THE FUGITIVE SLAVE CASE.

THE FUGIVIVES REMANDED BACK TO SLAVERY.

From the Cincinnati Gazette, Feb. 27.

At 1½ o'clock yesterday afternoon Commissioner Pendery opened his Court in the United States Court rooms, (Judge Leavitt giving way,) and gave his decision. He commenced by saying:

Previous to the disposition of the cases now before us, we shall pass upon the motion—"That we discharge Margaret Garner, Simon Garner, senior, Simon Garner, junior, and Mary Garner, from the custody of the United States Marshal, and deliver them into the possession of said Sheriff." This motion is based upon an indictment found by the Grand Jury of Hamilton County, Ohio, charging them with the crime of murder in the first degree, and a capias issued upon said indictment for their arrest.

We find no law to warrant us in making such order, and therefore overrule the motion.

He then proceeded to consider the claim of Marshall to Simon Garner, senior; Simon Garner, junior, and Mary Garner.

On the 28th of January, 1856, Archibald K. Gaines, a citizen of Boone County, and State of Kentucky, made an affidavit, etc., that one negro man named Simon Garner, senior, aged about 55 years; one negro man named Simon Garner, jr., aged about 25 years; and one negro woman named Mary Garner, aged about 50 years, who owe labor and service to James Marshall for life, under the laws of Kentucky, escaped from the State of Kentucky.

The testimony for the claimant shows that these persons are held by the said James Marshall as slaves for life under the laws of Kentucky, that the above named persons are the identical ones described in the claimant's affidavit, and that they escaped on the night of the 28th day of January last, from said County and State into the Southern District of Ohio, where the United States Marshall made the arrest.

The testimony for the defense is, in substance, that Simon Garner, junior, and Mary Garner, have both been in Ohio previous to their escape, with the claimant's consent; but no proof of that kind is offered as to Simon Garner, senior.

These are the principal facts elicited in the investigation of this case.

The only question which we propose to discuss in this case is, "does the fact of the temporary visit to Ohio of Simon Garner, junior, and Mary Garner, with the consent of their master, prior to their escape, affect the rights of their claimant?" Or, in other words, James Marshall having permitted these persons to come into Ohio, and they having voluntarily returned into his service, is their relation as master and slave changed?

Upon what principle, then, are we to find young Simon and Mary Garner to be free, when in Ohio by the consent of their master? Is it in the clause of our State Constitution, which declares there shall be no Slavery in this State, nor involuntary servitude, except for the punishment of crime? Article 1st. Section 5th.

The most recent bearing upon this point is that of Strader et al. vs. Graham, 5 B. Munroe, 173. The facts in this case were: Strader & Gorman were the owners of the steamboat Pike, and had permitted three slaves of Graham to come on their boat from Louisville to Cincinnati, whence they escaped into Canada. The defense made by Strader & Gorman was that these negroes were musicians, and allowed to travel about by the complainant as free negroes; that the complainant gave them written consent to come to Ohio, and that they remained here for a long time, then returned into the State of Kentucky, into the service of their master, and therefore that they were free. Judge Marshall, in delivering the opinion of the Court, held:

First: That a master residing in Kentucky, and taking his slave with him to Ohio, for a temporary purpose, is not to be understood as renouncing his right to his slave, and on the return of the slave to Kentucky he cannot, on that ground, assert a right to reedom.

Second: The owner of a slave who resides in Kentucky, who permits his slave to go to Ohio in charge of an agent for a temporary purpose, does not forfeit his right of property in such slave.

This case was afterward removed to the Supreme Court of the United States by a writ of error, and Chief Justice Taney delivered the opinion of the Court, as reported in 10 Howard's Supreme Court Reports, 92. He says: "Much of the argument on the part of the plaintiff in error has been offered for the purpose of showing that the judgment of the State Court was erroneous in deciding that these negroes were slaves, and it is insisted that their previous employment in Ohio had made them free when they returned into Kentucky."

Although the Chief-Justice decided that this was not the question before him, he states: "That the condition of the negroes as to Freedom or Slavery after their return depended altogether upon the laws of Kentucky, and could not be influenced by the laws of Ohio, that it was exclusively in the power of Kentucky to determine for itself whether the employment in another State should or should not make them free on their return, and that the Court of Appeals having decided that, by the laws of that State, they continued to be slaves, that decision was, in his opinion, conclusive."

This same doctrine is also fully maintained by the Supreme Court of the United States *vs.* The Ship Garonne, 11 Peters, Reports, 73. The facts of the case were that Mrs. Smith, a widow lady of Louisiana, had visited France, and had taken with her the slave Priscilla. Afterward she was brought back by the son-in-law of Mrs. Smith, and lived in Louisiana as his slave.

Chief Justice Taney, in delivering the opinion of the Court, held, That even assuming by the French laws that Priscilla was entitled to her freedom, upon her introduction into that country, the Court was of opinion that there was nothing in the Act of Congress to prevent her mistress from bringing her back to her place of residence and continuing to hold her as before in her service; and that although the girl had been staying for a time in France, in the service of her mistress, yet in contemplation of law she still continued an inhabitant of Louisiana.

To return to the question: When brought within the State of Ohio for a temporary purpose by the consent of the master, did they become free in consequence of the clause of the Constitution of Ohio, which declares "There shall be no slavery or involuntary servitude within her limits?" We think not; the true effect of that clause being to prevent Slavery as an institution within her limits, rather than to execute the act of manumission upon foreign slaves temporarily upon our soil with the master's consent.

Supposing that Ohio has the right under her Constitution to pass laws making the slave free the moment he stands upon Ohio soil by the consent of the master, it is sufficient for the purpose of this case that, at the time Mary Garner and Simon Garner were in the State of Ohio as alleged, there was no law declaring that the relations they held to their master as slaves were dissolved and at an end.

Had they refused to return to Kentucky, it is quite possible that the owner would have invoked the aid of legal process to compel their return in vain. The Federal Courts could not have remanded them to the custody and control of their master, because they were present in Ohio by act of the master, and not as fugitives who had escaped into Ohio. The Constitution and laws of the United States, all-powerful as they are, and I trust always will be, in National and inner State affairs, were inoperative when, by the act of the parties, the whole case was brought within the jurisdiction and disposal of the State of Ohio.

The aid of legal process from Ohio Courts could not have been obtained, for Ohio has enacted no laws for the control and management of foreign slaves while, for the purpose of sojourn or transit, temporarily within her borders.

With this state of the law, slaves asserting their freedom become practically free. The master has no longer the right of violent subjection to his command, but the State of Ohio extends to both parties the protection of equal laws.

But this possible freedom, this freedom in *posse*, rather than in *esse*, is something which the law of Ohio rather protects than creates. That the slave brought by his master into Ohio, and refusing to return, becomes free, is one of the inevitable results of the proposition that Slavery is a creature of law and cannot maintain itself where the laws do not regulate it and provide for its continuance.

But the slave having been brought to Ohio by the master, returns with him voluntarily to the State of Kentucky, what then is the relation between them? While in Ohio the Ohio courts could have determined that, for the whole matter was properly within her control. The act of the parties again changed the jurisdiction, and the whole matter rested again within the control of the State of Kentucky.

The claim upon the State of Ohio for protection against violent abduction was not made. The right to be free was waived. In coming to Ohio the master voluntarily abandoned his legal power over his slave, and in returning voluntarily the slave has equally abandoned his claim to freedom.

Upon the return of slaves voluntarily to Kentucky with their master, their relations become confirmed by the laws and jurisdiction of that State, and with that settlement of the question the Supreme Court of the United States has declined to interfere. The law, as thus determined, we have already stated in the earlier part of our opinion.

With reference to the particular case before us, we, therefore, are under the necessity of holding that these defendants, Mary Garner and Simon Garner, jr., were legally in slavery at the time of their escape on the 28th of January, 1856.

We have given those cases which in our opinion are the leading ones upon this subject, and which throw light upon the issues to be met in the case. They are the landmarks by which we have been guided in our decision.

The next and last question to be settled arises under the constitutional provision for the rendition of fugitives from labor under the Fugitive Slave Law, and the facts proved in the case render our duty a clear and unmistakable one.

The question is not one of humanity that I am called upon to decide. The laws of Kentucky and of the United States make it a question of property. It is not a question of feeling, to be decided by the chance current of my sympathies. There are to be adjudicated the rights of an institution so agreed to in the formation of our Government as to make it both municipal and federal in its character. It is the essence of the institution that the slave does not possess equal rights with the freeman. The abstract rights to life, liberty and property are in his case replaced by statutes providing expressly for his condition. It has been our duty, as a Court, to listen with attention, and, we trust, with courtesy to all those arguments which have urged the decision of this question upon moral rather than legal grounds. We conceive that our highest moral obligation in this case is to administer impartially the plain provisions of the law.

However painful the result may be to the defendants in this case, it is my duty to deliver them—Simon Garner, sr., Simon Garner, jr., and Mary Garner, fugitives from service—into the custody of the claimant, James Marshall.

He then proceeded to consider the claim of Gaines to Margaret alias Peggy Garner, a mulatto woman; Tom, a negro boy; Sam, a mulatto boy, and Sally, an infant girl, claimed by Archibald K. Gaines of Boone County, Ky., as fugitives from service and labor in the State of Kentucky.

In this case it is claimed by the defense that Peggy, when about six years old, was permitted by her previous master to come to the State of Ohio, and upon that fact they claim that she is entitled to her freedom; and that, being free at that time, and her children being born since, they are also entitled to freedom.

These facts present for our consideration the same question which was raised in the case of Marshall vs. Simon Garner et al., and the decision which we have just announced, applies equally in this case.

We shall therefore make the order that the parties named, to wit: Peggy, Tom, Sam, and Silla, be delivered into the custody and possession of the claimant, Archibald K. Gaines.

THE HABEAS CORPUS FOR THE FUGITIVE SLAVES.

Before Judge LEAVITT.

A writ of habeas corpus having been issued by Judge Leavitt at the instance of the United States Marshal, the Sheriff and Marshal both appeared yesterday morning in the United States Court-rooms, with their counsel prepared to argue the case.

The argument was opened by Mr. Headington, counsel for the Marshal. He claimed that the Sheriff's arrest of the fugitives, when placed in the County Jail by the Marshal, was illegal—that no crime could warrant him in making this arrest, and that the only legal way for him to have reached them was by a writ of habeas corpus. He claimed that they were not property, but persons, and as such were properly "prisoners," and came under the resolution of Congress and the Act of Assembly of Ohio, which authorized the United States Marshal to use the County Jail for the confinement of United States "prisoners." It was all well enough to say that the right of property of an individual must give way to the right of the State to punish a criminal, but he saw no way in which it could be done.

Judge Hoadley, counsel for the Sheriff, replied: He cited cases to show that a habeas corpus *ad subjiciendum* did not lie from one jurisdiction to another—for that of the General Government to that of a State. He considered international law and its application to sovereign States. He claimed the right of a State to punish a slave inhabitant of another State, as clearly as to punish a white citizen of another Commonwealth; for even in the Southern States slaves were regarded by the law as sensible human beings—were punished for all crimes that white men were punished for, and in some States held even to higher accountability, and punished for crimes which in white men were winked at or overlooked.

He also remarked that there was no other means of reaching these criminals—that if they were remanded back to Kentucky, no requisition was applicable to them.

After citing a large number of authorities in support of his positions, he closed his argument by reading an editorial on this case from the New-York *Journal of Commerce*, which was republished in *The Gazette*.

Mr. Headington replied, after which Judge Leavitt yielded the bench to Commissioner Pendery, who then gave his decision on the case of Marshall and Gaines. It is understood that Judge Leavitt will give his decision on the habeas corpus this morning at 9 o'clock.

The habeas corpus issued by Judge Burgoyne for Sam, Tom and Silla, the three children of Margaret, was heard yesterday afternoon in the Probate Court. Mr. Jolliffe, who appeared for the children, urged that the appointment of J. L. Pendery to the office of the United States Commissioner was unconstitutional. The Constitution says that all judicial power shall be exercised by certain Judges; but here was an individual pretending to such power, holding his Court with officers swarming about him like the lictors of a Roman tribunal, and whence did he derive his authority? Under the statute of 1850, which was unconstitutional and void, because it proposed to confer judicial authority on a man who had not been appointed by the President, who did not receive a salary, but a fee of $5 if he decided the case for the defendant, and $10 if in favor of a plaintiff, and held his office during the pleasure of Judge McLean.

Judge Burgoyne said he should require some time to render a decision. He intimated, however, that a majority of the Supreme Court having passed on the constitutionality of the Fugitive Slave Law was no reason why he should not take up the Constitution and read it for himself, being sworn to support the Constitution of the United States and of the State of Ohio.

Mr. Jolliffe asked the Court to make a special order that the children should not be removed until the final decision. This order was made.

Judge Burgoyne's decision will be given on Saturday.

From The Cincinnati Commercial, Feb 23

A hearing under a writ of habeas corpus allowed by Judge Burgoyne, alleging the illegal detention by the United States Marshal of the three negro children, Samuel, Thomas and Silla Garner, took place yesterday afternoon in the Probate Court.

Mr. Headington, on behalf of the United States Marshal, preliminary to offering any return to the writ, and in the expectation that probably no return would be found necessary, submitted a motion to the Court to dismiss the writ, as allowed without proper consideration, and mainly for the reason that a copy of the cause of commitment had not been produced before the Judge to whom the application had been made.

Copies of the proceedings in the United States Commissioner's Court were then read by counsel, who urged that, although on the original application it may not have been apparent that the allowance of the writ would be improper, it must now become clear, when the facts were all presented, that it was the bounden duty of the Judge to dismiss the writ, having no authority to interfere with the right of the owner of the slave, under the certificate he had received, to carry his slaves back to Kentucky, that right having been found in him by the Commissioner, after full investigation.

Mr. Jolliffe said he represented the infants at the request of their father and mother, who had solicited him to save the children if possible. He admitted that the motion on the other side brought up all the material questions in the case, and proceeded then to urge that the appointment of J. L. Pendery to the office of United States Commissioner was a nullity, because unconstitutional. The Constitution says that all judicial power shall be exercised by certain judges; but here was an individual pretending to exercise such power, holding his court with officers swarming about him like the lictors of a Roman tribunal, and whence did he derive his authority? Under the statute of 1850, which was unconstitutional and void, because it proposed to confer judicial authority on a man who had not been appointed by the President, who did not receive a salary, but a fee of five dollars if he decided the case for the defendant, and ten dollars if in favor of the plaintiff, and held his office during the pleasure of Judge McLean.

Mr. Gitchell, on the same side, further argued the unconstitutionality of the Fugitive Slave Law; suggested the absurdity of the proposition, that these young children could be regarded as fugitives, and objected to the proceedings of J. L. Pendery being received in evidence, because they had no sufficient seal of authentication.

Mr. Headington replied at some length. He declined to discuss the constitutionality of the Fugitive Slave Law, a majority of the Judges of the Supreme Court on circuit having decided it was constitutional, and that decision, he contended, concluded this Court. He closed by remarking that a State Court had no right to revise a decision of the United States Court by a writ of habeas corpus any more than a United States Court had to revise the decision of a State Court.

Judge Burgoyne intimated that, in view of the serious and important questions involved, he should require some time to render a decision. He intimated, however, that a majority of the Judges of the Supreme Court having passed on the constitutionality of the Fugitive Slave Law was no reason why he should not take up the Constitution and read it for himself, being sworn to support the Constitution of the United States and the Constitution of the State of Ohio.

Mr. Ketchum suggested that his Honor was as much bound in conscience to regard the decision of the majority of the Judges of the United States Courts as the express provisions of the Constitution itself.

Judge Burgoyne said that however the decisions of the Judges of the United States Courts might aid him in coming to a conclusion, where the obligations of his conscience were involved, he could not screen himself behind a decision made by somebody else.

Mr. Jolliffe asked the Court to make a special order that the children should not be taken out of the limits of the jurisdiction until the final decision of the case.

Mr. Headington—If such an order is made, it will not be as a matter of consent.

The Court—We ought not to allow the parties to be in any worse condition than if the return had been made, and therefore shall enter up the order. We shall probably decide the case on Saturday.

Jolliffe and Gitchell for the petitioners; Ketchum and Headington for the United States Marshall, F. T. Chambers attending as counsel for the claimant of the negroes.