for the purposes of the present examination, the constitutionality of those laws is not questioned, we have deemed all investigations as to their origin, all defence of their provisions, all laudation of their humanity, and all denunciations of their harshness as alike unnecessary and supererogatory.

The several sections as to the constitutionality of which the opinion of the court is desired, will be examined in the order in which they are presented for our consideration.

1. It is enacted by R. S., 1857, c. 79, § 20, that when the county attorney "is informed that any person has been arrested in his county and is claimed as a fugitive slave under the provisions of any act of congress, he shall immediately repair to his place of custody; render him all necessary legal assistance in his defence; and summon such witnesses as he deems necessary therefor and all other necessary legal expenses therein shall be paid by the state."

It will hardly be questioned that one alleged to be or even being a fugitive slave may not in a free state employ counsel to appear and contest the validity of the process against him. The person claimed may be free, or the person claiming may have no right, or the proceedings may be fatally defective. In Virginia and in many of the southern states in suits for freedom, "the person conceiving himself unlawfully detained as a slave," may petition the circuit court of the state and have counsel assigned by the court to aid him "without reward" and "to have free of cost all needful process, services of officers and attendance of witnesses." Such is the

praiseworthy solicitude of Virginia for the protection of her free colored inhabitants.

The same spirit of humanity unquestionably prompted the legislation, the constitutionality of which, is the subject of the present inquiry. In the free states, "every man black or white," says Mr. Justice McLean, in Prigg *v.* Pennsylvania, 16 Peters 671 "is presumed free and this is the unquestioned law of all the free states."

By the fugitive slave law, a resident of this state, and by its law presumed to be free, may be taken before a commissioner and upon *exparte* affidavits be surrendered to a claimant and forcibly carried without its jurisdiction. The legislature deemed it their duty that all within the limits of the State should receive the protection, which the law affords. For this purpose it makes use of the services of its officers. If one attorney may render his professional aid to the alleged fugitive so may another. Equally so may the attorney for the county in which the prisoner is arrested. The design of this section is to guard against the abuses incident to the fugitive slave law, and as far as may be, to prevent those, who are free, from being carried into slavery. This neither hinders nor obstructs action under the law of the United States nor is in contravention of any of its provisions

2. It is enacted by R. S., 1857, c. 80, § 37, that "the keepers of the several jails in this state shall receive and safely keep all prisoners committed under the authority of the United States, *except persons claimed as fugitive slaves* until discharged by law, under the penalties provided by law for the safe keeping of prisoners under the law of this state."

The jails of the state are the property of the several counties at whose expense they are erected. They are built for state objects. The government of the United States have no more right, without the assent of the state, to use them, than they have to use any other property of the state for purposes of its own. Still less can it claim that they should be used for the safe keeping of the personal chattels of the citizens of other states. As all right to their use is derived from the state, it may prescribe the terms and conditions upon which, and the purposes for which it will concede their use. If the terms are not satisfactory, the United States have the obvious right of refusal. The legislature might have entirely denied their use. If the United States accept jail upon the terms of the state, it is not for them to complain that more was not given, when all might have been withheld.

The legislation of congress upon this subject has been in accordance with these views. On 23d September, 1789, congress recommended to the legislatures of the several states to pass a law making it expressly the duty of the keepers of these jails to receive and safely keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, &c.

It appears from the subsequent acts of congress that its recommendations had been only in part complied with. Some of the states peremptorily refusing to comply therewith and others revoking the permission previously given, so that congress was compelled to authorize the marshal "to hire a convenient place to serve as a temporary jail," &c.—3 *St. of U. S.* 646. 4 *St. of U. S.* 634.

It is manifest, therefore, that the state may deny the use of its jails for the safe keeping of fugitive slaves—that not being one of the objects of their erection and the permission of their use by the government of the United States or the denial thereof being a matter solely for the determination of the state.

3. The R. S. of 1857, c. 80, § 53, is in the following words:

"No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace, or other officer of this state, shall arrest or detain, or aid in so doing, in any prison or building belonging to this state, or to any county or town, any person, on account of a claim on him as a fugitive slave. Any of the said officers violating any of the aforesaid provisions, or aiding or abetting any person claiming, arresting, or detaining, any person as a fugitive slave, shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is committed, or be imprisoned less than one year in the county jail."

The marginal reference is to the act of March 17, 1855, which consists of four sections, and is in these words:

"SECT. 1. No judge of any court in this state, and no justice of the peace, shall hereafter take cognizance of or grant a certificate in cases arising under the act of congress passed September 18, 1850, or the act to which that was additional, entitled 'an act respecting fugitives from justice,' to any person who claims any other person as a fugitive slave within the jurisdiction of this state.

"SECT. 2. No sheriff, deputy sheriff, coroner, constable, jailer, or other officer of this state, *in his official capacity*, shall hereafter arrest or detain, or aid in arresting or detaining, in any prison or

building belonging to this state, or any county, city, or town thereof, of any person, by reason of his being claimed as a fugitive slave.

"SECT. 3. Any justice of the peace, sheriff, deputy sheriff, coroner, constable, or jailer, who shall *in his official capacity* directly or indirectly offend against the provisions of this act, or *aid and abet* any person claiming any other person as a fugitive slave, in the arrest and detention of such person so claimed as a fugitive, shall forfeit a sum not exceeding one thousand dollars for every such offence, to the use of the county where said offence is committed, or shall be subject to imprisonment not exceeding one year in the county jail.

"SECT. 4. Nothing in this act shall be construed to hinder or obstruct the marshal of the United States, his deputy, or any officer of the United States, from executing or enforcing the laws of the United States referred to in the first section of this act."

It is first to determine whether the act of 1855 is constitutional, and if so, whether its character as a constitutional amendment has been changed in the revision, which being reported by Mr. Chief Justice Shepley, was enacted in 1857.

By §§ 2 and 3 of the act of March 17, 1855, the doing of the acts therein enumerated by certain officers of the state are prohibited under the penalties therein set forth. The sheriffs, deputy sheriffs, coroners, constables, jailers, &c., are forbidden in their *official capacity* to arrest, or detain or aid in so doing in any prison or building belonging to the state or to any county, city or town thereof, any person by reason of his being claimed as a fugitive slave.

Had the sheriffs, deputy sheriffs, coroners, &c., any right legally, and were they bound constitutionally *as officers of the state*, to do the several acts, the doing of which is interdicted by the sections under consideration. If they were under no constitutional obligation in their official capacity to perform the acts so interdicted, then their performance might constitutionally be inhibited.

The statutes of this state define the duties required of the various officers created by and under its constitution. It is no where made their official duty, or that of any of them, to arrest or detain or aid in so doing, any person on account of a claim against him as a fugitive slave in any prison or building belonging to any county in the state. And if it had been so made his duty, the

statute creating such duty might at any time be repealed by the power which imposed it.

The statute of the United States passed September 18, 1850, called the fugitive slave law, provides that all action under its provision should be by and through the officers of the United States. No authority is therein or thereby conferred upon any officers of the state to act in the matter of the rendition of fugitive slaves. The sheriffs, deputy sheriffs, coroners, &c., (magistrates excepted, which exception will be considered in the answer to another section,) have neither as state officers, nor as derived from the act of congress of 18th September, 1850, nor from its previous act on the same subject of 12th February, 1793, any authority to act officially in the premises. Having no authority to act, if they acted under color of their offices such action would be illegal. No justification therefore could be found under the statutes of Maine or of the United States.

As the acts of congress confer no authority on state officers, (magistrates excepted,) had these sections (2 and 3) been mandatory, requiring and commanding the several sheriffs, deputy sheriffs, coroners, &c., to do what by the existing law they are inhibited from doing, the statute containing them, it would seem, would be in direct contravention of the acts of congress before referred to, and of the construction of the constitution of the United States as enunciated by its highest judicial tribunal in Prigg *v.* Pennsylvania, in which it was held by the majority of the court that the legislation of congress upon the provisions in the second section of the fourth article of the constitution, relative to fugitives from service or labor "excludes all state legislation upon the same subject—that the power of legislation by congress upon the provision is exclusive; and that no state can pass any law as a remedy upon the subject, whether congress had or had not legislated upon it."

Congress can not compulsorily require new and onerous duties of state officers to be by them performed. It seems that such officers may if they choose, perform these new duties; and it is clear that the legislature may prohibit their exercise of the powers thus conferred. "As to the authority so conferred on state magistrates," says Mr. Justice Story in the case before referred to, "while a difference of opinion exists and may exist on this point, none is entertained by the court that state magistrates may if they choose, exercise authority, *unless prohibited by state legislation.*" Upon the same subject, Mr. Chief Justice Taney says—"*The state*

officers mentioned in the law are not bound to execute the duties imposed upon them by congress unless they choose to do so, or are required to do so by a law of the state; and *the state legislature has the power, if it thinks proper, to prohibit them..*"

It is manifest, therefore, if the acts, the doing of which is prohibited by §§ 2 and 3 of the act of the legislature of Maine, passed March 17, 1855, had been required by existing acts of congress, of the designated state officers as such, that the state might have constitutionally prohibited their performance.

As no acts of congress have required of the officers of this state mentioned in §§ 2 and 3, the doing of the acts inhibited by those sections would have been illegal. All therefore that the legislature have done is to prohibit the doing of that, which if done would have been contrary to law, as the officers of the state (magistrates excepted) have no authority from congress to act in the matter of the rendition of fugitive slaves, and the state has not conferred, and could not confer, such authority upon them.

It may be said that as the state officers named could not legally do the acts prohibited to be done, that the prohibition was unnecessary. But legislation by prohibiting what cannot legally be done is nothing unusual. An individual without commission cannot legally act as a sheriff or as a justice of the peace, and if he assumes thus to act his doings will be void, yet such assumption of non-existent authority is created an offence and is punishable by R. S., c. 122, § 18. So a sheriff can by virtue of his office take only the legal fees, but by color thereof he may take more, and taking more he is punishable therefor. The officer may under color of office do what he is not legally authorized to do, and his so doing may be created an offence. That is precisely what is done by §§ 2 and 3. Although the officers named in those sections cannot by virtue of their offices perform the acts therein set forth and forbidden, they may do them under color of office. Hence originated the statute. Whether it was necessary or expedient is not the question, but is it constitutional?

The act of March 17, 1855, c. 182, referring only to acts done by certain officers in *their official* capacity and prohibiting them, its constitutionality is not a matter of doubt. It conflicts with no act of congress. It is at variance with no decision of the supreme court of the United States. It is clearly constitutional.

It remains to consider whether §§ 2 and 3 of the act of March 17, 1555, which it has been seen are constitutional, and which in the

revision were condensed in § 53 of c. 80 R. S. 1857, have been transformed to a section which is unconstitutional. In other words, is R. S. 1857 in conflict with the fugitive slave law and the constitution of the United States?

In this aspect, the question at once assumes a grave importance. It is neither more nor less than whether this state by its legislative action has violated its constitutional obligations. In determining this, it may be important to refer to certain general principles which have been established by the highest judicial tribunals with the most entire and perfect unanimity of opinion. In Fletcher *v.* Peck, 6 Cranch 87, where the constitutionality of an act of Georgia was in issue, Mr. Chief Justice Marshall says that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." The discreditable technicalities by which, in criminal proceedings felons are permitted to escape, are not to be transferred to the construction of a statute, to induce the court by nice criticisms, hair breadth distinctions and forced constructions to decide that a statute is unconstitutional. "All acts of the legislature," says Mr. Chief Justice Mellen in Lunt's case, 6 Green. 1412, "are presumed to be constitutional; and the court will never pronounce a statute to be otherwise, unless in a case where the point is free *from all doubt.*" If the meaning of the language is doubtful, that construction should be given to it, by which the constitutionality of the act will be affirmed, rather than the reverse." Where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed *with irresistible clearness* to induce a court of justice to suppose a design to effect such objects.—*U. S.* v. *Assignees of Blight*, 2 *Cranch* 358. So an act of congress ought never to be construed to violate the law of nations *if any other possible construction remains.*—*Murray* v. *The Charming Betsey*, 2 *Cranch* 64. No court ought, unless the terms of an act *render it unavoidable*, to give a construction to an act which will involve a violation of the constitution.—*Parsons* v. *Bedford*, 3 *Peters* 414.

The ground of unconstitutionality urged is that the officers mentioned in R. S. 1857, c. 80, § 53, are citizens of the state, and as such are required to obey all constitutional enactments of congress,

and that *as citizens*, they are by this section prohibited from obeying the requirements of § 7 of the act of congress of September, 1850, by which "all *good citizens* are hereby commanded to aid in the prompt and efficient execution of the law, whenever their services may be required."

The first sentence of § 53 is a revision of § 2 of the act of 1855, and is in these words. "No sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace or other officer of this state, shall arrest or detain, or aid in so doing, in any prison or building belonging to this state, or any county, city or town thereof, of any person by reason of his being claimed as a fugitive slave."

The only difference between this section and the corresponding portion of the act of 1855, consists in the omission of the words, "*in his official capacity.*" But when a statute in its terms directs certain officers by designation of their office only to do or abstain from doing certain acts, it must be held to apply to acts, which may be done officially or by color of office.

If the words sheriff, deputy sheriff, &c., in the section, refer to them as officers and as citizens—then the same words must have the same meaning elsewhere—and when the command is to the sheriff to arrest or *not* to arrest, and the jailer to detain or *not* to detain in prison, it must alike refer to them with this *double* meaning attached. The consequence will be that when a sheriff is commanded to arrest, &c., he may arrest as an officer *or* as citizen, at his election. This is so,—or else the meaning must be held to vary accordingly, as the statute is affirmative or negative in its mandates. This at any rate would be "duplicity" of language.

If the word sheriff, deputy sheriff, &c., refer to them *only* as individuals, then it must, whether the command be to arrest or *not* to arrest, have such reference—and consequently the command to officers to arrrest or not to arrest would be to them as individuals, not as officers—unless a distinction be made as the enactment commands or prohibits.

Neither of these constructions is admissible.

The section is found in the chapter which is "of sheriffs, coroners and constables" and under "the provisions relating to sheriffs, constables and jailers." The language of the clause in its ordinary use applies only to action in an official capacity. When the sheriff is commanded not to arrest or the jailer not to detain in prison, the prohibition is to each in his official capacity. It is official action, or action under color of office, which is prohibited. It is upon

"*any of the said officers violating any of the aforesaid provisions*" in the next clause that the penalty for disobedience is imposed. If any of said officers were indicted, they must in the indictment be described as officers. Had the statute instead of being prohibitory been mandatory—requiring that "every sheriff, deputy sheriff, coroner, &c., shall arrest," &c., would any one construe a statute so commanding the officer to arrest, as referring to individual and not official action, and as directing him as an individual to arrest, &c. Does it mean official action when commanding and individual action when prohibiting? Most assuredly not. This clause most obviously refers to action as an officer, or under color of office, and not as a citizen—and is constitutional. Thus far, as we understand, the majority of the court concur.

The second sentence in § 53 corresponds to § 3 of the act of 1855, and provides that "any of the *said officers* violating any of the aforesaid provisions, *or aiding or abetting* any person, claiming, arresting or detaining any person as a fugitive slave, shall forfeit," &c.

It has been seen that the act of March 17, 1855, was constitutional, because it was limited to action in an official capacity. The acts specified in the first clause of § 53, are likewise so limited. It is said that the words *aid and abet* cannot refer to acts done in an official capacity, and consequently that the act is so far unconstitutional because it is a prohibition upon them as citizens.

But this construction is not admissible. Statutes in *pari materia* are to be construed together. If the word officers applies to them as such in the first clause, equally so does it in the last. It in each case is a prohibition upon them as *such*—and against their doing the acts prohibited.

But cannot the officer *aid* the person claiming? Does not the sheriff aid the person claiming, by arresting the fugitive? To abet means to assist. Does not the jailer abet—does he not assist the claimant by detaining the fugitive in jail? Technical precision of language is frequently disregarded in statutes. To construe a statute with the nicety applicable to a plea in abatement for the purpose of finding something unconstitutional therein, would at any rate have the merit of novelty. But according to such a construction the statute would read thus—any of the said officers violating any of the aforesaid provisions, or (*as private citizens*) aiding or abetting any person claiming, &c. The first clause "any of the said officers violating any of said provisions," is made to refer

to action in an official capacity—and is conceded to be constitutional by a majority of the court and the latter to action as a citizen. But if the first part has this meaning does not the word "*or*" carry the idea of official action or action by color of office to the residue of the sentence and is not the word officers to be used in the same sense throughout? Are words to be foisted in and the ordinary meaning of language abandoned so that thereby, a statute may be declared unconstitutional? Such a construction for such purpose would be at variance with the uniform current of authorities.

The limitation to action in an official capacity is alike in both parts of § 53.

It has been said that the words "any other officer of the state," includes all officers, and that the fish wardens and moose wardens—the inspectors of lime and lime casks, and the inspectors of pot and pearl ashes, and the innumerable list of officers of every description are included in this phrase and are thus forbidden to act as citizens in accordance with the command in § 7 of the fugitive slave law of 1850; and the fear is expressed, lest all citizens should be made office holders and thus the marshal be left without a possible *posse comitatus* to aid him in the enforcement of the law. The fear expressed is as ill founded as the construction is absurd. Among the rules of construction of universal application is that found in the adage "*nosciter a sociis*"—that is to say the meaning of a word may be ascertained by reference to the meaning of words associated with it. The intention of the legislature is to be ascertained by considering whether the word in question and the surrounding words are in fact *suidem generis* and referable to the same subject matter.—Broom's Legal Maxims, 456. "Any other officer" refers most obviously to any other of the same class—as marshals of cities or their deputies—by whom arrests may be made, or police or municipal judges, by whom precepts may be issued. If the words had been directory instead of prohibitory, would any one have construed them as commanding the governor of the state to arrest, or a justice of this court to detain in jail, because they are officers of the state and are therefore to be included in the expression "any other officer of the state?"

By the natural and obvious meaning of the language of § 53, the prohibition is of action in an official capacity as in §§ 2 and 3 of the act of 1855.

It was made the duty of those to whom the revision of the stat-

utes was intrusted, to "revise, collate and arrange all the public laws of the state," and "to execute and complete said revision in such a manner as in their opinion will make said laws most plain, *concise* and intelligible." They were to condense not to alter or change. Hence §§ 2 and 3 of the act of 1855, became in the revision, c. 80, § 53—two sections being changed into one—the words "in his official capacity," which are found in the original act in both sections, being omitted in the corresponding clauses of § 53. Hence too, the words "in his official capacity," were in both cases stricken out as superfluous—the statute in which the section is found referring to the duties of officers and defining what they may do by virtue of and prohibiting what they shall not do by color of office.

The view thus taken by the revisers was correct. In Hughes *v.* Farrar, 45 Maine 73, Mr. Justice Cutting affirms the law to be that the mere change of language is not to be deemed a change of the law unless such phraseology evidently purports an *intention* in the legislature to work a change. Upon the revision of statutes the construction is not changed by such alterations as were designed to render the provisions *more concise.*—Mooers *v.* Bunker, 9 Foster N. H., 420. An alteration in the phraseology of, or the *omission* or *addition* of words in the revision of statutes does not necessarily alter the construction of the act or imply an intention to alter the law. The intent of the legislature must be evident or the change in the language must *palpably require a different construction* before the courts will hold the law changed.—*Croswell* v. *Crane*, 7 *Barb. S. C.* 191.

The principle of condensation led to the omission § 4 of the act of 1855, as unnecessary. The design of the section was to exclude a conclusion. But the meaning was regarded as too plain to require its continuance and we think properly.

After the first revision by the resolve of April 1, 1856, the late Chief Justice Shepley was appointed to make such further revision "of the laws as may be necessary to present them in the most complete form for the consideration of the legislature;" and he was further "instructed to consider and recommend such *alterations* in the general laws as he may deem suitable and necessary, and to incorporate them with *distinguishing marks* or notes to the revised code, to be by him reported." By his report, it appears that this was done. In doing it, his design "was to make the enactment in language *so concise*," &c., as to avoid frequent and expen-

sive litigation. It does not appear by the report of the commissioners by whom the first, or in that of Judge Shepley, by whom the second revision was made, that in either revision any change had been made in the act of March, 1855. If any had been made it should in each revision have been noted with distinguishing marks.

Now, the last revision was made by one, who has held the highest judicial position with distinguished honor to himself and usefulness to the state, and whose opinions as a jurist would be entitled to the greatest respect in every state of the Union. It cannot be supposed that he would have been so negligent as to have sanctioned the conversion of a statute in all respects constitutional into one which is the reverse; nor that such a change should have been made and escaped his accurate observation and acute intellect.

It would be a reproach to the legislature to suppose that a statute legal and constitutional in its origin, could have changed by revision into one unconstitutional, and that this metamorphosis should have received their sanction.

It is therefore apparent that there was no intention by the change of language to change the meaning.

Now in determining the meaning of a statute, the intention must govern, and the manifest intention will be carried into effect though *apt* words are not used. Crocker *v.* Crane, 21 Wend. 212. The construction is to be adopted, "which carries into effect the true intent and object of the legislature in the enactment." Minor *v.* Bank of Alexandria, 2 Peters.

The intention of the legislature is to be gathered from the language used, taken in connection with the preceding legislation on the same subject.

Having regard to the well settled principles of construction, both as to the intention of the legislature and the meaning and constitutionality of statutes, we have arrived at the conclusion, that there is nothing in R. S. 1857, c. 80, § 53, which is in conflict with the constitution of the United States or with any act of congress passed in conformity therewith.

The officers named in § 53, are as citizens of the United States, bound to obey all the requirements of the acts of congress in question. The prohibition refers only to acts done by virtue or under color of office.

That such was the intention of those by whom the revision was made, and of the legislature by whom the revision was adopted,

we cannot doubt. And it is an universal rule that the intention when ascertained must govern.

4. By R. S. 1857, c. 132, § 4, it is enacted that magistrates "*shall not take cognizance* of any case relating to a person claimed as a fugitive slave, nor aid in his arrest, detention or surrender, under a penalty not exceeding one thousand dollars or imprisonment less than one year."

The act of congress of 12th February, 1793, relating to the rendition of slaves, is not repealed by the act of September 18, 1850, which in its terms is amendatory of and supplementary thereto.

It has been decided as before stated in Prigg *v.* Pennsylvania, that the state legislature may prohibit its magistrates exercising jurisdiction conferred upon them by act of congress. It is conceded by a majority of the court that the clause that magistrates "*shall not take cognizance of any case relating to a person claimed as a fugitive slave*" is constitutional.

It is urged that the latter clause of the same section "nor aid in his arrest, detention," &c., must be referred to action as an individual, and hence that it is unconstitutional.

But cannot the magistrate *aid in his* (the fugitive's) *arrest* by issuing his certificate, and is it not very efficient aid when in the language of the act of congress, such certificate "shall be a sufficient warrant for removing said fugitive from labor, to the state or territory from which he or she fled."

If it be urged that this construction makes the last clause superfluous, what then? "It is nothing more than that, the legislature has used superfluous language; that it has used words which might have been spared, and were either unnecessary or tautological. "Now I believe," says Mr. Justice Story in U. S. *v.* Bassel, 2 Story 404, "that there are few acts of legislation in the statute book, either of the state or of the national government, or of the British parliament, which do not fall in the same predicament and are not open to the same objection, or, if you please, to the same reproach." But because the same idea may be repeated and unnecessary language used, the act is not unconstitutional.

It is very common to insert in an act a sweeping clause, the object of which is to guard against any accidental omission. Such general words are never allowed to extend further than was clearly intended by the legislature. The expression, "nor aid in his arrest, detention or surrender," was used to guard against any and all action by magistrates by virtue or under color of office.

So far as they might act officially in any way, they are prohibited from so acting. If there was any official action which had not been prohibited by what precedes, these words were inserted to supply the omission. This construction is strictly in analogy with that adopted by the court in Preston *v.* Drew, 53 Maine 558, in which the generality of the statute that "no action of any kind shall be had or maintained in any court for the recovery or possession of intoxicating liquor or the value thereof," was restricted to actions for such liquors as were intended for unlawful sale.

The same reasoning is equally applicable to the similar prohibition, R. S. c. 80, § 53, which has already been considered.

The judicial construction which makes the legislature prohibit official action in the first part of the sentence and individual action in the last—by which the same word in the same section shifts its meaning, would at any rate be a remarkable one. It would illustrate the "shifting uses" of words.

As thus explained, the statute would read: "But *they* (magistrates) shall not take cognizance of any case relating to a person claimed as a fugitive, nor (as private citizens shall *they*) aid in his arrest, detention or surrender," &c.

It is due from the judiciary to itself and to the legislature that it should not resort to special pleading nor to strained constructions of the language of a statute, when thereby, and thereby alone, it is to be rendered unconstitutional. To alter the meaning of one and the same word in the same sentence as it precedes or follows a conjunction, *may be* in conformity with the intention of the legislature, which it is our duty to ascertain, and according to which, when ascertained, to decide; but to us a construction which requires it seems equally adverse to the rules of grammar and of law.

After a careful examination of the several sections of the different chapters of the revised statutes of 1857, to which the inquiry of the legislature relates, we are of opinion that none of them are repugnant to the constitution of the United States, nor in contravention of any law of the United States made in pursuance thereof.

JOHN APPLETON,
EDWARD KENT.

BANGOR, Feb. 25, 1861.

OPINION OF JUDGES MAY AND GOODENOW.

To the Hon. JAMES G. BLAINE,
Speaker of the House of Representatives:

In compliance with the order of the House, passed February 13th, 1861, we submit the following as our answer to the question proposed:

In order to a correct determination of the question, as stated, it is necessary to understand the relation which subsists between the federal and state governments, and the constitutional powers and rights of each, so far as they are connected with the specific duties required by the acts of congress, and the particular official or personal acts prohibited in the several sections of the statutes of this state, which are referred to in the question submitted. We will therefore first proceed to state as succinctly as possible, the general powers and rights of each government, bearing upon the question, that we may more fully understand the relation subsisting between them, and the obligations and duties of citizens, as such, to each.

The constitutions of the United States and of this state were designed to be independent of, and yet in harmony with each other. They provide for two separate governments, each an absolute sovereignty within its proper sphere. So far as the people have conferred power upon the general government, that government is supreme; and the residue of the power inherent in the people is reserved to the states. Each of these governments may therefore act within its appropriate sphere, and adopt such legislation for the accomplishment of its own ends as is required or authorized by its own constitution. The allegiance of every citizen is therefore twofold; and his aid and assistance may be required by each government in a constitutional manner for its own protection and for the execution and enforcement of its own laws.

The right of each government to command the services of its citizens for its own ends, is to be exercised in such a manner as to

produce no collision between the two. The one cannot rightfully throw any impediments in the way of the constitutional action of the other. Each government having equal constitutional claims upon its citizens when acting within its own appropriate sphere, any citizen whose services are required by both at the same time and who is therefore unable to serve them both, may properly render his service to that government which first commands it. While he is either officially or actually serving the one in pursuance of its lawful commands, he cannot be withdrawn, for the time being, from such service for the purpose of rendering aid to the other. Thus the citizen of a state when called upon by the sheriff to aid in the arrest of an offender against the laws of the state, cannot be required while he is upon the track of a murderer or other felon amenable to such laws, to render similar services to the general government at the bidding of its marshal. So too, if he is actually in the service of the general government, he cannot be withdrawn from such service by the sheriff of the county. Nor can a judicial or other officer of a state who is required by any constitutional law to perform official duties at certain fixed times and places, and who is actually engaged in the performance of such duties, be required by any officer of the United States to lay aside his official functions to assist him in the arrest of a fugitive from justice or slavery. In such and similar cases the government which first begins to be served, acquires a jurisdiction over the services of the citizen which cannot be defeated by the command of the other. In all cases, however, where the citizen is not in the actual service of one government at the time when he is required by the other to aid in the enforcement of its laws, he is bound, whatever may be his official station or rank, to render such service in good faith and without cavil; and when he is so required by the United States, no state can by its laws, or its constitution even, absolve him from the duty of such performance. The constitution of the United States and all the federal statutes which are authorized by it, are paramount not only to the statutes but to the constitution of every state; and when the latter are found to be in conflict with the former, or are directly calculated to impede or obstruct their execution, they are manifestly void.

No state is required by the federal constitution or can be required by any law of congress to furnish judicial courts, ministerial officers or prisons for the use of the general government; and

whenever a state does so, it is as matter of courtesy, and not of right. The state may, if it sees fit, prohibit the courts which it creates, the ministerial officers it appoints and the prisons and other buildings which it erects or owns, from being used for the enforcement of the federal statutes or for the detention or punishment of persons charged with or convicted in the federal courts of offences against the general government. A statute of the state, therefore, which merely prohibits the official action of its officers and the use of its prisons and other buildings belonging to it, from being applied to the execution and enforcement of the federal laws, or the detention and punishment of offenders against such laws, is constitutional. The legislature of the state, as well as congress, may exercise all the power necessary for the enforcement of its constitutional enactments and the protection or security of the rights of its citizens, including all such persons as are temporarily resident within its borders. But when either government goes beyond the pale of its constitutionally prescribed limits, and invades the rights granted to the one, or belonging to the other, such action is wholly unauthorized by the constitution of either.

In view of the general principles which have been stated, we will proceed to examine the several sections of the revised statutes referred to in the question propounded. The first, (section 20 of chapter 79,) provides that the county attorney "when he is informed that any person has been arrested in his county and is claimed as a fugitive slave under the provisions of any act of congress, shall immediately repair to the place of his custody, render him all necessary legal assistance in his defence; and summon such witnesses as he deems necessary therefor; and their fees, and all other necessary legal expenses therein, shall be paid by the state." Unlike the fugitive slave acts, referred to in the question, this section is a statute of humanity, and was intended solely for the protection of personal liberty. In its appropriation of money, and in its spirit, it is not unlike another statute found in the same volume, chapter 134, section 14, by which all persons indicted for a crime punishable by death, or imprisonment in the state prison for life, are aided by the state in making their defence. Such legislation is not confined to our state alone. The slave state of Virginia has a statute by which, whenever the title to the freedom of one claimed as a slave is to be tried in her courts, legal protection and counsel are to be furnished at the expense of the state. We are

not aware of any provision in the constitution of the United States, or of this state, or in the laws of either, which restrains the legislature from providing "legal assistance" to any person whose life or liberty is in issue, or at stake.

The next section of our statutes, referred to in the question, is that of chapter 80, section 37, which provides that "the keepers of the several jails in this state shall receive and safely keep all prisoners committed under the authority of the United States, except persons claimed as fugitive slaves, until discharged by law, under the penalties provided by law for the safe keeping of prisoners under the laws of this state." The law of comity only impelled to the passage of this section, and the same constitutional and legal rights which would have justified the legislature in refusing a passage to the entire section, justifies the exception which it contains. Because the legislature thought proper to incorporate this single exception relating to fugitive slaves, the general government has no ground of complaint. This section, notwithstanding this exception, is constitutional.

In regard to section 53, of the same chapter 80, there is more doubt; but before proceeding to an examination of this section, we will examine the only other section referred to in the question submitted, viz: section 4 of chapter 132. This section provides that judges of municipal and police courts and justices of the peace "shall not take cognizance of any case relating to a person claimed as a fugitive slave, nor aid in his arrest, detention or surrender, under a penalty not exceeding one thousand dollars or imprisonment less than one year." The only doubt in regard to the constitutionality of this section arises from the words, "nor aid in his arrest, detention or surrender," as used therein. Were these words intended to apply to the official action of such magistrates, and do they so apply; or were they designed to prohibit all other action? The chapter containing this provision is entitled, "election of municipal and police judges and proceedings of magistrates in criminal cases," and the section cited relates to the jurisdiction of such magistrates. Magistrates may be said, in one sense, to aid in the arrest, detention or surrender of a fugitive slave, when they issue a warrant therefor, or sit in the trial of the case, or give a certificate for such surrender. If the present acts of congress do not require such official action of these magistrates, still congress may pass an act conferring such jurisdiction at any time; and it

was competent for the state legislature to guard against such action. The words following as they do, in the same sentence, a direct prohibition on the part of the magistrates named, of any cognizance of any case relating to a person claimed as a fugitive slave, may properly be regarded only as an amplification of what is before stated by a further reference to the particular effect which would result from an assumption of such prohibited jurisdiction. The whole prohibited action, may for the reason stated, be regarded as referring only to official acts, and especially so, since, as we have seen, an entire prohibition of all private personal action would be clearly unconstitutional. When a statute is from its language fairly susceptible of two meanings, the one constitutional and the other not, that which is consistent with the constitution must be preferred. No part of the section under examination necessarily applies to the unofficial, individual acts of the magistrates therein named, and it cannot therefore be said to be repugnant to, or in contravention of the constitution of the United States, or to the acts of congress which have been referred to. It is therefore constitutional.

In relation to section 53, chapter 80, before mentioned, there can be no doubt that when taken in its literal sense, it is in direct conflict with the acts of congress passed in 1850, commonly known as the fugitive slave act.

The latter expressly makes it the duty of all persons, when required by a United States marshal under circumstances which authorize him to call for it, to render personal aid in the execution and enforcement of that act. The section of our own statute now before us, in words expressly prohibits such aid. It provides that "no sheriff, deputy sheriff, coroner, constable, jailer, justice of the peace or other officer of this state shall arrest or detain or aid in so doing *in any prison or building belonging to this state,* or to any county or town, any person on account of any claim on him as a fugitive slave." If the section stopped here, perhaps it might be regarded as applying only to the official acts of such officers as are particularly named in it, and other state officers. But it proceeds further and in a distinct and separate sentence provides that "any of said officers violating any of the aforesaid provisions *or aiding or abetting any person claiming, arresting or detaining any person as a fugitive slave,* shall forfeit a sum not exceeding one thousand dollars for each offence, to the use of the county where it is com-

mitted, or be imprisoned less than one year in the county jail." This part of the section directly prohibits the very acts which the persons holding the offices therein named or referred to, as well as all other citizens, are required as individuals to perform when called upon by virtue of the federal statutes just cited. Is there not then a necessary and real conflict between the two statutes, or is it only apparent? To decide this question we must, first, ascertain whether the federal statute is constitutional, and if it is, secondly, whether it is fairly susceptible of any construction which is in harmony with that statute.

In regard to the fugitive slave act, when we consider that the question of its constitutionality appropriately belongs to the federal courts, whatever might have been our own individual opinions as an original undecided question, we are bound by the authoritative decisions of the supreme court of the United States to regard that question as settled. That this act in all its details is constitutional has now become the well established law of the federal courts; see 21 Howard's U. S. Sup. Court Rep., p. 506. However much we may feel humbled as citizens when we perceive that under the harsh provisions of that statute a man or a woman and her posterity may, in effect, be made slaves forever with less legal protection and ceremony than is permitted under our state laws to establish the title to the smallest article of property; and however much we may regret the existence of such provisions in the federal constitution as constrain the highest judicial tribunal in the nation to decide that such a statute, with all its harshness, is constitutional; still sitting as we do only to declare the law as it is, we are not authorized to disregard the weight of judicial authority, especially when such authority comes from the tribunal to which the decision of the question in the last resort belongs. We must therefore in the discussion of the question before us, assume that the fugitive slave act is constitutional.

Our next inquiry then, is, can our own statute in the section under consideration fairly receive a construction in harmony with the requirements of the fugitive slave act? Does it leave the citizens of this state and the general government, who are designated therein, when not acting officially, free and unrestrained in the performance of such duties as may be legally and constitutionally required of them in the execution of that statute? If it does not, and its proper construction or effect is to prevent or obstruct the

execution and enforcement of that act, or to prohibit certain particular persons from the performance of such duties under all circumstances, then our statute must be declared unconstitutional. It is said that this entire section may be regarded as prohibiting only official acts. The first clause of this section, if it apply only to official acts, so fully covers all the acts which any of the officers mentioned therein can be expected to perform, that it is difficult to perceive what other official acts are left to fall within the special application of the second clause. And when we consider that some of the officers named in this section are elsewhere prohibited from acting officially in any case relating to a fugitive slave, and that others cannot legally be called upon under the federal statutes to perform any such acts; and further, that the statute of 1855, chapter 182, sections 2 and 3, from which the section in question was copied, contained immediately following the designation of the various officers upon whom the statute was to operate, the words "*in his official capacity,*" and that these words, so direct and necessary to describe the nature of the acts prohibited, are entirely omitted in both parts of the section as it now stands, we do not see how it can reasonably be inferred that the statute as amended was not designed to prevent all such persons as hold the official positions mentioned therein from rendering any aid as individuals or private citizens in the execution or enforcement of the fugitive slave act. We also suggest that the words, "any person arresting, or detaining any person as a fugitive slave," as used in the last clause of the section now under consideration, naturally refer to the claim, arrest and detention mentioned or referred to in the first clause; and the words "aiding or abetting," as applied to the person claiming, arresting or detaining such fugitive, are such as usually relate to the commission of some crime, rather than to any official action. It may therefore be presumed that the legislature intended to prohibit some action to which the first clause did not apply. The principal purpose of the first clause seems to be the protection of our prisons and buildings against the use prohibited; and of the latter to prevent aid of any kind to the claimant or person arresting or detaining the alleged fugitive slave.

For the reasons stated, and others which might be mentioned and are referred to by other members of the court, we deem the language of this statute too plain and unequivocal in its meaning to authorize us fairly to come to any other conclusion than that

the section, at least in its latter clause, does prohibit, under all circumstances, not only the official but the individual action of the persons holding the offices which it refers to and thereby makes the individual or private acts of such persons, performed for the enforcement of the acts of congress relating to fugitive slaves, a crime. We are therefore unavoidably, and irresistibly brought to the conclusion that this section is repugnant to and in contravention of the fugitive slave act of 1850, and is unconstitutional.

SETH MAY,
DANIEL GOODENOW.

FEBRUARY 21, 1861.

OPINION OF JUDGE DAVIS.

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 principles 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 historical fact, that the general expectation then was, that the other colonies would soon do the same. The feeling against its 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 claim of the party to whom such service or labor may be due."—*Art. IV., section* 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.

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 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.

But if this provision of the constitution is to be applied to slaves, I am of the opinion that its only force 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 may escape. This places that species of property in precisely the same condition 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."

But though the owners of these two kinds of property come into this state with 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 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 con

gress, this question would have to be determined in our state courts. As "between citizens of different states," it was competent for congress to provide for its trial in the courts of the United States. Constitution, Article III, section 2. And, if congress undertakes to provide for the case at all, 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. Or congress might have provided that, on proof before some court of competent jurisdiction in a slave state, 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, *there* 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 to 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 alleged to have been committed, to have his case determined by due process of law; 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 Cush. 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.*

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 a "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, 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 may be the opinions of 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, Article IV, V and VII.*

I am aware that the supreme court of the United States have decided that the 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. 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 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 technical terms of 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 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 and 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 September 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.

WOODBURY DAVIS.

NOTE BY JUDGE KENT,

SUPPLEMENTARY TO THE OPINION SIGNED BY HIM.

I concur in the result, and in the reasons therefor, stated in Judge Appleton's opinion. I wish simply to add a note in reference to § 53, chap. 80.

It seems that a majority of the court agree that the first sentence, and part of the second sentence, of § 53, are strictly constitutional. The difference of opinion arises from different views as to the effect of the words "any of said officers *aiding or abetting* any person claiming, arresting or detaining any person as a fugitive slave."

Did the legislature design to make that section *duplex* in its intent and effect? I think not. In my view the whole purpose was to prohibit the officers named from using their offices, or their official position or power, in arresting, seizing or detaining a fugitive slave, or doing it under color or pretence of office; but not to prohibit them from doing in their private capacity whatever any private citizen might or should do.

I draw this conclusion from a consideration of the former legistion on this subject; from the well established rules of construction and inference, stated in the opinion before referred to; from the safe and just rule that the intention of the legislature is to be ascertained, and is to govern, and that all presumptions are against the supposition that the legislature intended to violate the constitution in its enactments; and that no such construction is to be given to any act, unless the language absolutely requires it, and cannot be reconciled with any other intention.

I do not see why the language used cannot have a constitutional meaning, without rejecting any part, or without giving to it a forced and unnatural construction. A critical examination of section 53 will show that the first prohibition refers to an "arrest." This clearly contemplates an official act, by executing or aiding in the execution of a formal warrant. The next prohibition relates to detaining *in a particular place*—not to detaining generally, or in any other place than a jail, or a building which is public property. A majority of the court agree that these prohibitions are manifestly official in their nature, and unobjectionable.

But the legislature seems to have contemplated that these two negations might not reach all the cases in which the officers named might interfere officially, or under color or pretence of office, to aid

a claimant of an alleged fugitive slave. They knew that the law of congress gave authority to such claimant to act without warrant, by providing that "when a person held to service, &c., shall escape, the person, or persons, to whom such service and labor may be due, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners before named, *or by seizing and arresting such fugitive, when the same can be done without process.*"—*Section* 6, *of Act of* 1850.

The last provision in our statute, against aiding or abetting, was therefore inserted to cover the acts of the claimant in seizing and detaining the person claimed by him without any warrant, or process of any kind. Such seizure, by the claimant himself, is not technically an arrest, and would not be so considered, by any court, when construing a penal statute like this. Yet this private person might seize and detain in other places than a prison named in the first sentence. A deputy sheriff or constable might give him most essential aid, and abet him most efficiently by his presence as a known officer of the law—officiously proclaiming his character as an officer, and pretending to be in the exercise of his authority—although he might not "arrest," nor aid in arresting or detaining in any jail, or do any act which could be construed into a breach of the provisions of the first sentence. In the same way he might "aid and abet" the private claimant in his detention, without arrest or warrant, in a hotel or private house, by pretending that he had the fugitive in his care, and in various ways that might be suggested.

The fugitive slave law having given a private person the right to seize and detain another person without the semblance of legal process, this statute of our state was passed to prohibit any of the officers named from aiding him in their official capacity, or under color of their office—however strongly tempted to aid in such way, by pecuniary or other considerations. This I think is the purpose and the extent of the prohibition. If this construction is correct, all difficulty would seem to be removed—as I understand all the members of the court to agree that the prohibition of official action is constitutional.

I have examined the question, without considering at all the expediency of continuing the act upon the statute book—but with single reference to the question proposed, the constitutionality of the statutes named.

EDWARD KENT.

To the Hon. Speaker of the House of Representatives, Augusta, Me.