THE OBERLIN HABEAS CORPUS.

DECISION OF THE OHIO SUPREME COURT.

From the Columbus State Journal, May 31

The decision of the Supreme Court, in the application for a discharge of Bushnell and Langston, convicted of a violation of the Fugitive Slave Act, at the recent term of the United States District Court for the Northern District of Ohio, was announced yesterday afternoon, all the Judges being present. The decision of a majority of the Court—namely, Chief Justice Swan, and Judges Scott and Peck—was against the prayer of the relators. Judges Brinkerhoff and Sutliff dissented from the majority of the Court.

Whatever may be the conflicting popular opinions upon the decision rendered by a majority of the Court, the people of Ohio will doubtless regard it as the deliberate judgment of the highest tribunal of the State, and will respect it accordingly.

We give below a synopsis of Judge Swan's opinions. We had hoped to have given the opinion entire in this issue of our paper, but it was retained by Judge Swan for revision. The synopsis, however, presents the main points:

JUDGE SWAN'S OPINION.

Judge Swan, Scott and Peck held:

I. That the provisions of art. 4, section 2, of the Constitution of the United States: 'No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due,' guarantees to the owner of an escaped slave the right of reclamation.

II. That a citizen who knowingly and intentionally interferes with, for the purpose of rescue, or rescues from the owners, an escaped slave, is guilty of a violation of the Constitution of the United States, whether the Acts of 1793 and 1850, commonly called the Fugitive Slave Laws, are unconstitutional or not.

III. That the question in this case is not whether the Fugitive Slave Act of 1850 is unconstitutional in respect to the appointment and powers of commissioners, the allowance of a writ of habeas corpus, the mode of reclamation, &c., but whether Congress has any power to pass any law whatever, however just and proper in its provisions, for the reclamation of slaves, or to protect the owner of an escaped slave from interference when duly asserting his constitutional rights of reclamation.

IV. That Congress, from the earliest period of the Government, has, by legislative penalties, vindicated the Constitutional right of the owner of slaves against unlawful interference.

V. That such legislation was adopted in 1793 by the IId Congress elected under the Constitution, composed of many of the members of the Convention who framed the Constitution; has, from that day to this, been acquiesced in by all departments of the Government, National and State; and the legislative power of Congress on this subject has been *recognized* by the General Assembly of the State of Ohio in their statutes; by the Supreme Court of the United New York, Pennsylvania, Indiana, Illinois, California, by the Supreme Court of Ohio on the circuit, and, indeed, by the Supreme Court of every State in the Union, where the question has been made, and has never been denied by the Supreme Court of any State—the Courts of Wisconsin, notwithstanding the popular impression, not forming an exception.

VI. The right to rescue escaped slaves from their owners being denied to all citizens of the United States by the Constitution; Congress having prohibited it, and enforced the prohibition by penalties; the Supreme Court of the United States and Courts of the Free States having recognized and acquiesced in such legislative prohibition and punishment; if the question is not thus put beyond the reach of the private personal views of Judges; and if they possess judicial discretion or power to overrule, on the authority of their individual opinions, this unbroken current of decisions, and this acquiescence of the States of the Union, and change the settled interpretation of the Constitution of the United States; then there is no limit and no restraint upon Judges making, at any time, and under any circumstances, their own individual opinions the arbitrary interpreters of the Constitution.

VII. Whatever differences of opinion may now exist in the public mind as to the power of Congress to punish rescues, as provided in the Acts of 1793 and 1850, no such vital blow is given either to constitutional rights or State sovereignty by Congress thus enacting a law to punish a violation of the Constitution of the United States, as to demand of this Court the organization of resistance. If, after *more than sixty years of acquiescence* by all departments of the National and State Governments, in the power of Congress to provide for the punishment of rescuers of escaped slaves, that power is to be disregarded, and all laws which may be passed by Congress on this subject from henceforth are to be persistently resisted and nullified, the work of revolution should not be begun by the conservators of the public peace.

Judge Scott orally assented to the foregoing, as embodying his views, especially in its conclusions; although he intimated that he would, in a written opinion, modify some of the details.

Judge Peck delivered an elaborate written opinion, coinciding with Judges Swan and Scott, comprising a review of the decisions of the Courts, and particularly of the State Courts, upon the questions involved in the case, and treating the whole matter as a *res adjudicata*.

Judge Sutliff also read a dissenting opinion, taking the ground that, according to the established rules of construction, no authority for Congress to pass the Fugitive Act could be found in the Constitution.

Judge Brinkerhoff also dissented from the majority of the Court, in a forcible opinion, which we give below.

JUDGE BRINKERHOFF'S OPINION.

Judge Brinkerhoff said—Since the close of the argument of these cases—Sunday, and a visit to my family intervening—I have not had time to do more than hastily to sketch a brief outline of my opinion on the questions they present. This I give, and I may, or may not, as leisure or inclination may prompt, commit them to paper, with the reasons on which they rest, more fully and in detail hereafter.

I. Under the advice of the District-Attorney of the United States, the indictments under which the relators were convicted are appended to, and form a part of, the return to these writs. The question whether they charge a crime or not is, therefore, before us. Both indictments are fatally defective in this, to wit, that neither of them avers that John was held to service or labor in the State of Kentucky, '*under the laws thereof.*' 2d section, 4th article, Constitution United States.

1. This defect is not a mere error or irregularity. If it were, so far as this point is concerned, we should be obliged to remand the prisoners; for the writ of habeas corpus cannot be made to perform the functions of a writ of error. But 2d. This defect is an illegality. The averment omitted is of the essence of the crime; without the fact omitted to be averred, there is no crime; for it is no crime to rescue from custody a person held to service or labor in another State *otherwise* than 'under the laws thereof.' If there was no crime charged in the indictment, the judgment of the District Court of the United States under which the relators are held, is *coram non judice* and void; they are illegally restrained of their liberty, and they ought to be discharged.

II. 1. The indictment against Bushnell contains but one count, which charges the rescue of John from the custody of an agent of the claimant of his labor and service in Kentucky—John having been arrested and held in custody without warrant or any color of legal process.

It appears, then, on the face of the record which is made a part of the return to this writ, that here was a person domiciled or sojourning in Ohio, a free State, and therefore presumed in law to be a free man, 'unreasonably seized' and 'deprived of his liberty,' not only 'without due process of law,' but without the pretence or color of any process whatever. This arrest and custody was in direct contravention of the fourth and fifth articles of the amendments to the Constitution of the United States. The rescue of a person thus 'unreasonably seized,' and 'deprived of his liberty without due process of law,' cannot be a crime; and any statute or judicial procedure which attempts to make or treat it as a crime, is unconstitutional and void.

2. The indictment against Langston has two counts; the first of which is entirely similar to that against Bushnell; and the second of which alleges a similar rescue of John while arrested and held in custody under a warrant issued by a Commissioner of the Circuit Court of the United States, authorized by act of Congress to issue such warrant, and, under the authority thereof, to arrest, hold, and remove the person described therein to a foreign jurisdiction as a slave.

The acts of Congress referred to clearly attempt to confer on these Commissioners the powers and functions of a court; to hear and determine questions of law and of fact; and to clothe their findings and determinations with that conclusive authority which belongs only to judicial action. And the issue of the warrant mentioned in the indictment was a judicial act.

These provisions of the acts of Congress referred to, and all warrants issued under them, are unconstitutional and void, for the following reasons:

These Commissioners are appointed by the Circuit Courts of the United States only; hold their office at the will of such Courts, and are paid by fees. Whereas, by the express provision of the Constitution of the United States, (Art. 2, Sec. 2, and Art. 3, Sec. 1,) the judicial functionaries of the United States must be appointed by the President, by and with the advice and consent of the Senate, hold their offices during good behavior, and receive a fixed compensation which may not be diminished during their continuance in office.

The warrant of such a commissioner, therefore, is a nullity; it could afford no authority to hold John in custody; and to rescue him from such illegal custody could not, by the law of the land, be a crime; and therefore the imprisonment of Langston, by way of punishment of such pretended crime, is an illegal restraint of his liberty, and he too ought therefore to be discharged.

III. These relators ought to be discharged, because they have been indicted and convicted under an act of Congress upon a subject matter, in reference to which Congress has, under the Constitution of the United States, no legislative power whatever.

As to the correctness of this proposition, there does not rest on my mind the shadow or glimmer of a doubt.

The Federal Government is one of limited powers; and all powers not expressly granted to it, or necessary to carry into effect such as are expressly granted to it by the terms of the Constitution, are reserved to the States or the people. Amendments, Art. 10.

'No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.' Art. 4, Sec. 2.

This is the only clause of the Constitution from which anybody pretends to derive, or in which anybody pretends to find a grant of power to Congress to legislate on the subject of the rendition of fugitives from labor. I can find in it no such grant. The first part of it simply prohibits State legislation hostile to the rendition of fugitives from labor. Such fugitive shall not be discharged 'in consequence of any law or regulation' of the State into which he shall escape, 'but shall be delivered up.' By whom? By Congress? By the Federal authorities? *There are no such words*, and no such idea is hinted in the preceding portion of this article.

ART. 4. SEC. 1. 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. *And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.*' Here, in the first place, is a compact between the States respectively—an agreement of the several States to and with each other, that the 'public acts, records, and judicial proceedings' of each shall have 'full faith and credit' given to them in all. Had this section closed here, would any one claim that it embraced any grant of legislative power to Congress? I think not. But the framers of the Constitution thought that Congress ought to have the power 'to prescribe the manner in which such acts, records, and proceedings should be proved, and the effect thereof;' and hence they gave the power in express terms. When they intended a grant of power to Congress, and not a mere contract stipulation by, or injunction of duty upon the States, *they say so*, and leave us no room for cavil on the subject. But let us go on.

SEC. 2. 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'

'A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

That these clauses of section two are mere articles of compact between the States, dependent on the good faith of the States alone for their fulfillment, I suppose no one will dispute. They do not confer upon Congress any power whatsoever to enforce their observance. Then follows the last clause of section two, in respect to fugitives from labor or service, first quoted. And this, like all the other preceding clauses of this article, except the first, is destitute of any grant of power, or even allusion to Congress or the Federal Government. Now, if a grant of power to Congress was here intended, why this silence? If the framers of the Constitution intended a grant of power to Congress in this clause, why did they not say so, as they did say in the first section, in respect to 'public acts, records, and judicial proceedings'?

It seems to me that no rational answer can be given to this question, except by a denial of such intentions. *Expressio unius exclusio alterius*, is a legal maxim as old as the common law. The express mention of one thing implies the exclusion of things not mentioned. It is the dictate of reason and common sense. It is a maxim which applies alike in the interpretation of contracts, statutes and constitutions. Its application was never more obviously proper than to the question before us; and when applied, it seems to me to bring with it a force little short of mathematical demonstration.

Thus far I have reasoned as if we were ignorant of the history of the Constitution. But a glance at that history confirms the conclusions to which we are brought by the ordinary rules of interpretation, and makes 'assurance doubly sure.'

The Articles of Confederation under which the struggle for independence was carried through, and for which the present Constitution of the United States is a substitute, contain *nothing but* articles of compact. The fulfilment of its obligations was dependant upon the faith of the States alone. The Congress could make requisitions, but had no power to enforce them.

Again: Certain provisions of the ordinance of 1787, for the government of the territory north-west of the Ohio river, were in express terms declared to be 'articles of compact.'

Now, every one of the clauses of the fourth article of the Constitution above quoted were borrowed and transferred, with slight verbal alterations, from the Articles of Confederation and the Ordinance of 1787—the first three from the former, and the last from the latter—with this exception only, that to the first of these clauses was added a grant of power to Congress to prescribe the manner of proof and effect of public acts, records, and judicial proceedings. Here, then, we have certain articles of compact—admitted or declared to be such, and nothing more—borrowed and transferred from one instrument to another, with no intimation of any change of their character as articles of compact, except in a single instance where the change is expressly declared. The inference seems to me to be irresistible, that, except so far as the change is expressly declared, they remained, after the transfer, the same as they were before—articles of compact, and nothing else.

I conclude, therefore, that the States are bound, ein fulfilment of their plighted faith, and through th medium of *their* laws, legislation and functionaries, to deliver up the fugitive from service or labor, on claim of the party to whom such service or labor may be due under the laws of another State from which the fugitive has fled. But the Federal Government has nothing to do with the subject, and its interference is sheer usurpation of a power not granted, but reserved.

But, it is said, the question is settled, and our argument comes too late. I deny that it is settled.

The federal legislature has usurped a power not granted by the Constitution, and a federal judiciary has, through the medium of reasonings lame, halting, contradictory, and of far-fetched implications, derived from unwarranted assumptions and false history, sanctioned the usurpation. I deny that the decisions of a usurping party in favor of the validity of its own assumptions can settle any thing. It is true that the courts and legislatures of several of the States have decided in the same way; but they have been decisions of acquiescence rather than of original and independent inquiry. The fact that such jurists as Hornblower, Walworth and Webster thought on this subject as I think, shows that the question is not settled. The fact that a majority of my brethren, as I understand them, admit that if this were a new question, they would be with me, and that they yield the strong leanings of their own minds to the force of the rule of *res adjudicata* alone, proves that this question is not settled. The truth is, it is not till recently that the mass of intelligent and inquiring mind in this country has been brought to bear upon this question. It required the enactment and enforcement of the Fugitive Slave act of 1850, overriding the most sacred and fundamental guaranties of the Constitution, and disregarding in its provisions even the decencies of legislation, as if for the very purpose of irritation and humiliation, and the fine and imprisonment under it of *white* men for the exercise of the instinctive virtues of humanity, to awaken general inquiry. That inquiry is now going forward. And so surely as the matured conviction of the mass of intelligent mind in this country must ultimately control the operations of Government in all its departments, so surely is this question not settled. When it is settled right, then it will be settled, and not till then.

But, cotemporaneous construction is appealed to. I admit its weight, and its title to respectful consideration. But cotemporaneous construction speaks with a divided voice. It is true Congress, as early as 1793, legislated for the return of fugitives from labor. But nearly if not quite every one of the old States had also legislated on the same subject in fulfilment of what they deemed a matter of constitutional obligation resting on them. And such legislation on the part of the States, old and new, continued until the Supreme Court of the United States, in the Prigg case, as late as 1842 (16 Peters, 539), assumed for the Federal Government exclusive authority over the subject. And those who appealed to cotemporaneous construction should themselves respect it. From the foundation of the Government until within the last ten years, Congress claimed and exercised, without question, full and complete legislative power over the Territories of the United States; and as early as 1828, in American Insurance Company agt. Canters (1 Peters, 546), the Supreme Court of the United States, Chief Justice Marshall delivering its opinion, unanimously decided that in the Territories, Congress rightfully exercises the 'combined powers of the General and of a State Government.' Yet in the recent case of Dred Scott agt. Sanford (19 Howard, 393) all this is overturned and disregarded, and the whole past theory and practice of the Government in this respect attempted to be revolutionized by force of a judicial *ipse dixit*. We are thus invited by the Court back to the consideration of first principles; and neither it nor those who rely on its authority have a right to complain if we accept the invitation.

I know of no way other than through the action of the State Governments, in which the reserved rights and powers of the States can be preserved, and the guaranties of individual liberty be vindicated. The history of this country, brief as it is, already shows that the Federal judiciary is never behind the other departments of that Government, and often foremost, in the assumption of non-granted powers. And let it be finally yielded that the Federal Government is, in the last resort, the authoritative judge of the extent of its own powers, and the whole boasted theory of the limitations of the Constitution which the framers of that instrument so jealously endeavored firmly to fix and guard will soon be, if they are not already, obliterated; and that government, the sole possessor of the only means of revenue in the employment of which the people can be kept ignorant of the extent of their own burdens, and with its overshadowing patronage, attracting to its support the ambitious by means of its honors, and the mercenary through the medium of its emoluments, will speedily become, if it be not already, practically omnipotent.

These were my opinions, freely declared, for years before I had the honor of a seat on this bench; and, having learned nothing during the pendency of these cases to change, but much to confirm them, I know no reason why I should hesitate to avow them now.

I give my voice in favor of the discharge of the relators.