Ableman v. *Booth*
21 Howard 506

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1858

Nos. 1 and 23

STEPHEN V. R. ABLEMAN, *Plaintiff in Error,*

—VS.—

SHERMAN M. BOOTH.

THE UNITED STATES, *Plaintiff in Error,*

—VS.—

SHERMAN M. BOOTH.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE UNITED STATES

J. S. BLACK,
Attorney General.

SUPREME COURT OF THE UNITED STATES.

Nos. 1 and 23.

STEPHEN V. R. ABLEMAN, PLAINTIFF IN ERROR,

vs.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SHERMAN M. BOOTH.

In error from the Supreme Court of Wisconsin.

The following recapitulation of the points on which these two cases are rested by the government, and the authorities relied on to support them, may be useful to the court as giving the essence of the argument in the briefest possible space:

1. When a writ of error is issued from this court to the highest tribunal of a State, the judges to whom it is directed are bound to obey it, or make some return which will excuse them. If they refuse obedience, they are punishable as for a contempt.

2 Coke's Inst., 425–'27.
4 Jurist, 190.
17 sec. Jud. Act, 1789.
Act of 2d March, 1831.

2. The fugitive slave law of 1850 is constitutional and valid.

Jones *vs.* Vanzandt, 5 How., 230.
Moore *vs.* Illinois, 14 How., 13.
Henry *vs.* Lowell, 16 Barb., 268.
Sims's case, 7 Cush., 285.
Miller *vs.* McQuerry, 5 McL., 469.
Commonwealth *vs.* Pickering, 2 Pick., 11.
Wright *vs.* Deacon, 5 S. and R., 62.
Jack *vs.* Martin, 12 Wend., 311.
Hill *vs.* Lowe, 4 W. C. C. R., 327.
Prigg *vs.* Pennsylvania, 16 Peters, 539.
Johnson *vs.* Tompkins, 1 Bald., 571.
Ex parte Robinson, 3 Livingston's Law Mag., 386.
Murray *vs.* Hoboken Co , 18 How., 272.

3. The judgment of a federal court, charged by act of Congress with the duty of trying an offender against the laws of the United States, conclusively settles and determines, in every case tried, all

questions of constitutional law, of statutory construction, and of pleading, which was or might have been raised at the trial.

Cobbet's case, 5 C. B. Reps., 418.
Dimes's case, 14 Q. B. R., 566.
Partington's case, 6 Q. B. R., 656.
Baine's case, 1 Cr. and Ph., 44.
Dunn's case, 57 Eng. C. L. R., 216.
Chambers's case, Cro. Car., 168.
Prime's case, 1 Barb., 340.
Williamson's case, 26 Penn., 9.
Rev. Statutes of Wisconsin, Hab. Cor.
1 Curtis's Commentaries, 155,–'6,–'7, and 159.
Serg. Const. Law, 277.
1 Kent Com., 319 and 439.
2 Story on Const., sec. 1756–'7.
39th No. of Federalist.
81st No. of Federalist.
Rhodes's case, cited Serg., 284.
2 Wallace, jr., 526.

4. When a party is accused of any offence against the United States, and is arrested and held for trial before a federal court of exclusive jurisdiction, no State court has power to liberate him by habeas corpus.

Bushell's case, 1 Modern, 119.
Watkins's case, 3 Peters, 202.
2 Hale's Pleas of the Crown, 144.
King *vs.* Platt, 10 Petersdorf Abr., 287.
Rudgard's case, Vin. Abg., hab. cor., c. 2.
Resolution of Judges, 2 Inst., 615.
Cobbet's case., 57 Eng. C. and R., 418.
Paty's case, 2 Ld. Raymand, 1110.
Halloway's case, 5 Binn., 514.
Serg. Const. Law, 284.

When an attempt is made by a State court, which has no jurisdiction, to take a criminal out of the hands of a federal court which has jurisdiction, whether before judgment or afterwards, the federal officers are bound to disregard such attempts, and obey the mandate of the court to which they belong.

Case of the Marshalsea, 10 Rep. 76, vol. 5.
Cable *vs.* Cooper, 15 Johns., 152.
Horan *vs.* Waunberger, 9 Texas, 319.
State *vs.* Richmond, 6 Fost., 239.
Bush *vs.* Pettibone, 5 Barb., 276.

6. When a State court lawlessly attempts to obstruct the administration of criminal justice in a federal court, the federal court is bound to protect its officers against all personal consequences arising out of their refusal to obey the State court.

Act of March 2, 1833.
2 Wallace, jr., 521.
Ex parte Robinson, 3 Liv. Law Mag., 386.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1858.—No. 1.

STEPHEN V. R. ABLEMAN, Pl'ff in Error,

vs.

SHERMAN M. BOOTH.

From Supreme Court of State of Wisconsin.

The plaintiff in error, as marshal of the United States for Wisconsin, in 1854, arrested Sherman M. Booth, by virtue of a warrant issued by Winfield Smith, a commissioner of the district court of the United States for Wisconsin, for the offence of aiding one Joshua Glover, fugitive slave, to escape from the custody of the marshal.

While Booth was in custody of the marshal a writ of habeas corpus was issued by one of the justices of the supreme court of the State of Wisconsin requiring the marshal to bring said prisoner before him.

The marshal made a return to the writ showing the cause of the imprisonment, and on hearing the matter the judge ruled the return insufficient and discharged the prisoner.

The marshal sued out a writ of certiorari to the supreme court of the State of Wisconsin, when the matter was again heard, and the decision of the judge below confirmed.

From this decision a writ of error is sued out to this court.

No return has been made by the supreme court of Wisconsin to this writ of error.

The ground on which the supreme court of Wisconsin rest their judgment is, that the act of 1850, known as the fugitive slave act, is unconstitutional for two reasons.

1st. That it attempts to confer judicial powers upon persons other than those in whom the constitution directs such powers to be vested. And,

2d. That it does not provide for a trial by jury for the alleged fugitive from labor.

It is impossible to imagine that these questions require discussion at this late day, before this court. They have been discussed in every imaginable form, in legislative and judicial proceedings, for more than half a century. Decision after decision has been made by this court,

and by the State courts, affirming the constitutionality of this law. See Jones *vs.* Van Zandt, 5 Howard, 230. Moore *vs.* Illinois, 14 Howard, 13. These adjudications, it is true, were made upon the act of 1793, but that act contains both the features objected to in the act of 1850. It denied to the fugitive a trial by jury, and it vested in magistrates, not recognised in the constitution, the power of arresting and delivering such fugitive by a summary proceeding. For decisions under the act of 1850, see Henry *vs.* Lowell, 16 Barbour, 268. Sims's case, 7 Cushing, 285. Miller *vs.* McQuerry, 5 McLean, 469.

We will not consume time by rearguing this oft-decided question. The points may be very briefly stated.

The constitution declares, Art. ii., that the judicial power of the United States shall be vested in courts of a certain description. It is admitted that a commissioner is not such a court. But neither are the powers vested in the commissioner *judicial*, within the meaning of the constitution. By judicial power we understand to be meant the final adjudication of cases, the authoritative rendition of judgments, by which parties are concluded.

It does not mean preliminary steps, necessary to be taken in order to bring the case before the court for trial; nor yet, acts ministerial in their nature; although both classes of acts sometimes partake of a judicial character. See case ex parte Robinson, reported in Livingston's Law Magazine, vol. ii., for 1855, p. 386. Murray's Lessee *vs.* Hoboken Land Co., 18 Howard, 272.

The constitution explicitly declares that the *executive power* shall be vested in a President, but it was never held that many things involving executive power might not be done by officers appointed by the President.

All the legislative powers of the constitution are vested in Congress; but it has not been supposed that Congress could not vest certain legislative powers in the legislature of a territory, or in the corporation of Washington.

The constitution in these cases was intended to fix the supreme or ultimate powers, legislative, executive, and judicial, in the respective functionaries to whom they are intrusted.

The provisions for the rendition of fugitives, both from justice and labor, are not placed in the article of the constitution which treats of the judiciary—both of them belong more properly to the class of executive than judicial powers, and there is no doubt that Congress might, if it had seen fit, have placed the whole execution of them in the hands of others than the judges.

In neither of these proceedings is there any final adjudication of the rights of any one. It is simply the conveyance of the party to the forum which has jurisdiction over his case.

This may be easily shown by supposing that one who had been returned to any State as a fugitive slave, should bring an action asserting his freedom, and the defendant should plead in bar the adjudication of the commissioner. Would such a plea be listened to for a moment? The action of the commissioner settles nothing—therefore it is not judicial.

I have said thus much upon the first point taken by the supreme court of Wisconsin because the question, though several times adjudicated, is novel compared with the other.

I will not take up time in arguing the question of trial by jury in the State where the fugitive is arrested. It has always been the favorite hobby of the opponents of the law, and has been answered an hundred times. There is no propriety in arguing it further.

But the important and interesting question presented by this record is, how far one court, having no control or supervisory power over another court, can, by the use of the writ of habeas corpus, obstruct its processes, release its prisoners, and defeat its jurisdiction.

We lay down the fundamental principle, that no court (unless authorized by statute) can take cognizance by writ of habeas corpus of any criminal case which it has no jurisdiction to try.

The writ of habeas corpus is essentially a writ of error, and its purpose is to revise and rejudge the decision of an inferior judicatory. In Bushell's case, 1 Modern, 119, Lord Hale says: "A certiorari and a habeas corpus, whereby the body and the proceedings are removed hither, are in the nature of a *writ of error*." Says C. J. Marshall, in ex parte Watkins, 3 Peters, 202: "It is in the nature of a *writ of error*, to examine the legality of the commitment." And every habeas corpus necessarily involves the idea of a review of the decision of the proceedings of the committing court. Of course, I speak of the usual case of a prisoner confined on a criminal charge.

It does not affect this view, if the habeas corpus is granted by a judge of inferior grade to him who made the commitment. For in committing, he acts as a magistrate, and not as a superior court.

If then the discharge of a prisoner on habeas corpus be a revision, as by writ of error, of the proceedings of the committing court, it follows by sound reasoning that it can only be done by a court having jurisdiction of the offence with which the prisoner is charged. Positive statute can give the power to any court that pleases the legislature, but by the common law, and upon principle, the above proposition is true.

By the common law the writ of habeas corpus in the case of one charged with crime could only issue from the chancery or the King's Bench. The common pleas had not such jurisdiction, because, says Lord Hale, "they have not conusance of such crimes." 2 Hale's P. C., 144. To the same effect, Lord Coke, 2 Inst., 55.

The power anciently exercised by the lord chancellor was an exceptional case, by virtue of the royal prerogative, and does not affect our proposition.

In the case of Rex *vs.* Platt, in Petersdorff's Abridgment, vol. 10, p. 287, an application was made under the habeas corpus act, by a prisoner, to the criminal court at the Old Bailey, to be admitted to bail. The commitment was for treason committed out of the realm, which by statute is triable only in King's Bench or by a special commission. The court say: "The petition to a court of goal delivery, who have no power at all to try the prisoner, is nugatory and void."

In Rudyard's case, cited in Viner's Abr. Habeas Corpus, c. 2, p.

212, the court of C. B. said: "They had often directed that no habeas corpus should be moved for in that court, except it concerned a *civil cause*. Because when the party is brought in, and cause shown, C. B. cannot proceed upon it." The court of C. B. have, in Bushell's case, reported in Vaughn, and perhaps in a few other cases, exercised the power, but it was a clear usurpation.

In the 3d, James 1st, complaint being made to the King, that the temporal courts used to release prisoners confined upon charges in the ecclesiastical courts, the matter was laid before all the judges of England, who answered unanimously: "If the party excommunicate be imprisoned, wee ought, upon complaint, to send the King's writ for the body and the cause; and, if in the returne no cause, or no sufficient cause appeare, then we doe (as we ought) set him at liberty; otherwise, if upon removing the body, the matter appeare to be of ecclesiasticall cognizance, then we remit him againe." 2 Inst. 615.

In the case of Cobbett, 57, E. C. L. R., 418, Wilde, C. J., said: "This court has no power to interfere in the matter. The prisoner is in custody under process issuing from the court of chancery."

In the celebrated case of Regina *vs.* Paty, 2 Ld. Raymond's Reps., 1105, which was a habeas corpus for persons imprisoned by order of the House of Commons, the court held, that they had no jurisdiction, not only because of the exalted dignity of the House of Commons, but also because the King's Bench had no cognizance of parliamentary law.

Powel, J, says, p. 1110: "The court cannot judge of the return; first, because they were committed by another law, and consequently we cannot discharge them by that law by which they were not committed."

It appears, therefore, to have ever been the doctrine of the common law that the cognizance of a case by writ of habeas corpus stands on the same ground with any other assumption of judicial control over that case, and consequently belongs only to a court in whom the jurisdiction over the case is vested by law.

Now we have shown that the exclusive jurisdiction over offences created by act of Congress is in the federal judiciary, and that the unconstitutionality of the act, if admitted, does not affect that jurisdiction. See brief in case of U. S. *vs.* Booth, herewith presented.

If the constitution and the laws of Congress vest such exclusive jurisdiction in the federal courts, it follows that the State courts have no jurisdiction over such cases, and can no more assume it in the form of a habeas corpus than in any other form. Could the judges of a State court, unless authorized by act of Congress, arrest, commit, or bail on a criminal charge arising under an act of Congress? No more than they could convict or acquit.

In the case of Andrew Rhodes, cited in Sergeant's Const. Law, p. 284, Judge Cheves, of South Carolina, decided, "that he had no jurisdiction over the case; that the criminal jurisdiction under the laws of the United States was expressly exclusive; and that as a State court had no authority to take cognizance of the offence charged, so as to punish or acquit, it could not take jurisdiction under a *habeas corpus*, or declare an act of Congress unconstitutional and void."

In this decision the whole doctrine on the subject is compressed into a sentence.

The supreme court of Pennsylvania expressly so decide in Halloway's case, 5th Binney, 514. And in the case of Almeida in Maryland, reported in 2d Wheeler's Cr. C., 576, the court pronounced the act conferring such powers on the State courts unconstitutional; and there in some plausibility in the position.

But at all events, no jurisdiction can be exercised in such cases, *not* expressly authorized by Congress.

The power to discharge on habeas corpus stands on the same footing as the power to commit or bail, with the difference, that it is not authorized by any act of Congress.

That such a power has in some cases been asserted by the State courts, I am aware. The cases are collated in Sergeant's Constitutional Law, ch. 28th, pp. 282, 296.

That courts should grasp at power is no new thing; but the line of just and constitutional reasoning against the exercise of such a power by the State courts seems so plain, that they will undoubtedly yield to the decision of this court when the decision shall be made.

Most of the habeas corpus cases, in which the State courts have delivered prisoners from the federal authorities, have been the cases of persons in military custody.

Though I fully believe that no such power exists even in those cases, yet it is not necessary to argue that now.

This is a case of interference with a judicial process. It is a seizure by a court having *no* jurisdiction, of the control of a criminal case, from a court having *exclusive* jurisdiction. One of the positions taken by the supreme court of Wisconsin is, that the warrant does not describe any offence against any act of Congress. But this was the very point which the federal court *had* jurisdiction, and they *had not* jurisdiction, to try and determine. The federal courts have exclusive jurisdiction over offences created by act of Congress. What circumstances bring a case within the, law is one of the things for that court to determine. It is enough for the State courts, that he is not charged with any offence, for which *they* have the power to try him.

It will not do to say that the jurisdiction of the district court had not attached, because the commissioner is not an officer of that court. Whether he is an officer of court or not, is immaterial; he is a committing officer under the laws of the United States, and his acts as such have precisely the same effect as such acts of the district judge. The law requires in every case of commitment or bail, that a copy of the process be returned forthwith to the clerk of the court. Brightley's Dig. 90. Act of 1789, s. 33.

The jurisdiction of the court attaches as soon as the commitment is issued or the recognizance signed; if not as soon as the party is arrested. For the arresting officer, or the jailor, is not the officer of the commissioner, but of the court.

I need not enlarge here upon the theory of the division of powers among the State or federal courts under our system, nor upon the evil

consequences resulting from the interference of one with the processes of the other. I have endeavored to show that the constitution and laws forbid such interference; and it might easily be shown that the prohibition is absolutely essential for the administration of justice and the peace of the country.

In conclusion, I beg leave to refer to the brief herewith submitted, in the case of United States *vs.* Booth, as containing much that applies also to this case, and which need not be here repeated.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1858.—No. 23.

UNITED STATES vs. SHERMAN S. BOOTH.

In error to the Supreme Court of the State of Wisconsin.

BRIEF FOR THE UNITED STATES.

At January term, 1855, of the district court of the United States for the district of Wisconsin, Sherman S. Booth was convicted by the verdict of a jury, upon an indictment previously found by the grand jury of said court.

The indictment contained five counts, but the verdict of conviction was upon the 4th and 5th counts, which charged the defendant, under the 7th section of the act of Congress of September 18, 1850, commonly called the fugitive slave act, with aiding and assisting one Joshua Glover, arrested by the deputy marshal, under a warrant issued by the judge of the district court, as a fugitive from labor, to escape from the custody of said deputy.

After motions for a new trial, and in arrest of judgment, both of which were overruled by the court, the defendant was sentenced to one month's imprisonment and to pay a fine of one thousand dollars.

The defendant being in prison under this sentence, he was brought before the supreme court of the State of Wisconsin on a writ of habeas corpus, and discharged from custody.

A writ of error has been sued out to the supreme court of Wisconsin, to which they have refused obedience, and have ordered their clerk not to send up the record.

That the order of an appellate court to the clerk of a subordinate tribunal to send up the record, for the purpose of adjudication, is not to be avoided by the order of the very court whose decision is to be reviewed, would seem too plain to require argument.

By using the term subordinate, I mean to make no question of dignity with the supreme court of Wisconsin, but simply intend by the term, a court from whose decisions an appeal lies to another tribunal. Whether that court deny the entire power of this court to review any decision of theirs, or whether they confine their defiance of your authority to cases involving the rights of negroes, does not appear. The duty of this court, however, is plain. If its mandates can be set at defiance with impunity by one person, they will be by others. The power to punish for contempts belongs to every court, by the very conditions of its existence, and is, moreover, distinctly

recognised in this court by the act of March 2, 1831, in this precise case. Under the law of England such a power unquestionably existed.

By the statute of Westminster 2d, it is enacted, that the justices of all courts to which writ of error lies shall certify and send up the record when lawfully required. See Coke's 2d Inst., 425; upon which Lord Coke saith, same book, 427: "If they all refuse, it is a contempt in them all," &c. And in a late case of Newton *vs.* Alderson, 4 Jurist, 190, the King's Bench, though refusing an attachment against Alderson, B., for not sending up a record, evidently hold that they would do so on a proper case made.

I therefore hold unquestionably that, either by the common or universal power attaching to every court, to enforce obedience to every writ that it has the authority to issue, and without which such authority would be vain and idle; or by the ancient law of England, always in force in this country; or by the express grant of power in the 17th section of the judiciary act of 1789, declared and explained by said act of March 2, 1831, you have the authority to punish, by fine or imprisonment, the clerk or the judges of any court who refuse obedience to the lawful mandate of this court. It is not moved in this case to impose any punishment on them; but the right to do so, on proper preliminary steps taken, should be distinctly affirmed.

There is no station in this republic which exempts any man from the operation of the law, and none ought to exempt him from its penalties if he incurs them.

The decision of the supreme court of Wisconsin, now brought up for review, is an anomaly in judicial history. They have assumed the right, on a writ of habeas corpus, *to arrest the judgment* of another court, and to discharge the convict, on the ground of *a defect in the bill of indictment.* This is the main ground on which the judges put their decision. It is true that two of the judges take occasion to express an "obiter" opinion that the fugitive slave act is unconstitutional, but they do not rest their judgment upon that. They assume the general power, under the writ of habeas corpus, to determine the sufficiency of the indictment; and determining, in this case, that the offence is not properly set forth under the act of Congress, they set aside the judgment, so far as to release the defendant from confinement.

That no foundation for such a claim is to be found in the common law, is easily shown. The doctrine of the English courts has always been that no tribunal can discharge, on habeas corpus, one under final sentence of a court, unless it be a court over which the court issuing the habeas corpus has a revisory control, and even then only in case of defect of jurisdiction. See case of Cobbett, 5 Manning, Granger and Scott, 418, on which the common pleas refused to entertain an application from a prisoner committed by order of the court of chancery, saying "they had no power to interfere in the matter." See Dimes's case, 14 Ad. and Ellis, (new series,) page 566—a case of the same character.

The court of Queen's Bench say: "Their decision"—that of the chancellor and vice chancellor—"cannot be reviewed here. I may observe that an inferior court, such as the court of quarter sessions,

is a court over which this court has a controlling power, and whose proceedings are brought here by a writ of certiorari in order that we may exercise that controlling power. In that respect such a court differs from the court of chancery, and in that respect cases before us which relate to the inferior courts are distinguishable from this."

In Partington's case, 6 Ad. and Ellis, (new series,) p. 656, which was a case of commitment by a commissioner of bankruptcy, the court say: "There still remains the question, whether the commissioner has rightly decided that the prisoner's case was not within the act; but this was a question which he had jurisdiction to inquire into and decide; he has done so, and we are not authorized to review that decision."

In Baines in re, 1 Cr. and Ph., p. 44, (18 Eng. Ch'y R.,) which was a case of commitment by the ecclesiastical court, Lord Chancellor Cottenham says: "There may be many grounds upon which a judgment may be illegal, and in one sense the court, in pronouncing such judgment, exceeds its jurisdiction; but that is not the sense in which the expression is used when applied to a case like the present. The object of the jurisdiction I am now exercising is to keep the ecclesiastical court within the jurisdiction the law has assigned, and not to correct any error into which they may fall in the exercise of it. If this distinction is not carefully kept in view, every court and judge having authority to issue the habeas corpus would become a court of appeal from the court by whose authority the party was committed, and *so usurp the jurisdiction which the law has reposed in those courts to which an appeal is given.*"

In Dunn in re, 57, E. C. L. R., 216, Maule, J., says: "You are here asking a court, which is not a court of criminal jurisdiction, for a *habeas corpus,* upon an opinion that a sentence pronounced by the court of Queen's Bench, which is still a subsisting sentence, is erroneous; surely there is no authority for that." And Wilde, C. J., says: "It is perfectly clear that the remedy of the prisoner in this case, if any, is by writ of error. If we were to accede to this application, which is certainly one of the first impression, it would lead to consequences that never were contemplated. It would follow, that every sentence pronounced by the court of King's Bench would be subject to be reviewed summarily even by a judge at chambers."

In Chambers's case, Cro. Car., 168, being a habeas corpus for one committed by the star chamber, the court say: "To deliver one who was committed by the decree of one of the courts of justice, is not the usage of this court."

The 3d section of the habeas corpus act of Car. 2 shows that no change in that respect was made in the law.

See, also, Andrews in re, 4 M. G. and S., 228; Newton's case, 7 Scott, 101; Brennan's case, 10 Ad. and E., N. S., p. 502.

For decisions of our State courts see case of Prime, 1st Barb., S. C. Reps., 340; Williamson's case, 26 Penn. St. Reps. 9.

The same principles are recognised in the habeas corpus act of Wisconsin, from which the supreme court of Wisconsin derives its authority. I am not unmindful that one of the judges (see 3 Wise,

R. 190) seems disposed to deny the authority of the revised statutes, and rely upon the constitution of the State.

But this cannot help the case; for the grant of power in the constitution to issue writs of habeas corpus can only be construed in reference to existing laws; and the same provisions are contained in the act of the territorial legislature of Wisconsin, (see Revised Statutes to 1839, pp. 219, 222,) which, as well as other laws, are declared by the schedule to the constitution to be in force until altered.

If not limited by this, it surely must be by the common law, or else it would vest in the supreme court themselves that unlimited power of which they manifest so laudable a dread.

Referring, then, to the statutes of Wisconsin, (both before and since the adoption of their constitution,) we find in the second section that "persons committed or detained by virtue of the final judgment of any competent tribunal of civil or criminal jurisdiction" are not entitled to prosecute a writ of habeas corpus. And, again, by section — it is enacted that the person brought up on habeas corpus shall be remanded if it appear that he is confined—

"1st. By virtue of any process issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction; or,

"2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction."

I quote these statutes, not as if the constitution and laws of the United States could be controlled by a State law, but to show that the preposterous assumption of power to review and overrule the decisions of the federal courts, is solely on the responsibility of the judges; and is not countenanced by the State of Wisconsin in its laws.

No language could be plainer than the prohibition to its judges, by the State of Wisconsin, to meddle with the judgments of the federal courts within their proper sphere of action.

Now, it would seem to require no argument to show that this case is within every one of these prohibitory clauses. It is a case in which the United States courts have exclusive jurisdiction; and it is a case of the final judgment of a competent court of civil and criminal jurisdiction.

The act of Congress that creates the offence, gives jurisdiction of the same to the district courts of the United States, and to them only. The supreme court of Wisconsin can show no law, State or federal, by which jurisdiction of this offence can be assumed by any other court. By the judiciary act of 1789, section 11, the circuit courts have exclusive jurisdiction of all offences against the laws of the United States, except where otherwise provided by law.

The act of 1850 (fugitive slave law) vests the cognizance of this offence in the district courts. By the most obvious inference the exclusive jurisdiction of this offence is vested in the district court. Moreover, in Wisconsin the powers of the circuit court are vested in the district court. That the State courts have no jurisdiction of offences created by act of Congress would seem plain from the language of the constitution: "The judicial power shall extend *to all*

cases, in law or equity, arising under this constitution, the laws of the United States, &c."—(Article 3, section 2.)

This construction has been uniformly held by the courts and all writers on constitutional law. 1 Curtis' Com., p. 159; Sergeant's Const. Law, 277; 1 Kent's Com., 439; 2 Story on Const. § 1756–'7.

Nor is it known that any State court ever attempted to take cognizance of an offence created by act of Congress, unless there existed some State law against the same offence, which is not the case here.

Next, this is the final judgment of a competent court of criminal jurisdiction.

The words of the constitution on this subject are as plain as language can afford, viz:

"The judicial power of the United States shall extend to all cases, in law or equity, arising under this constitution, the laws of the United States, &c."

Is this a case arising under the laws of the United States? Surely we cannot suppose that any court would need argument on such a question. If it did not arise under the laws of the United States, under what law did it arise?

We cannot interpolate into the constitution the proviso, that the laws shall be such as are *constitutionally enacted*, because, in the first place, it is not so written, and the framers of that instrument knew how to use those words if they had meant it

In the second place, it would have been absurd, and destructive of the whole intent and meaning of the section, if they had said so.

The constitutionality of a law is one of the very things committed to the judgment of the federal judiciary, even to the extent of giving the Supreme Court an appellate control over the State courts, whenever such a question is presented in those courts and decided by their judges.

The 3d article of the constitution was carefully framed with the intent to raise one tribunal, which should decide, in the last resort, on the validity of all acts of Congress, so that the laws might operate equally over the Union.

That this is a power vested in the federal judiciary, and, in the last resort, to it alone, has never been doubted that I am aware of, unless it be by the supreme court of the State of Wisconsin. It is so utterly anomalous to suppose that the constitutionality of an act of Congress should be decided on, *without appeal*, by each court of the different States, that it cannot be attributed to rational men, as our fathers undoubtedly were. Let us look for a moment at the consequences. A law is passed punishing a certain crime. In New York the State courts pronounce it unconstitutional, and it cannot be enforced there. In Pennsylvania it is pronounced constitutional, and the citizens of one State are punished, for what the citizens of the other do with impunity. A direct tax is levied; in New York it is collected; in Pennsylvania the courts pronounce it unconstitutional, and the citizens of that State are exempt. Such are but single instances of the utter confusion to which such an hypothesis would reduce the system.

The convention of 1789 were not such bunglers at their work. Says Mr. Madison, in the 39th number of the Federalist, speaking of

questions as to the respective powers of the federal and State governments: "It is true, the tribunal that is ultimately to decide, is to be established under the general government. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general rather than the local government, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combatted." And although Mr. Hamilton, in the beginning of the 80th number, in speaking of the cases to which the judicial power of the Union ought to extend, uses the phrase, "cases arising out of the laws of the United States passed in pursuance of their just and constitutional powers of legislation," yet, throughout the 78th, 79th, 80th, and 81st numbers, he everywhere assumes, that the question of whether or not the laws are so passed, is one which is to be decided by that judiciary. Says that eminent man, in the 81st number: "The most discerning cannot foresee how far the prevalence of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts, constituted like those of some of the States, would be improper channels of the judicial authority of the Union State judges, holding their offices during pleasure, or from year to year, would be too little independent to be relied on for an inflexible execution of the national laws." See also 1st Kent's Com., 319; 1st Curtis's Com., 5, 6, 7.

I have intentionally omitted all reference to decisions of the Supreme Court, preferring to quote men who held no federal office, and had no motive to enlarge the power of the federal judiciary. Although the judges of Wisconsin tell us that they are controlled by reason, and not by authority, yet I can but think that the opinions of Hamilton and Madison, given cotemporaneously with the formation of the constitution, should be considered weighty, even if their reasons failed to convince.

I have said so much on this point, because, although the judgment of the court of Wisconsin is not put upon that ground, yet the judges, in their opinions, seem to intimate that the jurisdiction of the federal courts would be at once ousted, by simply deciding the act in question to be unconstitutional.

I trust I have shown that the jurisdiction of the courts of the United States is given especially over such cases; and that the necessity of one tribunal to determine the validity of the laws of the United States was one main reason for the adoption of the constitution.

But if the constitution has expressly vested in the federal judiciary the power to determine on the question of the conformity of all laws, State or federal, with its provisions, even in cases where the State courts are called upon, in the exercise of their legitimate functions, to decide the point; *a fortiori*, it has vested in the federal tribunals the power of deciding it when arising in their own forum.

To return, then, to the main line of our argument. The jurisdiction of the United States, vested in this case by law in the district court, is complete and exclusive, over all cases arising out of the criminal laws of the United States, whether constitutional laws or not.

See decision of Judge Cheves in case of Rhodes, before referred to, Sergeant's Const. Law, 284.

The supreme court of Wisconsin rest their decision on the following series of propositions:

1st. The district court of the United States has a limited jurisdiction, at least in criminal cases.

2d. Being a court of limited jurisdiction everything necessary to give it jurisdiction must appear on its records.

3d. The indictment must therefore set out an offence under some act of Congress, which Congress has given the district court power to try.

4th. This indictment, or, at least, the two counts on which the conviction was had, does not set out such an offence.

The conclusion is, that the court has no jurisdiction of this case, and its judgment is void.

I say that these are their propositions, because the line of their argument seems to require them, although the court in their official opinion do not in words assert the second proposition; on the contrary, the court say they admit, in deference to the decisions of this court, that the judgments of a district court are not void because they do not set out the grounds of their jurisdiction. (3 Wise, 181.)

But this admission is a logical "*felo de se.*" If the district court is entitled to the presumption of "*omnia rite acta*" due to superior courts, which is, that they have acted within their jurisdiction until the contrary appears, then there is an end of the question.

This the court do admit, as we have seen; but they say that in this case it appears that the court *had not* jurisdiction. How, and where?

The exception which the court takes is, that the indictment does not come within the act of Congress, in that it fails to charge that Joshua Glover, the person in custody, and whose escape was aided, was "a person owing service or labor."

But surely the court should have gone further, and told us how it appears on this record that he *was not*.

That is a point to be determined by inspection of the record. Joshua Glover *may* have been such a person, and if he was, then the district court had jurisdiction.

If it does not appear on the record whether he was or not, then, as the supreme court of Wisconsin admit, the presumption is that he was; and that *the fact appeared on the trial*, though not charged in the indictment. This presumption arises from the fact that the defendant was convicted and sentenced. It was unquestionably an oversight in the court of Wisconsin to admit that the district court is one to which the presumption of jurisdiction is given until the contrary appears.

It is impossible that grave judges could have said intentionally that it appears affirmatively here, that there was no offence committed against the act of Congress.

Waiving, then, that admission as being unguardedly made, we inquire whether the district court of Wisconsin is such a court as must show its jurisdiction affirmatively in order to sustain its judgments.

This court has repeatedly decided that it is not, which in ordinary cases would be sufficient. But in a matter of conflict of jurisdictions as grave as this, I will inquire as though it were an original question.

The general proposition, that a judgment of a court, on any matter over which it has no jurisdiction, is void, is not disputed.

Every fact necessary to give the court jurisdiction must *exist;* but *non-sequitur* that it must appear in the record. By what law is such a requisition made on any court? There is nothing in the constitution, or any act of Congress, or, so far as I know, of any State, requiring it of the district courts.

The supreme court of Wisconsin doubtless referred to the common law of England. But that part of the common law evidently has no applicability here. The constitution of our courts is too entirely different. But what is the doctrine of the common law on the subject? Judges in England frequently use the terms *inferior courts*, and *courts of limited jurisdiction*, as synonymous.

Upon looking into the question we find that this is loose and incorrect phraseology.

The distinction which separates courts whose jurisdiction must affirmatively appear, from those whose jurisdiction will be presumed, is not between courts of limited and general jurisdiction, but between *superior* and *inferior* courts. As to what are the inferior courts, I know of no better evidence than the list of them by Lord Hale, Analysis 25, who tells us they are, corporation courts, courts leet, sheriff's torns, courts baron, county courts, hundred courts, and others.

All the courts of Westminster were always reckoned superior courts, though the jurisdiction of some of them was originally very limited—as the court of exchequer, which had jurisdiction only in revenue cases; the King's Bench, which had jurisdiction only in pleas of the crown.

The "counties palatine" were superior courts. 1 Saunders's Reps. 74.

The ecclesiastical and admiralty courts are called inferior, because they do not proceed by the course of the common law, and yet their judgments are held entitled to the presumption of jurisdiction unless the contrary appears. See (as to ecclesiastical courts) Ricketts *vs.* Bonham, 4 Ad. & E., 433; (as to admiralty) Ladbroke *vs.* Crickett, 2 Durnf. & East., 653.

It thus appears that in England it is a question of the importance and dignity of the court, not of the limited or unlimited nature of its jurisdiction; and we see how little foundation there is for the assertion, that by the common law, even if it were applicable, the district courts of the United States would be ranked as inferior, in the sense that requires their jurisdiction to appear affirmatively.

But the whole pretence that this was not a case arising under the act of Congress, is unworthy of serious argument.

The court themselves show an uneasy consciousness of the flimsiness of this pretext, by continually falling back on the idea of the unconstitutionality of the act.

If the case did not arise under the act, how is it material whether it was constitutional or not? But if it did arise under the act, then

the jurisdiction attaches, and the supreme court of Wisconsin are prohibited by their own statute, no less than by the common law and every principle of jurisprudence, from inquiring into the regularity of the proceedings, or the correctness of the judgment.

The consequences which would result from the admission of such a power as is here claimed need only be alluded to, to show its utter absurdity.

No court could enforce the criminal laws, if another court, having no legal supervision over it, could, by habeas corpus, release from imprisonment its convicts, on the ground that no offence was charged against them in the bill of indictment. There was hardly ever an indictment drawn, to which an astute lawyer cannot urge some exception more or less plausibly.

Yet it would be hard to deny the general principle, that no court has a right to imprison, without a conviction for some offence known to the laws.

The answer is, that the court competent to try cases under the law, is competent also to determine what elements are sufficient to make such a case; and, after it has determined, its decision shall not be reviewed by another court, unless by a court, and in a mode prescribed by law; and a habeas corpus is not such a mode, even if the court had the revisory power.

In the case of The King *vs.* Suddis, 1 East., 313 to 316, a habeas corpus was applied for, in behalf of one convicted by sentence of a court-martial. Says Le Blanc, J.: "But another objection is, that it does not appear *that the party was charged* with the offence of which he was convicted. To which the answer is, that is sufficient for the officer having him in custody to return to the writ of habeas corpus, that a court, having competent jurisdiction, had inflicted such a sentence as they had authority to do; and that he holds him in custody under that sentence."

Grose, J., says: "It is enough that we find such a sentence pronounced, by a court of competent jurisdiction to inquire into the offence, and with power to inflict such a punishment. As to the rest, we must therefore presume *omnia rite acta.*"

Of two decisions, made by courts of equal dignity, one is as likely to be right as the other; and what good is to result from letting one rejudge the other's judgments?

The true view of the question I believe to be, that no State court has a right to interfere, by habeas corpus or otherwise, with the writs, processes or decisions of the Federal courts, either for want of jurisdiction or any other cause. This I conclude, not from common law authorities, but from the nature of our system.

The people of each State of the United States have seen fit, in the exercise of their unquestionable and uncontrollable sovereignty, to divide the powers of government between two different sets of political functionaries. They have attempted, and to a wonderful extent successfully, to draw the line of demarcation between the matters confided to the care of the one government and those intrusted to the other. Neither has the slightest claim of jurisdiction over the matters not put under their control. The obligation of an oath is im-

posed on every official, State and federal, to observe and keep within the boundaries of his own jurisdiction, that boundary being defined by the constitution of the United States.

But inasmuch as it was foreseen that questions must unavoidably arise, out of the ever-changing circumstances of human history, as to the true construction of the instrument which marks the distribution of power, the same people determined to establish a tribunal which should decide without appeal all such questions.

This tribunal is the Supreme Court of the United States, composed of judges appointed by the President, as the representative of the federal power, ratified by the Senate, as the peculiar representatives of the States as sovereignties, and holding office for life, and with an unchangeable compensation, and thus perfectly independent of the powers that be. To this august tribunal the whole people have mutually agreed that questions of the construction of the constitution and of the federal laws shall be ultimately referred.

To the subordinate tribunals, equally recognised by the constitution, is committed the original judicial cognizance of all the matters which by that constitution are enumerated. If they transcend those limits they can be controlled by the Supreme Court. Such is the theory of our system; and a statement of it is sufficient to overset every pretence of an authority, on the part of the State courts, to take an oversight or control of their proceedings, or to review their judgments. The whole matter is taken from them by the constitution, and there is no magic in the words "habeas corpus" which can invest them with it.

Some astute minds have held that a power lies in the sovereign people of a State, assembled in solemn convention, to nullify a law of Congress. This I shall not stop to argue, for whenever that point is reached, the matter will be beyond judicial control. But no one, so far as I know, ever maintained the power of a mere court to do so.

The judges of the State courts have no power except that conferred on them by the people. The supreme court of Wisconsin have no power to decide on the rights of their fellow-citizens, save by authority delegated from the people. Now the same people have seen proper to vest the power of deciding certain matters in other persons, to wit, the judges of the federal courts, appointed in a mode prescribed by the constitution. The one grant of authority is as perfect as the other; and it is inconsistent with the genius of the system, that the one set of public servants should be allowed to interfere with the proceedings of the other. To support a power so anomalous, express words of grant should be shown.

There is nothing in the assumption, that unless the State courts retain a power to protect their citizens, they will be oppressed by the action of the federal tribunals. There is just the same reason for the assumption of a power by the federal courts to prevent the oppression of the people by the State courts. The rights of the people must be presumed to be safe in the hands to which the constitution has committed them.

To the decision of the circuit and district courts, is committed jurisdiction over broad and well defined clases of cases. In all such cases

the constitution provides that the Supreme Court shall have appellate jurisdiction under the laws of Congress. This was reckoned a sufficient safeguard. If it is not, there is no remedy save by altering, or overturning the constitution.

These views, arising out of our peculiar institutions, strengthen greatly, in the United States, the general doctrine held by every court where habeas corpus is known, that no one tribunal can interfere with or reverse the judgments of another over which it has no control.

The writ of habeas corpus is given to prevent illegal and unauthorized imprisonment, not to set aside the sentences of courts. If the court of King's Bench disclaim all power even to look into a judgment of the chancery, and vice versa, as we have abundantly shown in the cases quoted; if, in short, no English court can, by habeas corpus, deliver one confined by final sentence of any court of oyer and terminer, unless for excess of jurisdiction, and *then only when the revisory power exists*, as we have also shown; how much less can any authority exist, in the courts of distinct and independent judicial systems, to attempt such intermeddling?

Why should it be thought a strange thing that the judgment of a court should be conclusive? Such is the practice of all civilized nations; and without it the institution of courts would be a curse instead of a blessing.

But whatever may be thought of the general doctrine, in this particular case there can be no doubt of the grossness of the error into which the supreme court of Wisconsin has allowed itself to be betrayed.

I have not discussed the question, whether the indictment in the district court was sufficient, or not.

It would be derogatory to the dignity of this court to consider that question. Nor have I argued the constitutionality of the fugitive slave act. First, because the decision of the court of Wisconsin is not put upon that ground. Secondly, because I believe it important to be determined, that even if a law be unconstitutional, the State courts have no power to declare void the judgments of the federal courts therefor. I am far from doubting the constitutionality of that act, but it cannot properly come in question here.

Even if a law be declared unconstitutional by the proper authority, that is by this court, that decision would not make void judgments previously rendered under it.

The rights of parties once adjudicated, shall stand. The law is constitutional for the purposes of a *decided case*, if not so as to future cases. The decision of a competent court, unreversed, settles all questions both of law and fact.

This great doctrine runs through the whole law, and needs no quotations to support it.

To declare a law unconstitutional is only to say it is not law, and if a judgment may be opened in such a case, it may in every case where it is unsupported by law. Therefore it comes within the doctrine of the conclusiveness of judgments as to the parties, so important for the well being of society, and so amply recognised by all courts.

It is unecessary, therefore, to decide or argue the constitutionality of the act in question.

The argument to show the fallacy of the pretensions of the court of Wisconsin, even on their own reasonings, and under their own statutes, is respectfully submitted.

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1855

No. 35

S. V. R. ABLEMAN, *Plaintiff in Error,*

—VS.—

SHERMAN M. BOOTH.

BRIEF FOR THE UNITED STATES

C. CUSHING,
Attorney General.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1855.—No. 35.

STEPHEN V. R. ABLEMAN vs. SHERMAN M. BOOTH.

STATEMENT OF THE CASE.

On the 26th of May, 1854, Winfield Smith, a United States Commissioner, issued, at Milwaukie, his warrant for the arrest of Booth. The warrant recited the following facts:

That a judge of the United States had issued his warrant to arrest Joshua Glover, who was claimed by Garland as held to service or labor in the State of Missouri under the laws thereof, and being the property of said Garland, and had escaped into the State of Wisconsin.

That Glover had been arrested by Cotton, a deputy marshal, by virtue of the judge's warrant, and that Booth had aided, assisted, and abetted Glover in making his escape.

That said Commissioner, on examination, was satisfied that the offence charged had been committed, and that there was probable cause to believe that Booth was guilty of the offence.

That he, thereupon, required said Booth to recognise, with sureties, for his appearance before the United States district court.

That he so recognised, with surety, and that his surety arrested and delivered him to the marshal before the Commissioner, and requested the Commissioner to recommit him to the marshal.

That Booth failed to recognise again, as required by the Commissioner.

That thereupon the Commissioner, by his warrant, directed the marshal to deliver him to the keeper of the jail, who was directed to keep him until he should be discharged by due course of law. (Record, 5.)

Booth applied to the Hon. A. D. Smith, one of the assistant justices of the supreme court of the State of Wisconsin, for a writ of *habeas corpus*, which was allowed. (Record, 6, 7.)

Ableman, as United States marshal, having Booth in custody, made return to that writ, that he had him in custody under the warrant issued by Commissioner Smith. (Record, 7.)

Booth demurred to this return, and Judge Smith, on the hearing, sustained the demurrer and ordered his discharge. (Record, 8.)

Ableman obtained the allowance of a writ of *certiorari*, and removed the proceedings into the supreme court of the State. (Record, 10.)

The supreme court affirmed the decision of Judge Smith, and ordered Booth to be discharged from imprisonment. (Record, 18.)

The court filed a written opinion, which is contained in the record at p. 19.

Ableman removed the proceedings from the supreme court of Wisconsin to this court, on the ground that the validity of a law of the United States had been drawn in question before a State court, and that it had been held to be invalid.

POINTS.

The record presents—

1. Question of the authority of the courts of one of the States of the Union to discharge, by *habeas corpus ad sub jiciendum*, a prisoner in the custody of the United States.

2. Of the general functions and authority of the class of judicial Commissioners of the United States; and

3. Of the constitutionality of the act of Congress constituting the offence of which the party stood accused before the Commissioner.

All these points have been decided in the State of Massachusetts, in a manner the precise opposite of the decision in that of Wisconsin. Sims' case, vii Cush., 285.

But they are now for the first time before this court; and are of course to be discussed here as questions of new impression.

I. If the particular act of Congress under which the offence in the present case was charged be constitutional, and if the Commissioner had lawful power to act as such, then, upon the process as exhibited by the petition and return, the courts of the State had no lawful power by the writ of *habeas corpus ad sub jiciendum* to discharge the party out of the custody of the ministerial officers of the United States.

1. The question under what circumstances the judicial power of a State may issue the writ of *habeas corpus* to inquire into the detention of a person under authority of the United States, and to determine the legality of such detention, has not been passed upon by the Supreme Court of the United States, and is not very clearly determined in the courts of the several States themselves, although it has repeatedly arisen there in one form or another. (Sergt. Const. L. 282.) But a careful analysis of the several decisions, and a classification of them, will furnish reliable doctrine for the present inquiry.

2. The first appearance of the question is, in the case of certain persons arrested by General Wilkinson at New Orleans, as commander of the forces of the United States there, and, by him, transferred to Baltimore, and detained at Fort McHenry to await the orders of the Secretary of War, on the charge of treasonable practices in connection with Aaron Burr. On process of *habeas corpus ad sub jiciendum*, Chief Justice Nicholson, of Maryland, discharged these persons on the ground that their arrest and their detention were

without even color of right or authority. (Cited in Roberts' case, ii Hall's L., p. 195.)

Afterwards in the case of an alleged unlawful enlistment in the navy, the same court held that it had no right to interfere, the enlistment being under the constitution and laws of the United States, (Roberts' case, *ubi supra;*) and on application being made to the supreme court of New York for a *habeas corpus* to try the validity of an enlistment in the army of the United States, the court refused the writ, Chief Justice Kent arguing with great force that the courts of the United States alone had jurisdiction in the matter; while the other judges dissented on the question of jurisdiction, but argued on the inexpediency of taking jurisdiction as a point of discretion, since the party, if aggrieved, might have relief by applying to one of the judges of the Supreme Court of the United States. (Matter of Ferguson, ix Johnson, 239 ; see also Husted's case, i Johnson, 136.)

But subsequently to this, the question of jurisdiction, as applied to enlistments in the army (or navy) of the United States, was definitively settled, so far as a long series of decisions of the States can go, in favor of the jurisdiction of the courts of the States, by adjudications, first in Pennsylvania, (Commonwealth *vs.* Murray, iv Binney, 487,) then in Massachusetts, (Commonwealth *vs.* Harrison, xi Mass. R., 63, and Commonwealth *vs.* Cushing, xi Mass. R., 66,) then in New York, (matter of Carlton, vii Cowen, 471,) New Jersey, (The State *vs.* Brearly, ii Southard, 555,) New Hampshire, (The State *vs.* Dimick, ix N. Hamp. R., 194,) and again upon argument in Pennsylvania, (Commonwealth *vs.* Fox, vii Barr, 336,) and probably in others of the States.

3. These decisions, limited to the special case of military enlistment, have been justified on the ground that a State cannot be deemed so far to have surrendered her independence as to be incapable of inquiring, through her tribunals, into the imprisonment of her citizens, no matter how illegal it may be, provided it be by agents of the United States, and under color of their laws, (per Southard, J., The State *vs.* Brearly, *ubi supra ;*) that if, on such inquiry, the laws of the United States justify the detention of the party, the court will adjudge accordingly; that if they do not, then it is not a case arising under the laws of the United States, but only colorably so; that a mere pretence of such authority neither gives exclusive jurisdiction to the courts of the United States, nor ousts that of the States, (per Parker, Ch. J., The State *vs.* Dimick, *ubi supra;*) and that, if called on, it is the duty of the judicial courts of a State to see whether the party detained is lawfully so detained under the alleged authority and laws of the United States, (per Coulter J., Commonwealth *vs.* Fox, *ubi supra.*)

4. There is another class of cases in which the detention of the party, alleged to be held under authority of the laws of the United States, was by *civil* process, and not military enlistment. The supreme court of Pennsylvania, in a case where the party was detained under warrant of arrest of an alderman of Philadelphia, charged with misprison of treason, had up the party on *habeas corpus*, and admitted him to bail on the single ground that the arrest was by the authority of an inferior magistrate of the State itself. (Commonwealth *vs.* Hollo-

way, v Binney, 512.) And in another case in Pennsylvania, where a party was held in arrest by the mere act of the marshal of the United States as an alien, the court of that State proceeded to inquire into the rightfulness of the imprisonment. (Lickington's case, v Hall's L. J., 92, 313.) The courts of Maryland, also, have entertained *habeas corpus* to inquire into and decide the lawfulness of an arrest for piracy, made by a justice of the peace of that State. (Case of Almida, Sergt. Const. L., 286.) But the contrary has been decided in South Carolina, where, in *habeas corpus*, the court of the State refused to go into the question of the constitutionality of an act of Congress. (Ex parte Rhodes, Sergt. Const. L., 284.) In the State of Georgia it has been expressly determined that the courts of the State will not grant a *habeas corpus* to discharge a person committed under an act of Congress. (The State *vs.* Plinn, T. U. P. Charlton, 142.) And even in the State of Pennsylvania, where the assertion of the jurisdiction of the courts of the State has been, as we see, sufficiently positive, so far as it goes, it is at an early day, that, in a case where the district court of the United States has jurisdiction, the courts of the State have no right to inquire into its judgment, or interfere with its process, (per Tilghman, Ch. J., exparte Sergt's Ex'r., viii Hall's Law J., 206,) and has been definitively determined of late in the case of ex parte Passmore Williamson. (See Appendix.)

5. The view of this question taken by the general court of Virginia, is, that a State court will issue the writ on the application of any party showing probable cause; that on the return thereof, the party will be held as lawfully restrained, if confined in obedience to any constitutional law either of the State or of the United States; that therefore the State court will neither discharge nor bail a party whose commitment is regularly made with view to a prosecution in the courts of the United States for an offence alleged, which is cognizable therein; and that in such case, although the State courts have concurrent jurisdiction with those of the United States in all cases of illegal confinement under color of the authority of the United States, yet the State court will not look beyond the warrant of commitment issued by a competent court of the United States. (Ex parte Pool and others, Sergt. Const. L., 286.)

6. The converse proposition has been decided by the Supreme Court of the United States, to wit: that the courts of the United States will not interfere, by *habeas corpus*, with the process, criminal or civil, of the courts of the States. (*Ex parte* Dorr, iii Howard, 105; Johnson *vs.* The United States, iii McLean, 90.)

7. The appellate courts of the United States will not inquire by writ of habeas corpus into the regularity of process of their own inferior courts, where there is redress by appeal, error, or certiorari. (*Ex parte* Watkins, iii Peters, 136.)

8. Nor will the courts of a State. (Yeates' case, iv Johns., 317.)

9. The rule is the same in England. (Cameron *vs.* Lightfoot, ii Black., 1190; ii Saunders, 101, *y* note 2; Carns Wilson's case, vii Q. B., 984; Crawford's case, xiii Q. B., 613; Brenan's case, x Q. B., 492; Re Dunn, v Com. B., 215; Re Newton, xxi C. B., 97; Catherine Newton's case, xviii Q. B., 716; Re Cowgill, xvi Q. B., 336; Dime's case xiv Q. B., 554.)

10. It may be assumed, as a general proposition, in our system of law, that where a party is in custody under judicial authority having apparent jurisdiction of the subject-matter, no other court is collaterally to take jurisdiction of the case under cover of the writ of *habeas corpus ad subjiciendum*, even as between courts of the same sovereignty or jurisdiction. (Commonwealth *vs.* Winder, iv Penns. L. J., 265.) *A fortiori*, if the prisoner cannot be withdrawn from the jurisdiction of the United States by *habeas corpus* returnable before a court of different jurisdiction, that is, one of the States.

11. The better practice, if not the received one, is, when the case for the petitioner itself shows that he is lawfully committed, then, for the court in its discretion to refuse to grant the writ; for if it appears on the petition that the petitioner is not entitled to relief, why obstruct the course of justice by requiring another hearing on the return? Of the better practice examples abound. (Ex. gr.; *Ex parte* Kearney, vii Wheaton, 38.) Possibly, in the present case, the State judge may, in granting the writ, have deferred to an erroneously supposed exigency of the statute law of his State. But even if the statute of the State were such as to have taken away the common law and the usual statute discretion in regard to the issue of the writ, still the statute of Wisconsin itself gives effect to the writ only in the case of persons *unlawfully* deprived of their liberty; and the return of the writ shows a commitment on formal process under authority of the United States. The State court, it seems to me, has no rightful authority to go behind this return of the marshal. The return shows a good and sufficient cause of detention, and the facts thereon stated must be taken as true by the judge of the State.

12. It has been adjudged that no part of the criminal jurisdiction of the United States can be delegated by Congress to the State tribunals. (Martin *vs.* Hunter's lessee, i Wheaton, 304.) Of course the State tribunals cannot constitutionally have or exercise any part of that jurisdiction. To assume it, would be mere usurpation. A State court has no jurisdiction even to enjoin the judgment of a court of the United States. (McKim *vs.* Voorhies, viii Cranch, 279.) Nor can a State legislature determine the jurisdiction of the courts of the United States, or annul their judgments, or give to its courts the power to do this. United States *vs.* Peters, v Cranch, 135.) All these are primary elements of constitutional law. To ascribe to a State court the power to annul or supervise the proceedings of the courts of the United States, would be to disregard all the theory of the constitution, and the supremacy of the treaties and the laws of Union; it would be to rest the ultimate appellate judicial power in the State courts, instead of the Supreme Court of the United States, where it was lodged by the constitution; there would cease, amid the conflicting decisions of the State courts, to be any settled construction of acts of Congress; the United States would be deprived of the power of enforcing their own laws by the instrumentality of their own tribunals; and the result would be mere confusion, insubordination, anarchy, and the overthrow of the constitution.

13. It cannot be justly alleged that the accused is subject to any hardships by denial of the jurisdiction of the State court over his

case—that denial would not deprive him of lawful redress; for, as well suggested by the court in Ferguson's case, (ix Johns., 241,) the party may have relief in *habeas corpus* by application to one of the judges of the Supreme Court of the United States, or of the district court of the district of Wisconsin, the exercise of whose jurisdiction in the matter would not involve a conflict of jurisdiction between the federal and the State courts—a thing so much to be deprecated in all federative governments.

14. But suggestion appears in the case of an alleged want of jurisdiction in the United States.

I do not think the State court has any right on *hebeas corpus* here, to consider that question.

The courts of the United States are the constitutional judges of their own jurisdiction. The United States Commissioner has taken jurisdiction here; if he has taken it wrongfully, that is for the courts of the United States to determine. No judicial tribunal of the State of Wisconsin can have, under the constitution, rightful power to annul, adjust, limit or define the jurisdiction of the courts of the United States. The undertaking of a State judge to do this, and to discharge the present prisoner on the ground that the courts of the United States have not cognizance of the case, would bring the judicial powers and jurisdiction of the General Government and of the State Government into direct conflict and contradiction in the same case, and upon a subject-matter where the United States indubitably have jurisdiction by unequivocal provisions of the constitution. As well might a State judge sustain a writ of error to review and revise a decision of the Supreme Court of the United States. And such a power, if assumed at all, might as well be exercised after conviction and judgment as before, and would equally authorize the discharge of prisoners under sentence of the United States courts, to the utter extinction of the judicial powers which the constitution of the United States granted to the Federal Union.

15. It would avail nothing to alledge any authority of the States as such in the question, for the State judges, alike with those of the United States, are under oath to support the constitution of the United States, (Const., Art. IV;) and the constitution expressly declares that "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, any thing in the constitution and laws of any State to the contrary notwithstanding." (Const., Art. VI.) No law of the State of Wisconsin, so long as it remains a member of the Union, can abrogate the supremacy of the constitution of the United States, or absolve the conscience of its judges from obligation to give complete force and effect to the laws of the United States.

II. The party in this case was in custody of a ministerial officer under proper warrant of a committing magistrate of the United States.

1. The Commissioner had jurisdiction to cause an arrest, and to

examine and commit where an offence had been committed against the laws of the United States.

The acts of 1812 (ii U. S. L., 679, and 1817, iii id., 350) authorize Commissioners to take the acknowledgment of bail, and to take affidavits. That of 1842 (v U. S. L., 516, 517) provides that Commissioners "shall and may exercise all the powers that any justice of the peace or other magistrate of the United States may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same under the thirty-third section" of the judiciary act of 1789.

The section thus referred to provides, that a justice, judge, or magistrate, may cause offenders to be arrested, imprisoned, or bailed, "agreeably to the usual mode of process against offenders in such State."

The act of 1850 (ix U. S. L., 462, 463, § 1) provides, that the Commissioners "are hereby authorized and required to exercise and discharge all the powers and duties conferred by this act." Section four provides that they shall "have concurrent jurisdiction with the judges of the circuit and district courts of the United States in their respective circuits and districts within the several States."

These provisions show that the Commissioner had the most ample jurisdiction over the offence alleged to have been committed against the seventh section of the law, (ix U. S. L., 464,) and clearly had jurisdiction of the subject-matter, and over the offender, if properly brought before him.

2. The warrant sets out a substantial offence against the provisions of the act, in so far as they regard the extradition of fugitives from service.

It was insisted and held below, that the warrant failed to state an offence under the act of 1850, for the reason that it did not state that Booth aided, abetted, or assisted a person, who was arrested as a fugitive from labor, to escape from custody. (Record, 24.) This assumption is founded in a misapprehension of both the act and the warrant. The act, as far as applicable to this case, is as follows:

"§ 7. That any person who * * shall aid, abet, or assist *such* person so *owing service or labor* as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons, legally authorized as aforesaid, * * shall, for either of said offences, be subject to a fine not exceeding one thousand dollars and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States," &c.

The words "such persons" refer to those previously used in the same and in the preceding sections, where the words are "such fugitive from service or labor," "person held to service or labor," "such fugitive person," "person owing service or labor," "owe service or labor to the person or persons claiming him or her," "from which such fugitive may have escaped," "said person escaped," and "such fugitive," and all mean one and the same thing. They are all alike descriptive, and intended to designate a slave and his owner. It is not possible to mistake the intention of these various descriptions, however varied the language may be.

The material parts of the warrant applicable to this point are as follows:

"Whereas, Sherman Booth, * * charged on oath with having * * unlawfully aided, assisted, and abetted a person named Joshua Glover, *held to service or labor* in the State of Missouri under the laws thereof, and being the property of one B. S. Garland, and having escaped therefrom into the State of Wisconsin, to escape from the lawful custody of C. C. Cotton, a deputy marshal," &c.

Here are the very words used in one part of the act; and without them the description is so complete and perfect, that no person of ordinary intelligence could mistake what was intended. Technical nicety and particularity are not required of the arresting and committing magistrate. But if they were, it is found in the warrant in this case, where one set of the descriptive words of the act is actually used in an appropriate and proper manner.

The offence described in the statute is fully stated in the warrant; and consequently it is valid, and was sufficient for the commitment of Booth.

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN V. K. ABLEMAN

—VS.—

SHERMAN M. BOOTH

UNITED STATES

—VS.—

SHERMAN M. BOOTH

ORAL ARGUMENT OF J. S. BLACK, ATTORNEY GENERAL

J. S. BLACK,
Attorney General.

ABLEMAN *vs.* BOOTH.—THE UNITED STATES *vs.* BOOTH.

SUPREME COURT OF THE UNITED STATES.

May it please your Honors:

THESE two cases may be regarded as one and the same case. They both arise out of the same transaction, and one of them takes it up just at the place where the other drops it. It is some little time since I have carefully looked at the record, but I think I can state the facts of the cases without danger of committing any material error.

It appears that a negro slave absconded from his master in the State of Missouri, and came over into Wisconsin, where he was apprehended under the act of 1850. While he was in the custody of the marshal, he was aided and assisted by Booth, the defendant in error, to escape. For that offense Booth was prosecuted under the seventh section of the act; arrested, carried before a commissioner, and, refusing to give bail, was committed for trial. After he went into custody under the warrant of commitment, he made application to one of the judges of the Supreme Court of the State of Wisconsin for a writ of *habeas corpus*, which was allowed him. The judge, after hearing the cause at his chambers, delivered a very elaborate opinion, in which he proved, apparently to his own entire satisfaction, that the fugitive slave law was unconstitutional, and that there were certain fatal defects in the warrant of commitment. From these premises he drew the deduction that he had the right to discharge the prisoner, so that he could not be tried by the United States Court.

To this proceeding a *certiorari* was taken by the District Attorney of the United States, and the case was removed into the Supreme Court of the State, in *banc*. There it was heard again. The judge who had already heard the cause adhered to his previous opinion. One of his brethren agreed with him that the law was unconstitutional, but put his opinion upon grounds somewhat different. The other judge concurred in affirming the order of discharge for the supposed

defects in the form of the warrant. The prisoner was therefore finally discharged, so far as that proceeding went.

Nevertheless, at the next term of the District Court of the United States, a true bill was found by the grand jury, and upon that indictment a bench warrant was issued by the judge, on which he was apprehended to await his trial at the next succeeding term. He made application again for another *habeas corpus* to the Supreme Court of Wisconsin. They refused to allow the writ, on the very sensible ground—sensible, I mean, when considered with reference to what the same court did before and afterward—that they had no authority over the matter, and that the District Court had all authority. He was tried; his guilt was proved; he was convicted; a motion was made for a new trial, which was refused; he moved in arrest of judgment, and that also was overruled; he was sentenced—sentenced moderately—to a fine of two hundred dollars, and ten days' imprisonment in the common jail.

Immediately after he went into the custody of the marshal in execution of this sentence, he made a third application to the Supreme Court of the State for another *habeas corpus*, which was allowed him, and they heard the cause again. But then it was heard *ex parte*. The District Attorney supposed that he had done his whole duty when he had followed the prisoner until he saw him convicted by a jury, and in custody under the sentence of a court having exclusive jurisdiction of the offense. But the case was argued at length by the counsel for the prisoner, and, after that, it was taken up by the judges and argued by them at still greater length on the same side. The same differences of opinion manifested themselves then, which had existed before, on the constitutional question. The third judge, who had previously dissented from the other two, dissented again, holding that the Fugitive Slave Law was constitutional enough. But it seems not to have entered the head of any judge on the bench that the question was already settled. That the District Court, the tribunal to which Congress had referred the whole case for decision, was entitled even to a voice in the matter, was a proposition which no one thought of unless to deride it.

There was another subject upon which they were unanimous, and that was, that if they could find any defect in the pleadings—if the offense was not set forth in the indictment with the legal precision which the statute required, *according to their construction* of the statute—then also they might reverse the judgment of the District Court, and enlarge the prisoner. Thereupon each judge drew as fine a sight as he possibly could upon the indictment, and each one saw, or thought he saw, some defect in it. Upon these grounds they discharged the convict, who goes unpunished at this hour. He has, besides, the implied assurance of the Supreme Court that if he pleases to commit the same offense again, they will use all their power to screen him from justice.

When these writs of error were taken, the judges refused to obey them, and directed their clerk not even to give us a copy. But we had copies before, and upon them the cases were docketed, as your honors remember.

Before I proceed to consider what may be called the legal merits—or rather the demerits—of these cases, I desire to call the attention of the court (but only for a moment) to the manner in which they come here. I have not a doubt that the filing of a record attested as this is will give your honors complete and ample jurisdiction to revise the proceedings and to reverse or affirm the judgment as you may see fit. I am equally well satisfied that my predecessor's conduct was governed by good and wise reasons. Nor do I think that any other course ought to have been taken by this court itself *ex mero motu*. But what I do fear is, that this case, taken in connection with that of Worcester *vs.* The State of Georgia, may be regarded as authority for a principle which I am very sure neither of them was intended to cover. The inference may be that this court considers itself as being powerless to enforce obedience to a writ of error addressed to a State court. This, of course, is untrue, and might lead to serious trouble. It might happen—it is almost a wonder that it did not happen in this case—that nothing but a regular return will bring the record here.

Most assuredly, if this court is authorized to issue a writ of error, as by the Constitution of the United States and the act of 1789 it is, to a State tribunal of the last resort, that authority must be coupled with the power to enforce obedience. It is no law unless it has a sanction, as Mr. Justice McLean said in Robinson's case. How, then, is the duty imposed by the command of this court upon the judges of a State court, to be enforced? I answer, by proceedings against them as for a contempt. That is the mode of enforcing obedience to all process of every court, except in cases otherwise specially provided for by statute. Against whom is the proceeding to be directed? Not against the clerk, who is merely the hand of the judges, but against the judges themselves, to whom the writ of error is directed, who can not shift the sin of disobeying it on their servant, nor atone for their offense by a punishment inflicted on him.

In the practice of that State with whose code of procedure I am most familiar, it has often happened that rules have been made in the Supreme Court upon judges of the Common Pleas to show cause why attachments should not issue against them. I speak what I do know when I say that, in every case where a rule was taken, the proceeding would have ended in the conviction of the judges, if some good defense had not been made. In one of the recent English reports—the fourth volume of the "Jurist"—where Baron Alderson was ruled to show cause why an attachment should not issue against him for a similar offense, he made an explanation which showed that he was not in

contempt, and therefore the matter was dropped. But it was not dropped because the court that issued the writ of error did not think they had the power to imprison him if he had finally and willfully refused to perform his duty. The general rule is also laid down in the Institutes. In the very remarkable controversy that took place in New York between Lansing and Yates—or one of the branches of that case—the Court of Errors and Appeals took the same course with the judges of the Supreme Court.

JUDGE NELSON.—That is the acknowledged practice in New York.

ATTORNEY-GENERAL BLACK.—It is so in Pennsylvania; it is so everywhere. All authority is for it. There is no authority nor no practice against it. The reason of the thing and all the analogies of the law are in favor of it.

For these reasons, I hope that your honors will cause it to be understood, as clearly and distinctly as possible, that these judges, in refusing to send up their record, violated a plain obligation imposed upon them by the Constitution of the United States, which they were sworn to support; that in that refusal they were guilty of a contempt of this court; that such a contempt is a high crime against the administration of justice; and that these men owe their impunity, not to any weakness, or supposed weakness, of this tribunal, but to the magnanimity of the Government in forbearing to ask for punishment.

Passing from that, let us look at the record itself.

I desire to speak as respectfully as possible of "all who are placed over us." I know that it is the religious duty of every Christian man, and the political duty of every good citizen, not "to speak evil of dignities." But I would be withholding from this court what I most devoutly believe to be the truth, if I did not say that the whole of these proceedings in the State Court of Wisconsin are, from beginning to end, a mere tissue of legal absurdities. I say this "more in sorrow than in anger"; for two of the judges, constituting a majority of the court, have discussed the case in terms of decency and moderation. Of the other judge I have nothing to say one way or the other. If you will take the trouble to read his voluminous opinions in these cases you will know as much about him as I do.

The legal point that was decided in one of these cases is just this, stated as shortly as possible—of course, I make the statement in my own words: *That where an offender against the laws of the United States is on his trial, the court which alone has power to try him shall not be permitted to determine whether the law that defines the offense is constitutional or not; nor to give the construction of it; nor to decide whether the offense is sufficiently set out upon its own record; but after conviction and after judgment all these questions remain open to further inquiry, and may be readjudicated by any State judge who is invested by a State law with the general authority to issue writs of*

habeas corpus. That is the proposition decided in one of these cases. In the other, it is held: *That a party charged with an offense against the laws of the Union, and in custody of the Federal officers awaiting his trial, may be taken out by habeas corpus and discharged without trial, by any State judge who has self-complacency enough to think he understands the law and the Constitution better than the tribunal whom Congress and the framers of the Constitution have charged with the duty of deciding upon them.* If I were required to make one head-note for both the cases, it would be this: *That the habeas corpus in the hands of a State judge may be used against the Federal tribunals as a Writ of Prohibition before judgment, and a Writ of Error after judgment.*

This claim is not based by the Wisconsin court upon any appellate jurisdiction which they supposed themselves to have. They admit that no authority is given them by any law, either of the State or of the United States, to review the proceedings of a Federal court. They do not assert even a right to try the party themselves. They merely say that no Federal court can have jurisdiction in any case where it has committed or is likely to commit an error. Being without jurisdiction, its proceedings are null and void. They have a right to determine what is an error and what is not. It follows from these premises that no Federal court which presumes to differ from them, either on a profound question of constitutional law or on a sharp point of special pleading, can exercise the authority given to it by the Constitution and laws of the Union. Upon this principle it is manifest that the laws of the United States can never be executed except by the grace and favor of the State courts, and such grace is never to be given when they disagree in opinion.

You have *no jurisdiction* when the State judges think you exercise it erroneously. No jurisdiction! One blast upon that ram's horn and the whole structure of judicial authority built up by this Government comes tumbling about our ears like the walls of Jericho.

The Constitution declares that the Federal courts shall try all offenses against the laws of the United States; and Congress has given exclusive jurisdiction of Booth's offense to the District Court. No law, State or national, has authorized the Supreme Court of Wisconsin to intermeddle with the business in any one way or another. Yet the latter court asserts its own jurisdiction and denies that of the Federal tribunal. The logic by which the judges bring about this strange *bouleversement* of the law is curious to look at. The first thing they do is to assume that their opinion is conclusive—"the end all and the be all" of the whole matter. Next they decide that the District Court is without authority, and its judgment a nullity. Thence they come back, as the surveyors would say, to the place of beginning, and conclude that inasmuch as the Federal court has no power they

themselves have all power. Their language to the Federal judge is substantially this: "We admit that the validity of our judgment depends on yours being void, but yours is void because ours is valid; and when we pronounced our valid judgment, we said yours was void." Logicians have told us that reasoning in a circle proves nothing. But here it has been used as a means of proving what could not possibly be proved in any other way.

If this power were conceded to the State courts, it would never be grossly abused by any judge who acknowledges the principle of *stare decisis*. But in this case all authority was trampled under foot. That public wisdom which, in every country, is made the rule of civil conduct for the very purpose of supplying the deficiencies of individual judgment, is treated with contempt, and in its place is substituted a mere private notion, which each judge carries about in his own breast. No matter whether he got it from a stump-speech or a partisan newspaper, or whether it be an original crotchet of his own brain, if it be his own, either by adoption or birth, that fact alone immediately consecrates it and makes it the supreme law of the land, so far as he has anything to do with the administration of it. The evil effect of departing from the settled law, and putting up private opinion as a standard of decision, was never so palpable as it is in this case. Here was a rule of constitutional interpretation, acted on by the Father of his Country, and by all his successors; approved by the second Congress that assembled under the Constitution and by every succeeding Congress; affirmed directly or indirectly by every judge that ever sat on this bench, and by all the Federal judges of the country; approved, moreover, by every State court (except that of Wisconsin) in which it was ever questioned; and all the people have said "so be it." This rule, so sanctioned, so approved, so sustained by every branch of the Government, and by all classes of people—this is the rule, which the court below repudiated. Why, it will stand the test of orthodoxy which St. Augustine applied to the creed of the church—*quod semper, quod ubique, quod ab omnibus creditum est.* Whosoever opposes his sole opinion to such an article in the judicial faith of the country, must needs be a promoter of heresy, disorder, and schism to the whole extent that his power can go. We are in the habit of speaking about legal authorities under the figure of a stream. When they are numerous, decisive, and strong, we call it a current. There is no current of authority here, but a torrent, rolling forward impetuously as the waters of the Niagara River, and pressed from behind by all the waters of the lake. And here stand one or two men on the shore who try to roll it back by throwing their handful of sand in it. But the mighty torrent still thunders onward.

Labitur et labetur in omne volubilis avum.

Still, perhaps everywhere, except in Wisconsin, we might manage to get on in some sort of fashion if this power were confined to the Supreme and Superior Courts—to those who occupy the highest posts in the State judiciary. But it is claimed as a mere incident to the law of *habeas corpus*, and, therefore, any judge who can issue a *habeas corpus* can do everything that was done by the Supreme Court of Wisconsin. In most of the Western States the power of issuing such writs is given to the probate judges, whose most important business it is to settle administration accounts, and who may, or may not, be fit even for that. In other States this power is wielded by the associate judges of the Common Pleas, whose general duty it is to sit beside the president during term-time, and do nothing at all. They are almost universally respectable men in their way, but nobody supposes that any great amount of legal talent is wasted upon that office. Your honors see very well, that, according to the Wisconsin doctrine, the highest, and the most elevated, and the most learned of the Federal judges is completely subordinated to the lowest, the most prejudiced, and the least educated of all the State judges, and that, too, on questions of national law. A judge appointed by the proper organs of the national Government, responsible to the public opinion of the whole nation, triable before the representatives of all the States for any offense he may commit in office—he is placed in total subjection to some other judge, who owes no responsibility to anything but the popular sentiment of a single county. If this were acted on but a little while, our judicial system would acquire a mode of progression like nothing I ever heard of, except Cotton Mather's snake—a very curious specimen of natural history, which, he said, he discovered in Massachusetts, and which he described as "a serpent which goeth one while with its head foremost, and one while with its tail foremost."

Suppose one of your honors to be sitting in the Circuit Court and trying a party accused of some grave crime against the laws of the United States—piracy, murder upon the high seas, the offense of importing captured Africans into the United States or exporting stolen slaves into Canada—it matters not what you suppose it to be. In the course of the trial the constitutional validity of a statute is denied, its construction is doubted, or the correctness of the pleading under it is impugned. You are not to decide these questions. It is not worth while for the counsel to argue the case to you; but if there should happen to be, among the spectators in a corner of the court-house, a probate judge of the county, let them address him; for he is the judge of last resort. You need not charge the jury. The verdict, if it be a verdict of guilty, will not stand a moment before the omnipotence of a *habeas corpus*. Charge the judge in the corner; for if you do not convince him, he will mount his *habeas corpus* and charge

down upon you. And he is an adversary that you can not possibly cope with. One blow from him will knock your proceedings all to pieces. One word of his will paralyze your power. If he but breathes upon your judgment he melts it into nothing. Even if you convince him, perhaps you have not done the tithe of the work you have yet to do. There may be a score of other judges in the neighborhood having just as much power over your judgment as he has, and if you do not get all of them you may as well have none. How are you to get them? Will you call them together and make a general speech? or will you canvass them separately? Their "most sweet voices" you must have in your favor, or else the execution of the Federal laws will become impossible.

The very reverse of this is as necessary to the administration of justice in the State as in the Federal courts. Imagine two State courts to be sitting side by side, each invested with its own exclusive jurisdiction over different classes of subjects, but all the judges of both having power to issue writs of *habeas corpus*. Shall a single judge of one discharge the prisoners and set aside the judgments of the other? They may on the principles laid down in this case. Nay, it is but carrying the doctrine to its consequences to say that, where a criminal court consists of three, four, or five judges, one of them, who dissents from the rest on a question of law, may wait till the term is over, bring the convict out from the penitentiary, and discharge him, on *habeas corpus*, despite the majority.

This notion that a judge who hears a case on *habeas corpus* is not restricted to his own proper jurisdiction, is a growth of the last ten years. Within that time great men at the bar have seemed to believe it sound; and now and then a judge has been found who eagerly grasped at the opportunity of doing by *habeas corpus* what the law forbade him to do in any other way. Six or seven years ago, a man who was arrested in Ohio, for embezzling public money in California, was taken out of the hands of the Federal authorities by a State judge, and to this day he runs at large unwhipped of justice. It was a grievous outrage on the authority of this Government, and it ought to have been condignly punished. Some time afterward a marshal in Ohio, who had a prisoner in his custody under process of the Circuit Court, was served with a *habeas corpus* commanding him to bring that same prisoner before a State judge. The marshal could not obey the *habeas corpus* without disobeying the other process, which he knew to be legally binding. The next place he found himself was in the custody of a sheriff, and he was on the point of being sent to jail for doing his duty, when Mr. Justice McLean threw the shield of his protection over him and pronounced all the proceedings of the State judge to be entirely void. In 1857 it seemed as if a civil war was about to break forth in Ohio, by reason of an effort which the State officers made to

thrust themselves between the Federal authorities and certain persons who had committed crimes against the United States. The history of this transaction is known to the court. It is also known how the Ohio Legislature has virtually abolished the old writ of *habeas corpus*—the writ made sacred and perpetual by the solemn words of the Constitution—and supplied another thing, which serves as a mere excuse to rescue and re-capture prisoners who are detained in lawful custody. But no Supreme Court—no court of any kind, whose opinions are thought by itself to be worth reporting—has taken the ground on which the Wisconsin court planted itself in this case.

All laws made for the general welfare of a country so large as ours, and for the protection of rights so diversified, must necessarily encounter some local unpopularity. It was always so from the origin of the Government. But in the earlier and better days of the Republic, this mode of opposing them was not thought of. In 1796 the excise duty on distilled spirits was believed in Western Pennsylvania to be not only oppressive but unconstitutional. But the men of that day threw themselves back on the moral right of revolution, and opposed the obnoxious law with arms in their hands. They never dreamed of carrying on the "Whisky War" by firing off writs of *habeas corpus* at the Federal authorities. Two years afterward there was a strongly-marked division of sentiment on the constitutional validity of the Sedition Law. There was but one man in the country who thought of asking relief at the hands of a State judge. The precedent was not thought a fit one to be followed, and Mr. Sergeant's research alone has saved it from total oblivion. Callender and Lyon and Cooper served out their time, and paid their fines, or waited the advent of a new Administration. At a later period, when nullification arose in South Carolina, the people of that State assembled in convention, and abrogated the tariff act by a solemn Ordinance. This, according to their theory, wiped it from the statute-book as completely as if it had been repealed by Congress. Then they authorized resistance to it, and judges might oppose it by *habeas corpus* and *homine replegiando* on the same principle that a private citizen could oppose it with pike and gun. We all remember the great debate in the Senate on this subject. Mr. Webster won his victory, so far as it was a triumph of logic and of law, by pressing this very point upon his adversary. "How," said he, "will you release yourselves from the grasp of the Federal judiciary?" But the victory would have been on the other side, if General Hayne could have answered that the State judges had a right to take every case into their own keeping by means of the *habeas corpus*. He could not say so; he was too wise a man to believe it, and too honest to say what he did not know to be true. President Jackson, in his proclamation, used the same unanswerable argument. The truth is, that the exclusive authority of the Federal judges to

decide all cases arising under the Federal laws was the lion in the path of nullification. It saved the country from dismemberment then, and no one knows the day nor the hour when it may be necessary to invoke it again for the same purpose. When it ceases to be maintained, the Union of the States will become a rope of sand.

The highest tribunals of the States (that of Wisconsin always excepted) have uniformly refused to adopt this wild notion of their power over the Federal laws. It was distinctly repudiated by the Supreme Court of Massachusetts, in Simms's case; by that of New York, in Prime's case; and by that of Pennsylvania, in Williamson's case. It had been exploded long before by Judge Cheves, of South Carolina, in an opinion of singular brevity, clearness, and force.

But there is one authority on this subject, to which I beg your special attention. What I refer to is an act of the Wisconsin Legislature, in which the judges of that State are plainly, expressly, and unequivocally forbidden to do the very things which were done in both these cases. The statute declares that no *habeas corpus* shall be allowed to any person who is detained in custody under process issued by a Federal court or judge having exclusive jurisdiction of the offense therein charged, nor shall such writ be allowed to one who is detained under the final sentence or judgment of *any* court of competent jurisdiction.

Mr. JUSTICE GRIER.—Was that statute in force at the time of this decision? Perhaps it was enacted since.

ATTORNEY-GENERAL BLACK.—It was in full force at the time. The decision of the court was in flat opposition to it. The judges saw it, met it full in the face, quoted it, and did not pretend to misunderstand it. They knew it to be as perfect a prohibition as the Legislature could make of their whole proceeding. Will your honors believe me, when I tell you what reason they gave for disregarding it? They said it was unconstitutional! They not only asserted their own authority to resist the execution of Federal laws, and set aside the judgment of a Federal court, but they denied the power of their own Legislature to confine them within the sphere of their proper duties.

I suppose I have said enough to show that, whatever the law upon the subject may be, the Supreme Court of Wisconsin is decidedly *not* the place to look for a sound exposition of it. I submit that the propositions of the brief are true, and sustained by the authorities cited. I shall refer to them severally.

I. *The judges were guilty of a criminal contempt in refusing to send up their record.* On this I have nothing further to say beyond a reference to the books. (2 Coke Inst., 425–27; 4 Jurist, 190; Act 1789, sec. 17; Act 2, March, 1831.)

II. *The act of 1850 for the extradition of fugitives from labor is constitutional, binding, and valid.* This has been denied on three grounds: 1. Congress had no power to legislate on the subject. 2. There is no provision for the trial of a fugitive by jury. 3. Commissioners are part of the machinery to be employed in executing it. The two first of these points have been so often decided here and elsewhere that this court, on several recent occasions, have admonished counsel that they were no longer regarded as open to argument. The third is equally well settled; but at first blush it has something about it a little more plausible. The argument on the wrong side is this: The judicial power of the United States is given by the Constitution to the Supreme and other courts, of which the judges shall be appointed in a certain way, and hold their commissions during good behavior. Commissioners exercise judicial functions, and are therefore judges. But they are not appointed in the way prescribed by the Constitution for the appointment of judges, nor do they hold their offices during good behavior. The vice of this argument consists in the assumption that commissioners are judges merely because they sometimes exercise powers which the judges themselves might exercise without them. A judge may commit to prison, take a recognizance of bail, administer an oath, investigate the facts of a cause, and deliver into the proper custody a fugitive from justice or labor. But it does not follow from this that he may not delegate the power to a clerk, examiner, master in chancery, auditor, commissioner, or other assessor. These are but servants of the court, not judges. Their decisions can determine no ultimate right, and are never conclusive either upon the court which appoints them or any other.

The same rule of constitutional interpretation which forbids the courts to appoint officers necessary for them, would require Congress to exercise directly all legislative power. Then Congress must sit every day as a town council for Washington and Georgetown. The executive power being given to the President, he must collect all the revenues and pay them out in his proper person; command the army and navy without the aid of subordinates; defend the country by his individual prowess; and put down every insurrection with his own right hand.

But this *reductio ad absurdum* was hardly needed, for the cases I refer to are more than enough to put every constitutional objection to the act of 1850 at rest forever. (5 How., 230; 14 How., 13; 16 Barb., 268; 7 Cush., 285; 5 McL., 469; 2 Pick., 11; 5 S. & R., 62; 12 Wend., 311; 4 W. C. C. R., 327; 16 Peters, 539; 1 Bald., 571; 3 Liv. Law Mag., 386; 18 How., 972.)

III. *But the judgment of the District Court, even if it had been erroneous, was absolutely conclusive.* Being a court not only of compe-

tent but of exclusive jurisdiction, no question of law or fact which was or might have been raised on the trial can afterward be examined either directly or collaterally between the same parties in another court. Here was an offender against the United States who entertained some new and curious views of the statute which defined his crime. He says the Constitution protects him from the operation of such a law; by his construction of it he is not within its meaning; and (what is worse than all) there is a flaw in the indictment. On these acute propositions he bases his claim to impunity, and his proper judge, whoever that may be, must determine whether his defense is false or true. Who is his proper judge? The Constitution and laws of the United States declare the sole authority over the subject-matter to be in the District Court, and that court pronounces his defense unsound in law. Thereupon he appeals by *habeas corpus* to another court, which all law, both State and national, has forbidden to take cognizance of the matter; and this latter court, in defiance of the prohibition, not only re-examines the cause, but enlarges the convict and sends him abroad to commit the same offense again.

The rule of law which made the judgment of the District Court conclusive in this case upon all the points which were here re-examined in the State court, is so clearly defined, so universally acknowledged, so well settled, so necessary, and so wise, that if I had not seen this record, I should have been willing to affirm that no judge in America had ever denied or ever would deny it. It is laid down in all the horn-books of the law; and I make some citations merely to show how strangely the authorities have been overlooked: (Dutchess of Kingston's case, St. Trials, 2 Smith's Leading Cases—note; 5 C. B. Rep., 418; 14 Q. B. R., 566; 6 Q. B. R., 666; 57 Eng. C. L. R. 216; Cro. Car., 168; 1 Barb., 240; 26 Penn. St. Rep., 9; Stat. of Wis., Hab. Corp.; 1 Curtis Com., 155–'56–'57; Serg. Con. Law, 277; 1 Kent, 319 and 419; 2 Story on Const., sec. 1756–'57; "Federalist," Nos. 30 and 81; Rhodes's case cited, Searg't, 284; 2 Wal., Jr., 536.)

IV. *When a party accused or convicted of an offense against the United States is in the custody of the proper Federal officers, all process issued by State judges to take him out of such custody is void, and the Federal officers may lawfully disregard it.* Surely, when a judge or other officer of the United States is engaged in a duty confided to him by the Constitution and laws, another judge who is wholly destitute of jurisdiction can not thrust himself into the business. No country in the civilized world permits the administration of justice to be baffled and obstructed in that way. All process intended for that purpose, or calculated to have that effect, must necessarily be void. When a Federal officer is commanded by his own court to do one thing, and a State judge commands him to do another, he can not obey both.

It admits of no doubt that in such a case he is bound to execute the process which is legal, until he is prevented by physical force. There may be cases in which it would be prudent to yield the right rather than provoke a collision and excite the passions which such a collision would kindle. But it is not the point of prudence which you are called on to decide; it is the question of law. What is the legal right and duty of an officer so situated? Your answer, I confidently trust, will be that he is bound to execute the legal writ, if it be possible; that he must not voluntarily abandon his duty; that the mere service of a bogus writ upon him is no excuse for surrendering a prisoner whom he is required to keep safely. If the prisoner be forcibly taken out of his hands, that is another thing. That is a rescue; and all concerned in it (including the judge who ordered it) may be dealt with accordingly.

I claim nothing for the Federal courts which is not habitually conceded to the State courts. Both are equally independent in their respective spheres. Every judicial officer, acting within his jurisdiction, is an organ of the law, and the highest can not irregularly interfere with the lowest. A justice of the peace is entitled to as much respect as the Chief-Justice of the United States. Of course, I do not mean that involuntary homage which we all pay to the highest intellect combined with the purest integrity, but the *legal* obedience which is due to every judge who confines himself to the duty assigned him by the law. When a valid and binding command is issued by a court of competent jurisdiction to its own officer, a conflicting order issued by another court which has no jurisdiction at all must be void. This is true of courts established and maintained by the same government. It is, if possible, more emphatically true of tribunals differently appointed, administering a different code, and responsible to a different government. (1 Mod., 119; 3 Pet., 202; 2 Hale Cr. Pl., 144; 10 Petersdorf Abr., 287; 2 Inst., 615; 57 Eng. C. L. R., 418; 2 Ld. Raym., 1110; 5 Binn., 514; Searg. Con. Law, 284; 10 Rep., 76; 15 Johns., 152; 9 Texas, 319; 6 Fost., 239; 5 Barb., 276.)

V. *When an officer is doing his duty in obedience to the legal process of the court to which he belongs, and an attempt is made by another court to punish him for so doing, he is entitled to such summary measures as may be necessary for his protection.* This is true at common law and by universal custom. Suitors, jurors, witnesses, and officers whose service or attendance is necessary to the administration of justice in one court, must be free, while so engaged, from the process of other courts. If a Federal officer can not serve a writ or execute a sentence without being arrested by a State court for doing so, the judicial authority of this Government will come to an end very soon.

But I need not argue this on original principles. The act of 1833 distinctly provides for the immediate and summary discharge of any Federal officer *so* arrested, whether on civil or criminal process. In Robinson's case, Mr. Justice McLean discharged his marshal with a stern rebuke to those who had detained him from performing his duty. In Jenkins's case, Mr. Justice Grier decided that the capias on which the deputy marshal had been arrested for the offense of serving process of the Circuit Court, was wholly void.

Mr. JUSTICE GRIER.—The officer was arrested in that case on a criminal proceeding. There was an indictment found.

ATTORNEY-GENERAL BLACK.—The case, then, is stronger than I supposed. In addition, I will give you a reference to the act of March 2, 1833; Jenkins's case, 2 Wall., Jr., 521; Ex Part. Robinson, 3 Liv. Law Mag., 386.

When these proceedings shall receive the solemn condemnation of this court, the proper means will be adopted to vindicate the law by rearresting the convict who was enlarged by them.