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From the Boston Courier, April 12.

Commissioner Curtis's Decision.

The following is the opinion of United States Commissioner Curtis, delivered yesterday morning, in the case of Thomas Simms. It will be perceived that the commissioner sustains the constitutionality of the fugitive-slave law, and decides upon granting a certificate to the claimant of the slave:

On Friday last, Thomas Simms, a man of color, of about twenty-two years of age, was brought before me under a warrant, issued at the instance of James Potter, a citizen of Chatham county, in the State of Georgia, who claims him as a fugitive from service. The hearing of this case has been continued from day to day until the present time, and I am now to give my decision.

That decision it would require but a very short time to pronounce, if there had not been raised a question of law, which I must examine and pass upon. The learned counsel for the prisoner have argued with great ability the question of the constitutionality of the act of Congress under which this warrant was issued, and have called upon me, as they had a right to do, to affirm or deny it. It can scarcely be necessary for me to say that I should have been glad to have been relieved of this labor and responsibility by any tribunal whatever, competent to assume the decision of the question; but inasmuch as my decision is final, so far as the restoration of the fugitive to the State of Georgia is concerned, and inasmuch as no court has felt it to be necessary to interpose to relieve me of this responsibility, I know of no reason why I should shrink from it. I have been told, indeed, by the learned counsel who closed this case for the prisoner (Mr. Charles G. Loring) that it seems to have been the design of the projectors of this law to make it as odious as possible to the people of the free States, and that, if it is held to be constitutional, endless agitation must ensue. I have been told that my decision will send this man to perpetual slavery; and, as if to increase to the utmost intensity the responsibility of acting according to its imperative requisitions, I have also been told that there are many persons in this community, fully entitled to remain here, who will be placed practically and directly in the peril of its grasp, if it is held to be constitutional.

I am here to decide a grave question of law, the decision of which, so far as the rights of the parties before me depend upon it, has been unavoidably cast upon me. I am to decide that question upon my conscientious convictions of the truth, by an intellectual process over which consequences can have no just influence or control. I have listened with all the attention I could command to what has been addressed to my reason. I have too much respect for the learned counsel, and have too strenuously endeavored to keep my mind in an attitude where it could appreciate his argument, to have allowed myself to suppose that any part of it was intended to be addressed to my fears. I recognise in his suggestions and his earnest assertions only evidence of the strength of his convictions, and of his sense of the importance of the opinions which he so ably and zealously maintains.

The learned counsel said to me, in the course of his argument, that there was a consideration connected with the statute under which I act which must be humiliating to this court, and to every other that had anything to do with it, and that was the clause which made the compensation to depend upon the manner in which the case was decided. If the learned counsel supposed that the sum of five dollars was likely to influence my judgment upon any question in this case, he did right in reminding me that the statute provides for a compensation. But it would, in my opinion, have been well if the learned counsel, before he addressed to me this observation, had examined the statute to see whether, although it authorizes the commissioner to receive a compensation, it imposes upon him any obligation to take it. If it does not, I see no cause for humiliation, and I certainly feel none.

In stating the views which I entertain of the various grounds of objection to the constitutionality of this law urged by the learned counsel for the prisoner, I shall not undertake to answer the whole of their course of reasoning. My purpose will be to state the reasons which satisfy my own mind that their objections are untenable. Them I cannot expect to convince, under the circumstances of the present occasion; nor is it any part of my duty to endeavor to do so. My duty, according to my understanding of it, will be fully discharged by stating my own convictions upon the several questions that have been discussed. Nor shall I undertake to examine arguments that have been made elsewhere, or to follow and refute any processes of reasoning or declamation that have led others to the opinions which they entertain with regard to this constitutional question.

I. The first objection taken by the learned counsel for the prisoner to the constitutionality of this act of Congress is, that the power which the commissioner undertakes to exercise under it is a judicial power, and the constitution of the United States does not authorize Congress to confer judicial power upon any persons but judges with stated salaries, appointed by the President for life, and holding their offices during good behavior. The 3d article of the constitution declares that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States," &c.; and it also declares "that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." The commissioner, it is very properly contended, is not such a judge.

The principal authority relied upon by the learned counsel to sustain their position, that the power conferred upon the commissioner is a judicial power, is a passage in the opinion of the Supreme Court of the United States (pronounced by Mr. Justice Story) in the case of *Prigg vs. the Commonwealth of Pennsylvania*, 16 Peters, 616. That passage is as follows: "It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognised and asserted before a court of justice between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case arising under the constitution of the United States, within the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity for the very purpose of giving effect to that right; and, if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances, the proceedings shall afford a complete protection and guarantee to the right."

The force and effect of any passage in the opinion of a court depend, of course, upon the question decided, and upon the course of reasoning employed in coming to the decision. The great questions raised and decided in Prigg's case were, whether, as a matter of jurisdiction, the surrender of fugitives from service was imposed by the constitution upon the general government, or upon the State governments; and if upon the general government, whether Congress could legislate to carry the injunction of the constitution into effect. The decision of the court was, that this duty was imposed exclusively upon the general government, and, being imposed there upon the great principle that where there is a duty imposed the means of fulfilling it are by necessary implication a part of the grant, that Congress possessed a full authority to provide those means by legislation. In coming to this result, the court laid down the two positions contained in the passage cited at the bar, and which I have just read. They held, first, that a claim for the possession of a fugitive slave was a case arising under the constitution of the United States, and so was within the grant of judicial power which that constitution had conferred upon the general government; secondly, that, being such a case, belonging to the judicial power of the Union, and not to that of the States, it was for Congress to regulate and prescribe the remedy, the form of proceedings, and the mode and extent in which the judicial power of the Union should be called into activity.

Now, the learned counsel for the prisoner have insisted most strenuously on the first of these positions, but they have said nothing with regard to the second. I see not why they are not both equally binding upon my judicial conscience. They are both the solemn annunciations by the highest tribunal of the country of doctrines of constitutional law; and if I am to take the one, as I certainly do take it, to be settled law, I am equally bound to regard the other, also, in the same light.

I admit, then, fully that a claim for a fugitive slave is a case between parties, arising under the constitution of the United States, and therefore that it belongs to the judicial power of the United States. I admit, also, and maintain, that, inasmuch as this case belongs to the judicial power of the United States, it is for Congress to decide in what mode, to what extent, and under what forms of proceeding, that judicial power shall be called into exercise, in order to give effect to the right of the owner claiming a fugitive slave. If so, the only question is, whether this particular form of procedure, authorized by this act, is or is not such a form of exercising the judicial power as it is competent to the general government to employ.

I take it to have been as true at the time when the constitution was formed as it has been since, and had been for a very long time previous, that in all governments formed upon the English model, and possessing the English constitutional division of the executive, legislative, and judicial departments, there is in the administration of the laws and the discharge of the functions of government a certain class of inquiries judicial in their nature, but which are confided to officers not constituting a part of the judiciary, strictly so called. Thus in England a master in chancery performs duties which are certainly in their nature judicial, and which are conferred upon him by statute, or the immemorial usage of the court of which he is an officer. His decisions, involving adjudications upon matters of law and fact in contestation between parties are, for some purposes, and for the ascertaining of some present rights, final. Yet a master in chancery is not, and never has been, from the most ancient periods of which there is any trace of his office, regarded as one of the judges of England. In the Year Book (27 Hen. VIII, fol. 15) it is said that in the court of chancery there is but *one judge*, viz: the chancellor; and I presume it was never supposed that the acts of 13 William III, c. 2, and 1 George III, c. 23—the great statutes which regulated the commissions of the judges and their tenure of office—had any application to the masters of the court of chancery.

In like manner a sheriff in England has a judicial capacity, and performs several judicial functions. "In his judicial capacity (says Blackstone) he is to hear and determine all causes of forty shillings' value and under in his county court, and he has also a *judicial power* in divers other civil cases." (4 Blackstone Com., 343.) Yet the sheriff, instead of being appointed *quamdiu bene se gesserint*, and with a stated salary, is appointed for a year, and receives no salary.

It is unnecessary to multiply these illustrations from English usage to show that there is a class of inquires of a judicial nature, constituting in one sense the exercise of judicial power, and generally directed for a special purpose, which are confided to officers who are not judges. This usage is in truth much older than the very origin of English law, and was derived apparently from the Roman jurisprudence. There was a class of officers under the Roman law called the *pedanei judices*, the assistants of the Prætor, to whom he was in the habit of delegating some of his judicial duties for special purposes, and who were allowed to receive gratuities from the parties for their services. (Dig. ii, 1, 16; Just. Novel., lxxxiii, c. 9.) There is little doubt that the office of master was borrowed from this source.

When we come to the practice of governments, constituted as ours are under written constitutions, carefully separating the judicial from the other powers of government, and strictly defining the tenure of the judicial office, if we find the same usage to prevail, and that it is extensively practised, it certainly shows that there exists in our system also a class of inquiries, judicial in their nature and special in their purpose, which may be confided to the determination of officers who are not judges. The constitution of this Commonwealth declares that "all judicial officers" shall hold their offices during good behavior, and shall be appointed by the governor, by and with the advice and consent of the council. The bill of rights, moreover, with great stringency declares that neither the legislative, executive, nor judicial departments shall ever exercise the powers of either of the others, "to the end it may be a government of laws and not of men." Yet the legislature of this Commonwealth have authorized a sheriff to preside at trials by juries, summoned to assess damages for laying out highways; have made it his duty to "decide all questions of law arising on the trial which would be proper for the decision of a judge, and to direct the jury upon any questions of law, when requested by any party, and to certify to the court, with the verdict, the substance of any decision or direction by him given, when any party shall request it." (Rev. Stat., c. 24, sec. 23-25.) Of course, if neither party does request the sheriff to certify his rulings, they are final and conclusive; and this constitutes, in the most ample sense, the exercise of judicial power by an officer whom no one can suppose is a judge. In like manner the legislature of this Commonwealth have authorized the courts to appoint auditors to hear matters of account. An auditor exercises judicial power, adjudicates and settles matters of law and fact, and determines a present right; for although his decision is not final, yet it changes the burden of proof from the plaintiff to the defendant, if the adjudication is in favor of the former. Yet an auditor certainly is not a judge, or a "judicial officer," within the meaning of the constitution.

So, also, the extensive and important duties imposed by statute upon commissioners of insolvency constitute the exercise of judicial power. But can any one suppose that it is not competent to the legislature to regulate the appointment and tenure of office of these officers, according to their pleasure, because the constitution fixes the appointment and tenure of office of "all judicial officers?" What is the court of county commissioners but a tribunal exercising judicial power? Yet the appointment of county commissioners is sometimes vested in the executive and sometimes in the people, according to the prevailing fancy of the legislature.

It is not necessary to go further with the practice of this Commonwealth. It shows that here, as elsewhere, it is well understood that there are certain judicial functions, having special objects, which are and must be exercised by inferior officers, not appointed, qualified, or commissioned, as the constitution of the State requires judges to be appointed, qualified, and commissioned. This usage prevails under the government of the United States. Under that government, for instance, there is an officer called Commissioner of Patents. He exercises judicial power; for the question whether one of two rival inventors is entitled to a patent is a case arising under the constitution and laws of the United States, and its decision involves adjudication of matters of law and fact between contending parties. Moreover, the decision of the Commissioner is final as to a present right; for although the validity of the patent may be contested elsewhere, yet the granting of the patent to one party and not to the other clothes the party who receives it with the very right for which both were contending—the right to be deemed, as against all the world, *prima facie*, the first inventor of the thing patented. Now, no one has ever thought of complaining of the creation of this office as an improper mode of exercising the judicial power of the United States.

There are other officers of the United States whose duties touch more nearly the ordinary administration of justice in the courts of the United States, in which capacity I now sit here. By an act of Congress, passed February 20, 1812, the circuit courts of the United States were empowered to appoint commissioners to take bail and affidavits in civil causes. By a subsequent act, passed March 1, 1817, the powers of these commissioners were extended, to enable them to take depositions, to be used in courts of the United States. By a still more recent act, passed August 23, 1842, their powers were further extended, to enable them to arrest and imprison for trial persons committing offences against the laws of the United States. Nearly nine years, therefore, have elapsed since these officers have been called upon to exercise judicial power in arresting, examining, and imprisoning offenders against the laws of the United States. Hundreds and thousands of seamen and other persons have by these commissioners been so arrested, examined, and imprisoned, and we have never heard it intimated that they ought first to have been appointed by the President, and commissioned for *life*. Yet the power which they exercise is a part of the judicial power of the United States. The result of the examination is final and conclusive for a special purpose—to wit, the imprisonment of the party until trial. It settles a present right—namely, that the party is to be deprived of his liberty until a fixed time shall arrive when a grand jury will determine whether to find a bill of indictment against him or not. This is clearly the exercise of judicial power, of a limited and special nature, conferred by Congress upon officers who are not judges.

The truth is, then, as it would seem, that in every government of laws, administered by a judiciary, there must be a class of judicial inquiries embraced within the general compass of the judicial power, but, from their special, limited, and ministerial nature, capable, without violating any constitutional rule, of being withdrawn from the action of the courts, and intrusted to officers specially authorized to conduct them. It may be difficult to define the boundary on one side of which all these cases would range themselves. It might be wholly inexpedient to define it in a written constitution. That it exists, no jurist can entertain any doubt; and it seems to me the only question in this case is, whether Congress, in authorizing these summary proceedings before a commissioner for the surrender of a fugitive from service, have passed that boundary or not.

I am clearly of opinion that they have not. And this brings me to the consideration of the nature, character, and effect of this proceeding, in regard to which I differ entirely from the learned counsel for the prisoner. He maintains that this is a trial of the right of Thomas Simms to his liberty, and that it is a final trial; that it is ministerial or auxiliary to nothing whatever; but that if the certificate is granted, Thomas Simms is consigned to perpetual slavery. Many of the arguments employed by the learned counsel to sustain his position consist of conjectures or suggestions as to what the claimant is physically able to do, after he gets the prisoner into his possession. If the learned counsel expects that in settling a question of constitutional law, and in determining on the character and effect of this proceeding, I am to look out of the statute, away from what it authorizes the claimant to do, and to indulge my imagination as to what he may do aside from it, I am afraid that I cannot satisfy the expectation. It has, however, been argued that the claimant *may* tear up the certificate the moment he receives it; that he *may* carry the prisoner to any other State, or to Cuba, or Brazil, and sell him; or that if he ever takes him to Georgia, he may hurry him into the interior, upon a plantation, and break down his spirit, and refuse him all opportunity to obtain a trial of the question of his freedom. These things, which it is said the claimant *may* do, are gravely put to me as considerations upon which I am to determine what it is that *the United States* undertakes to do when it surrenders this man for removal to the State of Georgia. I am of opinion that *this* question is to be determined by the provisions of the constitution and the act in question.

In the first place, then, I hold that the rendition of fugitives from service, under the constitution, is an act analogous to the rendition of fugitives from justice, and that the two cases, so far as the powers and duties of the general government are concerned, are of the same general character, and may appropriately be provided for by the same general means. It has, indeed, been declared at the bar that the two cases are as wide from each other as possible, and that they were made so by the constitution. There is, however, respectable—I may say more than respectable—authority for the position that they are not only analogous, but that the constitution contemplated similar proceedings in both. Mr. Justice Story, in his Commentaries on the Constitution, speaking of both of these provisions, holds the following language:

"It is obvious that these provisions for the arrest and removal of fugitives of both classes contemplate summary ministerial proceedings, and not the ordinary course of judicial investigations, to ascertain whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy. In cases of suspected crimes the guilt or innocence of the party is to be made out at his trial, and not upon the preliminary inquiry whether he shall be delivered up. All that would seem in such cases to be necessary is, that there should be *prima facie* evidence before the executive authority to satisfy its judgment that there is probable cause to believe the party guilty, such as upon an ordinary warrant would justify his commitment for trial. And in the cases of fugitive slaves there would seem to be the same necessity of requiring only *prima facie* proofs of ownership, without putting the party to a formal assertion of his rights by a suit at the common law. Congress appear to have acted upon this opinion, and, accordingly, in the statute upon this subject, have authorized summary proceedings before a magistrate, upon which he may grant a warrant for a removal." (3 Story's Com. on the Constitution, sec. 1806)

The Commentaries were written and published nearly ten years before the case of Prigg *vs.* Pennsylvania occurred. When the learned judge came to deliver the opinion of the court in that case he said: "There are two clauses in the constitution on the subject of fugitives which stand in juxtaposition with each other, and have been thought mutually to illustrate each other." (16 Peters, 611.) Let me ask by whom have they been supposed? Manifestly by the Congress who enacted the law of 1793 which provided for carrying both these clauses into effect in the same statute, and by similar proceedings, with the single difference that in the one case the appropriate proof was to be presented to the executive of a State, who is to deliver the fugitive to the agent of the State demanding him, and in the other the appropriate proof is to be presented to a judge of the circuit or district court of the United States, or any magistrate of a county, city, or town corporate, who is to grant a certificate to the claimant authorizing him to remove the fugitive to the State or Territory from which he fled. (Act of February 12, 1793.) It is obvious, therefore, that so far as the legislation of the country, practised under for nearly sixty years, can have any tendency to establish an analogy between these cases, this legislation warrants the position that they are analogous. In addition to this, the declaration of the Supreme Court of the United States in Prigg's case, carefully and industriously made, that they regarded the act of 1793 relative to fugitive slaves as clearly constitutional in all its leading provisions, and, with the exception of that part which confers authority on *State* magistrates, as free from reasonable doubt or difficulty, to my mind clearly authorizes the inference that it is as lawful for Congress to authorize summary ministerial proceedings in the case of one class of fugitives as it is in the case of the other; for it is quite plain that they *had* authorized such proceedings in both.

In addition to the authorities already cited to this point, I may also rely on that of the supreme court of Pennsylvania, who, in the year 1819, said of the law of 1793, that "it plainly appears, from the whole scope and tenor of the constitution and act of Congress, that the fugitive was to be delivered up, on a summary proceeding, without the delay of a formal trial in a court of common law. But if he had really a right to freedom, that right *was not impaired by this proceeding:* he was placed just in the situation in which he stood before he fled, and might prosecute his right in the State to which he belonged." (Wright *vs.* Deacon, 5 Serg. and Rawle, 64.)

It would seem, therefore, that it only remains to inquire whether the act of 1850 authorizes or requires anything more than a summary ministerial proceeding, in aid of the right secured by the constitution—namely, the right of removal. In order to determine this, it is necessary to look at the proceedings which have been authorized. The statute, like the act of 1793, requires the claimant to present to the commissioner proof that the person whom he demands owes him service in another State; and when the commissioner is satisfied of this, he is to grant a certificate, which will authorize the removal. Now, it seems to me to have very little tendency to show that this is a full and final trial on the question of servitude to say that the proof required to be offered is, that the party is held to service. The force and effect of the evidence required by the statute *must* be limited to the object for which it is required; and if that object be, as it clearly is, to establish the right of removal only, it cannot be extended to another and ulterior object—namely, the right to continue to hold the party after he has been removed. In the case of a fugitive from justice, it must be proved that he has committed a crime. But proved for what purpose? Clearly to establish the right of removal. This having been established, the warrant that authorizes his removal has no effect to authorize his imprisonment or punishment in the State to which he is removed; but the right of that State so to hold and punish him must be established, just as if he had never left its jurisdiction.

I am equally unable, also, to feel the force of the objection, that in the case of a fugitive from service, he is surrendered to his owner, whereas a fugitive from justice is surrendered to a State; for the fact seems to me to have no tendency to show that the proceedings here are in either case a trial of anything more than the right of removal. In both cases the government of the United States surrenders the fugitive or provides for his surrender to the party to whom it has stipulated that he shall be delivered up. That party in the one case is the owner, who claims a right to hold the fugitive after he has received him; in the other, it is the State, which claims to hold and punish the fugitive after it has received him. In both cases the government of the United States does nothing more than to surrender him, or to provide for and cause his surrender. It is not true that in the case of a fugitive from justice security is taken that the party will be tried. The act of 1793 does not *require* that he should even have been indicted. He may be demanded, although he is only charged with a crime on an affidavit sworn before a magistrate in the State from which he has come. Neither does the statute of this Commonwealth make any provision by which the executive of this State, when it surrenders a fugitive from justice, is to stipulate that he shall be tried. (Rev. Stat., c. 142, sec. 7, 8, 9.)

Neither does the government of the United States, when it surrenders a fugitive from justice to a foreign country, hold over him its protection until he has been tried. Such a fugitive is not surrendered under the law of nations, but under a treaty stipulation; and in the case of the treaty with England, he is to be delivered up to justice, but that justice is to be regulated, administered, and dealt out to him, not according to the demands or the ideas or forms of proceeding of this government, but according to the absolute discretion of the government that receives him. In all these cases the government making the surrender undoubtedly makes it in the general faith and confidence, which the comity of nations requires independent governments to place in each other, that the power demanding a fugitive will deal with him justly. But it does not ordinarily make stipulations to secure a trial, or a particular mode of administering justice, and unless such stipulations are made it can exercise no control over the matter.

In the case of fugitives from service, there may be practical difficulties or improbabilities as to a trial after the fugitive is returned. But the question here is, whether the government of the United States, in making the surrender which it has stipulated to make, is constitutionally bound to stipulate for a trial; and whether, because it has not made such a stipulation, its omission to do so makes these proceedings final and conclusive, instead of ministerial. I think neither of these positions is true. I know of nothing to prevent the general government from surrendering a fugitive slave if it sees fit, trusting to the government of the State to provide him with the means of testing his alleged owner's right to hold him after he has received him. It is suggested that there are practical difficulties and improbabilities. On the other hand, it may be suggested that there are practical means and provisions well known to be made by the slave States for trying these questions of freedom by process instituted for the express purpose; and the government of the United States, for aught that I can see, has just as clear a constitutional right to look to one class of probabilities as to the other. Its looking to the one and not to the other does not make its own proceedings, clearly designed to be ministerial, and to see only the limited right of removal, a full and final trial of a right which it obviously intends to leave to another government to adjudicate, upon the faith that it will do justice to its own subject.

Entertaining, therefore, a very clear opinion that these proceedings are ministerial, and that it is perfectly competent to Congress to authorize a magistrate, appointed by the authority of Congress, who is not a judge, to make this judicial inquiry for this special and limited purpose, I come now to examine the authorities which have been cited at the bar, in order to ascertain how far that competency is a settled question. The learned counsel for the prisoner has said—perhaps with entire correctness—that the question of the constitutional right of Congress to confer this authority upon an inferior magistrate has never been directly raised, argued, and decided in any court in this country, with the exception of a very recent case in the supreme court of this State. He admits, however, that the case of Prigg *vs.* the Commonwealth of Pennsylvania (16 Peters) does contain *language* that authorizes this jurisdiction, although he denies that such an effect ought to be given to the case. But it seems to me that I am bound to give effect to the solemn declaration of opinion found in that case; for I find it declared that that court entertained no doubt that *State magistrates* may, if they choose, exercise this authority, unless they are prohibited by State legislation.

The case of Wright *vs.* Hall (5 Serg. and Rawle, 62) is an authority directly in point. The supreme court of Pennsylvania in that case decided that a writ *de homine replegiando* would not lie, to interrupt a certificate granted by a State magistrate for the removal of a fugitive slave. The certificate was granted by a judge of the court of common pleas, who undertook to act under the law of 1793. In the case of Jack *vs.* Martin (12 Wendell, 311) the recorder of the city of New York had granted a certificate, and the supreme court of the State decided that a writ *de homine replegiando* could not prevent his removal. In the case of Commonwealth *vs.* Griffith (2 Pickering, 11) no warrant had been used, and no magistrate had undertaken to act, but the alleged fugitive had been seized by the agent of the owner without process. In like manner, in the case of Glen *vs.* Hodges, (9 Johnson, 67,) the slave had been seized without process, and consequently this question was in no way involved in the decision. These are all the authorities cited at the bar, with the exception of a case which, I am informed, occurred in the supreme court of this Commonwealth on Monday last in reference to this proceeding. It is stated by the counsel on both sides that an application was made to that court for a writ of *habeas corpus* to bring up the body of Thomas Simms, upon the ground that his arrest and restraint under my warrant is unlawful, for the reason that I had no authority to issue it. I understand that the same question was argued which has been argued before me, and that the court unanimously sustained my authority to issue the warrant, and refused the writ. I have not seen any report of the decision, but I presume that this question is now entitled to be considered as settled by other authority than my own.

II. The second objection taken by the learned counsel for the prisoner is, that this proceeding is a suit at common law, in which either party has a right to demand a trial by jury, and, inasmuch as the act of Congress has withheld a trial by jury, it is unconstitutional and void, as against the 6th article of the amendments to the constitution, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

I have endeavored in the foregoing discussion to show, on the authority of the Supreme Court of the United States, on that of the supreme court of Pennsylvania, on that of Mr. Justice Story as a commentator on the constitution, and by some views of my own, that this is a summary ministerial proceeding in aid of a right of removal, and that the liberty of the party is not in contestation here for final adjudication. If this be so—and I can entertain no doubt that it is—this proceeding is not a suit at common law, in which either party can, as a matter of right, demand a trial by jury. If it were a proceeding in which the rights of the parties were to be tried for final adjudication, then I should agree that the prisoner could, as a matter of right, demand a trial by jury, if it were true that slaves are entitled to the benefits of the constitution of the United States. But as I hold it to be a proceeding of an entirely different character, which, although it involves an inquiry judicial in its nature, is merely provided in aid of a right of removal which the claimant would have without it under the constitution, I am of opinion that a trial by jury cannot be demanded, and consequently that this objection to the act is untenable. The decision of the Supreme Court of the United States in Prigg's case, that the law of 1793, which also withheld a trial by jury, is constitutional in all its leading provisions, it seems to me fully disposes of this question.

III. The next objection taken by the learned counsel for the prisoner is, that the transcript of a record, authorized by the statute to be made in the State where the claimant resides, is incompetent evidence, Congress having no power to confer on State courts authority to take such testimony.

The argument in support of this objection is, that the exercise of an authority to take testimony to be used in this proceeding, or to find a fact involved in the decision to be made, is the exercise of judicial power, which Congress cannot constitutionally confer upon a State court or magistrate. In order to make the answer to this objection—which satisfies me that it is wholly unfounded—intelligible, it is necessary to recur to the provisions of the statute. The tenth section of the statute contains the following provisions:

"That when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party; whereupon the court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the clerk and of the seal of the said court, being produced in any other State, Territory, or district in which the person so escaping may be found, and being exhibited to any judge, commissioner, or other officer authorized by the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned."

By virtue of this provision, one branch of the inquiry directed by the statute to be made before a certificate is granted for removal is directed to be made by a court or judge of the State from which the fugitive has escaped. This part of the inquiry is, whether anybody owing service has escaped. The other branch of the inquiry—namely, whether the prisoner arrested here is the person who so escaped—is directed to be made here by the commissioner. I shall have something to say concerning the obvious reasons for this provision in another part of this opinion. At present it is only necessary to say that the objection is answered by the view which I take of the nature and character of this proceeding, and by the decision of the Supreme Court of the United States in the case of Prigg; for if it is true, as the court there declared, that State magistrates may, if they choose, exercise the whole of this jurisdiction, find every fact involved in the inquiry, and grant a certificate upon such finding, it is surely competent to Congress to confer upon a State magistrate authority to exercise a part of this jurisdiction and to make a part of this inquiry. That the finding of a State magistrate upon that part of the inquiry which he is authorized to make is made conclusive upon the commissioner here, who is to find the other fact, and to do something therein, is in strict analogy to a class of cases where officers who are not part of the judiciary are directed to make certain inquiries, and to find certain facts, which are to have certain legal consequences when presented to a tribunal authorized and directed to act thereon. I will cite a single but very important instance of this class of cases.

A statute of this Commonwealth, passed in 1838, directed bank commissioners to be appointed by the governor to examine the banks, and if they should be of opinion that any bank was insolvent, or in a condition that made its further progress hazardous to the public, or that it had exceeded its powers, they were to apply to a justice of the supreme judicial court, who should forthwith issue an injunction to restrain the bank from further proceeding with its business until a hearing could be had. In the case of *the Commonwealth vs. the Farmers and Mechanics' Bank*, (21 Pick., 542,) the objection was taken that this law was unconstitutional, because it was a usurpation of judicial power to confer on the bank commissioners authority to find a fact, and then to require the judge, on that finding, and without evidence to satisfy his own mind, to issue the injunction. The Supreme Court overruled the objection, and held that it was competent to the legislature to confer authority upon the bank commissioners to find and represent to the court a state of facts on which the court were to found a present and immediate action. This is entirely analogous in principle to what Congress have done in the present instance. They have authorized certain persons in another State to find a certain fact, on which the commissioner here is to act when it is properly certified to him.

IV. The next objection taken by the learned counsel for the prisoner to the constitutionality of this act of Congress is, that the prisoner was not present at the taking of the evidence before the State judge, and had no opportunity to cross-examine the witnesses, and therefore the evidence is incompetent.

If the prisoner is the identical person mentioned and described in this transcript of a record as having escaped from Georgia while owing service—and it has been proved to me by evidence wholly independent of the record that he is—his absence from the State where the evidence is directed by law to be taken, so that he could not be served with notice, if he was entitled to it, was in his own wrong, and he cannot now complain that he had no opportunity to cross-examine the witnesses.

V. The last objection of the learned counsel is, that Congress have no power to legislate on the subject of the surrender of fugitive slaves at all, but that it is a power and duty which belong exclusively to the States.

I might rest here wholly upon the authority of that high tribunal which is supposed to settle the construction of the constitution of the United States. But as all these questions have been pressed upon me in a manner to challenge my separate and independent judgment, I shall briefly state my view of a question which has long been part of the settled law of this country.

It is not necessary to look into the historical grounds on which this clause of the constitution is believed to rest, in order to see in it a purpose which can be effectually accomplished only by the national government. The very words of the clause seem to me manifestly to disclose such a purpose. They declare that these persons shall not be discharged from their service or labor in the State to which they may have fled "in consequence of any law or regulation therein." It would seem, therefore, to be beyond controversy that the object of this provision was to prevent State legislation from interfering with or impairing the right of the master to the service of his slave. It is intended to declare, and it does declare, that whatever may be the law of Massachusetts on the subject of personal liberty, that law shall not be applicable to a person who owes service or labor in the State of Georgia simply because he has escaped within the limits of this Commonwealth, but that the master or owner to whom such service or labor is due shall retain unimpaired the right to that service or labor which the law of his own State has given him.

Here, then, is a great leading purpose which the constitution meant to secure and accomplish, and which must be accomplished by means. The clause is not silent as to the means. It does not stop with the simple annunciation of the principle that the law of a free State shall not apply to a fugitive from service due in another State. It declares that such a fugitive "shall be delivered up on claim of the party to whom such service or labor is due." Now, undoubtedly, the question arises upon this injunction, By whom is he to be delivered up? But is it not quite obvious that a construction which confines the duty of making such delivery to the State governments may defeat the whole purpose which the previous part of the clause manifestly discloses? That purpose is to prevent any State legislation whatever from discharging the obligation to render service. But to say that the State, whose legislation or whose common law, if left to operate upon these cases, must discharge that obligation, is the authority, and the sole authority, intrusted with the power and duty of preventing this consequence, is to put it in the power of the State to do that which the constitution says shall not be done.

It is, to my mind, no answer to this difficulty to say that the constitution prohibits the States from doing certain other things, and at the same time leaves them physically free to do them, if they see fit—or, in other words, leaves them to exercise their own volition, whether to do them or to refrain from them. The constitution declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; but every State is physically able to disregard this prohibition, and its legislation will operate upon individuals until the judicial power interposes. There is no active and instantaneous means of enforcing the prohibition provided by the constitution, for the simple reason that the nature of the case does not require any, but the remedy may well be left to the slow but certain operation of the judicial power.

But in the case of the prohibition in question, which forbids the law of a State from operating to discharge an obligation of service due in another State, there is superadded to the declaration of this principle the means of giving it an immediate and certain operation, by the "delivery" of the person owing that service to the person to whom it is due. I cannot bring my mind to the conclusion that it was intended by the constitution to leave the sole application of these means, thus industriously added to the prohibition, to the very authority against whom the prohibition itself is directed. On the contrary, it seems to me that when the constitution prohibited the laws and regulations of the States from operating to discharge the obligation of service, and, in order to prevent this operation, provided that the party should be "delivered up," it meant to cast, at least, the concurrent duty of causing that delivery upon the power which can alone effectually accomplish it—the general government. To this I have only to add, that the question of the power of Congress to legislate on the subject of the surrender of fugitive slaves is conclusively settled by the Supreme Court of the United States in the case of Prigg, and upon their authority it may be safely left to rest.

One other objection of a technical character remains to be noticed; and that is, that the power of attorney under which the agent of the claimant undertakes to act is not properly authenticated. This power of attorney is acknowledged before and certified by a notary public of the city of Savannah. The statute requires the power of attorney to be "acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed." (Section 6.) The objection is, that a notary public is not a legal officer within the meaning of the statue. I am of opinion that he is. A notary public, by the nature of his office, and according to the law and usage of all civilized States, is a general certifying officer to the written acts of individuals, intended to be used in another country than that where they are executed. His authority, for *this* purpose, does not depend upon the local law, but upon the nature of his office, as understood and admitted everywhere; and in this respect he differs essentially from many other magistrates. In the case of Lord Kinnaird *vs.* Lord Saltoun (1 Maddox's Ch. R.) it was held that if a deed is formally executed in a foreign country, and the execution is authenticated by a notary public, this is sufficient proof to entitle it to be read; but if authentication was before the mayor of a foreign town, it is not received without proof of his office.

I now come to the evidence which has been offered here to establish the right of the claimant to remove from this district Thomas Simms, the prisoner at the bar. Two propositions are to be established affirmatively by the claimant in every case under this act: 1st, that some person owing service or labor to claimant escaped from the State where such service or labor was due; 2d, that the prisoner under arrest is the person who so escaped.

The statute prescribes a particular mode in which the first of these propositions may be proved, although it does not confine the claimant to that particular form of proof. If, however, the claimant sees fit to make use of this mode of proving the fact of an escape by a person owing service, the evidence, when put into the form required by the statute, is conclusive of that fact, but of nothing beyond it. The second proposition, involving the identity of the prisoner with the person described to have escaped, remains to be proved by independent and satisfactory evidence, and is open to contestation as long as a doubt can exist about it.

The provision of the statute which prescribes the mode in which a claimant may make this conclusive proof of the fact of an escape by a person owing service to him has already been read.

It is not at all difficult to see the reason for the introduction of this provision into a new law, designed to furnish a more effectual remedy than the old one for the reception of fugitives from service. Congress evidently considered that, from the great extent of the Union, there must be vast multitudes of cases in which the owners of the fugitives could not personally leave home, or send in person the witnesses who might be able to prove the fact that some one had escaped who owed service. It was therefore necessary to make some provision by which this fact could be proved, without transporting witnesses from one end of the Union to the other; for this fact lies at the foundation in every case of the right to arrest and remove an alleged fugitive.

This provision was made in the section above cited; and to my mind there is great security to liberty in its requisitions. In the first place, it is no inconsiderable safeguard to have a judicial inquiry into the fact, before the claimant sets forth in pursuit, that some one who owed him service has escaped. It has a manifest tendency to increase the difficulties of setting up fictitious and unfounded claims. It furnishes to the tribunal in a free State called upon to make an arrest the satisfactory assurance that a respectable tribunal of the vicinage has verified the fact that there was a certain slave, and that that slave has escaped. Any one who has been called upon in a free State to issue process to arrest one of these fugitives must have felt the force and value of such a verification.

In the next place, the statute, by requiring the claimant to make a description of the person who he says has escaped, and by requiring that description to be made matter of record, has furnished to the tribunals in a free State making an arrest an additional safeguard against imposition or mistake. A written description, made with all the convenient certainty that the case admits of, and made, too, at a time and place when and where the claimant cannot nicely adapt it to the exigencies of the arrest which he intends to make, is placed before the court or commissioner here as the very groundwork of the case.

In the third place, the statute, by making the record conclusive of the fact of escape, and that the service of the *party escaping* was due to the claimant, makes the recorded description also conclusive. The claimant cannot alter it or amend it by making one hair white or black. He comes with a record in his hand, and to that record he is bound as soon as he presents it to the commissioner. He must bring the person arrested within that description to the satisfaction of the mind of the commissioner by competent and independent proof—by the opportunities of inspection, examination, and comparison—or he fails to make out his case.

On the other hand, the making the record conclusive as to the description of the party who has escaped can work no prejudice to the party arrested; for, if he is not the party intended to be described, it is of no consequence to him whether the description be strictly accurate or not; and if he is the party intended to be described, any misdescription must only increase the chances of his escape. Whatever others may say or think, therefore, of this provision of the statute, I feel quite confident that there is no right-minded man in this country, who has been, or is likely to be, called upon to discharge judicial duties under it, who has not felt, or will not be likely to feel, inexpressible satisfaction and relief that the law has been made in this particular what it is.

Let me suppose, for a moment, that the statute had provided no such record, or that, being provided, it were not resorted to, but witnesses are sent here to establish both the propositions which are involved in the issue. In the first place, the warrant must be granted, without any certainty that the first proposition—viz: that there was a certain slave, and that he has escaped—can be established. In the next place, the witnesses who are to establish this proposition are also to swear to the identity of the person arrested, and they testify to both propositions after the arrest has been made. It is manifest that, under this form of proceeding, the opportunities for perjury and misrepresentation, in all their infinite variety of shades, are vastly increased.

There is no check upon the witnesses on the question of identity, because there is no standard to which that question can be brought. The witnesses may adapt their description of the party whom they say they knew as a slave to the appearance of the party under arrest; they may do this wilfully or unconsciously; but, whether it is done from corrupt design or from the mere effect of eagerness and zeal, it is very easy to see that, in a nice or critical question of identity, the dangers that would arise from the blending of both the propositions into one might be appalling. But the statute has provided a form of proceeding which keeps these propositions clearly and logically distinct, and makes the one, in some degree, a check upon the other; and as this is the most convenient form of proceeding for the claimant, there is every reason to expect, as there certainly is to hope, that it will generally, if not universally, be resorted to.

In the case before me the agent of the claimant has presented to me the transcript of a record duly authenticated, made by and before the Hon. Henry R. Jackson, judge of the superior court of the eastern district of the State of Georgia, from which it appears that, on or about the 22d day of February last, one Thomas Simms escaped from the State of Georgia while owing service or labor to James Potter, the claimant. The record also contains a description of the said Thomas Simms, which it is not necessary to recite. This branch of the inquiry is, therefore, fully made out—namely, that there was a certain person named Thomas Simms who owed service to James Potter, in the State of Georgia, and that he escaped from that State on or about the 22d of February last.

It remains only to inquire whether the claimant has sufficiently established the second proposition—namely, the identity of the prisoner at the bar with the person described in this record as having escaped from Georgia while owing service to James Potter. The evidence upon this point is of three kinds: 1. The evidence of the prisoner's appearance, which corresponds entirely to the description of him furnished by the record. 2. The evidence of witnesses who knew the prisoner in Savannah as the slave of James Potter. 3. Facts sworn to by other witnesses, which tend to corroborate the previous testimony.

The witnesses who swear directly to the prisoner's identity are two—Edward Barnett and John B. Bacon. Barnett testifies that he has known the prisoner for the last ten months in Savannah, under the name of Thomas Simms; that he worked as a bricklayer on the same scaffolding with him in August and September last; that he once asked the prisoner if he was a slave, and he replied that he was, and that he belonged to James Potter, a rice planter, who lives ten or twelve miles from Savannah, and that he had to pay his wages to Mr. Potter monthly, to the amount of about $10 per month. This witness also states that he knew the prisoner's mother and sister in Savannah.

The other witness (Bacon) is the agent of Mr. Potter, who came here to make the arrest. He testifies that he has known the prisoner, as the property of Mr. Potter, for fifteen years; that he last saw him in Savannah on the 22d of February; that during the last ten years the prisoner has generally lived with his mother in Savannah, accounting to Mr. Potter for his wages; that he knows the prisoner did so account for his wages, from being present both when they were paid to Mr. Potter by the mother and by the prisoner, and from repeatedly seeing his mother go after him for his wages; and that there is not a shadow of doubt with reference to his identity. He also testifies that he left the mother in Savannah a week ago last Saturday. He adds a fact which has no legal significance here, but which certainly disarms this case of any unpleasant features, that the last thing which the mother said to him, on the eve of his departure, was to beg him, whether her son was in a free State or a slave State, for God's sake to bring him back again.

Both of these witnesses are entirely unimpeached. Both have appeared upon the stand to be respectable, candid, and fair witnesses. They were very properly subjected to a searching cross-examination, to ascertain whether they have any contingent interest in the result of this proceeding, and it does not appear that either of them has. No attempt has been made in the argument to assail or shake their testimony, and I hold myself bound to yield to it unhesitating and implicit confidence.

The other evidence, which comes from the master and two of the crew of the brig M. & J. C. Gilmore, proves beyond the possibility of doubt that the prisoner at the bar came from Savannah, secreted on board the vessel, without the knowledge of the master or crew, in February last.

Ball, one of the crew, testified that he saw the prisoner in Savannah, five or six days before the brig sailed, alongside; that the steward asked him if they wanted a cook, and he replied no; that the next he saw of the prisoner was after the brig had arrived inside of Boston light, when he came out of his hiding-place.

Eldredge, the captain, testifies that he saw him first after the vessel arrived in this port; and Ames, one of the crew, testifies to the same thing. Both of these witnesses conversed with him separately, and both asked him the question whether he was a slave. To Ames he gave an account of himself utterly inconsistent with the account which he gave to Barnett, and with the other facts sworn to by Barnett and Bacon.

He told Ames that he was born in Florida; that he was not a slave; that he had a mother and sister in Boston, and came on to see them; that his father bought him free when he was six months old; that he had been in Savannah but twelve or thirteen months; that he left his free papers there; and that he came away because he had been reported to the authorities as a free negro, which made him liable to pay $100 fine. Capt. Eldredge says that he asked him who his master was; that at first he said he was not exactly a slave, but that he could get nothing satisfactory out of him, and that he did not give the name of his master. He made no definite reply to the question why he came on board.

This is the whole of the evidence; and I must say it leaves no room whatever for a doubt that the prisoner before me is the identical person described in the record as having escaped from Georgia while owing service to James Potter. If there is any truth whatever in the story