27th Congress, 3d Session. Rep. No. 80. Ho. of Reps.

FREE COLORED SEAMEN—MAJORITY AND MINORITY REPORTS.

JANUARY 20, 1843.

Mr. WINTHROP, from the Committee on Commerce, made the following

REPORT:

The Committee on Commerce, to whom was referred the memorial of Benjamin Rich and others, submit the subjoined report:

The memorial was commended to the most attentive and respectful consideration of the committee, as well by the subject-matter to which it relates, as by the character of those from whom it comes.

It is signed by more than one hundred and fifty citizens of Boston, in the State of Massachusetts, a large part of whom are very deeply interested in the commerce and navigation of the country, others of whom are eminently distinguished in legal, scientific, or literary pursuits, and all of whom are quite beyond the reach of a suspicion, that they would approach the Legislature of the nation in any cause, in which they did not sincerely believe that important principles or valuable interests were involved. Probably no paper was ever addressed to the Congress of the United States, which represented more of the intelligence, virtue, patriotism, and property also, of the metropolis of New England. In attestation of this statement, the memorial, with its signatures, is appended to this report.

The memorialists appear in the character of citizens of the United States, adding, also, that many of them are masters and owners of vessels.

They set forth, that on board the large number of Massachusetts vessels which are accustomed to touch at the Southern ports of this Union, it is frequently necessary to employ free persons of color. They proceed to state, that it often happens, at the ports of Charleston, Savannah, Mobile, and New Orleans, that these free persons of color are taken from the vessels to which they belong, thrown into prison, and there detained at their own expense. They submit, that such proceedings are greatly to the prejudice and detriment of their interests, and of the commerce of the nation. And they conclude by praying, that relief may be granted to them, and that the privileges of citizenship, secured by the Constitution of the United States, may be rendered effectual in their behalf.

The committee regret to say, that the facts which are set forth in the memorial, have been of too frequent and too notorious occurrence to admit of any denial or doubt. They regret still more to add, that the acts of violence complained of by the memorialists, have owed their occurrence, not to any temporary excitement or any local outbreak, but to the deliberately enacted laws, of the States in whose ports they have been perpetrated. It is known to every one, that laws, making it the imperative duty of the local magistrates to search for, arrest, and imprison, any free persons of color belonging to the crews of vessels which may enter their harbors,

have existed, and have often been most oppressively executed, during a long series of years, in some of the Southern States of this Union.

The existence of such a law in the State of South Carolina gave occasion, almost twenty years ago, to a formal remonstrance to our National Executive, on the part of the Government of Great Britain, as being in direct conflict with the rights which had been stipulated to British commerce by the most solemn treaties. An interesting correspondence, relating to this remonstrance, was communicated to this House during the last session of Congress, and is annexed to this report, for more convenient reference.

Laws of the same character have been more recently enacted in other States. Within the past year only, such a law has been introduced into the code of Louisiana, whether as an original enactment on the subject, or as a revised statute, the committee have not thought it important to inquire.

The committee have no hesitation in agreeing with the memorialists, that the acts of which they complain, are violations of the privileges of citizenship guarantied by the Constitution of the United States. The Constitution of the United States expressly provides, (art. 4, sec. 2,) that "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Now, it is well understood that some of the States of this Union recognise no distinction of color in relation to citizenship. Their citizens are all free; their freemen all citizens. In Massachusetts, certainly—the State from which this memorial emanates—the colored man has enjoyed the full and equal privileges of citizenship since the last remnant of slavery was abolished within her borders by the constitution of 1780, nine years before the adoption of the Constitution of the United States. The Constitution of the United States, therefore, at its adoption, found the colored man of Massachusetts a citizen of Massachusetts, and entitled him, as such, to all the privileges and immunities of a citizen in the several States. And of these privileges and immunities, the acts set forth in the memorial constitute a plain and palpable violation.

It matters not to this argument, in the opinion of the committee, what may be the precise interpretation given to this clause of the Constitution. However extended or however limited may be the privileges and immunities which it secures, the citizens of each State are entitled to them equally, without discrimination of color or condition; and unless it is maintained that the citizens of Massachusetts generally, may be made subject to seizure and imprisonment for entering these Southern ports in the prosecution of their rightful business, whenever the Legislatures of South Carolina, or Louisiana, or Alabama, or Georgia, may see fit to enact laws to that effect, it is impossible to perceive upon what principle the acts in question can be reconciled with this constitutional provision.

The State laws under which these acts are committed, are also, in the judgment of the committee, in direct contravention of another provision of the Constitution of the United States. The Constitution of the United States gives the power to Congress "to regulate commerce with foreign nations and among the several States." This power is, from its very nature, a paramount and exclusive power, and has always been so considered and so construed. There is no analogy between this power of regulating commerce and most of the other powers which have been granted to the General Government. The power to *regulate* admits of no partition. It excludes the idea of all concurrent, as well as of all conflicting, action. It can be exercised but by one authority. Regulation may be as much disturbed

and deranged, by restraining what is designed to be left free, as by licensing what is designed to be restrained. The grant necessarily carries with it the control of the whole subject, leaving nothing in reference to it for the States to act upon. But it is too obvious to require, or even bear, an argument, that the laws in question, imposing severe penalties, as they do, upon certain classes of seamen for entering certain ports, are infringements, by the States in which they have been enacted, upon this exclusive authority of the General Government.

Nor can the States which have enacted these laws escape, in the judgment of the committee, from the charge of having violated still another provision of the Federal Constitution. The sixth article of that instrument declares, that "all treaties made, or which shall be made, under the authority of the United States, shall be a part of the supreme law of the land." But the provisions of the laws in question, wherever they are applicable to the crews of foreign vessels, are in direct conflict with most, if not with all, of the commercial treaties which have been made by the United States with foreign nations. Certainly, no treaty of commerce between the United States and any other nation is known to the committee, which contains any restrictions as to the color of the crews by which that commerce is to be carried on.

It seems to be understood, that the application of these laws to foreign vessels has of late years been suspended. This consideration, however, if true, cannot make the laws themselves less obnoxious to constitutional objections; still less can it render them more acceptable to our own citizens. The idea that foreign seamen are treated with greater clemency in our own ports than native American seamen, can only serve, on the contrary, to increase the impatience, and aggravate the odium, with which such laws are justly regarded.

The committee are aware that the laws in question have sometimes been vindicated upon considerations of domestic police; and they have no disposition to deny, that the general police power belonging to the States, by virtue of their general sovereignty, may justify them in making police regulations even in relation to matters over which an exclusive control is constitutionally vested in the National Government.

But the committee utterly deny that provisions like these can be brought within the legitimate purview of the police power. That American or foreign seamen, charged with no crime, and infected with no contagion, should be searched for on board the vessels to which they belong; should be seized while in the discharge of their duties, or, it may be, while asleep in their berths; should be dragged on shore and incarcerated, without any other examination than an examination of their skins; and should be rened liable, in certain contingencies over which they may have no possible control, to be subjected to the ignominy and agony of the lash, and even to the infinitely more ignominious and agonizing fate of being sold into slavery for life, and all for purposes of *police*;—is an idea too monstrous to be entertained for a moment. It would seem almost a mockery to allude to the subject of police regulations in connexion with such acts of violence.

It may be difficult, perhaps, to assign the precise limits to which this police power of the States may extend. There is one limit to it, however, about which the committee conceive there can be no question. The police power of the States can never be permitted to abrogate the constitutional privileges of a whole class of citizens, upon grounds, not of any temporary,

moral or physical condition, but of distinctions which originate in their birth, and which are as permanent as their being. Or, to use still more general terms, the police power of the States can never justify enactments or regulations, which are in direct, positive, and permanent conflict with express provisions or fundamental principles of the national compact.

This would seem to be the doctrine laid down by the Supreme Court of the United States, in the recent case of Prigg *versus* the Commonwealth of Pennsylvania. The Court, having in that case decided that "the power of legislation in relation to fugitives from labor is exclusive in the national Government," seem to have anticipated that a necessity for State interference might arise, in reference to the peace and security of the Commonwealth in which such fugitives might take refuge. They accordingly admit, that the general police power of the States would reach to such a case; but declare that any such regulations of police "can never be permitted to interfere with, or obstruct, the just rights of the owner to reclaim his slave, derived from the Constitution of the United States."

Now, if such a limitation be applicable to the *third* paragraph of the 2d section of the 4th article of the Constitution, it certainly cannot be less applicable to the *first* paragraph of the same section of the same article. If the police power of a State cannot be permitted to divest a master of his constitutional right over his slave, as secured by one of these provisions, as little can it be suffered to divest a free citizen of his constitutional right over himself, his own actions, and his own motions, as guarantied by the other. If, on the contrary, this police power can make a citizen *no* citizen in one State, it is hard to perceive why it cannot make a slave *no* slave in another State.

There is an act on the statute book of the United States which may seem to have some reference to the subject under consideration. It bears date February 28, 1803, and contains the following, among other provisions:

"No master or captain of any ship or vessel, or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any State which, by law, has prohibited, or shall prohibit, the admission or importation of such negro, mulatto, or other person of color.

"No ship or vessel arriving in any of the said ports or places of the United States, and having on board any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope, as aforesaid, shall be admitted to an entry. And if any person, where importation is so prohibited, shall be landed from any vessel at such place," &c.

The act proceeds to prescribe penalties for the violation of these provisions, and to make it the duty of the officers of the revenue of the United States to notice, and be governed by, the provisions of the laws, then existing, of the several States prohibiting the admission or importation of any negro, mulatto, or other person of color, as aforesaid.

A very brief examination of this act will be sufficient, in the judgment of the committee, to show that it has little, if any, bearing upon the grievances complained of by the memorialists, or upon the State laws which are the

subject of this report. Indeed the committee would hardly have thought it necessary to allude to the act, had it not been relied on, to some extent by a late Attorney General of the United States, (Mr. Berrien,)—whose opinion is annexed to the report of the minority—to justify the operation of the law of South Carolina in the case of Daniel Fraser, a British sailor, born in the British West Indies.

The act of 1803 was evidently passed in reference to that provision of the Constitution of the United States which declares, "that the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808." This provision of the Constitution, it is well understood, had immediate relation to the slave trade, and was designed to secure to the several States of the Union, until the year 1808, the right to admit within their limits, or to exclude altogether, at their own discretion, the unfortunate subjects of this infamous traffic. The act of 1803 was obviously intended to aid those States, which might prohibit the admission of such persons, in the enforcement of such prohibitions. Congress, however, having taken this whole subject into its own hands at the earliest moment at which the Constitution empowered it to do so, and having enacted laws, coextensive with the whole country, in relation to the introduction of such persons into the United States, the reasons of the act of 1803 would seem to have wholly ceased; and it may well be questioned whether the act itself, though never formally repealed, has not ceased also. The committee incline to the opinion that it is a mere dead letter upon the statute book.

If, however, it is supposed to have any thing of vitality left, it must be observed that it relates exclusively to vessels arriving from foreign lands. This is evident, both from the general phraseology of the act, and from the particular penalty prescribed for its violation. The vessel, it is declared, shall not be admitted to "entry." But vessels bound to or from one State cannot constitutionally be required to "enter" in another. The act, moreover, expressly excepts from the operation of its provisions all colored persons who are "natives, citizens, or registered seamen of the United States, or seamen natives of countries beyond the Cape of Good Hope." In relation to all colored persons thus excepted, therefore, the act of 1803 contains no prohibition on the part of the General Government, and authorizes none on the part of any State; nor are any of its provisions applicable to vessels of the United States passing from port to port. The direct implication of the act, on the contrary, clearly is, that all colored persons included in the terms of the exception, shall have free and unmolested ingress into all the ports of this Union, and that our own vessels shall pass along from port to port with such crews, so far as color is concerned, as their masters and owners may see fit to employ. If, then, the act of 1803 be still in force, and if this be its just construction, no other evidence can be required, that the laws of the Southern States complained of by the memorialists, are in direct collision with a law of the United States.

There is one view in which the law of 1803 is certainly not without importance. There is one point on which, even if dead, it still speaks. The distinct recognition which it contains, of the idea that a negro, mulatto, or other colored person, may be a "citizen" of the United States, is sufficient to prove the opinion which was entertained by the Congress of 1803, upon a doctrine which of late years has so often been denied.

The committee do not deem it necessary to dwell longer on the constitutional character of the proceedings which the memorial sets forth, or of

the State laws by which they are sanctioned. They content themselves with appending, as a part of their report, an opinion on the subject, officially communicated to the Secretary of State, by the late Mr. Wirt, while Attorney General of the United States, in the year 1824; and also an opinion of the late Mr. Justice Johnson, of the United States court, delivered in a case arising under these laws, in Charleston, South Carolina, in the year 1823. This latter opinion, for which a call upon the Executive was made by this House at the last session of Congress, but which was not produced, contains a comprehensive and conclusive view of the whole subject, and, as the production of a native South Carolinian, can hardly be subject to the imputation of local prejudice.

That the operation of these laws is oppressive upon the memorialists, and greatly injurious to the general interests of commerce, the committee can see no reason and no room to doubt. For some of the stations on board both of our sail ships and steamboats, colored mariners are thought to possess peculiar qualifications. They are very generally employed as firemen, laborers, stewards, and cooks. The memorialists state that it is frequently *necessary* to employ them. The abduction of persons so employed immediately on the arrival of a vessel in port, and their detention at a heavy expense until the very moment of its departure, cannot be less an injury to their employers than it is an outrage on themselves. The opinion of Judge Johnson will be found to make mention of a case, in which, under the operation of these laws, "not a single man was left on board the vessel, to guard her, in the captain's absence!"

The committee are of opinion, that the memorialists are entitled to the relief for which they pray, and that important commercial interests, as well as the highest constitutional principles, call for the repeal of the laws in question. Congress, however, seem to have no means of affording such relief, or of effecting such a repeal. The Judiciary alone can give relief from the oppression of these laws while they exist, and the States which enacted them are alone competent to strike them from their statute books. The committee cannot conclude this report, however, without putting the opinions at which they have arrived, into a shape in which they may receive the ratification and adoption of the House; trusting that such an expression of them may not be without influence, in procuring for the memorialists, and still more for the oppressed and injured seamen in their employ, the redress which they rightfully demand.

The committee accordingly submit the following resolutions:

Resolved, That the seizure and imprisonment, in any port of this Union, of free colored seamen, citizens of any of the States, and against whom there is no charge but that of entering said port in the prosecution of their rightful business, is a violation of the privileges of citizenship guarantied by the 2d section of the 4th article of the Constitution of the United States.

Resolved, That the seizure and imprisonment, in any port of this Union, of free colored seamen, on board of foreign vessels, against whom there is no charge but that of entering said port in the course of their lawful business, is a breach of the comity of nations, is incompatible with the rights of all nations in amity with the United States, and, in relation to nations with whom the United States have formed commercial conventions, is a violation of the 6th article of the Federal Constitution, which declares that treaties are a part of the supreme law of the land.

Resolved, That any State laws, by which certain classes of seamen are prohibited from entering certain ports of this Union, in the prosecution of

their rightful business, are in contravention of the paramount and exclusive power of the General Government to regulate commerce.

Resolved, That the police power of the States can justify no enactments or regulations, which are in direct, positive, and permanent conflict with express provisions or fundamental principles of the national compact.

APPENDIX.

1. The memorial, with its signatures.
2. Message of the President of the United States, communicating correspondence as to colored mariners in ports of South Carolina. (Doc. 119, 27th Cong., 2d sess., H. R., Executive.)
3. The opinion of Mr Justice Johnson.
4. The opinion of Mr. Wirt.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

Your petitioners, citizens of the United States, and some of them owners and masters of vessels,

RESPECTFULLY REPRESENT:

That on board of that large number of vessels accustomed to touch at the ports of Charleston, Savannah, Mobile, and New Orleans, it is frequently necessary to employ free persons of color:

And whereas it freqently happens that such crews are taken from the vessels, thrown into prison, and there detained at their own expense, greatly to the prejudice and detriment of their interest, and of the commerce of these States:

They pray your honorable body to grant them relief, and render effectual in their behalf the privileges of citizenship secured by the Constitution of the United States.

And, as in duty bound, will ever pray.

Benjamin Rich	J. Ingersoll Bowditch
Henry Oxnard	Magoun & Son
Samuel Appleton	J. J. Dixwell
J. Thomas Stevenson	S. Austin, jr.
Benjamin Bangs	James S. Amory
Daniel P. Parker	Francis J. Oliver
Theodore Chase	Samuel May
Henry G. Rice	G. M. Thatcher
S. C. Gray	Ozias Goodwin
Abbott Lawrence	R. B. Forbes
Thomas Lamb	Samuel Whitwell
John P. Bates	James Savage
John Dorr	Caleb Loring
William Appleton	Thomas Motley
Paschal P. Pope	Samuel A. Dorr

William Ropes
B. T. Reed
C. J. Everett
Robert G. Shaw
Robert B. Williams
George Hallet
John G. Nazro
Phineas Sprague
Samuel T. Armstrong
James Dennie
Henry J. Nazro
Henry J. Oliver
Joshua Crane
Bramhall & Howe
C. Wilkins & Co.
George Thatcher & Co.
Edward Oakes
Charles C. Bowman
John J. Eaton
Henderson Inches, jr.
M. Brimmer
T. M. J. Dehon
Stephen Grover
Thomas B. Curtis
Joseph Ballister & Co.
Josiah Bradlee & Co.
James Parker
Henry Lee
Peter R. Dalton
B. C. Clark & Co.
A. W. Thaxter, jr.
Barnard, Adams, & Co.
James Huckins
Tapley & Crane
Billings & Bailey
J. P. Townsend & Co.
Samuel Welch
George Williams
Cyrus Buttrick
Frederick A. Sumner
Jos. Hunnewell & Sons
N. A. Thompson & Co.
Isaac C. Hall
Howes & Co.
Charles G. Loring
Franklin Dexter
Charles P. Curtis
B. R. Curtis
F. C. Loring
George T. Curtis
Thomas B. Pope
John R. Adan
John S. Eldridge
Joseph Balch
Benjamin Guild
Nath. Meriam
Lemuel Pope
C. Curtis
Edward S. Tobey
R. C. Mackay
John R. Brewer
Isaiah Bangs
John Q. A. Williams
Rice & Thaxter
Charles J. Morrill
Samuel Blake
Albert A. Bent
E. Williams, jr.
Henry W. Pickering
Richard W. Shapleigh
W. Cotting
William Worthington & Co.
Victor Constant
William Rollins
Cobb & Winslow
William Sturgis
George R. Minot
J. M. Forbes
Alfred C. Hersey
William Perkins
Robert G. Shaw, jr.
E. Weston & Sons
Winsor & Townsend
Frothingham & Bradlee
Stephen Tilton & Co.
S. R. Allen
John O. B. Merrit
Robert Vinal
Gregerson & Cox
Reed & Howe
Robert Day
Lot Day
Jackson Riggs
C. Allen Browne
R. Lincoln & Co.
William H. Prentice
Benjamin Rand
W. Minot
Edward G. Loring
W. W. Story
Charles Henry Parker
George William Bond
Richard Robins
Henry Hall

James K. Mills
Edm. Dwight
P. T. Jackson
J. H. Wolcott
A. C. Lombard & Co.
T. H. Perkins
John C. Gray
Amos Lawrence
S. Bartlett
B. A. Gould
Benjamin C. White
W. H. Gardiner
Charles Jackson
William Prescott
William H. Prescott
N. I. Bowditch
Edward Pickering
George Morey
W. R. P. Washburn
A. A. Dana
John Pickering.

Message from the President of the United States, transmitting the information required by a resolution of the House of Representatives of 2d February ultimo, in relation to an act of the Legislature of the State of South Carolina, directing the imprisonment of colored persons arriving from abroad in the ports of that State, &c.

To the House of Representatives:

I have the honor to submit copies of the correspondence and other documents called for by the resolution of the House of Representatives of the 2d February.

I am not informed of the existence of any official opinion of the late Judge Johnson, on the unconstitutionality of the act or acts of the State of South Carolina, upon the subject referred to in the resolution.

JOHN TYLER.

WASHINGTON, *February* 28, 1842.

The Secretary of State of the United States to the Governor of South Carolina.—[COPY.]

DEPARTMENT OF STATE, *Washington, July* 6, 1824.

SIR: By direction of the President of the United States, I have the honor of enclosing copies of several successive representations received at this Department, from the representatives of the British Government here, relating to the operation of an act of the Legislature of South Carolina. A copy of the opinion of the Attorney General of the United States upon the act is likewise enclosed; and I have it in charge to express the hope of the President that the inconvenience complained of will be remedied by the Legislature of the State of South Carolina itself.

I am, with great respect, sir, your very humble and obedient servant,

JOHN QUINCY ADAMS.

His Excellency the GOVERNOR
of South Carolina, Columbia.

Mr. Canning to Mr. Adams.—[COPY.]

WASHINGTON, *February* 15, 1823.

SIR: It is my duty to bring under your notice an act lately passed by the Legislature of the State of South Carolina, which cannot remain in force without exposing the vessels of His Majesty's subjects, entering the ports of that State in prosecution of their lawful commerce, more especially such as are engaged in the colonial trade, to a treatment of the most grievous and extraordinary description.

The accompanying transcript of the third section of the act to which I refer will make you acquainted with the particular nature of the grievance attendant on the enforcement of the law in question. I am confident that a mere perusal of the enactment will suffice to engage your interference, for the purpose of securing His Majesty's subjects, when trading with this country, from the effects of its execution.

One vessel under the British flag has already experienced a most reprehensible act of authority under the operation of this law; and if I abstain for the present from laying before you the particulars of the transaction, it is only in the persuasion that ample redress has, by this time, been obtained on the spot, at the requisition of His Majesty's consul at Charleston, and that the interference of the General Government, in compliance with the representation which I have now the honor to address to you, will be so effectual as to prevent the recurrence of any such outrage in future.

I beg, sir, that you will accept the assurance of my very distinguished consideration.

STRATFORD CANNING.

Hon. JOHN QUINCY ADAMS,
Secretary of State.

Third section of an act passed in the State of South Carolina, entitled "An act for the better regulation and government of free negroes and persons of color, and for other purposes."

And be it further enacted by the authority aforesaid, That if any vessel shall come into any port or harbor of this State, from any other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, mariners, or in any other employment on board said vessels, such free negroes or persons of color shall be liable to be seized and confined in jail until said vessel shall clear out and depart from this State; and that, when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro or person of color, and pay the expenses of his detention; and, in case of his neglect or refusal so to do, he shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes or persons of color shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid.

Mr. Adams to Mr. Canning.—[COPY.]

DEPARTMENT OF STATE,
Washington, June 17, 1823.

SIR: With reference to your letter of the 15th of February last, and its enclosure, I have the honor of informing you, that, immediately after its reception, measures were taken by the Government of the United States for effecting the removal of the cause of complaint set forth in it, which it is not doubted have been successful, and will prevent the recurrence of it hereafter.

I pray you, sir, to accept the renewed assurance of my distinguished consideration.

JOHN QUINCY ADAMS.

The Right Honorable STRATFORD CANNING,
Envoy Extraordinary and Minister Plenipotentiary from Great Britain.

Mr. Addington to Mr. Adams.—[COPY.]

WASHINGTON, *April* 9, 1824.

SIR: It will be in your recollection that His Majesty's envoy in this country and myself have both had occasion, within the last twelve months, to address representations to you, on the subject of a law enacted in the State of South Carolina, in December, 1822, prohibiting, under severe penalties, the entrance into that State of free persons of color. Against this law His Majesty's minister protested, generally, as being in manifest contravention of treaties existing between Great Britain and the United States, and its effects were more particularly pointed out by me in August last, as having operated practically in a manner highly prejudicial to the commerce and oppressive to the subjects of Great Britain.

To His Majesty's envoy, sir, you gave a written and to me a verbal assurance that every effort should be made, on the part of the Executive Government, to remedy the grievances complained of, and prevent a recurrence of them.

I lament to say that those efforts, in whatever way applied, have hitherto not been attended with the good effects which might have been expected to result from them. The evil still continues in undiminished rigor, and it becomes my duty, in pursuance of instructions which I have recently received from His Majesty's Secretary of State, to bring the subject once more under your serious consideration, and to demand redress and reparation for injuries inflicted on a subject of His Majesty, who has had the misfortune to fall under the oppressive weight of the statute in question.

The complainant, Mr. Petrie, of Liverpool, as will more particularly appear by his own letter, addressed to the President of His Majesty's Board of Trade, of which I have the honor herewith to enclose a copy, having occasion, in prosecution of his commercial pursuits, to touch at the port of Charleston, in a vessel called the Marmion, in the month of December of last year, had scarcely entered that port when one of his crew, a man of color, was seized by the police officers, and forcibly carried off to jail,

where he remained incarcerated during the stay of the complainant at Charleston. Three others of his crew, whom he had placed on board a packet for the purpose of having them conveyed, via New York, to England, were also apprehended on board that vessel, in the same forcible manner, and imprisoned. All the remonstrances of Mr. Petrie, against this violent and unjustifiable act, whether made personally or through His Majesty's consul at Charleston, were of no avail. During his stay at Charleston, the men remained in prison, and the fees attending their ultimate release, together with the loss of their services, put the complainant to considerable expense.

I feel persuaded, sir, that the bare recital of the outrage above recorded will suffice, without any further commentary on my part, to induce you, agreeably to the assurance already given by you, to use every effort in your power, not only to procure for Mr. Petrie that redress to which he seems to be so justly entitled, but to induce the authorities of South Carolina to repeal the obnoxious law, or at least so to modify it as that it shall no longer operate to the detriment of nations trading to the United States, on the faith of conventions, of which it is a direct and unqualified violation.

I have the honor to be, with distinguished consideration, sir, your most obedient, humble servant,

H. U. ADDINGTON.

Hon. JOHN QUINCY ADAMS, &c.

Mr. Petrie to Mr. Huskisson.—[COPY.]

LIVERPOOL, *January* 20, 1824.

SIR: Perhaps my communications should have come through another channel, or His Majesty's ministers may already be informed on the subject; but the certain knowledge of many of the subjects of this country, suffering under a very grievous law in the United States of America, in the particular State of South Carolina, merely from the circumstance of their being colored, has induced me to trouble you with my correspondence, conceiving that no country shall ever be permitted to treat any of the subjects of Great Britain so hostilely, without the interference of Government. The law is rigorously prosecuted, prohibiting all colored persons, sailors or others, from coming to that State, under the penalties of being imprisoned, corporeally punished, and made slaves of. Being an officer in His Majesty's navy, I have known the value of our seamen, and could not help remonstrating against this most oppressive law last month, when I was in Charleston, where I carried part of a crew, four in number, of these unfortunate people, in the ship Marmion, from this port; but my remonstrances were of little or no avail; nor could the British consul, after repeated application to him by every master in that port belonging to British vessels, obtain any alteration or qualification of the law. The Marmion was not well moored at the wharf before the officers who were appointed to put this law in execution came on board, and forcibly carried one of the four of these men to jail, where he remained during my stay in Charleston; the three others I had previously conveyed on board of a packet, on the eve of sailing to New York, where they were likely to obtain a passage more readily to England; but on board this vessel they were apprehended by men who seemed anxious only to get their fees, and thrown into prison, depriv-

ing them of the opportunity to comply with the law, which they would have done in a few hours. The release of these unfortunate men from jail, fees, and loss of their services, put me to considerable expense.

You will, no doubt, sir, be better able to judge of the justice of such laws, enacted against a great portion of the subjects of this country, especially of seamen out of this port, than I can, better knowing the commercial relations between the two countries.

I am, sir, &c.

PETER PETRIE.

The Right Honorable WM. HUSKISSON, *M. P.*

Mr. Addington to Mr. Adams.—[COPY.]

WASHINGTON, *July* 12, 1824.

SIR: On the 9th of April last I had the honor of submitting to you, agreeably to instructions which I had received from England, a specific demand for reparation for an injury inflicted on an English subject, by the authorities of South Carolina, in the enforcement of a law of that State relative to the treatment of free persons of color entering its ports, which law I represented to be a direct violation of existing treaties between Great Britain and the United States. I at the same time expressed a general desire that such measures might be taken, on the part of the Executive Government, as would be calculated to induce the State authorities of South Carolina to repeal or modify that law.

Having as yet received no answer to that letter, and not having been able to collect, with precision, in the various conferences which I have held with you, the views and intentions of the President on this subject, I take the liberty of requesting to be informed by you, sir, whether any, and what, steps have as yet been taken, or are in contemplation by this Government, in furtherance of the attainment of the objects submitted to their consideration by me, in the name of His Majesty's Government.

I have the honor to be, with distinguished consideration, sir, your most obedient humble servant,

H. U. ADDINGTON.

Hon. JOHN QUINCY ADAMS, &c.

Mr. Adams to Mr. Addington.—[COPY.]

DEPARTMENT OF STATE,

Washington, July 19, 1824.

SIR: With reference to your letter of the 12th instant, I have the honor of informing you that representations have been made to the Executive authority of the State of South Carolina upon the subject to which it relates, from which it is expected that, at the ensuing session of the Legislature of that State, measures will be taken for removing all grounds of complaint.

I pray you, sir, to accept the assurance of my distinguished consideration.

JOHN QUINCY ADAMS.

H. U. ADDINGTON, Esq.,
Chargé d'Affaires from Great Britain.

Judge Johnson to Mr. Adams.—[COPY.]

CHARLESTON, *July* 3, 1824.

SIR: I know not from whom the Government expects communications such as the present, but I am daily made sensible that the eyes of the community are turned most particularly to the judges of the Supreme Court for protection of their constitutional rights, while I feel myself destitute of the power necessary to realize that expectation. Hence, although obliged to look on and see the Constitution of the United States trampled on by a set of men who, I sincerely believe, are as much influenced by the pleasure of bringing its functionaries into contempt, by exposing their impotence, as by any other consideration whatever, I feel it my duty to call the attention of the President to the subject, as one which may not be unworthy of an official remonstrance to the Executive of the State.

In the envelope which encloses this, I have taken the liberty to enclose three documents. The first is an act of the Legislature of this State, passed at their last session, from which you will perceive how very far your expectations are from being realized, as you expressed them to Mr. Canning in your letter of June 17, 1823. The second is a paragraph from the Charleston Mercury of the 23d ultimo, from which it will be seen how pointedly the South Carolina Association, as it is called, are pressing the execution of that law. And the third is an article from the Charleston Courier of the 29th, which contains a report of the case of Amos Daley, from which it appears that he was a citizen of Rhode Island, and an articled seaman on board of an American vessel.

The ground of defence taken for him will also appear, and, in the disregard of them, the principles acted upon by the people who are pressing these measures.

This man has come off with twelve lashes, because "he could not help himself in returning to this port;" but you will see from the law that this summary court possesses the power of inflicting, in the most summary manner, twelve thousand lashes, should they think proper.

I am wholly destitute of the power of arresting those measures. Both the writs of habeas corpus and injunction I am precluded from using, because the cases assume the form of State prosecutions; and, if I could issue them, I have nobody to call upon, since the district attorney is himself a member of the association; and they have, further, the countenance of five other officers of the United States in their measures. To this fact I attribute much of the confidence with which these measures are prosecuted.

In fact, the law itself was passed under the influence of a memorial from the association, who, I am informed, actually had it drawn up here, in pursuance of their own deliberations, in order to be submitted to the Legislature. It is emphatically their law. The only resource of the masters for having their men taken from them, or of the men, and the only mode of bringing up the subject to the Supreme Court, is by an action for damages. But, without friends, without funds, and without time, mariners cannot resort to suits at law.

I must again apologize for troubling you with this communication, and there are many private considerations that would have deterred me from making it. But I am perfectly sure that I am the only public functionary here by whom it would have been made. The society has the countenance and support of some men who cannot openly join it; and, although

I am confident there is a decided majority against them, yet there are many wealthy and distinguished men in it, and some whose rank in life ought, in my opinion, to have prevented them from taking part with it.

A copy of Mr. Poinsett's letter to you on this subject has been shown among his friends here, and I have perused it. At the same time that I am well convinced Mr. Poinsett believed all that he there urges in excuse of the measure, yet I am well persuaded that it is in the power of no one to establish the facts there stated. Indeed, I do not hesitate to express the opinion, that the whole of the alarm of 1822 was founded in causes that were infinitely exaggerated.

A few timid and precipitate men managed to disseminate their fears and their feelings, and you know that popular panics spread with the expansive force of vapor. The rest of the State, I am well persuaded, takes no interest in these measures, but rather yields them to the fears of the city representation, where their chief operation is felt, than adopts them from an opinion of their necessity or utility.

With very great personal and official consideration, I have the honor to subscribe myself, sir, your very humble servant,

WILLIAM JOHNSON.

Hon. JOHN QUINCY ADAMS,
Secretary of State United States.

CHAPTER 20.

AN ACT the more effectually to prohibit free negroes and persons of color from entering into this State, and for other purposes.

Sec. 1. *Be it enacted by the honorable the Senate and House of Representatives now met and sitting in General Assembly*, That, from and after the passing of this act, it shall not be lawful for any free negro or person of color to migrate into this State, or be brought or introduced into its limits, under any pretext whatever, by land or by water. And in case any such free negro or person of color (not being a seaman on board of any vessel arriving within this State) shall migrate into or be introduced into this State, contrary to this act, he shall and may be carried by any white person before some justice of the peace of the district or parish where he or she shall be taken, which justice is hereby required to summon three freeholders, and form a court to examine such free negro or person of color, and, on conviction, to order him or her to leave the State. And every free negro or person of color so ordered to leave the State, and thereafter remaining longer than fifteen days within the same, or having left the State, and thereafter returning to the same, upon proof thereof, made before any magistrate and three freeholders, and on conviction thereof, shall be subjected to be sentenced to such corporal punishment as the said magistrate and freeholders shall, in their discretion, think fit to order. And if, after the said sentence or punishment, such free negro or person of color shall again remain longer in this State than fifteen days, or, having left the State, shall thereafter return to the same, upon proof thereof, before any magistrate and three freeholders, as aforesaid, and on conviction thereof, the said magistrate and freeholders shall adjudge the said free negro or person of

color to suffer corporal punishment a second time; and for every repetition of the offence of remaining in this State, contrary to this act, or of coming into the same after departing therefrom, such free negro or person of color shall be liable to be proceeded against in like manner; and so on, until such free negro or person of color shall cease to violate this act.

Sec. 2. *And be it further enacted by the authority aforesaid,* That it shall not be lawful for any free negro or person of color to come into this State on board of any vessel, as a cook, steward, mariner, or in any other employment on board of such vessel; and in case any vessel shall arrive in any port or harbor of this State, from any other State or foreign port, having on board any free negro or person of color, employed on board such vessel, as a cook, steward, mariner, or in any other employment, it shall be the duty of the sheriff of the district in which such port or harbor is situated, immediately on the arrival of such vessel, to apprehend such free negro or person of color so arriving contrary to this act, and to confine him closely in jail until such vessel shall be hauled off from the wharf, and ready to proceed to sea; and that, when said vessel is ready to sail, the captain of the said vessel shall be bound to carry away the said free negro or person of color, and to pay the expenses of his detention; and in case such captain shall refuse or neglect to pay the said expenses, and to carry away the said free negro or person of color, he shall forfeit and pay the sum of one thousand dollars, and be liable to be indicted therefor, and also to suffer imprisonment for any term or time not exceeding six months.

Sec. 3. *And be it further enacted by the authority aforesaid,* That whenever any free negro or person of color shall be apprehended and committed to jail, as having arrived in any vessel, in the capacity of a cook, steward, mariner, or otherwise, contrary to this act, it shall be the duty of the sheriff, during the confinement in jail of such free negro or person of color, to call upon some justice of the peace to warn such free negro or person of color never to enter the said State after he or she shall depart therefrom; and such justice of the peace shall, at the time of warning said free negro or person of color, insert his or her name in a book, to be provided by the sheriff for that purpose, and shall therein specify his or her age, occupation, height, and distinguishing marks, which book shall be good and sufficient evidence of such warning; for which services the said justice shall receive the sum of two dollars, payable by the captain of the vessel. And every negro or person of color who shall not depart the State, in case of the captain refusing or neglecting to carry him or her away, or, having departed, shall ever again enter into the limits of this State, by land or water, after being warned as aforesaid, shall be dealt with as the first section of this act directs for persons of color who shall migrate or be brought into this State.

Sec. 4. *And be it further enacted by the authority aforesaid,* That it shall not be lawful for any master or captain of any vessel, or for any other person, to introduce or bring into the limits of this State any free negro or person of color, as a passenger, or as cook, mariner, steward, or in any other capacity on board of such vessel, whose entrance into this State is prohibited by this act. And if any master or captain of any vessel, as aforesaid, shall bring in or introduce into this State any such free negro or person of color, whose entrance is prohibited as aforesaid, or if any other person shall introduce by land, as a servant, any free negro or person of color, every such person shall, for the first offence, be fined in a sum not

exceeding one hundred dollars, and for the second offence be liable to forfeit and pay, for each free negro or person of color so brought into this State, the sum of one thousand dollars, and shall moreover be liable to be imprisoned for any term or time not exceeding six months.

Sec. 5. *And be it further enacted by the authority aforesaid*, That it shall not be lawful for any free negro or person of color, who has left the State at any time previous to the passing of this act, or for those who may hereafter leave the State, ever to return again into the same, without being subject to the penalties of the first section of this act, as fully as if they had never resided therein.

Sec. 6. *And be it further enacted by the authority aforesaid*, That it shall not be lawful for any citizen of this State, or other person, to bring into this State, under any pretext whatever, any slave or slaves, from any port or place in the West Indies, or Mexico, or any port of South America, or from Europe, or from any sister State which may be situated to the north of the river Potomac or the city of Washington. Neither shall it be lawful for any person to bring into this State, as a servant, any slave who has been carried out of the same, if, at any time during the absence of such slave from this State, he or she hath been in ports or places situated in Europe, in the West Indies, or Mexico, or any port of South America, or in States north of the Potomac or city of Washington. And any person who shall bring into this State any slave, contrary to the meaning of this act, shall forfeit and pay the sum of one thousand dollars, and the said slave shall be a forfeiture to the State.

Sec. 7. *And be it further enacted by the authority aforesaid*, That all free negroes and persons of color, and all other persons, shall be exempted from the operation of this act, where such free negroes and persons of color and slaves have arrived within the limits of this State by shipwreck or stress of weather, or other unavoidable accident. But such free negroes or persons of color, and other persons, shall nevertheless be subject to the penalties of this act, if the requisites of the same be not complied [with] within one month after such shipwreck, stress of weather, or other unavoidable accident.

Sec. 8. *And be it further enacted by the authority aforesaid*, This that act shall not extend to free negroes or persons of color, who shall arrive in any port or harbor of this State, as cooks, stewards, mariners, or as otherwise employed in any vessel of war of the United States navy, or on board any national vessel of the navies of any of the European or other Powers in amity with the United States, unless said free negroes and persons of color shall be found on shore, after being warned by the sheriff or his deputy to keep on board of their vessels. Nor shall this act extend to free American Indians, free Moors, or Lascars, or other colored subjects of countries beyond the Cape of Good Hope, who may arrive in this State in any merchant vessel. But such persons only shall be deemed and adjudged to be persons of color, within the meaning of this act, as shall be descended from negroes, mulattoes, and mestizoes, either on the father's or mother's side.

Sec. 9. *And be it further enacted by the authority aforesaid*, That in case any master or mate of any vessel, on his arrival, shall make any false return, to the sheriff or his deputy, of the number of persons he may have on board, whose entrance shall be prohibited by this act, he shall forfeit and pay the sum of one thousand dollars. And any master of a vessel, or

other person, opposing the sheriff or his deputy in the execution of this duty, and all persons aiding and abetting him therein, shall be liable to be indicted and pay a fine of one thousand dollars, and be imprisoned for any term not exceeding six months.

Sec. 10. *And be it further enacted*, That any sheriff who shall wilfully neglect or refuse to perform the duties required by this act shall forfeit and pay five hundred dollars; one-half to the informer, and the other for the use of the State, to be recovered by action of debt in any court having jurisdiction.

Sec. 11. *And be it further enacted by the authority aforesaid*, That all prosecutions under this act may be maintained without limitation of time; and all penalties or forfeitures imposed thereby may be recovered in any court of record in this State, one-half of which shall go into the public treasury, and the other half to the person informing: *Provided, however*, That no prosecution shall be permitted against the masters of vessels, or any other white persons, from any port of the United States, in less than three months, or against captains of vessels from foreign ports in less than six months, after the passing of this act.

Sec. 12. *And be it further enacted by the authority aforesaid*, That so much of an act passed on the twentieth of December, one thousand eight hundred and twenty, entitled "An act to restrain the emancipation of slaves, and to prevent free persons of color from entering into this State, and for other purposes," and also so much of another act passed on the twenty-first of December, one thousand eight hundred and twenty-two, entitled "An act for the better regulation and government of free negroes and persons of color, and for other purposes," as are repugnant to this act, and so much thereof as makes it the duty of the harbor master to report to the sheriff the arrival of all free negroes in the harbor of Charleston, be, and the same are hereby, repealed.

Sec. 13. *And be it further enacted by the authority aforesaid*, That no free negro, or other free person of color, shall carry any fire arms or other military weapons abroad, except with a written ticket from his or their guardian, under pain of forfeiting the same, and being fined or whipped, at the discretion of the magistrate and three freeholders, before whom he or they may be convicted thereof. Nor shall any free person of color be hereafter employed as a pioneer, though he may be subjected to military fatigue duty when called on.

In the Senate house, the twentieth day of December, in the year of our Lord one thousand eight hundred and twenty-three, and in the forty-eighth year of the independence of the United States of America.

JACOB BONDTON,
President of the Senate.
PATRICK NOBLE,
Speaker of the House of Representatives.

[From the Charleston Courier.]

LAW REPORT.

State of South Carolina vs. *Doley.*

Mr. EDITOR: As this case appears to have excited some degree of interest among our fellow-citizens, and as only a very partial account of it has

yet been published, the following report, drawn up by one present at and concerned in the trial, may not be unacceptable to your readers:

Amos Daley, a native of Rhode Island, claiming to be a free Indian of the Narragansett tribe, was arraigned before a court formed under the act of 1823, for having returned into the State, contrary to the provisions of said act, after having received official warning of the consequences of such return.

The court consisted of John H. Mitchell, Q. U., and Joseph Cole, William McDow, and John Huger, Esqrs., freeholders. The trial came on on Tuesday, the 22d of June. Mr. Holmes, Solicitor of the South Carolina Association, for the prosecution; Messrs. Courtenay and McCrady for the prisoner.

On opening the court, the presiding officer read its proceedings at the last meeting, and the testimony of Andrew Bay, Q. U., a witness on behalf of the prosecution, which was as follows:

That he committed the prisoner, Amos Daley, to jail, having arrived here in the schooner Fox, Rose, master, on the 22d day of April last; that on the 3d of May last he was released, and, on his description and marks, age, &c., being duly recorded, witness warned the prisoner never to return here again, and warned, also, Captain Rose of the consequences which would ensue should he be brought into this State; that the prisoner did return to Charleston, (notwithstanding the warning aforesaid,) in the same vessel, commanded by the same captain, and witness again had the prisoner arrested and committed on the 16th of the present month of June, agreeably to the directions of the act of December, 1823.

The court then entered into the examination of witnesses on the part of the prisoner. Three witnesses were called, viz: Perry Rose, master of the schooner Fox; James Gilbert, mate; and Mr. R. B. Lawton.

Captain Rose was first sworn, and testified: That he well knew the prisoner's mother to be a Narragansett Indian, with straight black hair; also knew his father,* husband to the woman, his mother; that he, also, was a Narragansett Indian, with straight black hair; that his father was a freeholder, owning a farm, and that the prisoner was entitled to all the rights and privileges of citizenship in Rhode Island; that the prisoner was of Warwick; that these Indians trace their descent through the women.

The mate, James Gilbert, was next sworn. He had seen the woman called the mother of the prisoner, and she was an Indian squaw; he had also seen the man called his father; he, too, was an Indian. Both father and mother have straight hair. Witness had no doubt that the prisoner was a free Indian. He had known the prisoner since the time of the last war; that it was customary to call Indians colored men.

Mr. Lawton, being then sworn, said: That he was brought up in Rhode Island, and lived there until he was 15 years old. He knew the Indians of the Narragansett tribe very well, and the features of the prisoner were those of the tribe he claimed to belong to. On his cross-examination, he stated that the Narragansetts, like all other Indians, traced their descent always through the women; that the hair of the prisoner was not like the generality of Indians, but that he had seen genuine squaws of that tribe, who were old, with very curly hair; he thought, however, the hair of the prisoner rather against him; that negroes are not very plenty among the Narragansetts; that it was not uncommon to call Indians men of color.

* Counsel for the prisoner thought he said reputed father.

Messrs. Turnbull and Hugar were now called, on the part of the prosecution.

Mr. Turnbull, being sworn, said: That Captain Rose (thinking erroneously that he had something to do with the prosecution) had complained to him of the hard fate of the prisoner; that the captain told him he knew the prisoner's mother, and she was an Indian, but that he did not know his father; that he (witness) had seen Indians of various tribes; the complexion was not the test of genuine blood, but the long straight hair was the characteristic universally relied on. The prisoner was not darker than many Indians he had seen. He never was among the Narragansett Indians.

Next was sworn Mr. A. Hugar, who testified: That he was present with Mr. Turnbull when he conversed with the captain. The captain then said he knew the prisoner's mother very well; she was brought up in his family, and was an Indian; but, on being asked whether he knew the father, he had answered nearly in these words: "That he knew nothing at all about the father." He, too, (witness,) had travelled much among the Indians, and he considered the hair, not the complexion, the test of genuine blood.

Here the examination of witnesses closed. It was conceded that he (Fox) had come from a foreign port, and that the captain was not liable, under the act, for bringing the prisoner into the State. The sheriff's book was produced. The prisoner's hair was woolly. The following is the copy of a certificate in possession of the prisoner, which was adduced on the trial:

To whom concerned:

STATE OF RHODE ISLAND, *ss:*

I hereby certify that Amos Daley, a man of color, was born in the town of Warwick, in this State, on the 15th day of September, A. D. 1800, and is the son of William Daley, by Susannah, his wife, as appears of record.

JOHN REYNOLDS, *Town Clerk.*

NORTH KINGSTON, *December* 27, 1823.

Messrs. Courtenay and McCrady, for the prisoner, contended that the evidence adduced was conclusive as to the prisoner's national character, and brought him within the exception of the act, and at least sufficient to throw the *onus probandi* on the prosecution, and bound the court. The former gentleman then endeavored to show that, even if the prisoner were within the letter, he was clearly without the equity of the act. As it was no offence in the captain to bring him in, he was bound in bonds so to do, and the prisoner could not prevent it. And further argued, that the act itself was unconstitutional and void, under the 2d section of the 4th article of the Constitution of the United States: "that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," the prisoner being a citizen of Rhode Island. The latter denied the constitutionality of the law, also, but relied on the 8th section of the 1st article of the Constitution of the United States: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" the act being an interference with navigation, which, in the case of Gibbons *vs.* Ogden, had been decided to be an essential part of commerce, and beyond the control of the States. Further: that the act of 1823 clashed with the commercial regulations of the United States,

Mr. Holmes, in reply, denied that sufficient evidence had been adduced on the part of the prisoner to throw the "*onus*" on the prosecution; and that the prisoner was obliged to prove himself within the exception of the act; contended that the captain's evidence was worthless, as he had contradicted himself; and that the prisoner and captain both came within the equity of the act, both having been warned, but the captain happened to escape the letter; that Mr. Courtenay's construction of the Constitution had been refuted in the Missouri question by our ablest statesmen; that the part of the Constitution and the case relied on by Mr. McCrady were wholly inapplicable to the case before the court; seemed to doubt the principles in Gibbons *vs.* Ogden, and thought we should await the judgment of the Supreme Court in our own case before we yielded.

The court, after consideration, adjudged the prisoner guilty; but, in consideration of its appearing that he had not returned voluntarily, only sentenced him to receive twelve lashes on his bare back the same afternoon, at 5 o'clock, in the work-house.

CHAPTER 3.

AN ACT for the better regulation and government of free negroes and persons of color, and for other purposes.

Section 1. *Be it enacted by the honorable the Senate and House of Representatives now met and sitting in General Assembly, and by the authority of the same,* That, from and after the passing of this act, no free negro or person of color, who shall leave this State, shall be suffered to return; and every person who shall offend herein shall be liable to the penalties of the act passed on the twentieth day of December, in the year one thousand eight hundred and twenty, entitled "An act to restrain the emancipation of slaves, and to prevent free persons of color from entering the State, and for other purposes."

Sec. 2. *And be it further enacted,* That every free male negro or person of color, between the ages of fifteen and fifty years, within this State, who may not be a native of said State, or shall not have resided therein five years next preceding the passing of this act, shall pay a tax of fifty dollars per annum; and in case said tax shall not be paid, the said free male person of color shall be subject to the penalties of the act against free persons of color coming into this State, passed on the twentieth day of December, one thousand eight hundred and twenty.

Sec. 3. *And be it further enacted by the authority aforesaid,* That if any vessel shall come into any port or harbor of this State, from any other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, mariners, or in any other employment on board of said vessel, such free negroes or persons of color shall be liable to be seized and confined in jail, until said vessel shall clear out and depart from this State; and that, when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro or free person of color, and to pay the expenses of his detention; and, in case of his neglect or refusal so to do, he shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less

than two months; and such free negroes or persons of color shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid.

Sec. 4. *And be it further enacted by the authority aforesaid,* That the sheriff of Charleston district, and each and every other sheriff of this State, shall be empowered and specially enjoined to carry the provisions of this act into effect, each of whom shall be entitled to one moiety of the proceeds of the sale of all free negroes and free persons of color that may happen to be sold under the provisions of the foregoing clause: *Provided* the prosecution be had at his information.

Sec. 5. *And be it further enacted,* That it shall be the duty of the harbor master of the port of Charleston to report to the sheriff of Charleston district the arrival of all free negroes or free persons of color who may arrive on board any vessel coming into the harbor of Charleston from any other State or foreign port.

Sec. 6. *And be it further enacted,* That, from and after the passing of this act, it shall be altogether unlawful for any person or persons to hire to any male slave or slaves his or their time; and in case any male slave or slaves be so permitted by their owner or owners to hire out their own time, labor, or service, the said slave or slaves shall be liable to seizure and forfeiture, in the same manner as has been heretofore enacted in the act in the case of slaves coming into this State contrary to the provisions of the same.

Sec. 7. *And be it further enacted,* That, from and after the first day of June next, every free male negro, mulatto, or mestizo, in this State, above the age of fifteen years, shall be compelled to have a guardian, who shall be a respectable freeholder of the district in which said free negro, mulatto, or mestizo, shall reside; and it shall be the duty of the said guardian to go before the clerk of the court of the said district, and before him signify his acceptance of the trust, in writing; and at the same time he shall give to the clerk aforesaid his certificate, that the said negro, mulatto, or mestizo, for whom he is guardian, is of good character and correct habits; which acceptance and certificate shall be recorded in said office by the clerk, who shall receive for the same fifty cents; and if any free male negro, mulatto, or mestizo, shall be unable to conform to the requisitions of this act, then and in that case such person or persons shall be dealt with as this act directs for persons of color coming into this State contrary to law; and the amount of sales shall be divided, one-half to the informer, and the other half for the use of the State.

Sec. 8. *And be it further enacted by the authority aforesaid,* That if any person or persons shall counsel, aid, or hire, any slave or slaves, free negroes, or persons of color, to raise a rebellion or insurrection within this State, whether any rebellion or insurrection do actually take place or not, every such person or persons, on conviction thereof, shall be adjudged felons, and suffer death without benefit of clergy.

Sec. 9. *And be it further enacted by the authority aforesaid,* That the commissioners of the cross roads for Charleston neck be, and they are hereby declared to be, justices of the peace, ex-officio, in that part of the parish of St. Philip's without the corporate limits of Charleston, for all purposes except for the trial of causes small and mean.

In the Senate house, the first day of December, in the year of our Lord

one thousand eight hundred and twenty-two, and in the forty-seventh year of the independence of the United States of America.

JACOB BONDTON,
President of the Senate.
PATRICK NOBLE,
Speaker of the House of Representatives.

Mr. Vaughan to Mr. Van Buren.—[COPY.]

WASHINGTON, *December* 26, 1830.

It is with great regret that the undersigned, His Britannic Majesty's envoy extraordinary and minister plenipotentiary, finds himself called upon to represent to the Government of the United States the cruel and unjust operation of a law of the State of South Carolina, under which a free man of color, a British subject, has been seized on board a British ship, and imprisoned in the jail of Charleston.

The following is the statement of the case, received from His Majesty's consul: Daniel Fraser, a free colored man, born in the British West Indies, and carried, at the age of four years, to Scotland, and undoubtedly a British subject, arrived in the port of Charleston in the month of November last, in the capacity of cook, on board the ship Atlantic, from Liverpool, when he was seized and sent to prison, under a warrant issued by the sheriff, in virtue of an act passed by the Legislature of South Carolina. The third section of that act is in the following words:

"*And be it further enacted by the authority aforesaid*, That if any vessel shall come into any port or harbor of this State, from any other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, mariners, or in any other employment on board said vessel, such free negroes or persons of color shall be liable to be seized and confined in jail until the said vessel shall clear out and depart from this State; and that, when said vessel is ready to sail, the captain of the said vessel shall be bound to carry away the said free negro or person of color, and pay the expenses of his detention; and in case of his neglect or refusal so to do, he shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes or persons of color shall be deemed and taken as absolute slaves, and be sold in conformity with the provisions of the act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid."

The undersigned, desirous of avoiding any discussion with the Government of the United States involving a remonstrance against a State law, directed the British consul at Charleston to endeavor to procure the release of Daniel Fraser, by entering into communication with the proper authorities of that place, trusting, also, that he had only to point out the cruelty and injustice of an act so seriously affecting the commercial intercourse with British subjects, to ensure its repeal.

The undersigned has the honor to enclose copies of the correspondence which has taken place between the British consul, William Ogilby, and the sheriff of Charleston, by which the Secretary of State will perceive how hopeless it is to expect that the magistrates of Charleston will set at liberty

Daniel Fraser, or to look forward with any confidence to the repeal of the obnoxious act by the Legislature of the State.

Upon reference to a similar remonstrance made by the British minister at Washington, in 1824, the undersigned finds that the Government of the United States took the opinion of the Attorney General, who declared that the law of South Carolina, in question, was void, as it was incompatible with the rights of all nations in amity with the United States; that the Constitution gave to Congress the supreme and exclusive power of regulating commerce with foreign nations, and that no State had the right of imposing new restrictions. There is no requisition, in any treaty with Great Britain, that British vessels, permitted to enter any ports of the United States, shall be navigated by white men alone.

The undersigned is aware that the General Government of the United States cannot control the laws made in the several States; but the undersigned feels it to be his duty to point out the restriction and embarrassment which the State of South Carolina has put upon commercial intercourse with British subjects, in order that measures may be taken for the exact observance, as in the other States of the Union, of the stipulations of the treaties and conventions subsisting between Great Britain and the United States.

The undersigned cannot refrain from calling, earnestly, for prompt attention to the subject of this note, in order to avoid any future remonstrance, not unlikely to be occasioned in consequence of the intercourse being re-established between the British West Indies and the United States.

The undersigned has the honor to renew to Mr. Van Buren the assurance of his highest consideration.

CHAS. R. VAUGHAN.

Hon. MARTIN VAN BUREN, &c.

Mr. Ogilby to Mr. Steedman.—[COPY.]

BRITISH CONSULATE,

Charleston, December 15, 1830.

SIR: I should have done myself the honor of addressing you ere this, on a subject to which I have already called your attention several times in our interviews within the last fortnight, namely, the imprisonment of Daniel Fraser, a free man of color, belonging to the British ship Atlantic, now in this port; but being impressed with a due sense of the peculiar difficulties this State has to contend with, by reason of its very numerous slave population, and of the anxious wish which I know is entertained by His Majesty's Government to perpetuate the friendly relations and feelings which so happily exist, at the present time, between our respective countries, I felt, and still feel, an extreme reluctance to agitate a question which, I am aware, has already given rise, in more than one instance, to a good deal of excitement in this State: but the protracted imprisonment of the seaman before named, and the assurances I have recently received, from the best authority, that, on some former occasions, British colored seamen who were imprisoned here, under the 3d section of the legislative act of this State, were released by the authorities, on the application of His Majesty's consul, and given up to him without the payment of any costs, obliges me to conside

it imperatively my duty, as British consul, to request of you the release of the British subject before mentioned, Daniel Fraser, under the assurance that I shall not fail to impress upon the captain of the Atlantic the propriety of confining this seamen to his ship, and not allowing him to hold communication with any of the colored population of this city.

I have the honor, &c.

WILLIAM OGILBY,
British Consul for the State of South Carolina.

C. J. STEEDMAN, Esq.,
Sheriff, Charleston.

Mr. Steedman to Mr. Ogilby.

SHERIFF'S OFFICE, *December* 16, 1830.

SIR: Your letter of yesterday, relative to the imprisonment of Daniel Fraser, a free man of color, belonging to the British ship Atlantic, has been submitted to the attorney general of the State, and I now have the honor of enclosing his answer.

I exceedingly regret that I am constrained, against my inclination, to adhere to the law, which imperatively enforces on me the confinement of the man; and beg leave to assure you that if I could, consistently with my duty, release him, it would afford me pleasure to do so.

I have the honor, &c.

CHARLES J. STEEDMAN.

WILLIAM OGILBY, Esq., *British Consul, &c.*

Mr. Legare to Mr. Steedman.

SIR: I regret exceedingly, that, from the very imperative character of the acts of Assembly, relating to the introduction of free persons of color into this State, I do not feel myself at liberty to take any steps or give any counsel towards accomplishing the object of Mr. Ogilby's letter. I regret it the more, because the conciliatory and friendly tone in which that letter is written is in perfect accordance with my own feelings, and with what I believe to be the public feeling in regard to our intercourse with Great Britain and her dependencies.

But, as a member of the Legislature, I know that several efforts have been made, within a few years past, to relax the policy of those laws, and that they have all *decidedly* failed. It is not more than a fortnight since I had myself the honor of reporting a bill, from the Charleston delegation, to relieve the commerce of Charleston of some of the embarrassments occasioned by these acts; but this bill, too, it seems, has failed, even in the House of Representatives—that branch of the Legislature hitherto most favorable to the amendments proposed.

Under all circumstances, I think the law must take its course, however unwilling the officers who are bound to enforce it may be to enter into a conflict with a friendly foreign Power, so much respected by us.

I have the honor, &c.

HUGH S. LEGARE, *Attorney General.*

CHARLES J. STEEDMAN, Esq.,
Sheriff of the Charleston District.

Mr. Vaughan to Mr. Van Buren.

WASHINGTON, *January* 15, 1831.

The undersigned, His Britannic Majesty's envoy extraordinary and minister plenipotentiary, begs leave to inform the Secretary of State of the United States, that he has received a letter (a copy of which is enclosed) from Mr. Ogilby, His Britannic Majesty's consul at Charleston, South Carolina, stating that Daniel Fraser, a free man of color and a British subject, whose arrest and imprisonment gave occasion to the representation which the undersigned had the honor to make to Mr. Van Buren on the 26th December last, has been released and restored to his vessel. As it may possibly be inferred, from the release of Frazer, that satisfaction has been granted by the magistrates of Charleston for the wrong done to a British subject, which called for the remonstrance made by the undersigned, he thinks it his duty to make Mr. Van Buren acquainted with the circumstances attending the release of Fraser.

By a reference to the enclosed letter, it will appear that Fraser was not released from prison until the vessel to which he belonged had been removed to a position at such a distance from Charleston that the crew could not communicate with that town, and that the amount of the expenses incurred for his subsistence in jail was exacted. Redress, however, for the injury to the individual arrested has not been so much the object of the representation made by the undersigned, as to obtain from the Government of the United States an assurance that the acts of the Legislature of South Carolina would not, in future, counteract the stipulations contained in the treaties and conventions which regulate the intercourse of British subjects with this country. On these grounds, the undersigned is particularly anxious to be able to lay before His Majesty's Government the view taken by the President of the embarrassment which has been occasioned by the State law of South Carolina.

The undersigned has the honor to renew to Mr. Van Buren the assurance of his highest consideration.

CHAS. R. VAUGHAN.

Hon. MARTIN VAN BUREN, *&c.*

BRITISH CONSULATE,

Charleston, January, 3, 1831.

SIR: I am happy to have the honor of informing you of my having succeeded, on Friday last, in obtaining the release from prison of Daniel Fraser, the colored seaman belonging to the British ship Atlantic, in consequence of his ship having hauled into the stream, at a distance from the wharves, to take in a cargo of timber; and the crew being thereby prevented from holding communication with the shore, the authorities here agreed to release him, but not until the captain of the Atlantic had paid the expenses of his subsistence.

I have the honor, &c.

WILLIAM OGILBY, *Consul.*

The Rt. Hon. CHAS. R. VAUGHAN, *&c.*

Opinion of the Hon. William Johnson, delivered on the 7th August, 1823, in the case of the arrest of the British seaman under the third section of the State act, entitled "An act for the better regulation of free negroes and persons of color, and for other purposes," passed in December last.

Ex parte Henry Elkison, *a subject of His Britannic Majesty,*

versus

Francis Deliesseline, *Sheriff of Charleston District.*

The motion submitted by Mr. King, in behalf of the prisoner, is for the writ of *habeas corpus ad subjiciendum;* and if he should fail in this motion, then for the writ *de homine replegiando*—the one regarding the prisoner in a criminal, the other in a civil aspect; the first motion having for its object his discharge from confinement absolutely, the other his discharge on bail, with a view to try the question of the validity of the law under which he is held in confinement.

A document, in nature of a return, under the hand and seal of the sheriff, has been laid on my table by the gentlemen who conduct the opposition, from which it appears that the prisoner is in the sheriff's custody under an act of this State, passed in December last; and indeed the whole cause has been argued under the admission that he is in confinement under the third section of that act, as he states in his petition.

The act is entitled "An act for the better regulation of free negroes and persons of color, and for other purposes." And the third section is in these words: "That if any vessel shall come into any port or harbor of this State, from any *other State* or *foreign port*, having on board any free negroes or persons of color, as cooks, stewards, or mariners, or in any other employment on board of said vessel, such free negroes or persons of color shall be liable to be seized and confined in jail until such vessels shall clear out and depart from this State; and that, when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro or free person of color, and to pay the expenses of his detention; and, in case of his neglect or refusal so to do, he shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes or persons of color shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the 20th December, 1820, aforesaid."

As to the description or character of this individual, it is admitted that he was was taken by the sheriff, under this act, out of the ship Homer, a British ship trading from Liverpool to this place. From the shipping articles, it appears that he was shipped in Liverpool; from the captain's affidavit, that he had known him several years in Liverpool as a British subject; and from his own affidavit, that he is a native subject of Great Britain, born in Jamaica.

In support of this demand on the protection of the United States, the British consul has also presented his claim of this individual as a British subject, and with it the copy of a letter from Mr. Adams to Mr. Canning, of June 17th last, written in answer to a remonstrance of Mr. Canning against this law. Mr. Adams's letter contains these words: "With refer-

ence to your letter of the 15th February last, and its enclosure, I have the honor of informing you that, immediately after its reception, measures were taken by the Government of the United States for effecting the removal of the cause of complaint set forth in it, which it is not doubted have been successful, and will prevent the recurrence of it in future."

This communication is considered by the consul as a pledge which this court is supposed bound to redeem. It had its origin thus:

Certain seizures under this act were made in January last, some on board of American vessels, and others in British vessels; and among the latter one very remarkable for not having left a single man on board the vessel, to guard her, in the captain's absence.

Applications were immediately made to me in both classes of cases, for the protection of the United States authority; in consequence of which I called upon the district attorney for his official services. Several reasons concurred to induce me to instruct him to bring the subject before the State judiciary. I felt confident that the act had been passed hastily, and without due consideration; and, knowing the unfavorable feeling that it was calculated to excite abroad, it was obviously best that relief should come from the quarter from which proceeded the act complained of. Whether I possessed the power or not to issue the writ of habeas corpus, it was unquestionable that the State judges could give this summary relief; and I therefore instructed Mr. Gadsden to make application to the State authorities, and to do it in the manner most respectful to them. In the mean time, I prevailed on the British consul, the late Mr. Moody, and the Northern captains, to suppress their complaints, fully confident that when the subject came to be investigated they would be no more molested. The application was made to State authority, and the men were relieved; but, the ground of relief not being in its nature general or permanent, Mr. Moody made his representations to Mr. Canning, and the Northern captains, I am informed, did the same to Congress or to the Executive. What passed afterwards came to my knowledge in such a mode that, after what has publicly transpired on this argument, I do not think proper, as it certainly is not necessary, to declare it. A gentleman in his place (Col. Hunt) has declared, that he is authorized to deny that Mr. Adams was sanctioned by any thing that transpired between himself and any member of the State delegation to give such a pledge. Certain, however, it is, that from that time the prosecutions under this act were discontinued until lately revived by a voluntary association of gentlemen, who have organized themselves into a society, to see the laws carried into effect. And here, as I well know the discussion that this occurrence will give rise to, I think it due to the State officers to remark, that from the time that they have understood that this law has been complained of, on the ground of its unconstitutionality and injurious effects upon our commerce and foreign relations, they have shown every disposition to let it sleep. On the present occasion, the attorney general has not appeared in its defence. The opposition to the discharge of the prisoner has been conducted by Mr. Holmes, the solicitor of the association, and by Col. Hunt. As there is nothing done clandestinely or disavowed, there can be no offence given by a suggestion which means no more than to show that pressing the execution of this law at this time is rather a private than a State act; and to furnish an explanation that may eventually prove necessary to excuse Mr. Adams to Mr. Canning, and perhaps to excuse some member of the State delegation to Mr. Adams.

Certain it is that I cannot officially take notice of Mr. Adams's letter. However sufficient for Mr. Canning to rely on, it is not legally sufficient to regulate my conduct, or vest in me any judicial powers. The facts which I have communicated will, I hope, be sufficient to show that our administration has acted in good faith with that of Great Britain.

Two questions have now been made in the argument—the first on the law of the case, the second on the remedy.

On the unconstitutionality of the law under which this man is confined, it is not too much to say that it will not bear argument; and I feel myself sanctioned in using this strong language, from considering the course of reasoning by which it has been defended. Neither of the gentlemen has attempted to prove that the power therein assumed by the State can be exercised without clashing with the general powers of the United States to regulate commerce; but they have both strenuously contended that, *ex necessitate*, it was a power which the State must and would exercise; and, indeed, Mr. Holmes concluded his argument with the declaration, that if a dissolution of the Union must be the alternative, he was ready to meet it. Nor did the argument of Colonel Hunt deviate at all from the same course. Giving it in the language of his own summary, it was this: South Carolina was a sovereign State when she adopted the Constitution—a sovereign State cannot surrender a right of vital importance: South Carolina, therefore, either did not surrender this right, or still possesses the power to resume it; and whether it is necessary or when it is necessary to resume it, she is herself the sovereign judge.

But it was not necessary to give this candid exposé of the grounds which this law assumes; for it is a subject of positive proof that it is altogether irreconcilable with the powers of the General Government; that it necessarily compromits the public peace, and tends to embroil us with, if not separate us from, our sister States; in short, that it leads to a dissolution of the Union, and implies a direct attack upon the sovereignty of the United States.

Let it be observed that the law is, "if any vessel" (not even the vessels of the United States excepted) "shall come into any port or harbor of this State," &c., bringing in free colored persons, such persons are to become "absolute slaves;" and that without even a form of trial, as I understand the act, they are to be sold. By the next clause, the sheriff is vested with absolute power, and expressly enjoined to carry the law into effect, and is to receive the one-half of the proceeds of the sale.

The object of this law, and it has been so acknowledged in argument, is to prohibit ships coming into this port from employing colored seamen, whether citizens or subjects of their own Government or not. But if this State can prohibit Great Britain from employing her colored subjects, (and she has them of all colors on the globe,) or if at liberty to prohibit the employment of her subjects of the African race, why not prohibit her from using those of Irish or of Scottish nativity? If the color of the skin is to preclude the Lascar or the Sierra Leone seaman, why not the color of his eye or his hair exclude from our ports the inhabitants of her other territories? In fact, it amounts to the assertion of the power to exclude the seamen of the territories of Great Britain, or any other nation, altogether. With regard to various friendly nations, it amounts to an actual exclusion in its present form. Why may not the shipping of Morocco or of Algiers cover the commerce of France with this country, even at the present

crisis? Their seamen are all colored; and even the State of Massachusetts might lately, and may perhaps now, expedite to this port a vessel with her officers black, and her crew composed of Nantucket Indians, known to be among the best seamen in our service. These might all become slaves under this act.

If this law were enforced upon such vessels, retaliation would follow; and the commerce of this city, feeble and sickly, comparatively, as it already is, might be fatally injured. Charleston seamen, Charleston owners, Charleston vessels, might *eo nomine* be excluded from their commerce, or the United States involved in war and confusion. I am far from thinking that this power would ever be wantonly exercised; but these considerations show its utter incompatibility with the power delegated to Congress to regulate commerce with foreign nations and our sister States.

Apply the law to the particular case before us, and the incongruity will be glaring. The offence, it will be observed, for which this individual is supposed to forfeit his freedom, is that of coming into this port in the ship Homer, in the capacity of a seaman. I say this is the whole of his offence; for I will not admit the supposition that he is to be burdened with the offence of the captain in not carrying him out of the State. He is himself shut up; he cannot go off; his removal depends upon another. It is true the sale of him is suspended upon the conviction of the captain, and the captain has the power to rescue him from slavery. But suppose the captain, as is very frequently the case, may find it his interest or his pleasure to get rid of him, and of the wages due him, his fate is suspended upon the captain's caprice in this particular; but it is the exercise of a dispensing power in the captain, and nothing more. The seaman's crime is complete, and the forfeiture incurred by the single act of coming into port; and this even though driven into port by stress of weather, or forced, by a power which he cannot control, into a port for which he did not ship himself. The law contains no exception to meet such contingencies. The seaman's offence, therefore, is *coming into the State in a ship or vessel*; that of the captain consists *in bringing him in, and not taking him out of the State, and paying all expenses.* Now, according to the laws and treaties of the United States, it was both lawful for this seaman to come into this port in this vessel, and for the captain to bring him in the capacity of a seaman; and yet these are the very acts for which the State law imposes these heavy penalties. Is there no clashing in this? It is in effect a repeal of the laws of the United States, *pro tanto*, converting a right into a crime.

And here it is proper to notice that part of the argument against the motion, in which it was insisted on that this law was passed by the State in exercise of a concurrent right. Concurrent does not mean paramount; and yet, in order to divest a right conferred by the General Government, it is very clear that the State right must be more than concurrent.

But the right of the General Government to regulate commerce with the sister States and foreign nations is a paramount and exclusive right; and this conclusion we arrive at, whether we examine it with reference to the words of the Constitution or the nature of the grant. That this has been the received and universal construction, from the first day of the organization of the General Government, is unquestionable; and the right admits not of a question any more than the fact. In the Constitution of the United States—the most wonderful instrument ever drawn by the hand of man—there is a comprehension and precision that is unparalleled; and I can truly

say, that, after spending my life in studying it, I still daily find in it some new excellence.

It is true that it contains no prohibition on the States to regulate foreign commerce. Nor was such a prohibition necessary; for the words of the grant sweep away the whole subject, and leave nothing for the States to act upon. Wherever this is the case, there is no prohibitory clause interposed in the Constitution. Thus, the States are not prohibited from regulating the value of foreign coins, or fixing a standard of weights and measures, for the very words imply a total unlimited grant. The words in the present case are, "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." If Congress can regulate commerce, what commerce can it not regulate? And the navigation of ships has always been held by all nations to appertain to commercial regulations.

But the case does not rest here. In order to sustain this law, the State must also possess a power paramount to the treaty-making power of the United States, expressly declared to be a part of the supreme legislative power of the land; for the seizure of this man, on board a British ship, is an express violation of the commercial convention with Great Britain of 1815. Our commerce with that nation does not depend upon the mere negative sanction of not being prohibited. A reciprocal liberty of commerce is expressly stipulated for, and conceded by that treaty; to this the rights of navigating their ships in their own way, and particularly by their own subjects, is necessarily incident. If policy requires any restriction of this right, with regard to a particular class of the subjects of either contracting party, it must be introduced by treaty. The opposite party cannot introduce it by a legislative act of his own. Such a law as this could not be passed, even by the General Government, without furnishing a just cause of war.

But to all this, the plea of necessity is urged; and of the existence of that necessity we are told the State alone is to judge. Where is this to land us? Is it not asserting the right in each State to throw off the Federal Constitution at its will and pleasure? If it can be done as to any particular article, it may be done as to all; and, like the old Confederation, the Union becomes a mere rope of sand. But I deny that the State surrendered a single power necessary to its security against this species of property. What is to prevent their being confined to their ships, if it is dangerous for them to go abroad? This power may be lawfully exercised. To land their cargoes, take in others, and depart, is all that is necessary to ordinary commerce, and is all that is properly stipulated for in the convention of 1815, so far as relates to seamen. If our fears extend also to the British merchant, the supercargo, or master, being persons of color, I acknowledge that as to them the treaty precludes us from abridging their rights to free ingress and egress, and occupying houses and warehouses for the purposes of commerce. As to them, this law is an express infraction of the treaty. No such law can be passed consistently with the treaty, and, unless sanctioned by diplomatic arrangement, the passing of such a law is tantamount to a declaration of war.

But if the policy of this law was to keep foreign free persons of color from holding communion with our slaves, it certainly pursues a course altogether inconsistent with its object. One gentleman likened the importation of such persons to that of clothes infected with the plague, or of wild

beasts from Africa; the other to that of fire-brands set to our own houses, only to escape by the light. But surely if the penalty inflicted for coming here is, in its effect, that of being domesticated, by being sold here, then we ourselves inoculate our community with the plague, *we* ourselves turn loose the wild beasts in our streets, and *we* put the fire-brand under our own houses. If there are evil persons abroad who would steal to this place, in order to do us this mischief, (and the whole provisions of this act are founded in that supposition,) then this mode of disposing of offenders by detaining them here presents the finest facilities in the world for introducing themselves lawfully into the very situation in which they would enjoy the best opportunities of pursuing their designs.

Now, if this plea of necessity could avail at all against the Constitution and Laws of the United States, certainly that law cannot be pronounced necessary which may defeat its own ends; much less when other provisions of unexceptionable legality might be resorted to, which would operate solely to the end proposed, viz: the effectual exclusion of dangerous characters. On the fact of the necessity for all this exhibition of legislation and zeal, I say nothing—I neither admit nor deny it. In common with every other citizen, I am entitled to my own opinion; but when I express it, it shall be done in my private capacity.

But what shall we say to the provisions of this act, as they operate on our vessels of war? Send your sheriff on board one of them, and would the spirited young men of the navy submit to have a man taken? It would be a repetition of the affair of the Chesapeake. The public mind would revolt at the idea of such an attempt; and yet it is perfectly clear that there is nothing in this act which admits of any exception in their favor.

Upon the whole, I am decidedly of opinion that the third section of the State act now under consideration is unconstitutional and void, and that every arrest made under it subjects the parties making it to an action of trespass.

Whether I possess the power to administer a more speedy and efficacious remedy comes next to be considered.

That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery; but it is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom.

I am firmly persuaded that the Legislature of South Carolina must have been surprised into the passing of this act. Either I misapprehend its purport, or it is studiously calculated to hurry through its own execution, so as to leave the object of it remediless. By giving it the form of a State prosecution, the prisoner is to be deprived of the summary interference of the United States authority; and by passing it through the sheriff's hands, without the intervention of any court of justice, he is to be deprived of the benefit of the 25th section of the judiciary act, by which an appeal might be had to the Supreme Court. Thus circumstanced, it is impossible to conceal the hardships of his case, or deny his claim to some remedy.

The opposition to issuing the writ of *habeas corpus* is founded altogether on the ground that he is in custody under State authority; and the proviso to the 14th section of the judiciary act of 1789 is relied on. That proviso is in these words: "*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed

for trial before some court of the same, or are necessary to be brought into some court to testify."

Mr. King admits that this proviso is fatal to his motion, unless his case be taken out of it by one or both of the following considerations:

1st. That, so far as it abridges the right of *habeas corpus*, it is inconsistent with that provision of the Constitution which declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it"—a state of facts which cannot possibly be predicated of the present; or,

2d. That the prisoner cannot be said to be in confinement under State authority, if the State law be void under which he is arrested; and being by his national character entitled to the protection of this court—in other words, a constitutional suitor of the United States courts—this, which is the only adequate remedy, should be extended to him.

These views of the subject certainly merit much consideration. Arguments in favor of this cherished right are not lightly to be passed over. But what are the *courts* of the United States to do? We cannot undertake to judge when that crisis has arrived which the Constitution contemplates; nor are we to undertake to define and limit the meaning of these words, *the privilege of the writ of habeas corpus*. Every State in the Union may have had different provisions, limiting and defining the extent of this privilege; some, perhaps, confining themselves to the privilege as it stood at common law; others adopting some or all of those statute provisions which have wrought such a change in its practical utility. It can, then, only be left to Congress to give a uniform and national operation to this provision of the Constitution. In legislating on this subject, they have confined us to those cases in which the party is confined under United States authority, or is necessary to be introduced into its courts as witnesses.

On the second point, it is to be observed that the proviso to the fourteenth section of the judiciary act imposes on the petitioner the necessity of maintaining the affirmative of his being *confined under United States authority;* so that it is not enough to negative his being in custody under State authority, for the consequence is only that he is confined arbitrarily and without authority by a State officer—a case to which our power to issue this writ does not extend. As far as Congress can extend and shall extend the power to afford relief by this writ, I trust I shall never be found backward to grant it. At present, I am satisfied that I am not vested with that power in this case.

We come next to consider the motion for the writ *de homine replegiando*.

And here the question appears to me to be, "what right have I to refuse it?" As well might I interpose to prevent the petitioner from suing out his writ for trespass and false imprisonment, or the captain his writ for trespass in taking the seaman from his vessel, or the ordinary writ of replevin, on distress for rent, as to refuse this writ *de homine replegiando*. If it is not the proper writ for his case, he must take the consequences; but this is not the time and mode to try that question. It is the writ of common right, and contains upon the face of it its own death warrant, if it be not legally grantable in any particular case. If the return of the party to whom it issues shows that it is not a case proper for the remedy intended to be given, there it ends. If the return be false, it may be contested; if true, and it presents a proper case, then another writ issues, which brings

in question the right of personal freedom. The whole of this is set forth in the *Registrum Brevium*, and in Fitzherbert, which is nearly copied from it.

If my opinion, extra judicial, be asked, I would express the most serious doubt whether this writ could avail the party against the sheriff; but, as against his vendee, there is not a question that it will lie at common law.

But gentlemen contend that this writ is obsolete; that "it is not to be raked up from the ashes of the common law, to be now first used against the State of South Carolina;" that it cannot issue when the *habeas corpus* cannot issue; and, finally, that the writ of ravishment of ward is the only writ established by a law of the State as the proper writ to try the question of freedom of a person of color, and no other can be substituted without changing the law respecting slaves.

There is not one of these arguments that can be sustained, either in law or fact. The writ *de homine replegiando* is engrafted by law into the jurisprudence of South Carolina; nor is it unknown in actual practice, in cases to which it is applicable. In the State of New York it is familiarly used. It is true that the writ of *ravishment of ward* is expressly given by a State law; but it is given in favor of those who are by law declared to be *prima facie* held to be slaves. It curtails no right of a freeman, previously existing, and only operates to give an action to one whose condition or situation places him in absolute duresse, or to any other who shall charitably volunteer in his behalf as guardian. But the act under consideration furnishes itself the distinction between ordinary cases and the present. This act operates only as to freemen, *free persons of color*, and not as to slaves; so that a whole crew of slaves entering this port would be free from its provisions. It is an indispensable attribute of the individual affected by it that he should be free. If he is not, the sheriff is not authorized by it to touch him; and, although forbid by other laws to remain here, his coming here does not expose him to seizure and imprisonment under the provision of this law, whether it be constitutional or not. The negro act of 1747 supposes him a slave; the present act supposes him a freeman. Several other answers might be given to the argument, but this one is sufficient. We do not pretend to a right to encroach on the power of the State over its slave population. The power remains unimpaired. But under a State law this man is recognised as a freeman; and in that view, if in no other, we are fully authorized to treat him as such.

As to the argument that this writ cannot issue where the writ of habeas corpus cannot issue, it was fully answered by the petitioner's counsel. If the argument proves any thing, it leads to the contrary conclusion.

Upon the whole, I am led to the conclusion—

That the third clause of the act under consideration is clearly unconstitutional and void, and the party petitioner, as well as the shipmaster, is entitled to actions, as in ordinary cases;

That I possess no power to issue the writ of habeas corpus, but for that remedy he must have recourse to the State authorities;

That, as to the writ *de homine replegiando*, I have no right to refuse it; but, although it will unquestionably lie to a vendee under the sheriff, I doubt whether it can avail the party against the sheriff himself. The counsel will then consider whether he will sue it out.

Opinion of Mr. Wirt.

OFFICE OF THE ATTORNEY GENERAL, *May* 8, 1824.

SIR: The third section of the legislative act of South Carolina, entitled "An act for the better regulation and government of free negroes and persons of color, and for other purposes," which you submit for my opinion, is in the following words:

"*And be it further enacted by the authority aforesaid*, That if any vessel shall come into any port or harbor of this State, from any other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, mariners, or in any other employment on board such vessel, such free negroes or persons of color shall be liable to be seized and confined in jail until said vessel shall clear out and depart from the State; and that, when said vessel is ready to sail, the captain of the said vessel shall be bound to carry away the said free negro or person of color, and pay the expenses of his detention; and, in case of his neglect or refusal so to do, shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes or persons of color shall be seized and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid."

The question which you propounded for my opinion on this section is, "Whether it is compatible with the rights of nations in amity with the United States, or with the national Constitution?"

By the national Constitution, the power of regulating commerce with foreign nations and among the States is given to Congress; and this power is, from its nature, exclusive. This power of regulating commerce is the power of prescribing the terms on which the intercourse between foreign nations and the United States, and between the several States of the Union, shall be carried on. Congress has exercised this power; and among those terms there is no requisition that the vessels which are permitted to enter the ports of the several States shall be navigated wholly by white men. All foreign and domestic vessels complying with the requisitions prescribed by Congress have a right to enter any port of the United States, and a right to remain there, unmolested in vessel and crew, for the peaceful purposes of commerce. No State can interdict a vessel which is about to enter her ports in conformity with the laws of the United States, nor impose any restraint or embarrassment on such vessel in consequence of her having entered in conformity with those laws, for, the regulations of Congress on this subject being both supreme and exclusive, no State can add to them, vary them, obstruct them, or touch the subject in any shape whatever, without the concurrence and sanction of Congress. By the regulations of Congress, vessels navigated by black or colored men may enter any port of the Union for the purposes of commerce, without any molestation or restraint in consequence of having so entered; but the section of the law of South Carolina which we are considering declares, that if any vessel shall enter one of her ports, navigated in whole or in part by negroes or persons of color, the crew, so far as they are negroes or persons of color, shall be immediately seized and imprisoned at the expense of the captain, with various other contingent and severe penalties, both on the captain and his imprisoned crew. Here is a regulation of commerce, of a

highly penal character, by a State, superadding new restrictions to those which have been imposed by Congress; and declaring, in effect, that what Congress has ordained may be freely and safely done shall not be done but under heavy penalties.

It seems very clear to me that this section of the law of South Carolina is incompatible with the national Constitution and the laws passed under it, and is therefore void. All nations in amity with the United States have a right to enter the ports of the Union, for the purposes of commerce, so long as, by the laws of the Union, commerce is permitted, and so far as it is permitted; and, inasmuch as this section of the law of South Carolina is a restriction upon this commerce, it is incompatible with the rights of all nations which are in amity with the United States.

There is another view of this subject. By the national Constitution, the power of making treaties with foreign nations is given to the General Government; and the same Constitution declares that all the treaties so made shall constitute a part of the law of the land. The National Government has exercised this power, also, of making treaties. We have treaties subsisting with various nations, by which the commerce of such nations with the United States is expressly authorized, without any restriction as to the color of the crews by which it shall be carried on. We have such a treaty with Great Britain, as to which nation this question has arisen. The act of South Carolina forbids (or, what is the same thing, punishes) what this treaty authorizes.

I am of the opinion that the section of the law under consideration is void, as being against the Constitution, treaties, and laws of the United States, and incompatible with the rights of all nations in amity with the United States.

I have the honor to remain, very respectfully, your obedient servant,

WILLIAM WIRT.

To the SECRETARY OF STATE.

REPORT OF THE MINORITY OF THE COMMITTEE.

MR. RAYNER *submitted the following minority report:*

The undersigned begs leave to submit the following minority report, from the Committee on Commerce, to whom was referred the memorial of Benjamin Rich and others:

The undersigned readily admits the high character, the deeply involved interests, and conscientious motives of the memorialists in this case, as set forth in the report of the majority; and he has therefore felt the greater necessity and importance of bestowing on the subject the same "attentive and respectful consideration," which has been observed by the majority. That "attentive and respectful consideration" has, however, brought the undersigned to a different conclusion from that arrived at in the report of the majority.

The undersigned has not had an opportunity of examining any of the statutes of the States complained of, except that of South Carolina; but, as the law of that State is as objectionable to the memorialists as that of any of the States mentioned, it presents the merits of the whole subject sufficiently for all the purposes of this report.

The law of South Carolina, complained of, was passed in the year 1823, immediately consequent upon the discovery of the contemplated insurrection of the slaves in Charleston, which resulted in the trial, condemnation, and execution of the ringleaders of the plot. It was developed on the trial of the leaders of that intended outbreak—and is, as the undersigned understand, a part of the domestic history of that State—that the then planned insurrection was advised, set on foot, and arranged, by the agency of free negro sailors on board Northern vessels then and lately in the port of Charleston. And, as appeared from the evidence furnished on the trial, and the circumstances attending the same, the community had every reason to believe that those free negro sailors, who had thus instigated the slaves to mutiny and intended massacre, were agents of certain fanatics, who thus sought to gratify their vengeance against Southern institutions by kindling the flames of a servile war. South Carolina, then, as a means of safety, of protection, of self-defence, forced on her by stern necessity, and which, after all, is the end and object of all government, passed the law in question, prohibiting, under severe penalties, all "free negroes and persons of color from coming into that State, on board any vessel, as a cook, steward, mariner, or in any other employment, on board any such vessel." The undersigned feels convinced, after the most careful inquiry, that South Carolina did not pass the law in question from any captious spirit, from any unreasonable wish to harass the commerce or injure the interests of her Northern brethren, but solely from a sense of the stern necessity imposed on her, to protect her own citizens from murder and pillage—a right of which the Federal Constitution never intended to deprive her, and the taking away of which from any State, by any ingenious implication, would convert our boasted freedom into a mere mockery. As an evidence that that State was actuated by no factious or unfriendly feeling for her non-slaveholding sisters, it must

be recollected, that any restriction thus imposed on commercial intercourse must operate most severely on herself. Commerce always seeks those channels that are most productive to those interested in its pursuits; consequently, any burdens thus imposed by South Carolina must be calculated to drive commerce from her borders, and eventually result in evil to herself—an evil, however, which she has chosen to consider far less grievous than that of having a door open for scenes of violence and bloodshed. As a further evidence, that whilst that State has thus guarded her own most vital interests, she has not forgotten what was due to humanity and duty to the unfortunate, the very same act imposing these inhibitions makes special provision and exemption for "such free negroes and persons of color and slaves," as may "have arrived within the limits of that State, by shipwreck or stress of weather or other unavoidable accident." Again, let it be recollected that these restrictions do not operate exclusively on Northern commerce. The act applies to "any free negro or person of color" "from *any other State or foreign port*." Many masters of vessels residing in Southern ports frequently employ free negroes, or carry their own slaves on board their vessels; these come within the provisions of the law; and this fact is merely mentioned by the undersigned, to show that the passage of the law could not have been the result of unfriendly feeling to the non-slaveholding States.

It was not till within the last few years that other Southern States adopted provisions similar to that of the South Carolina law. They refrained from doing so, till the necessity growing out of self-preservation left them no other alternative. And the undersigned need hardly state, what is notoriously a part of the social and political history of the times, that these State regulations have grown out of incendiary efforts to light up the flames of a servile war in the South. Not only do the non-slaveholding States tolerate, within their limits, these affiliated societies, whose professed object is to destroy the institutions of the South, no matter by what means; whose daily efforts are directed not only to the protection of runaway slaves, but to the instigation of insurrection and servile war; but these leagued bands of incendiaries send their emissaries to the South, to operate in secret, regardless of all the social obligations and fraternal feelings which should bind the various sections of the Union together. The opportunities offered, by the means and through the agency of free negro sailors, of disseminating their mischievous purposes, have not been lost sight of by the abolitionists of the North. The ports of the Southern States have of late years frequently been agitated with rumors of intended insurrections; and, as the undersigned is informed, these disturbances have mostly had their origin in the agency of colored seamen in Northern vessels, who annoy the slaves with a glowing description of the efforts which their white brethren of the North are making in their behalf, and of their readiness to co-operate with them in their struggles for freedom. The undersigned does not allude to these things with any wish to aggravate the difficulties already existing, or to exasperate the feelings, already too highly excited, of the respective sections of the country; but simply for the purpose of showing, that these police regulations of the Southern States, complained of, are not the result of unfriendly feeling towards the North, but of stern necessity; that they have been adopted as a means of self-preservation, of preserving order and domestic tranquillity, and of preventing commotion, violence, and bloodshed.

The undersigned cannot agree with the majority of the committee on the points of constitutional construction set forth in their report. The report of the majority says: "The committee have no hesitation in agreeing with the memorialists, that the acts of which they complain are violations of the privileges of citizenship, guarantied by the Constitution of the United States. The Constitution of the United States expressly provides (art. 4, sec. 2) that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'" Even admitting that free negroes are citizens in the sense referred to in the Constitution, still the undersigned cannot agree with the construction which the majority has placed on this provision. The object of inserting this clause most unquestionably was to prevent the citizens of one State being considered as aliens in another; to extend to the citizens of every State the same privileges and immunities that might belong to the citizens of the State in which, for the time being, he might be—as, for instance, that a citizen of Massachusetts, when in South Carolina, shall be entitled to all the privileges of citizenship enjoyed by the citizens of the latter State, and *vice versa*. To use the language of Judge Story, in commenting on this clause of the Constitution, "it is obvious that, if the citizens of each State were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them, if one may say so, a general citizenship, and to communicate all the privileges and immunities which the citizens *of the same State would be entitled to under the like circumstances*." The "privileges and immunities" of citizenship mentioned in the Constitution must refer to those of the States *in* which, and not to the State *from* which, the citizen happens to be. It cannot be that a citizen of Massachusetts, on going to South Carolina, carries with him all the privileges and immunities which he possesses at home, or *vice versa*. Many of the State laws differ in regard to the exemptions from taxation on account of age or public station; in their exemption from bearing arms, serving on juries, working on roads, and various other kinds of public duty; and in their extension of the privileges of the right of suffrage, release under their insolvent laws, &c. Many of these are privileges and immunities which vary in most of the States. And it cannot be supposed that the citizen of each State is to carry those of his peculiar State with him wherever he may happen to go, although it may be to a State where no such privileges and immunities are recognised. The meaning of the Constitution must be, that South Carolina, and every other State, is bound to extend to the citizens of each and every State, the same privileges and immunities she extends to her own "under the like circumstances."

The report of the majority goes on to say: "It is well understood that many of the States of this Union recognise no distinction of color, in relation to citizenship. Their citizens are all free; their freemen are all citizens." Admitting this to be so, still it cannot alter or affect the relations which South Carolina or Louisiana may have established in regard to color. The memorialists ask Congress to enforce the same relations, in regard to the white and colored man in South Carolina, which prevail in Massachusetts. Do not the memorialists see how this request might be converted into an argument against themselves? It is in conflict with the decision of their courts, and the principles avowed by the abolitionists within their borders. If Congress has the power to enforce, in the slaveholding States,

the same relations between the white and colored man, that exist in the non-slaveholding States, it must have the right to enforce in the non-slaveholding the same which exist in the slaveholding. One of the "privileges and immunities" of a citizen in South Carolina is to seize his runaway slave wherever he finds him, and reduce him to subjection, by force if necessary. The supreme court of Massachusetts has decided that, if a master from the South carries his slave voluntarily into that State, the slave is, *ipso facto*, a free man, and the master cannot reclaim him. Suppose the citizens of South Carolina were to petition Congress to legislate so as to enforce, as they might say, the 2d section of the 4th article of the Constitution referred to, complaining that the master could not quietly enjoy the same privileges in Massachusetts that he did in South Carolina; that, in the former State, the relation of master and slave, as it existed in South Carolina, had been disregarded; that the citizens of the latter State were subjected to the punishment of having free negroes to give evidence against them, &c.; would the majority of the committee consider that Congress had the power to interfere, under that clause of the Constitution which says, "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States?" The undersigned does not wish to be understood as questioning the power of Congress to interfere in enforcing the rights of the slaveholder. That power is fully granted; but, in another paragraph of the same section, as follows: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or obligation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due."

The Constitution never designed to define the "privileges and immunities" of citizenship within the respective States. That is a question that rests entirely with State regulations, subject, of course, to the general restraints and provisions of the Constitution. And it was in consideration of this very fact, in view of the variant regulations the several States might adopt, that the clause alluded to (sec. 2, art. 4) was incorporated in the Constitution. Therefore, the term citizens, as used in the Constitution, has no specific or definite meaning, only so far as qualified by the regulations which the respective States may have adopted in defining their "privileges and immunities." The report of the majority says: "In Massachusetts, certainly—the State from which this memorial emanates—the colored man has enjoyed the full and equal privileges of citizenship since the last remnant of slavery was abolished within her borders by the Constitution of 1780—nine years before the adoption of the Constitution of the United States. The Constitution of the United States, therefore, found the colored man of Massachusetts a citizen of Massachusetts, and entitled him, as such, to all the privileges and immunities of a citizen in the several States." The undersigned, with all due deference, must dissent from this view of the majority. The undersigned must insist, that if the construction given by the majority to the 2d section of the 4th article of the Constitution be correct, still free negroes cannot be considered citizens, within the meaning of that instrument. What constitutes a citizen? What are the "privileges and immunities" intended to be conferred by citizenship? The undersigned begs leave to refer to the doctrines laid down on this subject by the supreme court of Kentucky, in the case of Amy *vs.* Smith, (1 Littell, 333,) as containing what he believes the true theory of our institutions in reference

to the question of citizenship: "The term citizen is derived from the Latin word *civis*, and, in its primary sense, signifies one who is vested with the freedom and privileges of a city. If we go back to Rome, whence the term citizen had its origin, we shall find in the illustrious period of her Republic, that citizens were the highest class of subjects to whom the *jus civitates* belonged, and that the *jus civitates* conferred upon those who were in possession of it all rights and privileges, civil, political, and religious. When the term came to be applied to the inhabitants of a State, it necessarily carried with it the same signification, with reference to the privileges of the State, which had been implied by it with reference to the privileges of a city; and it is in this sense that the term citizen is believed to be generally, if not universally, understood in the United States. This, indeed, evidently appears to be the sense in which the term is used in the clause of the Constitution which is under consideration; for the terms 'privileges and immunities,' which are expressive of the object intended to be secured to the citizens of each State in every other, plainly import, according to the best usages of our language, something more than those ordinary rights of personal security and property, which, by the courtesy of all civilized nations, are extended to the citizens or subjects of other countries while they reside among them. No one can, therefore, in the correct sense of the term, be a citizen of the State who is not entitled, upon the terms prescribed by the institutions of the State, to all the rights and privileges conferred by those institutions upon the highest class of society," &c.

Are free negroes, even in Massachusetts, entitled to *all* the rights and privileges conferred by her institutions upon the highest class of society? Certainly not. They are not elected to her Legislature. They have no agency, therefore, in making the laws. In very few even of the non-slaveholding States are they entitled to the right of suffrage. They do not fill the offices of judges, or discharge the duties of jurors; they, therefore, have no hand in administering the laws. They do not bear arms in the militia; therefore, the State does not look to them as its defenders. They are not allowed to intermarry with whites, which proves that they are looked on as a degraded *caste*. Perhaps it may be said that, although they do not fill these offices mentioned, yet there is no constitutional disqualification forbidding it. The undersigned thinks that this makes his case much stronger. If, in the absence of all prohibition, public opinion still excludes them from all places of honor and trust, it only proves the degradation of their condition, and that although they may not be theoretically, yet they are practically, excluded from the privileges of citizenship. How, then, can they be called citizens, unless the term citizen merely means one who is entitled to the protection of the law, so far as his personal security is concerned? And this the slaves of the South possess.

The supreme court of Pennsylvania has decided, in the case of Hobbs and others *vs* Fogg, (6 Watts, 552,) that "a negro or mulatto is not entitled to exercise the right of suffrage," under the clause of the constitution of that State, guarantying that right to "*freemen*." Chief Justice Gibson, in delivering the opinion of the court, used the following language: "Thus, till the instant when the phrase on which the question turns was penned, the term freeman had a peculiar and specific sense, being used like the term *citizen, which supplanted it*, to denote one who had a voice in public affairs. The *citizens* were denominated *freemen* even in the constitution of 1776; and, under the present constitution, the word, though dropped in the

style, was used in legislative acts convertibly with electors so late as the year 1798, when it grew into disuse."

In October, 1833, Chief Justice Daggett, of Connecticut, decided, in a case which came before him, that free negroes were not citizens within the meaning of the 2d section of the 4th article of the Constitution. The following are passages from his charge on that occasion: "The persons contemplated in this act [*colored persons* is the language of the act] are not citizens within the obvious meaning of that section of the Constitution of the United States which I have first read." Again: "To my mind, it would be a perversion of terms and the well-known rule of construction to say, that slaves, free blacks, or Indians, were citizens, within the meaning of that term, as used in the Constitution." (See 10 Connecticut Reports, 339.) Although this constitutional question, raised on the trial in the court below, was not decided in the supreme court of errors, the latter not considering it material to the issue, yet the high character of Chief Justice Daggett as a jurist entitle his opinions to great consideration.

The first naturalization law, passed by Congress in 1790, says "any alien, being a *free white person*, may become a *citizen* by complying with the requisites hereinafter named." And, in all the following regulations made by law on this subject in the years 1795, 1798, 1802, 1813, and 1824, the same reference is made to *free white* persons, who may become citizens," &c. Chancellor Kent, in speaking on this subject, says "the act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume that this excludes the inhabitants of Africa, and their descendants." Again: "In most of the United States, there is a distinction in respect to political privileges between free white persons and free colored persons of African blood; and *in no part of the country* do the latter, in point of fact, participate equally with the whites in the exercise of civil and political rights. The *African* race are essentially a degraded caste, of inferior rank and station in society." (See 2 Kent's Com., pages 72 and 258, 2d edition.)

Neither can the undersigned agree with the opinion of the majority of the committee, that these State regulations are in "contravention of another provision of the Constitution," viz: the power of Congress "to regulate commerce with foreign nations, and among the several States," &c. Even admitting that the laws of the States complained of, do affect the regulation of commerce—still, are they in direct conflict with any law which Congress may have passed in pursuance of the power in the Constitution "to regulate commerce?" The undersigned approves and relies upon the following doctrine, laid down by Judge Marshall in the case of Sturges *vs.* Crowninshield, (4 Wheaton, 193,) in reference to the concurrent powers of the Federal and State Governments: "The mere grant of a power to Congress did not imply a prohibition on the States to exercise the same power. The States may legislate in the absence of Congressional regulations. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States." Judge Story, in the opinion which he gave in the case of Houston *vs.* Moore, (5 Wheaton, 1,) lays it down that a mere grant of power in affirmative terms to Congress did not, *per se*, transfer exclusive sovereignty on such subjects. The powers granted to Congress were never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power was pro-

hibited to the States, or there was a direct repugnancy or incompatibility in the exercise of it by the States."

This the undersigned considers to be the true doctrine of the Constitution; and even admitting that South Carolina, or any other Southern State, may have considered it indispensable to her safety and the interests of her people, to pass the law complained of, as a regulation of commerce, still, in the absence of any law of the Federal Government contravening it, the undersigned cannot discover how it could be a violation of the Constitution. Congress has "*the power* to regulate commerce;" but till it shall have passed a conflicting regulation, how can the laws of the States, passed for purposes of police, be considered unconstitutional, contravening, as they do, no law of the General Government? The undersigned would ask, whether these State laws, complained of, are expressly in conflict with any law of Congress, passed for the regulation of commerce. Certainly not; else, why ask Congress now to legislate on the subject? The undersigned does not, however, insist on the right of the States to legislate with a view to the regulation of commerce, except so far as it may be incidental to the exercise of the other powers of sovereignty, which must necessarily reside in the States, to enable them to protect their own citizens. The laws of the States complained of were not passed for the purpose of regulating commerce, but as mere regulations of domestic police, which those States believe to be essential to their most vital interests. The right of the States to establish their own police and municipal regulations for their own internal government, to extend the shield of protection over all their citizens, and to take precautionary as well as remedial measures towards preserving their own domestic peace and tranquillity, never was, and never could have been intended to be, divested, by the adoption of the Federal Constitution. The doctrine was held by the Supreme Court, in the case of Gibbons *vs.* Ogden, (9 Wheaton, 1,) that the power of Congress to regulate commerce, "like all the other powers of Congress, was plenary and absolute *within its acknowledged limits.* But it was admitted that inspection laws relative to the quality of articles to be exported, and quarantine laws, and health laws of every description, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., were component parts of an immense mass of legislation not surrendered to the General Government." Story, in his Commentaries, speaking of these, says: "These powers are entirely distinct in their nature from that to regulate commerce; and though the same means may be resorted to for the purpose of carrying each of these powers into effect, this by no just reasoning furnishes any ground to assert that they are identical. They are not so much regulations of commerce as of police; and may be truly said to belong, if at all to commerce, to that which is purely internal. The pilotage laws of the State may fall under the same description." The undersigned supposes the majority of the committee will readily admit that these powers of police or domestic regulation belong to the States; and because in their exercise they may have an incidental relation to commerce, is no reason why the States should be divested of these powers. All the great powers of legislation and of domestic police are so connected and interwoven in some of their remote and incidental results, that we can hardly conceive of the exercise of any power under State authority which might not have a bearing upon, or connexion with, the action of the Federal Government. So the great

power of general regulation and control is preserved to the latter, and that, too, with a view to the purposes and condition contemplated, all the ends of the Constitution will be answered. But it appears to the undersigned to be a most dangerous construction of the Constitution to suppose, that the grant of every power in that instrument necessarily carries with it an unlimited control of every question of State legislation, which may in its operation have a relation to the subject-matter to which the grant of power applies. Under such a construction, the grant of any one great power in the Constitution might be construed to swallow up and control almost every subject of State legislation. Because Congress has power to "lay and collect taxes," does that deprive the States of the power of providing for the support of their own domestic Governments, or of imprisoning their citizens for a violation of law, because State taxation might render them less ready to meet the demands of the General Government, or because imprisonment for crime might prevent them from earning the same by their labor? Because Congress has "power to borrow money on the credit of the United States," has it a right to prevent speculation in the States by fixing an arbitrary value to property, lest by overtrading, and consequent reaction, the "credit" of the Government may be affected? Because Congress has "power to establish a uniform rule of naturalization," does that deprive the States of the power of compelling aliens to do public duty, and of conferring on them corresponding privileges? Because Congress has power to "establish uniform laws on the subject of bankruptcy," does that deprive the States of regulating compulsory process in their courts for the payment of debts? Or does it authorize the General Government to establish such rules of evidence in bankruptcy as shall admit free negro or slave testimony against white men? Because Congress has power to "establish post offices and post roads," have not the States the right to punish crimes against their authority, committed in such offices, or along such roads? And because Congress has power "to regulate commerce," does that deprive the States from punishing what they choose to consider as crimes, because the perpetrators may happen to be walking the deck of a vessel? The undersigned merely mentions these cases to show the absurdity of claiming for the General Government the *exclusive* and unqualified control of every subject, which may have a *remote* connexion with the exercise of those powers granted to it by the Constitution.

It must be admitted, it appears to the undersigned, that every State has the power to punish offences against its authority, committed within its borders. And it also has the right to take precautionary measures against the commission of crimes, as well as adopt the means of punishment for their perpetration. Those who come within the limits of a State are supposed to come with a knowledge of its laws—they voluntarily subject themselves to the operation of the same. It must be admitted that every Southern State has the power to punish those who disseminate seditious and insurrectionary doctrines among the slaves. Suppose the leaders of abolitionism were to go to Charleston, Savannah, Mobile, or New Orleans, on board commercial vessels: would that extend to them the protection of the General Government, and could they in security harangue the slaves on the wharves, merely because they stood on the decks of ships? The undersigned supposes the majority of the committee will admit, that the masters and crew of vessels would be liable to the penal-

ties of the law, if they should be found engaged in preaching insurrection to the slaves, although the detention of both vessel and crew would to some extent operate injuriously to the commercial interests of those concerned. Then, if South Carolina, or any other State, has power to detain a vessel and punish the crew for a violation of the municipal law, she must have the right to prevent these violations by confining the most dangerous portion of the crew, whilst the vessel is in port. Again: State laws subject vessels and cargoes, like every other kind of property, to the process of the law, for the payment of debts. This may to some extent interfere with the pursuits of commerce; and yet will it be pretended that the exercise of this power in a State is a violation of the Constitution? Are not seamen subject to the municipal regulations of every port where they may happen to be? Because the departure of a vessel might be postponed, and a commercial adventure, consequently, injured by the detention of the crew, yet, is that a reason why sailors found in a drunken brawl should not be rightfully confined in the watch-house? The municipal regulations of wharfage, drayage, inspection, &c., must necessarily be local in their character; and although they affect and relate to commerce, yet no one will pretend that the General Government has power to assume all control over these subjects. Will it be pretended that the General Government has power, under the clause to regulate commerce, to declare that it was necessary to remove all restrictions on commercial enterprise, and that therefore no wharfage should be collected in any port in the Union? Would it be constitutional thus to deprive citizens, that may have expended hundreds of thousands in improving their docks and wharves, of the right to enact their own municipal regulations, although they might affect commerce? The municipal authorities must have the power to affix penalties to the violation of their port regulations—as for instance, to subject the crew to punishment, and the vessel herself to the charge of making indemnity, for throwing ballast overboard, so as to fill up the docks, or block up the channels; although these regulations have relation to commerce.

The quarantine laws, which are mere questions of police, present still stronger grounds of illustration. It will be admitted that these are strictly police regulations, and that State laws can subject vessels engaged in commerce to detention at quarantine, when there is reasonable ground to suspect the contagion of disease. If the State authorities of Boston were convinced that the importation of large quantities of West India fruit at certain seasons of the year was calculated to engender and disseminate disease, the undersigned supposes there can be no doubt but the local authorities would have full power to prevent their importation, and to subject to punishment, both vessel and crew, those who disregarded these police regulations. Suppose the local authorities of New York, or any other commercial city, might have reason to suspect that a cargo of rags about to arrive from the Levant might bear about them the contagion of the plague, would they not have full power to subject their importation to the severest restrictions, and those to punishment who disregarded them? These are matters of safety, of self-preservation, which must, in the very necessity of the case, belong to every authority which possesses the sovereign power to punish crime, and to protect the citizen in his rights; questions of police regulation, which necessarily belong to sovereignty, and by the denial of which, the States cannot be considered in any other

light than as exercising all those powers by the mere sufferance of the Federal Government.

Then, if the States have the power to enact rules and regulations for the preservation of the health of their citizens, have they not the power to enact them for the preservation of their lives, and the maintenance of peace and order within their limits? If they have the right to pass police regulations for the avoidance of physical disease, have they not the right to pass them for the prevention of a moral and social malady, which threatens to convulse them with all the agonies of civil dissension, and to disturb the institutions and regulations which they may have established for their own government, in pursuance of an undisputed authority to do so?

In the case of Brown *vs.* the State of Maryland, Chief Justice Marshall says: "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States." And in the case of the City of New York *vs.* Miln, (11 Peters, 102,) Justice Thompson, in alluding to the foregoing opinion of the Chief Justice, says: "The State law here is brought to act directly upon the *article* imported, and may even prevent its landing, *because it might endanger the public safety.*" If the local authorities have power to *direct the removal* of gunpowder, which is an *article* of commerce, for the purposes of "public safety," as a means of police regulation, it appears to the undersigned that they must certainly have the power to punish crime, and consequently to take measures to prevent it, although the regulations passed for these purposes may operate on the *agents* of commerce, when within their jurisdiction. As far as this question, of the powers of a State over municipal legislation depends on judicial construction, it was clearly defined in the case of City of New York *vs.* Miln, just alluded to. In February, 1824, the Legislature of New York passed "an act concerning passengers in vessels arriving in the port of New York." By one of the provisions of the law, the master of every vessel arriving in New York from any foreign port, or from a port of any of the States of the United States, other than New York, is required, under certain penalties prescribed in the law, within twenty-four hours after his arrival, to make a report in writing concerning the names, ages, and last legal settlement, of every person who shall have been on board the vessel commanded by him during the voyage, &c. The corporation of the city of New York instituted an action of debt under this law against the master of the ship Emily, for the recovery of certain penalties imposed by this act The judges of the circuit court being divided in opinion, as to whether the act of the Legislature of New York assumed "to regulate commerce," that was the question decided by the Supreme Court of the United States. Mr. Justice Barbour, who delivered the opinion of the court, held: "We are of opinion that the act is not a regulation of commerce, but of police; and that, being thus considered, it was passed in the exercise of a power which rightfully belonged to the States.

"If we look at the place of its operation, we find it to be within the territory, and therefore within the jurisdiction, of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York, for whose protection and welfare the Legislature of that State are authorized, and in duty bound, to provide. If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the

means by which those ends are proposed to be accomplished, they bear a just, natural, and appropriate relation to those ends.

"How can this (the right of the importer to dispose of his goods free from State interference) apply to *persons? They are not the subjects of commerce*, and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce.

"All those powers which relate to merely municipal regulation, or what may, perhaps, more properly be called *internal police*, are not surrendered or restrained, and consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.

"We suppose it to be equally clear that a State has as much right to guard, by *anticipation*, against the commission of an offence against its laws, as to inflict punishment upon the offender after it shall have been committed. The right to punish, or to *prevent crime, does in no degree depend upon the citizenship of the party* who is obnoxious to the law.

"We think it as competent and as necessary for a State to provide *precautionary measures* against the *moral pestilence* of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease."

Mr. Justice Thompson, who delivered a concurring opinion in this case, lays it down, that "although commerce, within the sense of the Constitution, may mean intercourse, and the power to regulate it be coextensive with the subject on which it acts, * * * it cannot be claimed that the master or the passengers are exempted from any duty imposed by the laws of a State, after their arrival within its jurisdiction, * * * or that any greater rights or privileges attach to them because they come in through the medium of navigation, *than if they come by land from an adjoining State.*

"Can any thing fall more directly within the police power and internal regulation of a State than that which concerns the care and management of paupers or convicts, *or any other class or description of persons* that may be thrown into the country, and likely to *endanger its safety*, or become chargeable for their maintenance? If all power to guard against these mischiefs is taken away, the safety and welfare of the community may be very much endangered.

"Whether the law of New York, so far as it applies to the case now before the court, be considered as a new police regulation, and the exercise of a power belonging exclusively to the State, or whether it be considered as legislating on a subject falling within the power to regulate commerce, but which still remains dormant, Congress not having exercised any power conflicting with the laws in this respect, no constitutional objection can, in my judgment, arise against it."

The undersigned looks upon the third and last constitutional objection urged by the majority of the committee—that these State regulations are in violation of that clause of the Constitution which declares that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land"—as entitled to no consideration. The ground of objection is sufficiently answered by another sentence in the report of the majority, as follows: "It seems to be understood that the application of these provisions to foreign vessels has of late years been suspended." If the application of these regulations to foreign vessels

and crews ever was a grievance, it was one which did not affect American vessels from Northern ports. But if they have ceased to be applied to foreign vessels, the undersigned cannot discover how their mere enactment should afford any annoyance to the memorialists. It is the execution, and not the mere passage, of an obnoxious law, which constitutes it a grievance. The mere existence of such a law on the statute book of South Carolina, in the absence of any evils growing out of its execution, cannot, in the opinion of the undersigned, be a grievance to the people of Massachusetts, of which Congress is bound to take cognizance.

The undersigned begs leave to refer to the opinion of the Hon. John M. Berrien, when Attorney General of the United States, submitted to the President of the United States in March, 1831, and in reply to a communication from Sir Charles R. Vaughan, the English minister, addressed to the Department of State. (See Executive Documents, 2d sess. 26th Cong., p. 817.) This communication was in reference to the application of the South Carolina law, complained of, to the case of colored seamen in the British service. The undersigned agrees with most of the views contained in this opinion of Attorney General Berrien, so far as applicable to the grievances of which the memorialists in this case complain, and herewith submits that opinion at length, (see Appendix,) that all the information that can be obtained on this subject may be brought to view.

The undersigned feels fully assured that the memorialists in this case are free from the imputation of wishing to disturb the domestic relations in the Southern ports, and that they are actuated solely by the wish to remove the restrictions which the regulations complained of *do impose* on Northern commerce. The undersigned has therefore felt the greater necessity of looking at the subject dispassionately, and with reference to its true merits. The undersigned has not felt called on to express any opinion as to the abstract policy or expediency of passing the regulations complained of, so far as regards their effects upon the interests of those States that have enacted them, or of the general welfare of the country. It may be that the vital interests and domestic security of the States enacting them render it indispensable; it may be that no such restrictions are absolutely necessary, and that their effects have injured the interests of the States in question, and operated injuriously upon the commercial and social relations of the different sections of the Union. The only inquiry is, had the States in question *the power, the right,* to pass these regulations? If they have them, then the exercise of that power is a matter which each State must, in its discretion, decide for itself, without being held amenable to any other tribunal.

The undersigned regrets the difficulties to which this subject has given rise. For the peace and harmony of the country, they are to be deplored.

The undersigned readily admits that these State regulations complained of operate very frequently as a hardship upon Northern vessels, and, in fact, upon all vessels having on board colored hands. He also regrets that these measures of safety may tend to widen the differences already existing between the North and the South. Still, the undersigned is compelled to think that these are questions over which each State must have control; and of the merits of which each must judge for itself. The causes, however, which originally led to these difficulties did not commence in the slaveholding States. As long as their institutions were left undisturbed by fanatics, no restrictions were imposed on colored seamen. But, when

they received satisfactory evidence that these colored seamen were the agents which incendiaries were employing for their own wicked designs, the Southern States, in discharge of a high and solemn duty, felt bound to extend their protection to their own citizens, by passing the regulations complained of.

The undersigned begs leave to submit the following amendment to the resolutions reported by the majority of the committee: Strike out all after *Resolved*, and insert as follows: "That the committee be discharged from the further consideration of the subject."

Respectfully submitted.

K. RAYNER.

APPENDIX.

ATTORNEY GENERAL'S OFFICE,

March 25, 1831.

SIR: I have read the communication, with its accompanying documents, which the right honorable Charles R. Vaughan, His Britannic Majesty's envoy extraordinary and minister plenipotentiary, addressed to the Department of State, and which you did me the honor to refer to me. I have examined the question thus presented to your consideration, with the anxious care which is due to the intrinsic importance of the subject, and to the solicitude of this Government to preserve and cherish the good understanding which happily subsists between the United States and Great Britain. I have not been unmindful of the previous communications between the two Governments in relation to this matter. Indeed, my chief embarrassment has arisen from the fact and nature of those communications, from the decisive and unqualified opinion of my own immediate predecessor, and from the acts and communications of those to whom the Executive functions of this Government have been heretofore confided, in apparent harmony with it. Heretofore, the only question considered by this Government seems to have been, whether a law of South Carolina, conflicting with the provisions of the convention with Great Britain, and with the commercial laws of the United States, is constitutionally valid. The fact of such conflict has been assumed, as it appears to me, without a sufficient attention to the terms of the convention or the laws of the Union. My belief is, that no such conflict exists in fact; that, on the contrary, there is perfect harmony between the legislation of South Carolina and the United States. Lest, however, I should err in this opinion, and because I cannot acquiesce in the doctrines heretofore avowed, even upon the state of facts which was assumed in that discussion, I believe that I shall more certainly discharge my duty, and meet your expectations, by considering this question in all its various aspects.

The communication of His Britannic Majesty's minister presents the following statement of facts:

Daniel Fraser, a free colored man, born in the British West Indies, carried thence to Scotland at an early age, and undoubtedly a British subject, arrived in the port of Charlerton, in the capacity of a cook, on board the ship Atlantic, from Liverpool, when he was seized and committed to prison under a warrant issued by the sheriff, acting under the authority of an act of the Legislature of South Carolina. In consequence of directions to that

effect, given by His Britannic Majesty's minister, the British consul at Charleston used his endeavors to procure the release of Fraser, by entering into communication with the proper authorities of that place; and, in point of fact, he was eventually released and restored to his vessel on her removal to a position at such a distance from Charleston that the crew could not communicate with that city, and on the payment of the expenses incurred for his subsistence in jail.

His Britannic Majesty's minister informs the Secretary of State that redress for the injury to the individual arrested is not so much the object of his representation, as to obtain from the Government of the United States an assurance that the acts of the Legislature of South Carolina would not, in future, counteract the stipulations contained in the treaties and conventions which regulate the intercourse of British subjects with this country. It becomes necessary, then, to examine the provisions of these compacts.

The commercial convention of 1815, first continued for ten years by the convention of 1818, and afterwards indefinitely by that of 1827, in its first article provides for a reciprocal liberty of commerce between the territories of the United States of America and His Britannic Majesty's territories in Europe. It gives to the inhabitants of the two countries, respectively, liberty, freely and securely, to come with their ships and cargoes to all those places, ports, and rivers, in their respective territories, to which other foreigners are permitted to come; to enter, remain, and reside there; to hire and occupy houses for the purposes of their commerce, and generally to enjoy complete protection and security for the same, subject to the laws and statutes of the two countries, respectively.

It is to the rights secured to British subjects, by the stipulations of this article, that His Britannic Majesty's minister appeals; and it will of course be indispensable to consider how far, giving full effect to these stipulations, the act of the Legislature of South Carolina can be considered valid. But a further view is rendered necessary. The statement or summary furnished by the Department of State shows that this question is not now for the first time presented to this Government. A similar complaint was made in 1823, by the minister of Great Britain, and renewed in 1824; and, on a reference to the Attorney General of the United States, he expressed the opinion that the law of South Carolina was void, as well because it conflicted with the general commercial laws of the United States, as with the treaty in question. It may be proper, therefore, further to consider the validity of the act of South Carolina— assuming, for the purpose of the inquiry, the fact that such conflict exists in its relation to those laws.

The act in question is entitled "An act for the better regulation and government of free negroes and persons of color, and for other purposes;" and in its third section it provides—

"That if any vessel shall come into any port or harbor of this State (South Carolina) from any other State or foreign port, having on board any free negroes or persons of color, as cooks, stewards, mariners, or in any other employment on board said vessel, such free negroes or persons of color shall be liable to be seized and confined in jail until said vessel shall clear out and depart from this State; and that, when said vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro or person of color, and pay the expenses of his detention; and, in case of his neglect or refusal to do so, he shall be liable to be indicted, and, on conviction thereof, shall be fined in a sum not less than one thou-

sand dollars, and imprisoned not less than two months; and such free negroes or persons of color shall be deemed and taken as absolute slaves, and sold in conformity to the provisions of the act passed on the twentieth day of December, one thousand eight hundred and twenty, aforesaid."

Under the general commercial laws of the United States, and the particular provisions of the commercial convention with Great Britain, a right is alleged, in behalf of the subjects of the latter, to enter the ports of the former, with ships or vessels having free colored seamen on board. The law of South Carolina inhibits such persons from coming into that State, and subjects the parties offending to the restraints and penalties prescribed by the act. Is this law of South Carolina constitutionally valid, notwithstanding the commercial laws of the United States and the convention above referred to?

In examining this question it will be proper to consider—

1. The power of the Legislature of South Carolina to pass this law.

2. How far it may constitutionally operate, notwithstanding its liability incidentally to conflict with the general commercial laws of the United States, and the particular conventions with Great Britain.

3. Whether this law does, in point of fact, conflict with the laws of the United States, or with the commercial convention with Great Britain.

Apart from the supposed liability of the act of South Carolina to conflict with the laws of the United States and the convention with Great Britain, the right of the Legislature of that State to pass such a law cannot, I apprehend, be doubted. In the general distribution of powers between the Federal and State Governments, the power to regulate its own internal police was clearly reserved to each State. We are told in the contemporary vindication of the Constitution of the United States, which is so often appealed to in discussions of this sort, that the powers delegated to the Federal Government by that instrument are few and defined, operating chiefly on external objects; while those which remain with the States are numerous and indefinite, extending to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The act of South Carolina which we are considering has for its object the regulation and government of free persons of color within the limits of that State, and as strictly belongs to its internal police as a law regulating the course of descents, or one defining the crime of murder, and prescribing the penalty which shall attach to its commission. I do not, however, apprehend that the power of the State of South Carolina to pass this law is doubted. The general right of a State to regulate persons of color within its own limits is one too clearly recognised by the tenth amendment to the Constitution to be drawn into controversy. The claim presented by the communication of the minister of His Britannic Majesty, and sustained by the opinion of my predecessor, is intended to deny the legal validity of this act, in so far as it conflicts with the provisions of the laws of the United States which regulate the entry of foreign vessels into our ports, and with the commercial convention with Great Britain, which guaranties to the subjects of that nation complete protection and security for their commerce, and free entrance into our ports with their ships and vessels. The power of South Carolina to regulate free persons of color within her limits is admitted; but the right of the United States, under the authority to regulate commerce with foreign nations, or, in the exercise of the treaty-making power,

to extend the protection of the United States, even within the limits of South Carolina, to such persons of color, is also asserted; and then the argument is, that the law of South Carolina, which is subordinate, must bend to those of the Union, which are supreme. I do not admit the existence of this conflict; but, lest I should err in that opinion, I am thus called to consider the second inquiry proposed, viz:

How far this act of South Carolina can constitutionally operate, notwithstanding its liability incidentally to conflict with the commercial laws of the United States, and the conventions with Great Britain?

The power to regulate commerce with foreign nations is vested in Congress by the Constitution; and the President, by and with the advice and consent of the Senate, has authority to make treaties. Are these powers unlimited? Does the Constitution impose no restraint upon their exercise? If in terms it does not, is no restriction imposed, and necessarily so, by the nature of our political association, by those great and fundamental principles which are at all times, and equally, obligatory upon communities and individuals? If the enforcement of a law passed by the Legislature of a State, in the clear and undisputed exercise of its reserved rights of sovereignty, be vitally essential to the safety of its people, may Congress, in the exercise of its granted powers, capriciously, and at will, so extend its legislation as that it shall in its operation incidentally conflict with such State law, and thereby annul it *pro tanto*—whether such extension is, or is not, indispensable to the execution of the granted power? And is the National Legislature the sole judge of this necessity? There is presumption, perhaps, in the mere suggestion of these inquiries. I am not unmindful of what was said by the court in the case of *Gibbons* and *Ogden*, and am entirely sensible of the respectful consideration to which even the *dicta* of that high tribunal are justly entitled. But the proposition there announced was not essential to the decision of the pending controversy, and it ceased to be authoritative as soon as it had passed that limit. The counsel for the defendant in error, in that case, sought to sustain the acts of the Legislature of New York—

1st. As acts passed in the exercise of a concurrent power to regulate commerce.

2d. As police laws.

It was sufficient for all the purposes of that decision to affirm, as the court did in fact substantially affirm, that the acts of the Legislature of New York were laws affecting commerce, which conflicted in their operation with the laws of the United States, passed in the exercise of the power given by the Constitution, "to regulate commerce with foreign nations, and between the several States," and incidentally between the ports of the same State. It was not indispensable to decide how far a law passed by a State Legislature, in the exercise of an undisputed power to regulate its own internal police, and plainly limited to that object, must yield to an act of Congress, enacted under the authority to regulate commerce, in the event of an incidental conflict, which might have been avoided without restraining the full exercise of the constitutional power of the Federal Government. That question, therefore, is still open to inquiry. If it be objected that the affirmance of the validity of the State law in the case supposed would be to establish a principle, of which the practical application will be often difficult, and always embarrassing, the answer is, that such a consequence is the unavoidable result of our complex system of government. Without

doubt it would add to the simplicity of the rule of construction adopted in the interpretation of our constitutional codes, to assert, in one general proposition, the absolute and unqualified supremacy of the Federal enactments. But how far this would comport with the intentions of their framers; how far it would consist with the rights of the respective parties, and tend to the perpetuity of the Union, which it is their object to uphold and preserve, is another, and, as I apprehend, a very different question.

The view which I have of this subject shall be briefly stated. The powers granted to the Federal Government are supreme. In so far as the exercise of these powers is intrusted to Congress, they are authorized to carry them into full effect; but certain powers are as clearly reserved to the States. If the plenary execution of the Federal charter be essential to the efficiency of that Government, the continued exercise of the powers reserved to the States may be alike indispensable to their existence as such. What is especially desirable is, to avoid such an exertion of the several powers of the two Governments, as may impair the efficiency of the former, or jeopard the safety of the latter. The conflict between their respective enactments, which it is so desirable to shun, it is often difficult to avoid. Laws, passed even in the execution of powers essentially distinct in their nature, may be so extended in their operation upon men and things as incidentally to conflict with each other, and in cases which were unforeseen by their framers. "All experience shows (says the Supreme Court, in the case referred to) that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers." It is an easy solution of the difficulty to maintain that, whenever, in the operation of the laws of the Federal and State Governments, such unforeseen and incidental conflicts shall occur, the enactments of the latter, however indispensable to their safety, or even to their existence, shall yield to those of the former, however superfluous; that a State law, the enforcement of which is of vital importance to that State, shall bend to the authority of an act of Congress, whose provisions may incidentally conflict with it, although those provisions are not indispensable to the plenary exercise of the power which the Constitution intended to confer, or to give effect to all the purposes for which it was conferred. But I cannot, for myself, acquiesce in this mode of interpreting our fundamental charter. I repeat the concession, that the powers granted to Congress are supreme. Whatever is *indispensable* to their plenary exercise, the Legislature of the Union has the power to enact, and State legislation must bend beneath its sway. But if the means by which such granted power may be carried into effect are various, and alike efficient—if its exercise in one mode will consist with the unfettered exertion of the reserved powers of the States, while the use of a different means will, by producing a conflict with State legislation, paralyze the reserved rights of those sovereignties—the selection of the former mode becomes, I apprehend, a duty of constitutional obligation. In the view which I have of this subject, the right of Congress, even in the exercise of its expressly granted powers, to control the legislation of the States, results, and results only, from the *necessity* of such control to *the efficient exercise of the granted power*. It is not a right capriciously and at will to select from various modes, all of which are equally efficient, that which will conflict with, and therefore control, the enactments of the State Legislature. To give to the acts of the Federal Legislature this control

ling influence, they must be *indispensable to the due execution of the power intended to be carried into effect.*

Take, for example, the commercial power.

The power of Congress to regulate commerce may be considered as exclusive, and the authority of the Federal Government as supreme over all subjects within the constitutional sphere of its action. The result will be, that State laws which conflict with its rightful exercise of this power must necessarily yield. I say which conflict with its rightful exercise; because it has limits; which are prescribed by the Constitution, and those moreover which necessarily belong to the nature of the Federal association.

Congress has power to regulate commerce; and authority is given to that body, by the Constitution, to pass all laws which may be necessary and proper for the purpose of carrying into effect its granted powers. The right to pass such laws would have been a necessary inference from the powers granted. Why, then, was it expressly conferred? I apprehend it was so conferred to serve as a limitation upon that right, restricting it to such laws as are "*necessary and proper.*" So exercised, the laws which are passed to carry it into effect are supreme. State legislation must yield to them, for such is our Federal compact. To the extent to which the right of Congress to regulate commerce must *necessarily conflict* with the right of a State to regulate its own internal police, the latter right will be presumed to have been surrendered by the adoption of the Federal Constitution by the respective States. But if, for the purposes of the constitutional grant, the power may be exercised without producing such conflict, the obligation so to exercise it is imperative; because, in this event, the law or regulation which produces such conflict is not *necessary*, and *therefore* is not proper to carry that power into effect.

If this be true (as I apprehend it is) in relation to the legislative power, it is true also in reference to all those who are called to the interpretation of its acts. A law, or commercial regulation, which is general in its terms, will, in obedience to this principle, be so construed as to restrict its operation within limits which may consist with the true interpretation of the granted power.

If the power to regulate their own internal police be, as I think it is, clearly reserved to the respective States, laws passed by the General Government, in the exercise of the right to regulate commerce, cannot control the exercise of this reserved power of the States, except in so far as those laws may be both *necessary and proper* to the preservation of the commerce of the Union. The consequence is, as I apprehend, that the police laws of the several States must continue to operate within their respective limits, if they can so operate without prejudice to the efficient exercise of the commercial power; that the power of Congress itself, over the subject, is liable to this restriction; and that, subject to this limitation, the general terms of a law or commercial regulation of the Federal Legislature must be so construed as to allow their operation.

If, now, we inquire how far, in relation to the subject immediately under consideration, the power of Congress may be exercised without paralyzing the legislation of South Carolina, the answer seems to be, that the admission of colored seamen indiscriminately into all the ports of the United States is a matter rather of convenience than of necessity; that it is in the power of Congress to exclude them; and that if, in truth, their admission into the ports of the slaveholding States is forbidden by the laws, because

dangerous to the safety of the people of those States, it is their duty to do so; that such a modification of our commercial regulations as would exclude them from the ports of the slaveholding States, leaving them free to enter all our other ports, whether such regulations be made by law or by treaties, could furnish no just ground of complaint to other nations; would in no degree impair our commerce; or, if injurious to it at all, would be so exclusively to the commerce of those for whose protection it was established, and within whose limits alone the exclusion would operate. But if this view be correct, the obligation of Congress so to exercise the power would seem to follow; and it would result, as a necessary consequence, that the general terms of a treaty, or of an act of Congress, affecting the subject-matter, must receive a corresponding interpretation.

I am not, therefore, prepared to affirm that an act of the Legislature of South Carolina, which inhibits the entrance of free persons of color into that State, is necessarily invalid, because, under the general terms of the commercial laws or treaties of the United States, such persons might, in the absence of this law, claim such entrance. On the contrary, I think that such an act of legislation is, under the circumstances which I have supposed, a justifiable exercise of the reserved powers of that State, and ought to have effect; that Congress are under a constitutional obligation to respect it in the formation of treaties, and in the enactment of laws; and that those who are called to interpret their acts are equally bound so to construe them as to restrain the generality of their expressions within the limits of this obligation.

Upon what other principle than this can we explain the operation of the quarantine laws of the several States? They act directly upon the commerce of the Union; and yet they emanate exclusively from the States. They restrain that commerce, and control the enactments of the National Legislature, made for its regulation; and yet they are permitted to operate. In the case of Gibbons *vs.* Ogden, speaking of quarantine laws, the court say: "The constitutionality of such laws, so far as we are informed, has never been denied." Whence is it, then, that the rights acquired by foreigners, under the general commercial laws of the United States, or under the particular conventions entered into between this Government and that of which they are subjects or citizens, are controlled by the quarantine laws of the several States, enacted in the exercise by those States of the reserved right to regulate their own internal police, and are yet beyond the reach of all other control by laws emanating from the very same source, enacted for the selfsame objects, and which are even more vitally indispensable to the personal security of the citizen? Is the right of self-protection limited to defence against physical pestilence? It would be too revolting to arrogate to the Federal Government a power which would deny to a State the right of guarding its citizens from the contagion of disease. When the peculiar situation of the slaveholding States is considered, would it be less—nay, would it not be infinitely more—revolting to withhold from them the power of protecting themselves as they may against the introduction among their colored people of that moral contagion, compared with which physical pestilence, in the utmost imaginable extent of its horrors, would be light and trifling?

Will it be said that the quarantine regulations of the several States, having been recognised by Congress, derive their authority from that source, and not from the legislation of States? The answer seems to be obvious.

From the adoption of the Federal Constitution, until May, 1796, Congress did not legislate on this subject at all; and the short enactment which was approved on that day simply authorizes the President to direct certain officers of the United States to aid in the execution of *the health laws of the several States.* The act of 1799 only reiterates the same injunction to the officers themselves, and makes certain provisions connected with the customs, to conform to the requisitions of those laws. There is no pretence of giving the sanction of Congress to these enactments. They are dealt with as laws of perfect obligation, emanating from the authority of the States, as acts of State legislation, which are valid, efficient, and actively obligatory.

I repeat the inquiry, then: Upon what principle is it that these laws of quarantine, emanating solely from the authority of the States, and operating directly upon the commerce of the Union, are allowed to have a constitutional validity and effect, which are denied to the act under consideration? Founded on the same reserved right—the right of the State to regulate its own internal police; and devoted to the same object—the personal security of the citizen; I am unable to ascribe to either a constitutional validity or effect, which does not seem to me equally to belong to the other.

So far, then, as the penal provisions of the act of the Legislature of South Carolina are essential to prevent the ingress of free persons of color into that State, it is, I apprehend, valid and obligatory; and except where the operation of the act may interfere with rights existing under the commercial laws or conventions of the United States, the Legislature of South Carolina is the exclusive judge of this necessity. In its relation to those rights, the validity of those provisions would seem to me to be dependent upon the consideration which I have stated; and if it could be supposed that Great Britain, or any other nation, would continue to employ colored seamen in their commercial intercourse with South Carolina, it might be advisable to correspond with the Governor of that State, with a view to obtain such a modification of the provisions of the act, as, without frustrating its purpose, might render its operation less burdensome to mariners of that description. I do not, however, believe, sir, that such mariners will be hereafter employed in that navigation. If I am right in the view which I am about to present to you, the right so to employ them cannot be derived from the convention with Great Britain; nor can they be so employed without violating the laws of the United States.

I proceed to the last inquiry, suggested in the preceding part of this letter. In all the discussions on this subject hitherto, the concluding clause in the first article of the convention between the United States and Great Britain seems to me to have been overlooked. It is under this article that liberty of commerce, and a free and secure entry into our ports, is claimed for all the subjects of Great Britain. But these privileges are granted with a qualification, which is distinctly expressed in the concluding clause of the article. They are to be freely enjoyed, "but *subject always to the laws and statutes of the two countries, respectively.*"

The master of an American vessel sailing from Charleston to Liverpool, having his own slave on board, in the same capacity in which Daniel Fraser was employed in the Atlantic, would find himself, on his arrival at that port, without the protection of the treaty, in a contest with that slave for his right to freedom. The law of England, we are told, so abhors slavery, that the slave who touches her soil becomes from that moment free; and her courts have decided that the owner cannot maintain trover for the recovery of his

negro slave. It was but the other day that the judge of a British court of vice admiralty enforced this principle in the case of a cargo of slaves wrecked on the coast of one of the British West India islands, in an American vessel, on her transit from Baltimore to New Orleans. The rights of hospitality, which are as sacred as the stipulations of a treaty, could not secure to the American owner the control of his property. The statement is made on the authority of a newspaper, but is believed to be true. Within her own limits Great Britain enforces her own laws, the treaty notwithstanding. Why should not the rule operate reciprocally on the master or mariners of an English vessel sailing from Liverpool to Charleston? Why should not the cook of that vessel be subject to the laws of South Carolina, on his arrival within a port of that State? Is it because these are the laws of a *State*, and not of the United States? Is the law of a separate State, then, not included in the term "the laws and statutes of the two countries, respectively?" A legislative act is not less a "law or statute of the country," because the sphere in which it operates is not co-extensive with the whole country. All that is required is, that it should be enacted by authority which is competent within that sphere, and that this should be within the country. The custom of *gavelkind* is not less a part of the law of England, because it prevails only in Kent, North Wales, and a few other places. And are not the laws of police of the several British West India islands, and of the other Provincial Governments dependent on that Power, "laws and statutes" of that country, within the meaning of the treaty? But what laws of the United States, strictly so called, other than those which regulate the customs, does the objection suppose will be found operating in the port of Charleston, subject to which this right of entry and commerce is to be enjoyed? And is the foreign navigator, then, to be exempted from the operation of the police laws of that State, while his vessel is lying in her port?

Let us take again the case of the quarantine laws. These are State laws, emanating from State authority; police laws, enacted for the regulation of the internal concerns of the State, and for the protection of its citizens. No one doubts the treaty, notwithstanding that these laws are obligatory upon the foreign navigator. Nay, it is not to be questioned that they were distinctly within the view of the parties in framing this article. He is then bound to observe these laws. The commercial rights which he enjoys are liable to be restrained by the quarantine laws of a State. What exempts him from the operation of the other police laws of the same State? Those who contract with us are presumed to understand the nature of our institutions. The power to pass all laws which may be deemed necessary for the regulation of its own internal police belongs exclusively to each State; Congress cannot exercise it. The terms used in the convention, "the laws and statutes of the two countries, respectively," must be presumed, then, to have been used with a perfect understanding that they would include the police laws of the respective States.

But the act of bringing Daniel Fraser, a person of color, into the port of Charleston, was expressly forbidden by the laws of the United States. By an act entited "An act to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited," masters or captains of ships or vessels are forbidden, under a severe penalty, to "import or bring, or cause to be imported or brought, any negro, mulatto, or person of color, not being a native, or citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape

of Good Hope, into any port or place of the United States, which port or place shall be situated in any State which, by law, has prohibited or shall prohibit the admission or importation of such negro, mulatto, or other person of color." The terms used in the act, to *import* or *bring*, and *importation* or *admission*, are intended to apply, with the exceptions specified, of "*native citizens*, or *registered seamen of the United States*," and "*seamen, natives of countries beyond the Cape of Good Hope*," to all other persons of color, *free* or *slave*; and that the framers of the act were aware that such would be its operation, is manifest from the fact that a proviso is added, expressly for the purpose of preventing the act from being "construed to prohibit the admission of Indians."

The second section prohibits such vessel from being *admitted to entry*; and provides that, "if any such negro, mulatto, or other person of color, shall be landed from on board any ship or vessel in any of the ports or places aforesaid, or on the coast of any State prohibiting the admission or importation as aforesaid, the said ship or vessel, with the tackle," &c., "shall be forfeited," &c.

I have not been able to discover that this law has been repealed or modified; and if not, the legislation of Congress is in perfect harmony with that of the State. It recognises the authority of the State to pass this law, and comes in aid of its enforcement. It is at least as authoritative a recognition of State laws inhibiting the admission of persons of color, as the acts of Congress of 1796 and 1799 are of the quarantine laws of the several States; and this law, as well as those which it recognises and enforces, are within the terms of the convention—*laws and statutes of this country*; subject to which, the rights of commerce and navigation, secured by that compact, are to be enjoyed. Neither is it to be doubted that the general provisions of the commercial laws of the United States, which regulate the right of entry into the ports of the United States, must be construed so as to give effect to this law.

Such, sir, are the views which I entertain on the question which you have referred to me. I should not have deemed it necessary to enter into this extended examination of it, but for the conflicting opinion which appears to have been entertained by those to whom the executive functions of this Government have been heretofore confided.

JN. MACPHERSON BERRIEN.

To the PRESIDENT OF THE UNITED STATES.