OBJECTIONS

TO THE

ACT OF CONGRESS, COMMONLY CALLED

THE

FUGITIVE SLAVE LAW

ANSWERED,

IN A LETTER TO

HON. WASHINGTON HUNT,

GOVERNOR ELECT OF THE STATE OF NEW YORK.

BY

JAMES A. DORR,

A MEMBER OF THE NEW YORK BAR.

NEW YORK:

1850

SIR:

I propose to reply to the five objections which have been most frequently made to the Act of Congress of September 18th, 1850, commonly called the Fugitive Slave Law.

My object is to remove doubts as to the constitutionality, legality and propriety of this Act from the minds of good citizens, who are sincerely seeking the path of duty. I shall therefore use language, certainly legal, but as little as possible technical.

FIRST OBJECTION.

That the Fugitive Slave Law deprives persons of the right of Habeas Corpus, and that therefore the Act is unconstitutional and illegal.

REPLY.

The right of Habeas Corpus is a right of a prisoner, in certain cases, to be taken before a magistrate, in order that the legality or illegality of his imprisonment may be investigated and decided by the magistrate. This right is confirmed by Section 9th, Article 1st, of the Constitution of the United States, in which it is declared that "the "privilege of the writ of Habeas Corpus shall not be sus-"pended, unless when, in cases of rebellion or invasion, "the public safety may require it." This right is also confirmed by Section 4th, Article 1st, of the Constitution of the State of New York, and by the Constitutions of all the several States of the United States.

The right of Habeas Corpus is not mentioned in the Magna Charta of Great Britain, though it is claimed as a right at common law. The writ of Habeas Corpus is not

grantable of course, but on motion stating a probable cause for the application. If the evidence produced to support the application show the legality of the imprisonment, it is the duty of the magistrate to refuse to grant the writ, and the prisoner must remain imprisoned. The Fugitive Slave Law impairs no right of Habeas Corpus which existed before the passage of this law. Application for the writ may be made as freely as could have been done if this law had not been passed: and there is nothing in the law to prevent the granting of the writ upon probable illegality of imprisonment being shown by the evidence produced in support of the application. These great principles of law have been clearly and forcibly set forth by Attorney General CRITTENDEN, and Justice GRIER, in their opinions recently published.

But I go further than Mr. CRITTENDEN and Justice GRIER, in reply to this first objection, and hold that the Fugitive Slave Law is virtually and substantially a law, EXTENDING THE BENEFITS OF HABEAS CORPUS, IN CERTAIN CASES, TO FUGITIVE SLAVES, AND TO PERSONS CLAIMED AS FUGITIVE SLAVES. The substantial benefit of Habeas Corpus, is the right to a speedy examination by a competent magistrate, of the legality or illegality of the imprisonment complained of. The sixth Section of the Fugitive Slave Law, provides for this most amply. No effectual action can be had under and by virtue of the sixth Section of this law, unless the person arrested shall "*be taken* "*forthwith before the Court, Judge, or Commissioner, whose* "*duty it shall be to hear and determine the case* of the claim- "ant in a summary manner." The proceedings before the magistrate are precisely the same as proceedings in Habeas Corpus. The duty of the magistrate is precisely the same in both cases—namely: to hear and determine upon the legality or illegality of the imprisonment. Any and all things which might be argued or urged in proceedings under Habeas Corpus, may be with equal force and effect argued or urged before the magistrate under this law. The jurisdiction of the magistrate himself, and the constitutionality and legality of the Act itself, may be drawn in question. Further than this, by Section 6th, of the Fugitive Slave Law, the claimant must produce "*satisfactory proof*" to the magistrate, "that the person so arrested does in fact "owe service or labor, to the person or persons claiming,

"and that said person escaped."—"*Satisfactory proof*," by which is meant good and sufficient legal, equitable and *technical* proof, the burthen being upon the claimant and the benefit of doubt belonging of right to the prisoner: so that if the claimant fail in a single point, whether of form or substance, meritorious or technical, the prisoner is entitled to, and, as in the case of Henry Garnett, recently decided by Justice GRIER, will have his discharge.

It is to be noticed, also, that the sixth Section of the law is imperative, commanding the claimant, to take the person of the alleged fugitive before the magistrate for a hearing and determination of the case "*forthwith*," which means without any delay,—so that a claimant, voluntarily and wilfully keeping the person arrested in imprisonment, and delaying to take him before the magistrate, would forfeit all remedy and redress under the law,—but the law is not imperative in commanding the magistrate to determine forthwith, *it leaves to the magistrate full discretion*, and it is the duty of the magistrate to suspend his determination against the alleged fugitive, until his mind shall be clearly satisfied with the proof produced. Thus we have seen, that in a recent case at Detroit, the alleged fugitive was allowed time to send from Detroit to Cincinnati, to procure evidence on his behalf to be used at the hearing of the case, which was postponed for his advantage. Besides, it must be remembered, that cases under this law, will occur only in the Northern States, in which the magistrates, will of course feel the strongest disposition to insure a fair hearing to the alleged fugitive.

Having thus shown that the proceedings under this law, grant to the alleged fugitive, in certain cases, the substantial benefits of the writ of Habeas Corpus, I proceed in confirmation and enlargement of the same idea, to point out a great advantage, which this law practically confers upon the fugitive, and upon alleged fugitives. The Constitution of the United States, Article 4th, Section 2d, declares, that "No "person held to service or labor in one State under the laws "thereof, escaping into another, shall, in consequence of any "law or regulation therein, be discharged from such service "or labor, but shall be delivered up *on claim* of the party to "whom such service or labor may be due." This Section of the Constitution contains verbal and grammatical errors and faults of construction, but its meaning is evident,

namely, that *any* person held to service, &c., shall be delivered up *on claim* of the party, to whom such service or labor may be due. The fugitive shall be delivered up "*on* "*claim.*" What claim? Manifestly on *legal claim made before a magistrate,* competent to hear such claim. If the word "claim" do not mean this, it means nothing, and may be stricken out of the Constitution with its dependent words. It has been decided heretofore, (Prigg *vs.* the Commonwealth of Pennsylvania, 16 Peters, 539,) by the Supreme Court of the United States, that the owner might, in virtue of the Constitution, and his own right of property at common law, seize and recapture his fugitive slave, in whatsoever State he might find him, and carry him back to the State from which he escaped. But it has been found that the remedy at common law alone, even if it theoretically exist, is practically ineffectual, so that the owner of the fugitive must resort to his remedy under the laws of the United States; and now that a special mode in which, and magistrates before whom, claims should be made, are provided and pointed out by Congress, through this law, it will be practically necessary that the claimant should conform to the spirit and letter of this law in the prosecution of his claim. It is fair to suppose that this consequence was contemplated and intended by the framer of the bill, but, whether contemplated or not, it is a legal and proper consequence, which will secure to alleged fugitives the benefit of a speedy hearing before the magistrate appointed, and thus procure for them, substantially, the benefits, of the writ of Habeas Corpus.

SECOND OBJECTION.

That the Fugitive Slave Law deprives persons of the right of trial by jury, and that, therefore, the Act is unconstitutional and illegal.

REPLY.

This objection is founded upon the error of supposing that before the passing of this Act, fugitives from service were entitled to trial by jury.

The right of trial by jury is a right secured to citizens of the United States, in certain cases, by constitutions and

statute laws. It is doubtful whether the right to trial by jury in any case exist at common law, strictly so called. By some legal authorities the origin of trial by jury is attributed to the Greeks. In England the custom of trial by jury has been interrupted by, or existed concurrent with, other forms of trial from time immemorial. But these doubts and questions, important as they may be, are immaterial to the present purpose, because the right of trial by jury has been adopted and confirmed to citizens of the United States, by constitutions and express statutes, to the fullest extent that it was ever enjoyed by any people under the common, or any other, law.

The Magna Charta of Great Britain, (a local statute or law of the land of Great Britain, by no means applicable to, or the law of the land in the United States, inasmuch as the greater part of its provisions are feudal and monarchical in their nature), declares, Section 29th, "that no free-"man shall be disseized of his freehold, imprisoned and "condemned, but by judgment of his peers or by the law of "the land,"—nisi per legale judicium parium suorum, vel per "legem terræ." It refers to freemen, not to bondmen; it declares that they shall not be "imprisoned *and condemned*," thereby implying a previous judicial accusation, "but by judgment of their peers," who for aught contained in Magna Charta may or may not be twelve, "or by the law of the land," thereby providing for other forms of judgment than the judgment of his peers, with no limitation of the forms except that they shall be the law of the land. The attentive reader will perceive how little foundation there is in Magna Charta for the opinion that the right of trial by jury is therein absolutely secured to citizens in all cases of imprisonment. Magna Charta specifically declares, that judgment of one's peers shall not be the only form of trial, but that a freeman may be imprisoned and condemned by other forms known as the law of the land. The 29th Section of Magna Charta, before quoted, is the historical origin of the guarantees of trial by jury, *in certain cases*, which may be found in the Constitution of the United States, and in the Constitutions of the several States. By carefully reading the sections of those supreme laws relating to the subject, it will be noticed that the provision of Magna Charta has been essentially modified in these Constitutions.

The Constitution of the United States, Article 3d, Section

2d, provides, that "the trial of all crimes, except in cases of "impeachment, shall be by jury, and such trial shall be held "in the State, where the said crimes shall have been com- "mitted." The Sixth Article of the Amendments to the Constitution of the United States provides, that "in all cri- "minal prosecutions, the accused shall enjoy the right to a "speedy and public trial, by an impartial jury of the State "and district wherein the crime shall have been committed." If it be a "crime" for a person held to service to escape from the party, to whom such service may be due, or in other words if a Fugitive Slave be a criminal, it is evident that under the provisions of the Constitution of the United States just quoted, even if there had been no special provision for the case, it would be the duty of the proper authorities to deliver up such fugitive to be removed to the State, where the crime of escape was committed, to take his trial in that State from which he had escaped. In the Fifth Article of the amendments of the Constitution of the United States it is provided that "no person shall be deprived of his liberty with- "out due process of law." In the Seventh Article of the amendments of the Constitution of the United States, it is provided, that "in suits at common law where the value in "controversy shall exceed twenty dollars, the right of trial "by jury shall be preserved." The Constitution of the State "of New-York, Article 1st, Section 1st, declares, that "No "*member of this State* shall be disfranchised or deprived of "any of the rights or privileges secured to any *citizen there-* "*of*, unless by the *law of the land, or* the judgment of his peers;" and Section 2d declares that "The trial by jury, *in* "*all cases in which it has been heretofore used*, shall remain "inviolate forever." The Constitutions of all the several States contain similar provisions, being modifications of the 29th Section of Magna Charta of Great Britain. These provisions of the Constitutions, above cited, contain the sum and substance of the fundamental laws of this country upon the subject of the right of trial by jury. The impartial reader will notice how very far they are from justifying the assertion that a fugitive slave is entitled to trial by jury in the place in which he may be arrested. Criminals are certainly entitled to trial by jury, but where? this is the point, where? why in the *State in which the crime was committed.* "No person shall be deprived of *his liberty without*"—what? "—without *due process of law*"—not without trial by jury.—

"In suits at common law, where the value in controversy "shall exceed twenty dollars, the right of trial by jury shall "be preserved." Is the claim for a fugitive slave under the Fugitive Slave Law a "suit at common law"? If a suit at all, is it not under the express *statute* of the United States? Can there exist a suit at common law for the recovery of a slave, when it is held that the common law does not recognise slavery?

The Constitution of the United States, Article 6th, declares that "this Constitution *and the laws of the United* "*States* which shall be made in pursuance thereof, and all "treaties made or which shall be made under the authority "of the United States shall be the *supreme law of the land,* "and the judges in every State shall be bound thereby, "anything in the Constitution or laws of any State to the "contrary notwithstanding." The Constitution of the United States has been adopted and confirmed by all the several States, so that there can be no question that the Constitution and laws of the United States are "the supreme law of the "land:" and being the *supreme* law of the land, it follows that there can be no higher law of the land. It follows further that any moral or metaphysical law called a higher law *cannot be the law of the land;* and it follows further that to disobey the supreme law of the land, in obedience to any such pretended higher law, is rebellion. It is distinctly and clearly provided and enacted by and under the Constitution and laws of the United States, that a fugitive, proved, to the satisfaction of the magistrate appointed, to owe service to another, shall on claim be delivered up to the owner of those services: and if the Constitution and laws of the United States in providing for this matter had interfered with, nay, if they had entirely suppressed trial by jury in such cases, whatever might be our private opinions as to the wisdom or expediency of such enactments, there can be no doubt that the enactments would be the supreme law of the land. But happily the Constitution and laws of the United States do not interfere at all with the right of an alleged fugitive to trial by jury—*that right remains to the alleged fugitive as fully as it existed before the passing of this Act,* and there is nothing in the Act to destroy or to impair any such right in the smallest degree. The Fugitive Slave Law provides that the fugitive satisfactorily proved to owe services to another shall be delivered up to the owner;

and it also provides for the removal of the fugitive to the State from which he escaped, but there the laws of the United States leave him to be disposed of or dealt with according to the laws of that State of which he originally was and continued to be the subject or citizen. It is provided by the laws of the Southern States that persons held as slaves claiming to be freemen shall be entitled to trial of the fact by jury. This is the case, I believe, in each and all of the slaveholding States; and if we may rely upon the numerous decisions given by Southern Courts under those laws, they are faithfully and fairly administered. I do not doubt that they are so. But however interesting this question may be on the score of sympathy and humanity, it has little to do with constitutional or legal rights. The United States may be regarded, (now since the unanimous adoption of the Constitution), as one great legal body, corporation or country, and in this view the delivery and transfer of a fugitive, who claims the right of trial, is merely a settlement or change of "venue," as it is called, or place of trial. The United States may also be regarded as a league or union of sovereign States by virtue of a solemn compact or TREATY called the Constitution of the United States. It is intended to be a treaty of perpetual peace, amity, and alliance; and in so far as it is a treaty, it is, according to the law of nations, the highest law of the land of each of the sovereign contracting parties, and as such would have supremacy over, and take precedence of, all internal and municipal regulations of the several parties, even if this supremacy had not been distinctly declared and confirmed in the instrument itself. This treaty may be altered and amended in the way provided by it, but, like any other treaty, it cannot legally be abrogated or annulled except by the *unanimous consent* of the high contracting parties.

THIRD OBJECTION.

That the appointment of the Commissioners, authorised to act under the Fugitive Slave Law is unconstitutional and illegal.

REPLY.

If there be any force in this objection, it applies to only a part of the law; namely, to some of the magistrates

named and authorised to execute it, and leaves it to be enforced or administered by the judges of the Courts of the United States, who are also empowered to act under it. But there is no ground whatsoever for the objection. The Constitution of the United States, Article 3d, Section 1st, declares, that "the judicial power of the United States "shall be vested in one Supreme Court, and in such inferior "Courts as the Congress may from time to time ordain and "establish. The judges, both of the supreme and inferior "Courts, shall hold their offices during good behavior; and "shall, at stated times, receive for their services a compen-"sation which shall not be diminished during their continu-"ance in office." Article 2d, Section 2d, declares, that "the "President shall nominate and appoint Judges of the Su-"preme Court and all other officers of the United States "whose appointments are not herein otherwise provided for, "and which shall be established by law. But the Con-"gress may, by law, vest the appointment of *such inferior of-"ficers as they think proper*, in the President alone, *in the "Courts of Law*, or in the heads of departments." Now, whether or not these commissioners are ministerial officers of the Courts of Law appointing them, or, as I incline to think, rather, special officers and agents of the United States, to hear and determine whether or not alleged fugitives shall be discharged from arrest or delivered up to the laws of the States which have rightful jurisdiction over them; or whether or not they are Judges of inferior Courts, I shall not discuss,—for it seems to me that the Constitution of the United States expressly authorises their appointment, whatever the nature of their office may be.—Every commissioner to take testimony is in some sense a judge. Every constable is in some sense a judge, authorised, in certain cases, and in his discretion, to arrest and imprison his fellow citizens. Whatever these commissioners may be, they are appointed according to the spirit and letter of the Constitution of the United States.

A trivial and captious objection has been made to the form of compensation provided for these commissioners. The objector, assuming that these commissioners are judges of the United States, and assuming further that they are the Judges meant in Article 3d, Section 1st of the Constitution, above cited, objects that the commissioners ought to be paid by a salary, and not by fees becoming due when the

services are rendered. The Constitution says that the judges of the United States, "shall, at stated times, receive "for their services a compensation which shall not be di- "minished during their continuance in office." The intent of the clause is to protect the judges from political influences, through the delay or diminution of their compensation, and if these commissioners be judges meant by this Section of the Constitution, it will be unconstitutional to delay or diminish their present compensation. But the objector may say, that the phrase, "at stated times," means on certain days of the year, and excludes incidental fees. The word "to state" is defined by Dr. Johnson, "1st, to settle, to regulate; 2d, "to represent in all the circumstances of modification." The Act conforms strictly to these definitions in providing for the compensation of these commissioners. The times of the payment of compensation to these commissioners, are "settled" and "regulated" by the Act, to be the times of the "delivery of the certificates," or of rendering the other services mentioned. So that, even if we admit, what is by no means the truth, that these commissioners are "judges," in the meaning of Section 1st, Article 3d of the Constitution, it appears that this law conforms to and complies with the letter, as well as with the spirit of the Constitution.

FOURTH OBJECTION.

That, inasmuch as the Fugitive Slave Law declares "that "in no trial or hearing under the act shall the testimony of "an alleged fugitive be admitted in evidence,"—the law is unjust.

REPLY.

It is a maxim of the common law, that no one ought to be a witness in his own cause, "nemo testis esse debet in "propria causa." This maxim is stated by Blackstone to be "an invariable rule of the law of England," and the reason of the rule is said to be—"to avoid all temptations of per- "jury." 3 Bl. Comm. 371. This argument in justification of the provision of the Fugitive Slave Law has been fully and forcibly set forth by Justice GRIER, in his recently published opinion.

But there is another argument which, it seems to me, justi-

fies this provision of the act still more conclusively; namely, that, inasmuch as the Fugitive Slave Law is a Statute which concerns the liberty of persons, and therefore must be construed strictly: and, if slavery be contrary to common law, then, inasmuch as it is a maxim founded upon innumerable decisions that Statutes in derogation of the common law are to be construed strictly; and inasmuch as the claimant is required to furnish satisfactory proof—that the alleged fugitive actually does owe service, and as the evidence of such owing of service must be construed strictly and in accordance with the doctrine of the burthen of proof which lies upon the claimant; therefore, IT IS THE DUTY OF THE MAGISTRATE TO ASSUME AND TAKE FOR GRANTED THE RIGHT OF LIBERTY OF THE ALLEGED FUGITIVE AS FULLY AS THOUGH THE FUGITIVE HAD GIVEN TESTIMONY IN HIS OWN BEHALF. If we consider the fugitive to be a criminal—this duty of the magistrate is still stronger, for it is a maxim of common law that every person accused of crime shall be presumed to be innocent until he shall have been proved to be guilty. So that the alleged fugitive, while the law protects him from the temptation to commit perjury in order to gain his freedom, grants to him the same advantage which he would enjoy if he had borne witness in his own behalf. Further than this, it is provided by this Act that no action can be had before any magistrate under it, unless the claimant of the alleged fugitive make affidavit that the services claimed are due—thus rendering any false and fraudulent claimant a subject of the pains and penalties attached to perjury. So that it appears that under this Act, the alleged fugitive, instead of being hardly and unjustly dealt with in this respect, enjoys the double advantage, that his own oath is waived and dispensed with, without detriment to him, while the claimant's oath is required, at his peril if false.

Suppose for a moment, that the alleged fugitive were allowed and required to give his testimony in evidence? If the alleged fugitive were really not a fugitive, he would gain nothing by giving his testimony, for the law now presumes that he is not a fugitive: but suppose that the alleged fugitive really were a fugitive, and that he gave faithful testimony, stating the truth, the whole truth and nothing but the truth, what would be the inevitable consequence? Why,

plainly, that THE FUGITIVE WOULD CONDEMN HIMSELF BY HIS OWN TESTIMONY. Is this a consequence which those who make this fourth objection desire?

FIFTH OBJECTION.

That while the Fugitive Slave Law would punish with fine and imprisonment, those who obstruct or resist this law, it imposes no pains and penalties upon persons, who may fraudulently and wrongfully claim or arrest a freeman as a fugitive from service, and that, therefore, the law is partial and unjust.

REPLY.

If this law had provided to impose pains and penalties upon persons, who may fraudulently and wrongfully claim or arrest a freeman, such provision would have been superfluous. For any such wrongs, ample remedies, pains, and penalties had already been provided by law, both by common law, and by special statutes of all the States. Any freeman who has been wronged in this way, has at his option a great variety of prompt, powerful, and effectual remedies and indemnifications, and he may avail himself of *several of them at the same time.* He may bring actions for slander, libel, malicious prosecution, false imprisonment, and assault and battery; he may also cause the offender to be indicted and tried for all these crimes, and in addition to them for the high crimes of perjury and kidnapping, according to the circumstances of the case. He may arrest the offender and cause him to be imprisoned until he shall find satisfactory bail. If the offender escape into another State, he may in virtue of the Constitution of the United States, Article 4th, Section 2d, and Article 3d, Section 2d, and Amendment 6th, make application to the Executive authorities of the State, into which the offender may have fled, and cause him "to be delivered up," to be removed to the State from which he fled, to take his trial by jury in the State in which the offence was committed. If the complainant make good his complaint before the jury, he will recover exemplary damages, and the offender will be punished, according to the malignity of his offence, by fine and imprisonment.

Will any one seriously affirm that it is necessary, or desirable, or possible, to add anything, reasonably, to this formidable array of remedies and indemnifications, pains and penalties already provided by law?

I have thus replied to the five objections most frequently made to this law. If the replies be well grounded it must be admitted that the law is a fair and sincere attempt to carry out the spirit of the Constitution. It is very much more favorable to the alleged fugitive, than I, before carefully analysing it, imagined, and being a law of Southern origin, we are to infer that all its favorable provisions were *expressly intended* by the framers of the bill. It deprives the fugitive of no privileges which he legally had before, while it confers upon him powers and rights which he had not before. It ought, in my opinion, to be satisfactory to all good citizens, who honestly and bonâ fide desire and intend to maintain the Constitution and the Union of the United States.

But whatever may be the opinion of any individual as to the expediency of the law, it is OUR DUTY TO GIVE IT A FAIR TRIAL, and, so long as it exists upon the Statute books, to execute it faithfully and honorably according to its intent. If it should be found in practical operation to work injustice and not to fulfil its proper purpose, we may then proceed, and cause it to be, constitutionally and legally, altered and amended. I am, sir, respectfully,

Your fellow-citizen,

JAMES A. DORR.

69 WALL-ST., NEW-YORK,
NOVEMBER 15th, 1850.

HON. WASHINGTON HUNT,
Governor elect of the State of New-York.