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THE FUGITIVE SLAVE LAW.

The Judicial Powers of Commissioners Unconstitutional.

From the Cincinnati Gazette.

MESSRS. EDITORS: As I have concluded to exercise no longer the powers conferred upon me as United States Commissioner, by the Fugitive law, and the criminal laws of the United States, it is due both to the public and to myself, that I should make known the fact, and my reasons for it. This I would have done in the case of A. K. MARSHALL *vs.* LEWIS, claimed as a fugitive, which was heard before me last October, but the escape of LEWIS rendered it unnecessary, and I hoped that the important questions of constitutional law, which were presented by the counsel in the case, would be settled by higher authority, before an occasion should arise that would make it necessary for me to decide them myself. But having lately been required to issue warrants, which I declined doing, see no good reason for further delay in defining my position.

The main question to be determined is, whether the judicial powers conferred upon Commissioners are constitutional? It has never yet been settled by any Judge of the United States.

Commissioners were first appointed under the act of March 2, 1793, to *take bail* in criminal cases. Their authority was revocable at the pleasure of the Court. By the act of February 20, 1812, they were authorized to take *acknowledgments of bail and affidavits*, and by the act of March 1, 1817, to do the same *in civil cases*, in the District Court; and to exercise the powers or a United States Judge *in taking depositions*. Their appointment is vested in the Circuit Courts. Their powers in criminal cases did not exist until the act of August 23, 1842, was passed, by which "the Commissioners to take bail, affidavits and depositions" were authorized to arrest, imprison or hold to bail, &c. These same Commissioners are, by the act of September 18, 1850, (the Fugitive Slave law,) "*authorized and required* to exercise and discharge all the powers and duties conferred by this act."

Commissioners then are appointed by, but are not officers of the Circuit Courts, as Masters in Chancery, &c. They are appointed to take bail, affidavits and depositions, and their other powers in fugitive and criminal cases are *adjoined and superadded* to them. The object of their appointment is to save the trouble and delay of an application to the Circuit or District Judge. Their term of office is not defined in the acts subsequent to the act of 1793.

The 1st section of the 3d article of the Constitution of the United States is as follows:

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

These questions here arise:

1. Is any part of the Judicial Power of the United States vested in Commissioners?

2. Is the Commissioner's tribunal "an inferior Court" of the United States? and if so, is his appointment, term of office, and compensation, such as the Constitution requires?

1. *As to the Judicial Power.*—The Constitution (sec. 2, art. 3,) provides that "the Judicial power shall extend to all cases in law and equity, arising under *this Constitution, the laws* of the United States, and *treaties*, &c."

Section 2, art. 4, provides that persons held to service or labor in one State, escaping into another, shall be delivered up, on claim, &c.

In the case of *Prigg* vs. *Pennsylvania*, (16 Peter's Rep., 616,) Judge STORY, after showing that the National Government (not the States) is bound to enforce claims for fugitives, through its own proper departments, legislative, judicial or executive, says:

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and, inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a Court of Justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case "arising under the Constitution of the United States, within the express delegation of *judicial power* given by that instrument."

The Fugitive act of 1850 clothes the Commissioner with the power of hearing and determining such cases, which the highest authority thus declares to be a *judicial power*; but, even aside from this, the conclusion would seem inevitable. His powers under the law, are not merely acts of a judicial character, such as it is claimed may be exercised by masters in chancery, &c. Masters may report both the law and the facts, but their office is merely *auxiliary*. Their reports are not in the nature of a judgment or decree, such as the decision of the Commissioner, which is "conclusive against the process of any court, judge, magistrate, or person whatsoever," (Act, sec. 6.) He is an officer of the United States, and not of the court which appointed him. The proceedings have all the forms of judicial acts. The Commissioner issues process to the Marshal, who makes return of his acts under it. The parties, claimant and claimed, appear in court by their counsel: the case is heard and argued, and determined according to the law and facts, in a summary manner, and the judgment of the Commissioners is rendered and certified; and, however erroneous or mistaken it may be, it is a conclusive determination, if against the person claimed, of his liberty, without appeal or recourse to any other tribunal. I cannot see how this can be merely a *ministerial* act, such as that of a clerk or sheriff in the exercise of his functions. A ministerial officer is one who performs an act in obedience to a precept issued to him, but the Commissioner acts under the law from his own discretion in a judicial capacity, and is a judge in all but the *name*.

It has been said that it is merely a *preliminary* proceeding. If so, how does that affect *its judicial* character? But, to what is it preliminary? to a further investigation of the case? Not at all. The act plainly contemplates the decision of the Commissioner as final, and conclusive of the master's rights. There remains to be done, nothing but to take him to the place of his alleged escape. He is not committed or held to bail to appear at a higher tribunal. He has been tried and convicted, and his only remedy, if really entitled to his freedom, is at best the right to prove it, perhaps hundreds of miles away from home, without the means of producing his testimony, and with every presumption and every influence against him. What else, then, is the proceeding virtually preliminary to, but slavery for life? A man who is charged with some petty criminal offence has the benefit of an examination, preliminary to a fair and impartial trial by jury, and with a recourse to the highest courts of the country; but a free man may be charged with being a slave—the property of another man—and, upon the testimony of men whom he has never seen before, or upon their *ex parte* affidavits, taken before a Court of Record, he not being present to cross-examine, or to test their credibility, he may be deprived of his liberty, of everything that may be dearer to him than life, and hurried into slavery, without hope of relief; and this, by the decision of one man—the lowest tribunal, in degree, known to the law. This awful power, this fearful responsibility, I cannot conceive to be merely a ministerial function.

It is said that it is merely a question of extradition, *the delivery of a slave who has escaped from his master*. But that is the very question to be determined.

In Ohio, every man, white or colored, is free until he is proved to be a slave. Color cannot be taken as presumptive evidence of Slavery. "Every presumption must be in favor of liberty." If he is to be deprived of freedom, his claimant must make out a clear case by sufficient testimony, before a competent judicial tribunal.

There is a material difference between the cases of fugitives from justice and fugitives from labor. In the former case, the fugitive is surrendered to an officer, who receives him for the purpose of *trial*. Every opportunity for defence is afforded, and the burden of proof is upon the State. In the latter case, the fugitive, without benefit of trial by Jury, after a summary proceeding before an irresponsible officer, may be given up to the claimant, and, without provision for further trial, consigned to slavery until he can prove his right to freedom. Meanwhile there is no security required for his return to the place from which he is alleged to have escaped; he may be sold, or carried wherever his owner may please.

It is clear then, to my mind, that the powers of the Commissioner, under which a question of such vast importance as freedom or slavery is to be determined, are judicial.

In this view, I am also supported by the opinion of Attorney General CRITTENDEN, given to the President, Sept. 18, 1850—the date of the Fugitive law—in which he considers the powers and jurisdiction of the Commissioner as "*judicial*," "and all the proceedings but so much of orderly judicial authority, interposed between him (the slave) and his owner." He also says that Congress has constituted, by this law, a tribunal with *exclusive jurisdiction, to determine summarily and without appeal, who are fugitives, &c.*

Judge GRIER, in his letter to CHARLES GIBBONS, dated October 25, 1850, says the Act contemplates a trial, and a decision of the Court or Judge, involving questions of law and fact, and the exercise of a judicial power.

Whether the powers of the Commissioner in criminal cases are judicial, is not perhaps so clear. It has never to my knowledge been decided. Judge CONKLING says: "The power to order the arrest of a citizen, and then of deciding upon the propriety of discharging, committing or bailing him, seems to savor strongly of judicial authority, and to stand in striking contrast to that exercised by the ministerial officer, who merely obeys such order."—*Conkling's Treatise*, 300. But he does not decide the question. The forms of proceeding, however, are strictly judicial. The Commissioner holds a Court, issues process, hears and determines the matter in question. His powers are those of a justice of the peace, and it is difficult to understand them as being anything else than judicial. In fact, very nearly the same reasoning will apply in this, as in fugitive cases. Criminal cases before the Commissioner, it seems to me, are cases arising under the laws of the United States, and are therefore to be determined by the judicial power. Having seen then, that his powers are judicial, we are next to inquire:

2. Is the Commissioner's tribunal an "Inferior Court," within the meaning of the Constitution?

"A Court is a place where justice is judicially administered."—Co. Lit. 58a. The Judges alone are also called the Court. It requires the presence of a Judge, ministerial officers and parties. The judicial power is to examine the truth of the fact—to determine the law arising upon that fact, and apply the remedy. Courts are either *of record* or *not of record*; of the latter, justices of the peace are an instance. The Commissioner's powers are equivalent to those of a justice of the peace in criminal cases; his jurisdiction is concurrent with that of the Circuit and District Judges in fugitive slave cases; and his authority coextensive with theirs. He holds a Court, and his proceedings are in the forms usual in Courts, although there is no Court established by Congress as a "Commissioner's Court." It is no less a Court, because its jurisdiction is limited. "Some Courts are constituted to inquire only; others to hear and determine,—some in the first instance, others on appeal, &c." 3 Bl. Com. 24.—Commissioners are virtually courts, *not of record*. But it is very doubtful whether Congress meant to establish Commissioners as such inferior courts. They are such only by implication, not being created by express terms. If, however, they are not such, their exercise of judicial power is clearly unconstitutional. Congress cannot vest any portion of the judicial power, except in courts ordained and established by itself. Martin *vs.* Hunters' Lessee, 1 Wheaton 330-1. The whole judicial power of the United States must be vested in those courts. *Ibid.* But, if it be admitted that Commissioners are "Inferior Courts," let us see whether they have the requisites of a court. They are to be deemed *Judges*, if their tribunals are courts. The Judge is the essential part of the Court. Their appointment, tenure of office, and compensation, must be the same as those of Judges of the other Courts. The District Courts are "Inferior Courts" under the Constitution. Commissioners are appointed by the Circuit Courts: they receive no commission, nothing, but a certificate of the record, and there is no term of office defined. If they are Judges, they cannot, in accordance with the uniform practice in such cases, be considered "inferior officers, whose appointment may be controlled by Congress—Const. Art. 2, Sec. 2. They ought to be appointed by the President. They are not officers of the Court appointing them, but distinct Courts of themselves; and therefore cannot be removed at the pleasure of the appointing power. Judges of the United States hold their offices during *good behaviour*; that is, for life. They are not "inferior officers," within the meaning of the Constitution. *Ex. parte* Duncan N. Hennen, 13 Peters, 230. It was held in that case, that HENNEN, as a *Clerk* of the District Court of the United States, Eastern District of Louisiana, was such an "inferior officer." He was an officer of the Court, and removable at its pleasure. But if the Commissioner is a Judge, and therefore not "an inferior officer," his appointment by the Court is invalid.

But if Commissioners are merely creatures of the Circuit Courts, removable at pleasure, which seems to be the better opinion; if they are not Courts under the Constitution, but merely persons appointed to take bail, affidavits and depositions, and *as such* have judicial power conferred upon them, we have seen that their authority is invalid.

As to compensation.—This is to be received by the Judges *at stated times*, and not to be *diminished* during their continuance in office. But the Commissioner receives no stated salary. He depends upon fees, the amount of which is uncertain, and liable to be altered by act of Congress.

If, then, the Commissioner is a Court, he fails in essential requisites in the manner of his appointment and compensation. If he is not a Court, then his powers being judicial, are unconstitutional. In either case the result is the same.

In conclusion, I wish to say a few words by way of reply to the suggestion that has been made that a Commissioner ought to resign his office rather than undertake to decide constitutional questions. Like every other officer, he is sworn to obey the constitution. It is paramount to all legislative acts. He should be governed by the decisions of higher tribunals, if they exist; but if they do not, he must be guided by his own judgment, and it then becomes his sacred duty to determine the law according to the best of his ability; and most especially in a case involving the question of liberty or slavery for life; in which the judgment, is conclusive and without appeal, and wrong once done, however innocently, would most probably be irreparable. He is the sole judge of the law and the facts of the case,—and why should he refuse to look into the most important point of all—the source of his authority? Moreover, I was not appointed a Commissioner under the Fugitive Slave law; it was passed nearly a year *after* I was appointed. It required me as a Commissioner to do certain acts; which, after very careful investigation and much reflection, I am satisfied I cannot perform. Is not my duty then plain, to decide accordingly? If I could see any necessity for resigning on this account, I would certainly not hesitate to do so. If I saw no legal difficulty in the way, or if the question were decided by the proper judicial authority, it might then become a question with me whether I would not resign rather than continue to be an instrument in the execution of a law which late events have rendered odious and repugnant to the feelings of very many who previously felt it a duty to tolerate, and submit to it.

SAM. S. CARPENTER.

CINCINNATI, June 15, 1854.

A PRODIGY IN AYRSHIRE.—There is at present attending the Hastings school, Darvel, in Ayrshire, a girl, aged between 8 and 9 years, who commenced the study of arithmetic less than a twelvemonth ago. Such are the powers of her memory that she is now able to calculate mentally, in a very few moments, such questions as these: How many seconds in 20, 60, 90, or 900 years? How many ounces in 20, 60, or 100 tons? She can multiply such a line as £894 19s. 11d. by 32, 56, or 96, as cleverly and correctly as any ordinary arithmetician would multiply by 4, 6, or 8. Counts in long division (simple and compound) she divides by short division, or in one line, by such figures as 34, 56, 72, 96, &c., in eight or ten seconds. The first time her teacher, MR. TARBET, discovered her remarkable abilities was when she was showing him sums multiplied by numbers from 14 to 4,380, which at first he thought she must have worked on the slate below, and then transfered. He alleged as much, which she would by no means admit. He then, to test her, told her to multiply a line of pounds, shillings, and pence, which he gave her, by 72. To his surprise, she multiplied it as fast as any other person could have done by 7. Yet this girl never learned the multiplication table higher than 12 times 12! She can also add up right or ten lines of pounds, shillings, and pence, by first adding the two lowest lines together, then the third lowest, and so on. When performing these calculations every limb and feature seem at rest. One day lately, the teacher set the door open, and ordered the children to be quiet, as he was going to give her the most difficult count she had ever got. He then told her to walk out into the garden and find out how many moments there were in 900 years. She walked only about ten yards at an ordinary pace, when she told the answer correctly—never having reached the garden. "But," says one of the boys, "she did a far bigger count than that yesterday—the biggest, they say, that ever was done by anybody—she multiplied 123456789 by 987654321, and gave the correct answer in less than half a minute, for the bet of a penny," which she refused to take, because her teacher had forbidden her in the presence of the scholars to calculate large sums at the bidding of any person. On being interrogated as to how she knew whether the answer was correct, the boy replied that two of them had counted it on a slate, and found it correct; and that the figures were so far above hundreds of millions that none of them could read them. The girl's name is MARGARET CLELAND, daughter of GAVIN CLELAND, shoemaker in DARVEL.—*North British Daily Mail.*

The Frederick (Md.) *Examiner* announces the completion of the Artesian well in that place. At present it is found impossible to ascertain accurately the yield of water, but all accounts agree that it will be at least 150 gallons per minute, and may be much more.

The editor of the Harrisburg (Pa.) *Union* has just had the census of that town taken, showing the white population to be now 11,217, and the colored 605. The whites, since 1850, have increased 4,693, while the colored have decreased 105.

Locusts are infesting Northern Illinois in my rinds. In many parts of that region, they cover every shrub, and make the woods vocal with their singing. In that section they are said to have last appeared in the Summer of 1836.