

ART. V.—TRIAL BY JURY, IN QUESTIONS OF PERSONAL FREEDOM.

[The common law provides two modes for the trial of questions, involving the right to personal liberty;—by the writ of *habeas corpus*, and the writ *de homine replegiando*. The first of these writs presents the whole case for the decision of the court, upon the return of the party exercising the restraint. The other, like the common writ of replevin, presents an issue for the jury. The latter, therefore, is the only process, by means of which, a person imprisoned, or otherwise restrained of his liberty, can have his right to freedom passed upon by a jury of his fellow citizens. Both these remedial proceedings were early introduced into, and regulated by, the statute law of Massachusetts; both were retained by the commissioners for the revision of the statutes, in their Report of the revised statute laws; and both were retained by the committee of the legislature, who examined and supervised that report,—the writ *de homine replegiando*, however, under the more popular and appropriate name of “personal replevin.” When the statutes, as thus revised by the Commissioners and the Committee, were under the consideration of the legislature, in the autumn of the year 1835, that portion of the 11th chapter, which established and regulated the proceedings in the writ of “personal replevin,” was struck out, and a single section inserted instead thereof, declaring, that “the writ *de homine replegiando* is abolished.” The intention of the author or authors of this amendment, if such it may be called, was no doubt twofold,—namely, to abolish the statutory provisions, concerning the writ *de homine replegiando*, and also to prevent the revival of the remedy at the common law. The ostensible and probably the real ground was, that the remedy by the writ of *habeas corpus* was entirely sufficient to answer all the purposes of justice; and this ground was certainly strengthened by the fact, that the writ *de homine replegiando* had seldom been resorted to in practice, while the writ of *habeas corpus* was in very common use.

The result of this legislation was, therefore, to leave the law of Massachusetts deficient, in relation to a most important and vital point, to wit, the personal liberty of the citizens.

At the recent session of the legislature of Massachusetts, the Committee on the Judiciary, of the House of Representatives, were early directed to inquire into the expediency of “restoring

the writ *de homine replegiando*, or of providing some other process, by which one under personal restraint may try his right to liberty before a jury.” Sundry petitions, praying “the passage of such laws, as will secure to those, claimed as slaves in this Commonwealth, a trial by jury,” were also referred to the same committee. Two questions of great interest and importance were thus presented to the Committee, for their consideration;—the propriety and expediency of restoring the provisions of the writ *de homine replegiando*; and the application of that form of process to the case of persons claimed as fugitive slaves. In regard to the first question, the committee considered “the furnishing of such a remedy, to be a measure, without reference to its effect upon those claimed as fugitives from labor, if not of constitutional obligation, at least of the highest political wisdom, and necessary to the completeness and perfection of our system.” The other question was a more delicate and difficult one. It related to the exercise of the rights of slave-holders, secured to them by the constitution of the United States, over their property in the non-slave-holding States; and it was found to be complicated with constitutional provisions, federal legislation, and the decisions, sometimes conflicting, of the State courts. These subjects were thoroughly investigated and considered by the committee, in an able and learned report, which is entirely free from all sectional prejudice or local feeling, and we believe, perfectly sound in its reasonings and conclusions. The committee reported a bill, “to restore the trial by jury, on questions of personal freedom,” containing in substance the provisions of the old statute law, and which passed in both branches of the legislature, without objection. The nature of the topics discussed in this report, and the ability with which they are treated, render the labors of the committee well worthy of preservation, in a more durable form, than that of a legislative document. We shall therefore present our readers with those portions of the report, in which the questions, relating to the trial of the right to liberty of persons, claimed as fugitives from labor or service, are considered. It gives us pleasure to add, that this report is the production of James C. Alvord, Esq. of Greenfield, who, though young in years, has already attained an enviable distinction at the bar, and as a jurist. ED. JUR.]

The mode of delivering up fugitive slaves is made, or, at any rate, is attempted to be made, a matter of national regula-

tion. An act of Congress prescribes this mode, and that act, if "in pursuance of the constitution," is paramount to all state authority. In order to understand the question, it is necessary to consider particularly the provisions of the constitution, and the law of Congress upon this subject, in connexion. The last paragraph of Art. iv. § 2 of the constitution is in these words: "No person held to labor and service 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 labor or service may be due." This provision was unanimously adopted in the convention, which formed the constitution, and is one of the many concessions, which were made to the demands of the South; and, although it imposed a duty upon Massachusetts, in derogation of her common law and the spirit of her institutions, (which would otherwise have made every human being free, who should have come within her borders), she cannot shrink from performing, to the full, every part of the contract, into which she voluntarily entered. The second Congress of the United States passed an act, prescribing, among other things, the manner in which fugitives from labor in other States should be seized and delivered up. The act is of the 12th February, 1793. The third section provides, that "when a person held to labor in any of the United States, or in either of the territories northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territories, the person to whom such labor or service 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 courts, 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 or arrested doth, under the laws of the state or territory, from which he or she hath 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 said fugitive from labor to the state and territory from which he or she fled." The next section imposes a penalty of \$500, upon any person, who shall hinder such arrest or rescue the fugitive.

It was apparently the purpose of some of the petitioners, though not directly proposed by them, that the trial by jury should be secured to the persons claimed as fugitive slaves, not by any independent enactment, but by engrafting a provision, effecting this object, upon the proceedings under the law of the United States. The Committee are of opinion that this cannot be done. If the law of Congress be unconstitutional, as they allege, such a provision would be useless; and if it be otherwise, such a course would obviously be beyond the powers of State legislation. It is true indeed, on many subjects, within the legitimate power of Congress, that, in the absence of any action by them, the States may legislate; but this clearly cannot be, when Congress has exercised its power in the enactment of a law, evidently intended to cover the whole subject, and when, as in this case, the spirit and object of that law would be defeated by the proposed action of the State.

There is another difficulty, which, perhaps, may as well be noticed in this connexion. The Committee believe that such a measure would be unauthorized, because it would attempt to regulate the proceedings of the judicial tribunals of the United States. It is true, that, by the act before quoted, the trial (so far as any trial is provided for) of the right of the master, may as well be before a state magistrate as the judges of the Circuit and District Courts. But the Committee, after a full investigation of the question, believe that this part of the law is unauthorized and void. It is a well-settled principle, that Congress cannot confer any part of the judicial power of the United States on state magistrates or officers. In the language of the Supreme Court of the United States, (1 Wheaton, 304) "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself, and by a well-settled construction, in order to give courts

tee did not think sufficiently authenticated to demand their consideration.

There are some other cases, (2 S. & R. 308; 4 S. & R. 305; 9 Johns. R. 67; 1 Wash. C. C. R. 501; 4 Wash. C. R. 46, 306, 326; 3 Am. Jur. 406; 1 Breese R. 188; 2 Marsh. R. 301), where the act came more or less directly before the court; but, in neither, was the law attempted to be enforced by the court; nor was the question of its constitutionality in any way raised or alluded to. And, in relation to the cases which were particularly reviewed, it will be remembered, that neither called for any decision of the point; that, in but one, (that in Wendell), was the question as to the power of Congress to pass any law upon the subject, discussed; that the two opinions in Pennsylvania and Massachusetts, in the first of which the constitutionality of the act was *assumed*, as in the last it was *declared*, are in direct opposition in relation to its effect, as will be more particularly shown hereafter. The Committee, then, could not say, aside from the peculiar relation we bear to the Supreme Judicial Court of this Commonwealth, that the question ought to be considered so conclusively settled, by judicial interpretation, as to prevent, or render useless, a recurrence to the constitution itself, and to the general principles of construction, which tend to develop its true intent and meaning. Of the result of such an examination, the Committee have already expressed their opinion. They would, however, hesitate long before recommending any act of legislation, which would be in conflict with, or in disregard of, any opinion of our own supreme court, the intimations of which; as well from its place in our political system, as the character of the eminent men who have composed it, are certainly entitled to the highest consideration. And they are happy to find, that no such course, (as will appear hereafter), is necessary for the purpose of carrying out the views before expressed by them.

There are other objections to the act of Congress, which, in their character, admit the power of that body to pass laws upon the subject of reclaiming fugitive slaves, but which insist, that this power has not been exercised, agreeably to the constitution, in the act in question.

It is said, that this act is in violation of the last clause of art. iii. § 2, and also of art. vii. in amendment of the constitution, which provide for a trial by jury in all cases of crimes, and all suits at common law, where the value in controversy shall exceed twenty dollars. It is insisted that these provisions were intended to, and upon a fair construction do, cover every case of the trial of rights of whatever character, without any other limitation, than the expressed one as to the importance of the matter in dispute. In answer to this suggestion, it is said, in addition to the denial of the propriety of the construction, that the process and proceedings, provided in the act, are not conclusive in their effect, but are merely preliminary; and that in this respect they are entirely analogous to the primary examinations for suspected crimes before a magistrate, who never has the aid of a jury, because he does not decide definitely upon the guilt or innocence of the accused. And that the certificate under the act is preliminary, supposing, or at least admitting of, a future trial of the question of liberty, is certainly a position, which has great support in authority. (See the case before considered, and 3 Story's Comm. on Const. 677-8).

It is again said in answer, that none of the provisions of the constitution have any reference to *slaves*, but establish the rights of *citizens*, who alone can take advantage of them. But is not this begging the very question in dispute? A person who is seized here is *prima facie* a freeman, and the very matter to be tried is, *whether* he is a slave; and can that be *assumed* in the outset, in order to give jurisdiction to the magistrate, and validity to his judgment?

The Committee dismiss this part of the subject for the present, because these different positions will be brought in view, under the next succeeding head.

The remaining objection to the act of Congress, is founded upon the fourth article of the amendment of the constitution, which secures the people "against all unreasonable searches and seizures," and provides that "no warrants shall issue but upon probable cause, supported by oath or affidavit," and upon a clause in the fifth article, that no person shall be "deprived of life, liberty, or property, without due process of law."

This last clause is but an enlargement of the provision of the magna charta,—of which, the latter words, (*per legem terrae*), have always been construed to mean, by due presentment or indictment of a grand jury. (2d Inst. 50; 1 Tucker's Blk. App. 304; 2 Kent's Com. 10). And Mr. Justice Story says, (3 Com. 661), that the clause "in effect affirms the right of trial, according to the process and proceedings of the common law."

It is manifest that the process and proceedings under the act of Congress are in violation of the privileges secured by these clauses, if they are at all applicable to this subject. But their application, as in the other case, is denied because the subjects of the process are *assumed* to be slaves.

These questions were fully discussed in the case before cited, in our own courts, (2 Pick.) for it was from this part of the constitution, that the prosecuting officers drew their arguments against the validity of the law of Congress. Parker, C. J. in giving the opinion of the majority of the court, thus disposes of them:—"It is said, that the act which is passed on this subject is contrary to the amendment of the constitution, securing the people in their persons and property against seizures, &c. without a complaint on oath, &c. But all the parts of the instruments are to be taken together. It is very obvious that slaves are not parties to the constitution, and the amendment has relation to the parties. But it is objected that a person may, in this summary manner, seize a freeman. It may be so, but it would be attended with mischievous consequences to the person making the seizure, and a habeas corpus would lie to obtain the release of the person seized." And if a habeas corpus, then of course the concurrent remedies.

The principle here distinctly stated, when carried out, relieves the act of Congress of all its obnoxious features, and places the question, *under the law*, precisely where the Committee would have placed it *under the constitution*, without the law. It holds that the proceedings are constitutional as to slaves, and unconstitutional as to freemen, and gives the person seized the right to try the question, as to his character, by any suitable, independent process. And this principle must extend

to his situation either before or after certificate, for the jurisdiction of the magistrate, upon the same reasoning, must be special and limited, depending entirely for its foundation upon the fact, whether the person so seized be a slave; for, if he be not, the whole proceedings are void, as against the express provisions of the constitution. It makes, then, the claimant act at his peril throughout, and gives the person seized an opportunity to try, in another form, the applicability of the process to him; and that, too, wherever he chooses. It is, in this view, if he be a freeman, precisely like the case where A is arrested on a process against B, and where of course A can be delivered from his imprisonment by *habeas corpus*, or the writ *de homine*, or sue the officer in damages. (See, as to limited jurisdiction, *Wise v. Withers*, 3 Cranch 331, and 19 Johns. R. 7).

ART. VI.—DISTRIBUTION AND DEPOSITE OF THE SURPLUS REVENUE OF THE UNITED STATES.

[From the Eastern Argus.]

SUPREME JUDICIAL COURT.

COUNTY OF YORK. . . . APRIL TERM, 1837.

Present,

HON. NATHANIEL WESTON, J. L. D., Chief Justice.

" NICHOLAS EMERY, } Justices.

" ETHER SHEPLEY, }

William P. Hooper v. Samuel Emery et al.

This case was argued on the 29th of April; and the opinion of the court was delivered during the session of the court in Cumberland, by adjournment, on the week following. The facts in the case appear sufficiently in the opinion of the court, delivered by

SHEPLEY, J. This is an action of assumpsit brought to recover a sum of money alleged to be due from the defendants to the plaintiff. The facts are agreed; and from the agreement of the parties it appears, that at a legal meeting of the inhabitants of the town of Biddeford, qualified to vote in town