REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

BY THE

HON. LEWIS H. SANDFORD,

LATE ONE OF THE JUSTICES OF THE COURT.

VOLUME V.

ALBANY:
LITTLE AND COMPANY,
LAW BOOKSELLERS, 53 STATE STREET.

MDCCCLIII.

The People of the State of New York, *ex relatione* Louis Napoleon *v.* Jonathan Lemmon.*

By the law of nations, the citizens or subjects of one nation have a right to pass with their property, through the territories of another nation; and where there exists a necessity for such passage, arising from the *vis major*, the right so to pass is a perfect right and cannot be lawfully refused.

But the property which they have a right to take with them, is merchandise, or inanimate things. These belong to them by the law of nature; and there is no such rule of the law of nations authorizing a passage with slaves as property.

Slavery does not exist by the law of nature, but only by force of the law of the state. This principle is as old as ancient Rome, and was a part of the civil law. It is also a part of the modern law of nations, and has been recognised as such by the tribunals of the civilized nations of Europe.

By the law of nature alone, one can not have a property in slaves. By that law, all men are free, and one race of men is no more subject to be reduced to slavery than other races.

When, therefore, a master enters a state with his slave, where slavery is not upheld by law, there being no law but the law of nature, and the master and slave being equally entitled to their rights under that law, the slave has the same right to assert his freedom, that the master has to claim a passage through the country.

The law of nations was originally, no more than the law of nature applied to nations.

That provision of the constitution of the United States, which provides, that "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," secures to a citizen from home, in a sister state, the privileges enjoyed by a citizen of that state, but not the privileges to which he would have been entitled in his own state.

The provision of the constitution relating to fugitives from service, or labor, has no effect to secure the right to property in slaves, unless they are fugitives. For all other purposes it is the same thing as if it were not in the constitution.

That provision of the constitution, which empowers congress to regulate commerce among the several states, does not deprive the states of the power to forbid the introduction of slaves from other states, as that is among the powers implied by reservation to the states.

---

* The novelty and importance of this case, and the national interest that has attached to its decision, were deemed to justify, if not require, the early and full report, that is now given, although to make room for its insertion many practice cases, earlier in the order of time, have been omitted. They will appear in the next volume, which will be put to press in June next.

The People v. Lemmon.

The states have full power to forbid the introduction of slavery under any circumstances.

Since the law of 1841, repealing those sections of the revised statutes, which authorized the introduction of slaves into this state, under certain circumstances, slavery cannot exist in this state, except in the single instance of fugitives from service under the constitution.

A citizen of Virginia, owning eight slaves, came with them in a vessel to New York, intending to tranship them to Texas, whither he was going with them to reside. They were landed, and next morning were brought before the court by *habeas corpus*. *Held*, that under the existing laws, they were free, and entitled to be discharged.

(Before PAINE, J., acting as a supreme court com.)

(November 9; 12, 1852.)

ON the 8th of November, 1852, a petition was presented to Mr. Justice Paine, praying for a writ of *habeas corpus*, for the production of eight persons of color, a man, aged about eighteen, two women, of about the same age, each with a young infant, and three children. The petition stated, that these persons arrived at this port, from Virginia, in the steamer City of Richmond, whence they were taken to a boarding house, No. 3 Carlisle street. That they were held under pretence that they are slaves, and that they had, as the petitioner is informed and believes, been bought up by a negro trader or speculator, called Lemmon, by whom, together with the aid of the man keeping the house, whose name was unknown, and who was an agent of said Lemmon, they were held and confined therein; and that said negro trader did intend, very shortly, to ship them to Texas, and there to sell and reduce them to slavery; that the illegality of their restraint and detention consisted in the fact, as petitioner was advised and believes, that they were not slaves, but free persons and entitled to their freedom; that the petitioner could not have access to them to have them sign a petition; but, that they desired their freedom, and were unwilling to be taken to Texas, or into slavery.

A writ was thereupon granted and executed.

On Tuesday, Nov. 9th, the following amended return was made to the court:

Jonathan Lemmon, respondent above named, for return to the writ of *habeas corpus* issued herein, states and shows that the eight persons named in said writ of *habeas corpus* are the pro-

perty and slaves of Juliet Lemmon, the wife of this respondent, for whom they are held and retained by the respondent. That the said Juliet Lemmon has been the owner of such persons as her slaves for several years last past, she being a resident and citizen of the state of Virginia, a slaveholding state ; that under and by virtue of the constitution and the laws of the state of Virginia, the aforesaid eight persons, for several years last past, have been and now are held or bound to service or labor as slaves, such service or labor being due by them as such slaves to the said Juliet, under and by virtue of the constitution and laws aforesaid. That the said Juliet, with her said slaves, persons or property, is now *in transitu*, or transit, from the state of Virginia aforesaid to the state of Texas, the ultimate place of destination, and another slaveholding state of the United States of America, and that she was so on her way *in transitu* or transit, and not otherwise, at the time when the aforesaid eight persons, or slaves, were taken from her custody and possession, on the sixth day of November instant, and brought before the said superior court of the city of New York, or one of the justices thereof, under the writ of *habeas corpus* issued herein ; that, by the constitution and the laws of the state of Texas aforesaid, the said Juliet is, and would be, entitled to the service or labor of the said slaves, or persons, in the manner as they are guaranteed and secured to her by the constitution and laws of the state of Virginia aforesaid ; that said Juliet never had any intention of bringing the said slaves, or persons, into the state of New York to remain or reside therein, and that she did not bring them into said state in any manner or purpose whatever, except *in transitu*, or transit, from the state of Virginia aforesaid, through the port or harbor of New York on board of steamship for their place of destination, the state of Texas aforesaid ; that the said Juliet as such owner of the aforesaid slaves or persons was, at the time they were taken from her as aforesaid, on the writ of *habeas corpus*, and she was thereby deprived of the possession of them, passing with them through the said harbor of New York, where she was compelled by necessity to touch or land, without on her part remaining, or intending to remain, longer than necessary. That the said slaves have not been bought up by a negro trader, or speculator,

and that the allegation to that effect, made in the petition of one Louis Napoleon above named, is entirely untrue. That the said Juliet is not, and never was, a negro trader, nor was, nor is this respondent one. That the said persons or slaves were inherited by said Juliet Lemmon, as heir at law, by descent, or devise of William Douglas, late of Bath county, in the state of Virginia aforesaid. That it is not, and never was, the intention of the said Juliet to sell the said slaves, as alleged in the petition of the relator, nor to sell them in any manner. This respondent, further answering, denies that the aforesaid eight persons are free; but on the contrary, shows that they are slaves as aforesaid, to whom and to whose custody and possession the said Juliet is entitled. Respondent further shows that the said slaves, sailing from the port of Norfolk, in the said state of Virginia, on board the said steamship Richmond City, never touched, landed, or came into the harbor or state of New York except for the mere purpose of passage and transit from the state of Virginia aforesaid to the state of Texas aforesaid, and for no other purpose, intention, object or design whatever.

That the said Juliet, with her aforesaid slaves, was compelled, by necessity or accident, to take passage in the steamship City of Richmond, before named, from the aforesaid port of Norfolk, and state of Virginia, for the state of Texas aforesaid, the ultimate place of destination. That the said slaves are not confined or restrained of their liberty against their will, by the respondent or the said Juliet, or by any one on her behalf.

The counsel for the petitioner, demurred to this return, and the case was heard upon the questions of law thus raised.

E. D. Culver and *John Jay* appeared as counsel for the petitioners.

H. D. Lapaugh and *H. L. Clinton*, for the respondent.

The argument was commenced by *Mr. Culver*, in support of the petition.

If the court please, our petition, which is the foundation for

this writ of *habeas corpus*, states certain facts, and, we suppose, these facts are to be taken as true, unless the other side controvert them in their return to the writ of *habeas corpus*. Our petition sets forth, that these persons were brought into this city on board of the City of Richmond; that they were taken from thence after these proceedings were commenced, carried round the city, and finally lodged at No. 3 Carlisle street, where they were found. That they were there detained in custody by this defendant, Lemmon, and his agent, their return does not deny; nor does it deny, that they were brought in that vessel to this city, but admits it. It does not say anything about where they were found, but admits they were found in the city of New York, in this place; and it further alleges, that these persons are the property of Mrs. Lemmon. It admits further, that they were brought here for the purpose of being taken to another place, or, in other words, that they were *in transitu* to Texas, and that slavery is allowed by the laws of Virginia and Texas, which we knew before. In the first place, we ask the discharge of these persons upon four independent grounds. Firstly, that by the great presumption of the common law, they are entitled to their freedom. The provisions of the common law are in favor of the personal rights, liberty and freedom of every individual; and unless you can overcome that presumption, by some positive local statute, it must prevail and give to every man his freedom. The second ground is, that by the adjudications, made from time to time, not only in free, but in slave states, it is held, that by bringing these persons within, or to, a locality where slavery is not in existence, and has no legal evidence, they are made free. If I should be wrong in both these positions, which are based upon the common law, then, I maintain, that I am right, under the statute of the state of New York, and that, I believe, is pretty good law in this state. By this statute, it will be found, in sections one and sixteen, which relate to the importation of persons held as slaves, that the legislature has said, many years since, that hereafter every person born in this state is to be free, and that every person heretofore born in this state is free, and then goes on and declares, that every person imported into this state, under any pretence whatever, except as provided for in that statute, is by that act

made free. It will devolve upon the other side, to show, that they come within the exceptions. In looking through this statute, I find that there were some exceptions made. It was about that time, that the legislature had its eye upon Saratoga Springs, for they provided, that persons coming here, and bringing slaves, could retain them for a period of nine months, and then take them back. Sections 3, 4, 5, 6 and 7, were the only ones in which these reservations were made; this seemed to limit the general rule, which the legislature had laid down in the first section of that statute. But in 1841, as we got rid of the last dregs and abominations of slavery, the legislature, in both houses, by a large majority, swept away the fourth and fifth sections from our statute book, and no longer made it allowable for a man to come to Saratoga Springs, or to the city of New York, and sojourn with his slaves. This, therefore, leaves a cleaner sweep for the general provision. Therefore, one of those exceptions left, is that, where a person secretes himself on board a vessel, in port, in a slave state, and comes off to a free state, the legislature has provided that some of the officers of that ship might take him back again; but so jealous is the law in this state, with regard to personal rights, that they will not allow the captain to take him back. This is reported in the *Legal Observer*, in a case tried before Judge Edmonds. That is the third ground upon which we move the discharge of these persons, by the positive provisions of the state of New York, unless the counsel on the opposite side, can convince the court, that the question comes up upon some of the exceptions left. The fourth ground upon which I claim to have these persons discharged is, that they are free by the act of the defendant and his wife. They have admitted, in their return, that they brought these persons here, *in transitu*, with the intention of taking them to Texas. I believe it is in section nine, that any person who shall export, or carry a person, held as a slave, out of this state to another place, that, in itself, shall work the freedom of the slave; and it goes further and declares, that not only the exporting, but any *attempt* to export a person, held as a slave, makes him free. So the defendants here, by the attempt which they have made in endeavoring to procure a vessel to proceed to Texas, and keeping these persons in imprisonment, which facts they have

alleged in their return, have saved us any further trouble. That act alone works the freedom of man, woman, and child. These are the four grounds, upon which, we say, we are entitled to the freedom of these persons; and I now ask your honor's attention to some adjudications which have been made, and which have a direct bearing on this case.

I stated first, that the great presumption of the common law is in favor of personal liberty. I quote now from Wheeler's Law of Slavery, which was written in 1837, long before the agitation which shook the public mind from its balance, in which are gathered up all the decisions made on that subject in all the courts of the United States and the state courts. I find, in pages 362 and 363, some of the conclusions which Justice Shaw arrived at in a case that came before him in the state of Massachusetts. He remarks: While slavery is considered as unlawful in both this state and in England, and this because it is contrary to natural right, and to the laws designed for the security of personal liberty, yet, in both, the existence of slavery is recognised in other countries, and the claims of foreigners growing out of that condition are respected. Lord Mansfield was of opinion that slavery could not be introduced upon any reason, moral or political, but only by positive law, and that it was so odious that nothing could be suffered to support it but positive law. I read this simply to show that slavery is in derogation of personal freedom. The same doctrine is clearly stated in the full and able opinion of Chief Justice Marshall, 10th Wheaton, 120, in which he says that slavery is contrary to the law of nature, and that every man has a natural right to the fruits of his own labor, and that no person can deprive him of those fruits and appropriate them against his will. In the case of *Forbes* v. *Cochrane*, 2d Barnwell and Creswell, and in Wheeler, 366, another learned judge states that the law of slavery is a law *in invitum*, and where a party gets out of the territory where it prevails, without any wrongful act, the right of the master, founded upon municipal law of the place, does not continue. He ceases to be a slave in England, because there is no law sanctioning slavery. But we place this case upon much higher grounds here, for when these people touched within the domains of New York, they came where there was not only no

slavery, but where it was positively interdicted by statute by the government and the people of that State. I read those authorities to show this great fact, that slavery is a creature of positive law, local statutes, and municipal regulations, and it drops off the moment a person gets over the bounds that limit that local law. Mr. Webster, in his great speech on the Oregon question, in 1848, took the same ground held by Justice Shaw and the British authorities; that slavery was local in its character and not general, and that it was in derogation of personal rights and could nowhere have an existence except by the force of positive statute. There is another case reported here, which brings up some nice views, of which I will read the head note. It is in 340 Wheeler upon the Law of Slavery, and is as follows: "The treaty of cession by Virginia to the United States, which guarantees to the inhabitants of the North West territories their titles, rights, and liberties, does not render void that article of Congress of 1789, which prohibits slavery in that territory. There was a case raised here, whether a person that was a slave in the North Western territory, and taken back afterwards into a slave state, had lost his freedom by going back; or, in other words, whether he could be held as a slave in the North West territory. All this, however, was overruled by a southern judge on a slave plantation, who said: 'If Indiana had had no positive law upon the subject, if she had had no constitution upon the subject, yet that very great platform there would be sufficient to have sent slavery out. Although it was done before Indiana was a state, it was done before we had adopted the constitution, and yet it was in the nature of a compact, and as that it became part of the fundamental law of the land, and could not be touched.'" Now, sir, in relation to our state legislation on this subject, I find another adjudication here which gives to the state of New York the right to do all that she has assumed, and it is found in 346 Wheeler, 6th Randolph's reports. It says that the power of state law to change the condition of persons held in slavery under them cannot be doubted. The operation of foreign laws upon slavery is immediate and perfect, and a party cannot be again reduced to slavery. I find several cases here where persons have been taken from a slave state into a place where slavery did not exist,

and then taken back into a slave state, have been declared to be free. I have a case here where a slave was taken into France only for a short time and then taken back to Louisiana, and he was declared by the courts of that state to be free because he had been taken to a place where slavery had no legal existence, so that it necessarily follows, if these people take their slaves to Texas, they will be entitled to their freedom—there under the adjudication of the southern courts; but, for the sake of convenience, we prefer that they should be freed in this state. Here is the first section of the statute of New York: "No person held as a slave shall be imported, introduced, or brought into this state upon any pretence whatever except in the cases hereinafter specified." Now suppose they are. "Every such person shall be free." Then further: "Every person held as a slave contrary to the laws now in force shall be free." Then there are several sections which give some exceptions—some of which have been overturned by adjudications, and 5, 6, and 7, have been repealed by the law of 1841. The last section is: "Every person born within this state, whether white or colored, is free. Every person who shall hereafter be born within this state shall be free; and every person brought into this state as a slave, except as authorized by this title, shall be free." I will now ask your attention to the other point, which is penal in its character. "No person shall send, export, or carry out of this state, any person who has been held as a slave or servant for a term of years, except as herein provided; and whoever shall offend against this statute, by aiding and consenting to such exportation or attempt, shall be deemed guilty of a misdemeanor; and every person so exported, or attempted to be exported, shall be freed and discharged from all obligation and service to the individual so attempting to export him." Now I think that my positions are sustained by these authorities. In the first place these persons are entitled to their liberty until they are brought within the operation of some local municipal statute which overturns the presumptions of the common law. In the second place, they are brought to a place where slavery has no legal existence, and by that act they are made free, not only free here, but free to the end of time, and all that shall be born of them in after time. In the

third place, we meet our opponents by another of the positive statutes of the state of New York, which provides that any person brought into this state is free by that act. That leads me to look at the return they have set forth, which avows that these slaves were brought here by the claimants, and they do not say that they are fugitives within the meaning of the law of 1850 or 1793, or the constitution of the United States. The return, sworn to by the defendant, shows that these slaves were innocent of any attempt to run away; that they were brought here on board a steamer, their owners coming with them, for the purpose of being shipped to Texas; and, consequently, they do not hold allegiance to the laws of Virginia or Texas, but only to the laws of the State of New York; for it is the laws of this locality which attach to them the moment they come within its limits. Some cases may be found, of a very early date, where slaves were delivered up when vessels put into this port in consequence of stress of weather; but I apprehend no case can be found of late occurrence, as between us and foreign nations, that will show that slaves have ever been given up when a vessel has been driven into port by stress of weather. I remember a case some years ago, that there was a vessel that had slaves on board, being freighted coastwise, driven into a British port, and all had their freedom, as a matter of course, and all passed off quietly, and nothing was heard of the matter. Here it is different. No stress of weather drove them here; nothing but the free choice and free will of the owners. If your honor should decide to deliver these persons into the custody of this man and his wife, I must confess that, in my opinion, it will overturn what I think to be the well-settled adjudication of the last seventy years, and I now wait with great interest to see what arguments my friends will bring forward in support of their case.

Mr. Lapaugh and *Mr. Clinton*, for the respondent, submitted the following points in his behalf:

I. The slaves in question, being property, the respondent has the right to be protected in the possession of them, and to take them with him from one slave state to another slave state of

the United States, even by passing through a free state of the said Union, in order to reach his place of destination. Such right is in accordance with the comity of states. (*Commonwealth* v. *Ayres*, 18 Pickering Rep. 215 and 224; *Rankin* v. *Lydia*, 2 Marshall's Rep. 477; *Stroeder* v. *Graham*, 7 B. Monroe 572; *Willard* v. *People*, 4 Scammon's Rep. 472, '3, '4, '5, '6.) The goods even of individuals, in their totality, ought to be considered as the goods of their nation in regard to other states. (Vattel, Bk. 2, p. 225, § 81.)

The citizen or subject of a state, who absents himself for a time, without any intention to abandon the society of which he is a member, does not lose his privilege by his absence. He preserves his rights, and remains bound by the same obligation. (Vattel, Bk. 2, 235, §§ 107, 108.)

The property of an individual, does not cease to belong to him, on account of his being in a foreign country, and it is still a part of the wealth of the totality of his nation. (Id. § 109.)

II. The constitution of the United States, and the constitution and laws of the state of Virginia, make the slaves in question, property, or personal chattels, and the legislature of New York has no right or power to deprive the owner of that property. The law with us must conform to the constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution, first, of the United States, and then of their own state, as the permanent and supreme law, to which every derivative power and regulation must conform. (1 Kent's Com. 5 Ed. 449; Const. U. S., art. 6, sub-div. 2.)

The statute must be construed according to the rules of the common law, for it is not to be presumed, that the legislature intended to make any innovation upon the common law, any further than the case absolutely required. (1 Kent's Com. 5 Ed. 463; *vide* also, Id. p. 460, as to the interpretation of statutes.)

By the constitution of the United States, congress alone has the power of regulating commerce between the several states of the Union, and no individual state has the power to deprive

the citizen of another state of his property, whilst using it as commerce, in passing from one state to another. It has uniformly been contended, by what may be termed the Abolition party, that under the power contained in that clause of the constitution which gives to congress the exclusive right of regulating commerce between the states, Congress has the power to prohibit the traffic in slaves, between the citizens of one state, and those of another state; at all events, it cannot be denied, that congress has the power, under the constitution, to pass an act authorizing the transit of slave property across one state into another. If so, no individual state government has the right to pass a law which may interfere with the power and authority of congress. (Const. of the U. S., art. 1, § 8, subdiv. 3.) For example, suppose congress should enact as follows: That any person, owning slaves in Virginia, may take the same to the state of Texas, by shipping them to the port of New York, thence to Texas, their place of destination, without in any manner impairing the owner's right of property in the same, would such a law be constitutional? No one could deny that such a law would come within the very letter and spirit of the constitution of the U. S., art. 1, § 8. If so, any law of any state of the Union, interfering with the right of congress to create such law, would be clearly unconstitutional, it being an usurpation of the authority of congress to regulate commerce between the several states.

III. The respondent possesses the right of passage, claimed by him, by virtue of the provisions contained in article 4, §§ 1, 2, of the constitution of the United States. (*Prigg* v. *Commonwealth*, 16 Peters's Rep. 539, 612.)

IV. The statute of the state of New York, upon which the petitioner's counsel rely, is not applicable where the slaves are brought into the state, *in transitu*, by a citizen of Virginia, proceeding with her slave property, through New York, to the state of Texas. In other words, that the object of the statute of New York is, to prohibit slaves being brought into the state by their masters, with the intention of residing therein, either for a longer or shorter period, and that, for this reason, a citizen of Virginia, carrying with him his slave property, *in transitu*, through the port of New York, without any intention of

residing, or remaining in the state, does not "import, introduce or bring" slaves into the state, within the purview of that statute.

In support of these points Mr. Lapaugh argued as follows:

I can but approach this case with diffidence and embarrassment. But in approaching the case, however diffidently I may do it, I shall approach it in such a way, I hope, as to rest the arguments which I shall adduce upon sound law, and upon the constitution of our country; and I shall contend before your honor, that by the laws of nations, by the constitution of the United States, by the comity between nations, and by the laws of congress, these persons, who are citizens of Virginia, and under the constitution of the United States citizens of this entire Union, are entitled to that property which was property to them in Virginia and property to them in the state of New York. Now I do not propose, and if I did, it would, perhaps, be out of my power, to discuss this matter with a degree of feeling and enthusiasm, as satisfactory to those who may be listening, as my friend on the other side has done. But it seems to me that the counsel in this case has not contended for the discharge of these persons upon any ground which really entitles them to be discharged, in relation to the laws of the state of New York. The counsel has based his argument on the ground that a person coming from the state of Virginia is placed exactly in the same position as a person coming from Germany would be placed. How is it that these United States are to be thus treated in regard to each other as separate, distinct and foreign states, in the latitude and extent that one of the countries of Europe would be regarded in reference to the United States? Can it be that is the meaning of the constitution that binds these states together? Can it be that such is the intention of that instrument, which says "that the public acts of each state shall receive full faith and credit in every other state of this Union?" Are the several states, whose public acts are entitled, by virtue of that constitution, to receive full faith and credit in every state, in the same position, in respect to each other, that Germany would stand in reference to the United States? Let us

look at this constitution, and see how it is that we are entitled to have our rights protected. The right to property in the state of Virginia, it seems to me, is the same as the right to property in the state of New York. The fact being admitted by the demurrer taken to this return, that these slaves are the property of Mrs. Lemmon, there is no difficulty on that point, to perplex the argument in this case. They being the property of Mrs. Lemmon, under the laws of the state of Virginia, let us call to our aid, in order to protect this property in the possession of Mrs. Lemmon, the constitution of the United States, which has a superintending power and control over all the states of this Union, and without which they might be placed in that dilemma that one state of Europe is placed in regard to one of the states of this Union. I call your attention to the second article of the constitution of the United States, which is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Now it would seem that this provision of the constitution disposes entirely of the objection that these persons having come into the state of New York, are to be set at liberty. It strikes me, and I shall so argue, that the gentleman misconceives the effect of the constitution, the law of nations, and the comity of the law of nations, when he says that because slavery does not exist in New York, slaves brought from other states into New York are free. Now, it must be conceded that unless there is some strong controlling authority of the courts of the United States pronounced in reference to this provision of the constitution which I have read, declaring that full faith and credit shall be given to the acts of the various states, as we contend—it must be conceded, I say, that this property must continue to be in the state of New York, as it was in the state of Virginia, the rightful property of Mrs. Lemmon. It may, perhaps, be necessary to take into view the objects and design of the law of the state of New York, which has been read, stating that no slaves shall be brought into this state. It may become necessary, in the course of this argument, to contend that the law of the state of New York which in any way prohibits the full exercise of the rights of our client under the constitution of the United States, and under the constitu-

tion and laws of the state of Virginia, is constitutional. But I shall discuss first the object of the law of New York, in order to show that it may stand, and yet not be deemed inconsistent with the rights for which we contend here. Mr. Justice Kent lays it down as a rule that, in the construction of a statute, we should first ascertain what was the common law before its passage that was designed to be remedied by the statute. Bearing that interpretation in view, we conceive that the effect of this statute was not intended to be anything more than this: that slavery, which did not exist by the common law, should not exist after the passage of that statute law in the state of New York. Let us see what rights belong to Mrs. Lemmon, and how far, by the law of nations, a party owning property in one state, has a right to its possession in another state. On this subject I will take the liberty of citing Vattel on the law of nations. [Here the counsel cited from the second book of Vattel, p. 225, section 81, showing that the goods even of individuals ought to be considered as the goods of the nation in regard to other states.] According to the authority, continued the counsel, the property of a citizen of Virginia passing through the state of New York is to be regarded as the property of the former state, and the state of New York is bound, in fidelity to the constitution of the United States and the laws of Virginia, to give that property to these persons. The statute of this state contemplated that when slaves were to be made free by being introduced into this state, they must be brought with the design of keeping them here permanently. But never was it intended, in the enactment of that statute, that persons passing through this state with slaves, should, by the mere act of transit, thereby forfeit and lose their right to their property. In the same book, section 109, I find that Vattel lays down the doctrine that the property of an individual does not cease to belong to him on account of his being in a foreign country, and that it still constitutes a part of the aggregate wealth of his nation, so that if we were to take the broad ground that Virginia and New York are to be considered as distant foreign states, yet, by the laws of nations, we have proved that the individual who comes into this state, from Virginia, with property, is entitled to it, New York having respect for the laws of Virginia. And to the

same effect also, do we find that the subject of one state who happens to go from the state to which he belongs, into another, without the intention of remaining in that state, must be regarded in the same respect as he would be in the state from whence he came, so far as the right to his property is concerned. If this is not the rule marked out by the authority from whom I have quoted, we cannot understand the design of the constitution where it says, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The intention of this clause was to confer on them as it were, a general citizenship, and to communicate all privileges which citizens of the same state would be entitled to under like circumstances. If your honor please, I understand four distinct points to be made by the counsel for the slaves, on the first of which he claims their discharge and contends that they are free by the common law. Now, the authorities cited by me have been quoted for the purpose of showing, that, notwithstanding whatever may be the belief in this community, that all slaves who come into it in this manner are free, yet that is entirely incorrect and without foundation. On this point, I call your attention to a case recently tried in Pennsylvania, in the circuit court of the United States, before Justices Grier and King. It was an action brought by a southerner against a person named Kauffman, for the harboring of certain slaves. On the trial, the point was taken that the slaves were brought voluntarily into the state by their owners, and therefore that they were free; but I cannot do better than give it in the clear and forcible language of Justice Grier himself: "It has been contended," he says, in charging the jury, "that these slaves became free by the action of the plaintiff in voluntarily bringing them into the state of Pennsylvania; but the question depends upon the law of Maryland, and this court cannot go behind the *status* of these people in the state from whence they escaped."

Judge Paine. Were they escaping?

Mr. Lapaugh. He goes on to say, your honor, that he knew no law or decision of the courts of Maryland which treats a slave as liberated who has been conducted by his master into a free State, along the national high road. Now, we say, in the eye of the law, we are conducting these persons along the

national high road. We had no other object in view than to proceed to Texas. We were compelled, on our way thither, to embark at Norfolk, Virginia ; and we never brought the slaves to the harbor of New York with any intention of keeping them in this State. We say that the mere passing of slaves over this part of the national highway is not, and should not be, regarded as an act of liberation. We have sent on to Justice Grier to get the facts in this case, so as to have them more fully stated.

Judge Paine. Read what he says about the national high road.

Mr. Lapaugh. On this subject he remarks,—"Lord Mansfield had said many pretty things,"—as the counsel for the slaves (Mr. Culver) has said here—"in the case of Somerset, which are often quoted as the principles of the common law ; but they will be found to be embellished with rhetorical flourishes rather than with legal dogmas." Now, in illustration of the principle for which we contend, and in order to show the falsity of the argument advanced to prove that the intention of the statute is that every man brought into this State shall be free, let me allude to another case. Your honor is aware that we have a fugitive slave law, and you are also aware that in 1793 there was an act passed in relation to fugitives from labor. Now, supposing a slave escaped from his master into Ohio from Virginia, and after he had been delivered to him under the law of 1793, that master was by necessity compelled to take him through the State of New York, the learned counsel contends he would be free, because he was brought to New York on his way to slavery. The position we take on this point is the only one that is tenable. We say that the importation of a slave into the State was the case to which the act refers, and not his mere transient passage through it. If this were not the right interpretation, then the south could never secure her rights if a free State were allowed to declare that the very moment a slave was brought into it, under any pretence whatever, he should be free. And taking that view of the case, we perceive that the constitution of the United States and the laws of New York and Virginia harmonize and sustain each other. It is only under this relation of the States to each other that Mr. Lemmon can be

entitled to all the privileges and immunities of a citizen of the United States. Now, what sort of an argument has the counsel presented in reference to the position the State of New York and Pennsylvania occupy to each other? He has given expression to a doctrine which, if practically carried out, in less than ten years would destroy the union which now binds us together. This question is one in which the south has taken a deep interest, and it has come to the knowledge of some of the people of that section, who are determined to have a decision even in the highest courts of the United States on this matter, so that it shall be finally settled whether they shall be entitled to carry their property in the same manner and under the same protection that would be extended to any gentleman in this court who might be travelling through the state of Virginia. The counsel proceeded, at still greater length, to argue on the legality of the claimant's right to his property, and concluded by speaking of the great interests and questions of deep importance that were involved in this case.

Mr. Clinton followed in an argument on the same side.

Mr. Jay, in reply for the petitioners.

The great question involved in this suit, the right of a master, from Virginia, a slave-holding state, to hold his slaves in this, a free state, while *in transitu* to Texas, another slave state, was definitively decided, eighty years ago, by the court of King's Bench, after a very full argument, in the case of Somerset.

The question there was, whether the law of Virginia, fixing the *status* of Somerset, should prevail over the common law of England; and here, it is, whether the law of Virginia, which fixed the *status* of these persons as slaves within its borders, shall prevail to determine their *status* in this court, over the common law of New York, as derived from the mother country, and now expressly declared by statute.

Mr. Justice Paine. In the case of *Somerset*, I think the right of passage, *in transitu*, was not the question. Was not the slave brought from Jamaica to England to remain there?

Mr. Clinton, for the defendant.

That was so, your honor ; the question was on the right of the master to continue Somerset in slavery, in England.

Mr. Jay. On the contrary, the question was, and it was so expressly declared by the court, (20 Howell's State Trials, p. 79,) as to the right of the master to detain the slave, for the purpose of sending him out of England, to be sold in Jamaica, precisely as it is here, upon the right of Mr. Lemmon to detain these persons, for the purpose of carrying them as slaves to Texas. Somerset, when brought before Lord Mansfield, on *habeas corpus*, was taken from on board a ship, lying in the Thames, bound for Jamaica ; and the commander of the vessel, to whom the writ was addressed, and by whom the return was made, declared distinctly, that Somerset had been placed in his custody, by his master, one Charles Stewart, to be safely kept and conveyed in the said vessel, to Jamaica aforesaid, there to be sold as a slave. There was no pretence whatever, that he was to be held in slavery, in England. He had been brought there only *temporarily*, for his master's convenience, and was then actually leaving the country for one where slavery existed : and with all respect to the learned arguments of our opponents, there is nothing that I can perceive, in this case, to except it from the governance of these great principles of English law, then so prominently recognised, in regard to human freedom.

Somerset was a native African, and had been legally reduced to servitude, under laws enacted by the British Parliament, authorizing and regulating the slave trade. He had been held as a slave, by the laws of Virginia, a British colony ; he might be so held again by those of Jamaica ; he had become, by purchase, under the sanction of the British colonial law, the property of Mr. Stewart. He had been taken to England from occasion of business, with the intention still continued of returning to America, and all these facts were carefully set out in the return. The counsel for the master, strenuously urged the excessive hardship and manifest impropriety of the court *disturbing this relation* thus lawfully established between Somerset

and Mr. Stewart, and scornfully denied the doctrine that the air of England was too pure for a slave to breathe in. After prolonged and elaborate argument, and repeated postponements, the court unanimously decided that Somerset must be discharged. They declared, in language already quoted by my learned associate, but which the court will allow me to repeat, for the reason that the principle disposes at once of all the moral and political and social arguments that have been advanced in favor of allowing Mr. Lemmon a right of passage, *in transitu*, with his slaves through this port, that "the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law. * * * It is so odious that nothing can be suffered to support it but positive law."

The case of Somerset was decided in 1772. Its authority, excepting in the cases quoted by the respondent, and which I confess are new to us, has never, that we are aware of, been questioned. Its ruling was followed in *Knight*, a negro, v. *Weddeburn*, in Scotland, in 1778, where the court held that the dominion assumed over the negro under the laws of Jamaica, being *unjust*, could not be upheld to any extent (20 Howell State Trials, p. 2, note); and in the more recent case of *Forbes* v. *Cochran* (2 Barnwell and Cresswell 448), where the court of King's Bench decided that 38 slaves who had escaped from a plantation in East Florida to a ship of war on the high seas, became thereby free.

The decision in Somerset's case, occurring before our Revolution, became a part of that common law which, according to all our reliable authorities (Chief Justice Marshall, Mr. Duponceau, Chancellor Kent, and many other both in the federal and state courts), as absolutely belongs to us as it did to our ancestors before the separation from Great Britain. The pre-eminence of the common law is recognised on the ground that it is based upon the higher law of God; and Chief Justice Taylor, of North Carolina, in the case of the *State* v. *Reed*, declared it to be of "paramount obligation to the statute," because "founded upon the law of nature and confirmed by revelation."

In opposition to the doctrine of the Somerset case, the court is referred, by the respondent, to a newspaper report of a recent

alleged decision of Judge Grier, of Pa., in the case of *Oliver* v. *Kauffman and others*, for harboring and secreting slaves, wherein it seems to have been held, that the plea offered in defence, that the slaves had been previously made free by being carried by their master from Maryland to Kentucky, through Pennsylvania, was insufficient: since to determine the status of the slaves at the time of the escape for which the suit was brought, the court must look only to the law of the state whence they had escaped. The decision itself seems to have been expressly limited to that particular case. But Judge Grier is reported to have remarked, and the counsel for the defendants have laid great stress on his language, that "Lord Mansfield said many pretty things in the case of Somerset, which are often quoted as the principles of the common law, but that they deserve to be classed with rhetorical flourishes rather than dogmas."

Apart from the improbability that any gentleman occupying a seat on the bench of the supreme court of the United States, would permit himself thus to speak of so eminent a judge, and so well established a principle of law, which has again and again been recognised by the American judiciary (*Greenwood* v. *Curtis*, per Sedgwick, J., 6 Mass. R. 366; Mr. Justice Story's remarks thereon in Conflict of Laws, 215, note; C. J. Marshall in the case of the Antelope, 10 Wheaton 420; *Jones* v. *Wheaton*, 2 McLean 596), the court will observe at a glance, on looking at the case of Somerset, in 20 Howell's State Trials, that Lord Mansfield was most anxious to escape the necessity of pronouncing a judgment. That on its first coming before him, he strongly recommended that it be accommodated by agreement, declaring that if the parties would insist upon a decision, they must have it, without reference to compassion on the one hand, or inconvenience on the other, but simply to the law, and that the setting of 14,000 or 15,000 men (that being the estimated number of slaves then in England) at once loose, by a solemn opinion, was very disagreeable in the effects it threatened—but notwithstanding, if the parties would have judgment, *fiat justitia, ruat cœlum*.

That these distinct intimations were given on the conclusion of the argument, and before the day for pronouncing the opinion

of the court, and that when no compromise having been effected as he recommended, the court were compelled to give judgment, he rendered their judgment with unusual brevity, after a short statement of the case, and so far from indulging in "rhetorical flourishes," his opinion occupied scarcely more than twenty lines, while the arguments of counsel had been spread over 70 pages.

We respectfully submit, therefore, that it would be clearly unjust and improper, upon an unauthenticated newspaper report, to assume that Judge Grier has either denied this fundamental principle of our common law, or thrown ridicule on an opinion which he never read—a proper respect for the federal bench forbids us to regard this extraordinary report as other than an exaggerated sketch, or possibly, a malicious libel.

As to the other cases to which the court has been referred, that of *Sewall's Slaves* in Indiana (3 Am. Jurist 404), and of *Willard* v. *The People*, in Illinois, by Judge Douglass (4 Scammon 461), as affirming the right of transit with slaves through a free state, it would indeed seem that in some of the border states, a few individual judges have been, by their views of political expediency, led to ignore the inflexible principles of the common law touching the natural right of personal liberty, to meet the wishes and interests of their slave-holding neighbors, especially when no state statute like that of New York has positively declared the law, and limited the discretion of the courts. But your honor will find, on examining the reasonings of those cases, that they are *not law.*

Mr. Lemmon, then, to retain these slaves for the purpose of carrying them to Texas, must show a *positive statute, binding upon this court,* authorizing him to hold them in servitude while *in transitu* through the state of New York; calling them property, and invoking the law of nations and the comity of states, and appealing to the constitutional provisions in regard to commerce, will not help him.

The learned counsel have omitted to show, for the simple reason that it was impossible, that the law of nations recognises property in man. The *lex loci* establishing such property has no force beyond its territorial limits. The comity of states will not help them, since, for centuries past, as shown by the exam-

ples of the united provinces of Holland, the Austrian Netherlands, France, Great Britain (see authorities cited in Mr. Hargrave's argument in the Somerset case, 20 Howell State Trials, pages 61, et seq.), and America, that comity recognises neither slaves nor slavery. Even in the state of Maryland, the slaves of a St. Domingo master, who had fled to their border, was declared free, although he had been sold since his arrival (*Fulton* v. *Lewis*, Hen. & John. 564). The principle of comity has no application to systems or laws that offend against morality, that contravene the policy and principles of the state, or that violate natural justice and the law of God; and slavery, in the judgment of the common law, offends in all these particulars.

But it is contended, that apart from the doctrine of comity between foreign states, the constitution of the United States, exercising a superintending power and control over the states of the Union, has given to Mr. Lemmon the right to hold as property in the state of New York, that which was his property by the laws of Virginia, and the court is referred, in support of this proposition, to the provision "that faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state." (Art. 4, § 1.)

I confess myself unable to understand the bearing of that provision on the question before us—giving full faith and credit to the public acts of Virginia, fully admitting the averments in the demurrer, and that her laws permitted the slavery of these persons and their exportation to Texas. What has that to do with the validity of our laws, and their operation upon these persons, when brought by the respondent *within our jurisdiction?* If the question before the court related to fugitives from service under the laws of Virginia, then the validity of those laws might perhaps be questioned by those sought to be affected by them, for it is established as a general rule that the courts of one state have power to decide on the validity of legislative acts of another state when the question arises in a case within their jurisdiction (*Stoddard* v. *Smith*, 5 Binney 355, 8 Pick. 194); and it is declared to be not only their right, but their duty, to declare null and void statutes which violate the constitution of the United States, or the plain and obvious principles of common

right and common reason. (See collection of cases cited in 1 United States Digest, p. 553, of the power of courts to declare legislative acts unconstitutional.)

But here it is unnecessary at all to consider the validity of the laws of Virginia under which these persons were reduced to servitude, for they have passed beyond their sway. By the act of the claimant himself they stand in our free state, and share with him the protection of our laws.

"The relations of the United States to each other in regard to all matters not surrendered to the general government by the national constitution, are those of foreign states, in close friendship, each being sovereign and independent," (1 Greenleaf on Evid., § 489,) and the very clause in the constitution which limits the sovereignty of the states in regard to fugitives from service (Art. 4, § 3), and declares that "no person held to service or labor in one state by the laws thereof, *escaping into another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor shall be due," recognises, by direct implication, the *right* of each state to discharge, by such laws and regulations as it may deem fit, all persons held to service or labor in other states who may come within their territory, *otherwise than by escape*, no matter who may claim them, nor to whom, under the slave code of other states, their service or labor may be due. That right was never yielded by New York in the constitutional compact, but being thus reserved and declared in the compact, she did, of her own accord, waive it for a season, by the enactment of the law permitting slave-holders to bring their slaves into the state and take them again from the state, during a space of nine months. With the repeal of that law in 1841, the common law, as declared in the case of Somerset, resumed its sway, making every slave *other than a fugitive*, the instant he touches our soil, a *free man*. This principle Mr. Justice Story declares, and his authority will outweigh all the cases cited against it, pervades the non-slave-holding states in America (Conflict of Laws, 92), and its correctness has been repeatedly and honorably recognised by the southern courts, (*ex parte* Simmons, *Maria Louise* v. *Marot*, 9 Louis. R. 473; *Smith* v. *Smith*, 13 Louis. R. 441; *David* v. *Porter*, 4 Har. and

McHen. 418 ; *Davis* v. *Jaquin*, 5 Har. and J. 107, note ; *Fulton* v. *Lewis*, 3 Har. and J. 564.) (*a.*)

But New York, to prevent the possibility of any mistake on the point, or any relaxation of the principle, has re-enacted and published it to the world, declaring, in language so plain as to defy the most ingenious efforts of counsel to perplex, that she will not tolerate slavery for any conceivable motive, or for an instant of time.

Upon the point submitted by the respondent, that the law is unconstitutional and should be so determined by your honor, I shall not further detain the court by submitting a reply. I will but remark in conclusion, that interesting and important as the case may be regarded by the counsel for the respondents, and by the citizens of the slave-holding states, as involving what, by their laws, are held rights of property, it is interesting and important to a large portion of our countrymen on far higher grounds, as involving the sovereign right of each state within its own limits, excepting in the single case of fugitives from service, to regulate, on principles of equal justice, its own internal polity ; to reject and forbid foreign interference with our free institutions ; to maintain in its purity the common law, and to protect in the enjoyment of life, liberty, and the pursuit of happiness—rights once declared by this nation at large to be inalienable—every slave who is brought within our limits, no

(*a.*) In the recent case of *Lucy Brown* v. *Persifer Smith*, in the supreme court of Louisiana, which was not quoted in the argument, Lucy claimed her freedom on the ground that she had been brought to New York during the continuance of the law allowing slaves to be detained there for 9 months, and declaring them free after that period—and that she had resided there more than one year. The opinion of the court was delivered by *Eustis, Chief Justice*, and it was "held, that under the state of facts presented, the plaintiff must be regarded as having acquired her freedom, with the consent of her master, by her residence in New York, which status she did not lose by subsequently being taken *back into slave territory.*"

The view taken by the criminal court of Louisiana in 1841, of the point raised by the counsel for the respondent, that *a right of transit* with slaves is not forbidden by a statute absolutely forbidding the introduction of slaves, appears from the following letter of the attorney general of the state, which explains generally the facts of the case. Williams had been arrested *in transitu*, imprisoned, tried,

matter how humble his condition, nor how powerful the state or the parties who would reduce him again to servitude.

PAINE, J.—This case comes before me upon a writ of *habeas corpus*, issued to the respondent, requiring him to have the bodies of eight colored persons, lately taken from the steamer City of Richmond, and now confined in a house in this city, before me, together with the cause of their imprisonment and detention.

The respondent has returned to this writ, that said eight colored persons are the property of his wife, Juliet Lemmon, who has been their owner for several years past, she being a resident of Virginia, a slaveholding state, and that by the constitution and laws of that state they have been, and still are, bound to her service as slaves; that she is now, with her said slaves or property, *in transitu* from Virginia to Texas, another slaveholding state, and by the constitution and laws of which, she would be entitled to said slaves and to their service; that she never had any intention of bringing, and did not bring them into this state to remain or reside, but was passing through the harbor of New York, on her way from Virginia to Texas, when she was compelled by necessity to touch or land, without intending to remain longer than was necessary. And she insists that said persons are not free, but are slaves as aforesaid, and that she is entitled to their possession and custody.

---

found guilty, his negroes, 24 in number, confiscated, and himself fined $1200, which was expiated by one year's imprisonment.

Attorney General's Office,
New Orleans, June 11, 1841.

DEAR SIR: In reply to your note of the 8th instant, I take pleasure in stating that, on the trial of Mr. William Williams, in the criminal court of the first district, for having brought or imported into this state certain slaves convicted of capital crimes in the state of Virginia, no evidence whatever was offered that Mr. Williams either sold or attempted to sell any of those slaves in the state of Louisiana. It was proved, on the contrary, by two witnesses, that when asked whether the slaves were for sale, Mr. Williams answered in the negative, and said he was going to Texas with them. I took the ground that the mere fact of bringing such slaves into the state was a violation of the statute, and constituted the offence of which Mr. Williams stood charged. This proposition was sustained by the court.

Yours very respectfully,
C. ROSELIUS.

JOHN R. GRIMES, Esq. (present).

To this return the relator has put in a general demurrer.

I certainly supposed, when this case was first presented to me, that, as there could be no dispute about the facts, there would be no delay or difficulty in disposing of it. But, upon the argument, the counsel for the respondent cited several cases which satisfied me that this case could not be decided, until those cases had been carefully examined.

The principle which those cases tend more or less forcibly to sustain, is, that if an owner of slaves is merely passing from home with them, through a free state, into another slave state, without any intention of remaining, the slaves, while in such free state, will not be allowed to assert their freedom. As that is precisely the state of facts constituting this case, it becomes necessary to inquire whether the doctrine of those cases can be maintained upon general principles, and whether the law of this state does not differ from the laws of those states where the decisions were made.

I shall first consider whether those cases can be sustained upon general principles.

The first case of the kind which occurred, was that of *Sewall's slaves*, which was decided in Indiana, in 1829, by Judge Morris, and will be found reported in 3 Am. Jurist, 404. The return to the *habeas corpus* stated that Sewall resided in Virginia, and owned and held the slaves under the laws of that state; that he was emigrating with them to Missouri, and on his way was passing through Indiana, when he was served with the *habeas corpus*.

It, however, appeared on the hearing, that Sewall was not going to Missouri to reside, but to Illinois, a state whose laws do not allow of slavery. The judge for this reason discharged the slaves. This case, therefore, is not in point, and would be entirely irrelevant to the present, were it not for a portion of the judge's opinion, which was not called for by the case before him, but applies directly to the case now before me.

"By the law," he says, "of nature and of nations, (Vattel, 160,) and the necessary and legal consequences resulting from the civil and political relations subsisting between the citizens as well as the states of this Federative Republic, I have no doubt but the citizen of a slave state has a right to pass, upon business

or pleasure, through any of the states, attended by his slaves or servants; and while he retains the character and rights of a citizen of a slave state, his right to retain his slaves would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free state, should be considered as an escape from the state where the master had a right of citizenship, and by the laws of which the service of the slave was due. The emigrant from one state to another might be considered prospectively as the citizen or resident of the state to which he was removing; and should be protected in the enjoyment of those rights he acquired in the state from which he emigrated, and which are recognised and protected by the laws of the state to which he is going. But this right I conceive cannot be derived from any provision of positive law."

The next case relied upon is *Willard* v. *The People*, (4 Scammon's Rep. 461) and which was decided in the state of Illinois in 1843. It was an indictment for secreting a woman of color owing service to a resident of Louisiana. The indictment was under the 149th section of the Criminal Code, which provides that "If any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or a servant owing service or labor to any other persons, whether they reside in this state or in any other state, or territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every such person so offending shall be deemed guilty of a misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months."

It appeared that the woman of color was a slave, owned by a resident of Louisiana, and that, while passing with her mistress from Kentucky to Louisiana through the state of Illinois, she made her escape in the latter state, and was secreted by the defendant.

There were several questions raised in the case which it is unnecessary now to notice. The indictment, which was demurred to, was sustained by the court. The main objection to it was that the section of the code under which it was found was a violation of the sixth article of the constitution of the state

of Illinois, which declares that "neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."

The court, in answering this objection, say: "The only question, therefore, is the right of transit with a slave; for if the slave upon entering our territory, although for a mere transit to another state, becomes free under the constitution, then the defendant in error is not guilty of concealing such a person as is described in the law and in the indictment. The 149th section of the criminal code, for a violation of which the plaintiff is indicted, does most distinctly recognise the existence of the institution of slavery in some of these United States, and whether the constitution and laws of this state have or have not provided adequate remedies to enforce within its jurisdiction that obligation of service, it has provided by this penal sanction, that none shall harbor or conceal a slave within this state, who owes such service out of it. Every state or government may or may not, as it chooses, recognise and enforce this law of comity. And to this extent this state has expressly done so. If we should, therefore, regard ourselves as a distinct and separate nation from our sister states, still, as by the law of nations (Vattel, B. 2, ch. 10, § 132, 133, 134) the citizens of one government have a right of passage through the territory of another peaceably, for business or pleasure, and that too without the latter's acquiring any right over the person or property (Vattel, B. 2, § 107, 109), we could not deny them this international right without a violation of our duty. Much less could we disregard their constitutional right, as citizens of one of the states, to all the rights, immunities, and privileges of citizens of the several states. It would be startling indeed if we should deny our neighbors and kindred that common right of free and safe passage which foreign nations would hardly dare deny. The recognition of this right is no violation of our constitution. It is not an introduction of slavery into this state, as was contended in argument, and the slave does not become free by the constitution of Illinois by coming into the state for the mere purpose of passage through it."

Another case cited by the respondent's counsel, was the *Com-*

monwealth v. *Aves* (18 Pickering's Rep. 193). In this case the owner brought her slave with her from New Orleans to Boston, on a visit to her father, with whom she intended to spend five or six months, and then return with the slave to New Orleans. The slave being brought up on habeas corpus, the court ordered her discharge. The case was fully argued, and Chief Justice Shaw closes a very elaborate opinion with these words: "Nor do we give any opinion upon the case, where an owner of slaves in one state is *bonâ fide* removing to another state where slavery is allowed, and in so doing necessarily passes through a free state, or where by accident or necessity he is compelled to touch or land therein, remaining no longer than necessary."

I have quoted largely from the opinions in these cases, in order that it may be understood clearly what is presented by them as their governing principle. The respondent's counsel insists it is this: That by the law of nations, an owner of a slave may, either from necessity or in the absence of all intention to remain, pass with such slave through a state where slavery is not legalized, on his way from one slave state to another, and that during such transit through the free state the slave cannot assert his freedom.

I admit that this is the principle of these cases, and I now propose to consider it. Each case denies that the right of transit can be derived from the provision of the constitution of the United States respecting fugitive slaves, and, where an opinion was expressed, places the right upon the law of nations.

Writers of the highest authority on the law of nations agree that strangers have a right to pass with their property through the territories of a nation. (Vattel, B. 2, ch. 9, §§ 123 to 136. Pufendorf, B. 3, ch. 3, §§ 5 to 10.) And this right, which exists by nature between states wholly foreign to each other, undoubtedly exists, at least as a natural right, between the states which compose our Union.

But we are to look further than this, and to see what the law of nations is when the property which a stranger wishes to take with him is a slave.

The property which the writers on the law of nations speak of is merchandise or inanimate things. And by the law of nature these belong to their owner. (Institutes of Just., B. 1,

t. 2, § 2.) But those writers nowhere speak of a right to pass through a foreign country with slaves as property. On the contrary, they all agree that by the law of nature alone no one can have a property in slaves. And they also hold that, even where slavery is established by the local law, a man cannot have that full and absolute property in a person which he may have in an inanimate thing. (Pufendorf, B. 6, ch. 3, § 7.) It can scarcely, therefore, be said, that when writers on the law of nations maintain that strangers have a right to pass through a country with their merchandise or property, they thereby maintain their right to pass with their slaves.

But the property or merchandise spoken of by writers on the law of nations which the stranger may take with him, being mere inanimate things, can have no rights; and the rights of the owner are all that can be thought of. It is, therefore, necessary to look still further and to see what is the state of things, by the law of nature, as affecting the rights of the slave, when an owner finds himself, from necessity, with his slave in a country where slavery is not legalized or is not upheld by law.

It is generally supposed that freedom of the soil from slavery is the boast of the common law of England, and that a great truth was brought to light in Somerset's case. This is not so. Lord Mansfield was by no means, so far as the rest of the world is concerned, the pioneer of freedom. Whatever honor there may be in having first asserted that slavery cannot exist by the law of nature, but only by force of local law, that honor among modern nations belongs to France, and, among systems of jurisprudence, to the civil law. The case of Somerset did not occur until the year 1772, and in 1738 a case arose in France in which it was held that a negro slave became free by being brought into France. (13 Causes Célèbres, 49.)

But in truth the discovery that by nature all men are free, belongs neither to England nor France, but is as old as ancient Rome; and the law of Rome repeatedly asserts that all men by nature are free, and that slavery can subsist only by the laws of the state. "*Bella etenim orta sunt, et captivitates secutæ et servitutes quæ sunt naturali juri contrariæ; jure enim naturali omnes homines ab initio liberi nascebantur.*" (Institutes, B. 1, t. 2, s. 2.) "*Naturalia quidem jura, quæ apud omnes*

gentes peræque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent." (Institutes, B. 1, T. 2, S. 11; Digest, B. 1, T. 1, s. 4; B. 1, T. 5, ss. 4, 5.)

The writers on the law of nations uniformly maintain the same principle, viz. that by the law of nature all men are free, and that where slavery is not established and upheld by the law of the state there can be no slaves. (Grotius, B. 2, ch. 22, s. 11; Hobbes De Cive, B. 1, ch. 1, s. 3. Pufendorf (Barbeyrac) Droit de la Nature, B. 3 ch. 2, ss. 1, 2, B. 6, ch. 3, s. 2.)

The same writers also hold that by the law of Nature one race of men is no more subject to be reduced to slavery than other races. (Pufendorf, B. 3, ch. 2, s. 8.)

When we are considering a master and slave in a free state, where slavery is not upheld by law, we must take into view all these principles of the law of nature, and see how they are respectively to be dealt with according to that law; for it will be remembered that the master can now claim nothing except by virtue of the law of nature. He claims under that law a right to pass through the country. That is awarded to him. But he claims in addition to take his slave with him; but upon what ground? That the slave is his property. By the same law, however, under which he himself claims, that cannot be; for the law of nature says that there can be no property in a slave.

We must look still further to see what is to be done with the claims of the slave. There being now no law but the law of nature, the slave must have all his rights under that, as well as the master; and it is just as much the slave's right under that to be free as it is the master's to pass through the country. It is very clear, therefore, that the slave has a right to his freedom, and that the master cannot have a right to take him with him.

As the cases cited by the respondent's counsel all rest the master's right of transit exclusively upon the law of nations, and admit that he cannot have it under any other law, I have thus followed out that view, perhaps at unnecessary length, in order to see to what it would lead. In order to prevent any misapprehension as to the identity of the law of nature and the law of nations, I will close my observations upon this part of the case with a citation, upon that point, from Vattel. (Preli-

minaries, § 6.) "The law of nations is originally no more than the law of nature applied to nations."

I ought also to notice here that the respondent's counsel, upon the authority of the case in Illinois, insisted that this right of transit with slaves is strengthened by that clause in the constitution of the United States which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The case in Indiana, on the other hand, says expressly that the right does not depend upon any positive law.

I think this remark must have found its way into the opinion of the judge who decided the Illinois case without due consideration. I have always understood that provision of the constitution to mean (at least so far as this case is concerned) that a citizen who was absent from his own state, and in some other state, was entitled while there to all the privileges of the citizens of that state. And I have never heard of any other or different meaning being given to it. It would be absurd to say that while in the sister state he is entitled to all the privileges secured to citizens by the laws of all the several states or even of his own state; for that would be to confound all territorial limits, and give to the states not only an entire community, but a perfect confusion of laws. If I am right in this view of the matter, the clause of the constitution relied upon cannot help the respondent; for if he is entitled while here to those privileges only which the citizens of this state possess, he cannot hold his slaves.

I must also here notice some other similar grounds insisted upon by the respondent's counsel.

He cites Vattel (B. 2, ch. 8, s. 81) to prove that the goods of an individual as regards other states are the goods of his state. I have already shown that by the law of nature, about which alone Vattel is always speaking, slaves are not goods; and I may add that what Vattel says in the passage to which the counsel refers has no connexion with the right of transit through a foreign country. Besides, in the case from Illinois referred to by respondent's counsel, the court distinctly declare (*Willard* v. *People*, 4 Scammon's Rep. 471) that they "cannot see the application to this case of the law of nations in relation

to the domicil of the owner fixing the condition of and securing the right of property in this slave, and regarding the slave as a part of the wealth of Louisiana, and our obligation of comity to respect and enforce that right."

The respondent's counsel also refers to those provisions of the constitution of the United States which relate to fugitive slaves and to the regulation of commerce among the several states. With regard to the first of these provisions, which the counsel insists recognises and gives a property in slaves, it is sufficient to say, that although the supreme law of the land in respect to fugitive slaves, and as such entitled to unquestioning obedience from all, it is, so far as everything else is concerned, the same as if there were no such provision in the constitution. This has been so held in cases almost without number, and is held in each of the three cases cited by the respondent's counsel, and upon which I have before commented.

As for the provision of the constitution in relation to commerce among the states, it has been often held, that notwithstanding this provision, the states have the power impliedly reserved to them of passing all such laws as may be necessary for the preservation, within the state, of health, order, and the well being of society, or laws which are usually called sanative and police regulations. (*Passenger cases*, 7 Howard S. C. R. 283; *License cases*, 5 Ib. 504; *Blackbird Creek Marsh Company*, 2 Peters, 250; *New York* v. *Miln*, 11 Peters, 130; *Brown* v. *State of Maryland*, 12 Wheat. 419; *Groves* v. *Slaughter*, 15 Peters, 511.) Laws regulating or entirely abolishing slavery, or forbidding the bringing of slaves into a state, belong to this class of laws, and a right to pass those laws is not affected by the constitution of the United States. This view of the subject is taken by the three cases upon which the counsel mainly relies.

It remains for me to consider how far the local law of New York affects this case, and distinguishes it from the cases in Indiana and Illinois.

To go back, first, to the right of transit with slaves, as it is claimed to exist by the natural law: it appears to be settled in the law of nations, that a right to transit with property not only exists, but that, where such right grows out of a necessity created by the *vis major*, it is a perfect right, and cannot be law-

fully refused to a stranger. (Vattel, B. 2, ch. 9, s. 123; Ib. Preliminaries, s. 17; Pufendorf, B. 3, ch. 3, s. 9.) In this case it is insisted that the respondent came here with his slaves from necessity, the return having so stated, and the demurrer admitting that statement. It is perfectly true that the demurrer admits whatever is well pleaded in the return. But if the return intended to state a necessity created by the *vis major*, it has pleaded it badly; for it only alleges a necessity, without saying what kind of necessity; and, as it does not allege a necessity created by the *vis major*, the demurrer has not admitted any such necessity. Where the right of transit does not spring from the *vis major*, the same writers agree that it may be lawfully refused. (Ib.)

But, however this may be, it is well settled in this country, and so far as I know has not heretofore been disputed, that a state may rightfully pass laws, if it chooses to do so, forbidding the entrance or bringing of slaves into its territory. This is so held even by each of the three cases upon which the respondent's counsel relies. (*Commonwealth* v. *Ayres*, 18 Pick. R. 221; *Willard* v. *the People*, 4 Scammon's Rep. 471; *Case of Sewall's Slaves*, 3 Am. Jurist, 404.)

The laws of the state of New York upon this subject appear to me to be entirely free from any uncertainty. In my opinion they not only do not uphold or legalize a property in slaves within the limits of the state, but they render it impossible that such property should exist within those limits, except in the single instance of fugitives from labor under the constitution of the United States.

The revised statutes (vol. 1, 656, 1st Ed.,) re-enacting the law of 1817, provide that "no person held as a slave shall be imported, introduced or brought into this state, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought into this state contrary to the laws in force at the time shall be free." (S. 1.)

The cases excepted by this section are provided for in the six succeeding sections. The second section excepts fugitives under the constitution of the United States; the third, fourth, and fifth sections except certain slaves belonging to immigrants, who

may continue to be held as apprentices; the seventh section provides that families coming here to reside temporarily may bring with them and take away their slaves; and the sixth section contains the following provision:

"Any person not being an inhabitant of this state, who shall be travelling to or from, or passing through this state, may bring with him any person lawfully held by him in slavery, and may take such person with him from this state; but the person so held in slavery shall not reside or continue in this state more than nine months; and if such residence be continued beyond that time, such person shall be free."

Such was and had always been the law of this state, down to the year 1841. The legislature of that year passed an act amending the revised statutes, in the following words, viz. "The 3d, 4th, 5th, 6th and 7th sections of title 7, chapter 20, of the 1st part of the revised statutes are hereby repealed."

The 6th section of the revised statutes, and that alone, contained an exception which would have saved the slaves of the respondent from the operation of the first section. The legislature, by repealing that section, and leaving the 1st in full force, have, as regards the rights of these people and of their master, made them absolutely free; and that not merely by the legal effect of the repealing statute, but by the clear and deliberate intention of the legislature. It is impossible to make this more clear than it is by the mere language and evident objects of the two acts.

It was, however, insisted on the argument that the words "imported, introduced, or brought into this state," in the 1st section of the revised statutes, meant only "introduced or brought" for the purpose of remaining here. So they did undoubtedly when the revised statutes were passed, for an express exception followed in the 6th section giving that meaning to the 1st. And when the legislature afterward repealed the 6th section, they entirely removed that meaning, leaving the first section, and intending to leave it, to mean what its own explicit and unreserved and unqualified language imports.

Not thinking myself called upon to treat this case as a casuist or legislator, I have endeavored to discharge my duty as a judge in interpreting and applying the laws as I find them.

Did not the law seem to me so clear, I might feel greater regret, that I have been obliged to dispose so hastily of a case involving such important consequences.

My judgment is, that the eight colored persons mentioned in the writ be discharged.

There are two acts of congress bearing upon the questions in this case, and illustrating the views of congress, as to its power, under the constitution, over the introduction into any of the states, of free colored persons or slaves, brought from foreign countries, or transported coastwise from one state to another.

The first is the act of 1803, ch. 10, entitled "An act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited." (2 U. S. Statutes at Large, 205.) This act forbids any master of a vessel, or other person, "importing, or bringing 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."

The other act is the first law prohibiting the foreign slave trade (2 U. S. Statutes at Large, 426, sess. 2, ch. 22, 1807). The title of the act is, "an act to prohibit the importation of slaves, into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord 1808." The reader must judge how far the following sections of this act, are in subordination to or independent of the general purpose of the act, as expressed in its title.

"Sec. 9. And be it further enacted, That the captain, master, or commander of any ship or vessel, of the burthen of forty tons or more, from and after the first day of January, one thousand eight hundred and eight, sailing coastwise, from any port in the United States, to any port or place within the jurisdiction of the same, having on board any negro, mulatto, or person of color, for the purpose of transporting them to be sold or disposed of as slaves, or to be held to service, or labor, shall, previous to the departure of such ship or vessel, make out and subscribe, duplicate manifests of every such negro, mulatto, or person of color, on board such ship or vessel, therein specifying the name and sex of each person, their age and stature, as near as may be, and the class to which they respectively belong, whether negro, mulatto, or persons of color, with the name and place of residence, of every owner or shipper of the same, and shall deliver such manifests to the collector of the port, if there be one, otherwise to the surveyor, before whom the captain, master, or commander, together with the owner, or shipper, shall severally swear or affirm, to the best of their knowledge and belief, that the persons therein specified were not imported, or brought into the United States, from and after the first day of January, one thousand eight hundred and eight, and that under the laws of the state, they are held to service or labor: Whereupon the said collector or surveyor shall certify the same, on the said manifests, one of which he shall return to the said captain, master, or commander, with a permit, specifying thereon the number, names, and general description of such persons, and authorizing him to proceed to the port of destination. And if

any ship or vessel, being laden and destined as aforesaid, shall depart from the port where she may then be, without the captain, master, or commander, having first made out and subscribed duplicate manifests, of every negro, mulatto, and person of color, on board such ship or vessel as aforesaid, and without having previously delivered the same to the said collector, or surveyor, and obtained a permit, in manner as herein required, or shall, previous to her arrival at the port of her destination, take on board any negro, mulatto, or person of color, other than those specified in the manifests, as aforesaid, every such ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited to the use of the United States, and may be seized, prosecuted, and condemned, in any court of the United States, having jurisdiction thereof: and the captain, master, or commander of every such ship or vessel, shall moreover, forfeit for every such negro, mulatto, or person of color, so transported, or taken on board, contrary to the provisions of this act, the sum of one thousand dollars, one moiety thereof to the United States, and the other moiety to the use of any person, or persons, who shall sue for, and prosecute the same to effect."

"Sec. 10. And be it further enacted, That the captain, master, or commander, of every ship or vessel, of the burthen of forty tons or more, from and after the first day of January, one thousand eight hundred and eight, sailing coastwise, and having on board any negro, mulatto, or person of color, to sell or dispose of as slaves, or to be held to service or labor, and arriving in any port within the jurisdiction of the United States, from any other port within the same, shall, previous to the unlading or putting on shore, any of the persons aforesaid, or suffering them to go on shore, deliver to the collector, if there be one, or if not, to the surveyor residing at the port of her arrival, the manifest certified by the collector, or surveyor of the port, from whence she sailed, as herein before directed, to the truth of which, before such officer, he shall swear or affirm; and if the collector or surveyor shall be satisfied therewith, he shall thereupon grant a permit for unlading or suffering such negro, mulatto, or person of color, to be put on shore, and if the captain, master, or commander of any such ship or vessel being laden as aforesaid, shall neglect or refuse to deliver the manifest, at the time, and in the manner herein directed, or shall land or put on shore, any negro, mulatto, or person of color, for the purpose aforesaid, before he shall have delivered his manifest, as aforesaid, and if obtained, a permit for that purpose, every such captain, master, or commander, shall forfeit and pay ten thousand dollars, one moiety thereof, to the United States, the other moiety to the use of any person or persons who shall sue for and prosecute the same to effect.

Note by the present Reporter.—Although the above case was heard by Mr. Justice Paine, as a supreme court commissioner, not as a judge of the superior court, and was, therefore, decided by him without consultation with any of his brethren, yet, the extreme importance of the questions of constitutional and of national law, which its discussion involved, seemed to the reporter to justify its exception from the general rule, which he holds himself bound to observe, namely, not to publish any decision, resting only upon the authority of a single judge.

As an appeal to the supreme court, from the judgment of Mr. Justice Paine, is now pending, it would be manifestly improper, to give any intimation, as to the probable concurrence or dissent, of his associates, had they been consulted.