the writ of error from this Court must be dismissed for want of jurisdiction. And being dismissed on this ground, it is unnecessary to examine the other objections which have been taken in support of the motion.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa, and was argued by counsel. On consideration whereof, and it appearing to the court here upon an inspection of said transcript that the judgment of the said Supreme Court is not a final one in the case, it is thereupon now here ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed for the want of jurisdiction.

WHARTON JONES, PLAINTIFF, *v.* JOHN VAN ZANDT.*

Under the fourth section of the act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harboring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor under the third section of the above act, and served on the person harboring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.[1]

Such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent to the person who harbors or conceals the fugitive; and to charge him under the statute a general notice to the public in a newspaper is not necessary.[2]

Clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice.

Receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harboring or concealing of the fugitive within the statute.

A transportation under the above circumstances, though the boy should be recaptured by his master, is a harboring or concealing of him within the statute.

Such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harboring him within the statute.

---

*Same case, 2 McLean, 596, 611.

[1] See *Robinson* v. *Rowland*, 26 Hun. (N. Y.), 502.

[2] Notice, as used in this statute, means knowledge. "It is enough if the defendant knows that the person he is harboring is a fugitive from labor." *Oliver* v. *Weakley*, 2 Wall., Jr., 311, 317.

A claim of the fugitive from the person harboring or concealing him need not precede or accompany the notice.

Any overt act so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harboring of the fugitive within the statute.

In this particular case, the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

*216] *They also contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress.

The averments in the said counts, that the defendant harboured said Andrew, are sufficient.

Said counts are otherwise sufficient.

The act of Congress, approved February 12, 1793, is not repugnant to the constitution of the United States.

The said act is not repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An Ordinance for the Government of the Territory of the United States northwest of the River Ohio."

THIS case came up from the Circuit Court of the United States for the District of Ohio, on a certificate of division in opinion between the judges thereof.

It was an action of debt, brought by Jones, a citizen of Kentucky, against Van Zandt, a citizen of Ohio, for a penalty of five hundred dollars, under the act of Congress passed on the 12th of February, 1793, for concealing and harbouring a fugitive slave belonging to the plaintiff. The act is found in 1 Statutes at Large, 302.

The 3d and 4th sections, which were the only ones involved in this case, are as follows:—

"§ 3. Be it enacted, that when a person held to labor in any of the United States, or in either of the Territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such arrest or seizure shall be made; and, upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested doth, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be a sufficient warrant for removing the said fugitive

from labor to the State or Territory from which he or she fled.

"§ 4. That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars; which penalty may be recovered by and for the benefit of such claimant, by action of *debt, in any court proper to try the same; saving, moreover, to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them." [*217

The suit was brought in the Circuit Court of Ohio, in June, 1842. The declaration consisted of four counts, the two last of which were abandoned in the progress of the cause. As the remaining two—viz. the first and the second—are commented upon by the court, it is deemed proper to insert them. They are as follows:—

"*First Count.—Concealing.*

"Wharton Jones, a citizen of, and resident in Kentucky, by Charles Fox, his attorney, complains of John Van Zandt, a citizen of, and resident in Ohio, was summoned to answer unto the plaintiff in a plea of debt; for that, whereas, a certain person, to wit, Andrew, aged about thirty years, Letta, aged about thirty years, on the 23d day of May, in the year eighteen hundred and forty-two, at Boone county, in the State of Kentucky, was the slave of, and in possession of the plaintiff, and his property, and owed service and was held to labor to the plaintiff by the laws of Kentucky, unlawfully, wrongfully, and unjustly, without the license or consent and against the will of the plaintiff, departed and went away from, and out of the service of the plaintiff, at said Boone county, and came to the defendant at Hamilton county, in the State and district of Ohio, and was there a fugitive from labor; and the defendant, well knowing that said Andrew was the slave of the plaintiff, and a fugitive from labor, yet afterwards, to wit, on the day and year aforesaid, at said district, contriving, and unlawfully and unjustly intending to injure the plaintiff, and to deprive him of said slave, and of his service, and of the profits, benefits, and advantages that might and would otherwise have arisen and

accrued to him from said slave and his service, did then and there, *and there* knowingly and willingly, wrongfully, unjustly, and unlawfully receive the said slave of the plaintiff into his service, and knowingly and willingly harbour, detain, conceal, and keep the said slave, in consequence of which the plaintiff lost said slave, and was deprived of his services and of all benefits, profits, and advantages which might and would have arisen and accued to him from such slave and his service, contrary to the statute of the United States in such case made and provided, whereby the defendant forfeited the sum of five hundred dollars to and for the use of the plaintiff; yet the defendant, though often requested, has not paid the same, nor any part thereof."

"*Second.—Concealing.*

"And also for that, whereas, on the day and year aforesaid, at said Boone county, a certain person, to wit, Andrew, aged about thirty years, was the slave of, and in the possession of the plaintiff, *and his property, and owed service, and was held to labor to the plaintiff by the laws of the State of Kentucky, did unlawfully, wrongfully, and unjustly, without the license or consent and against the will of the plaintiff, depart and go away from and out of his service, to wit, at Boone county aforesaid, and came to Hamilton county in the State and district of Ohio, to the defendant; and the defendant had notice that the said Andrew was the slave of the plaintiff, and a fugitive from labor; yet afterwards, to wit, on the day and year aforesaid, at the district aforesaid, contriving, and wrongfully and unjustly intending to injure the plaintiff, and deprive him of the said slave, and of his service, then and there, on the day and year aforesaid, at the district aforesaid, knowingly and willingly, unjustly, wrongfully, and unlawfully conceal the said slave from the plaintiff, in consequence of which the plaintiff lost said slave, and was deprived of his service, and of all profits, benefits, and advantages which might and otherwise would have arisen and accrued to the plaintiff from such slave and his service, contrary to the statute of the United States in such cases made and provided, whereby the defendant forfeited the sum of five hundred dollars, to and for the use of the plaintiff. Yet, though often requested, he has not paid the same, nor any part thereof."

*218]

The defendant pleaded the general issue, and in July, 1843, the cause came on for trial. The jury found a verdict for the plaintiff. The substance of the evidence given upon the

trial was agreed upon by the counsel who argued the cause in this court, as will be seen by the following, viz.:—

"The undersigned, of counsel respectively for Jones and Van Zandt, now under submission to the court, agree that the statement of the evidence as contained in the opinion of his Honor, the circuit judge, on the trial below, shall be taken and considered by the court in the same manner as if it were a part of the record, and certified by the Circuit Court.

J. H. MOREHEAD,

"26*th February*, 1847. *Of counsel for Jones.*

WILLIAM H. SEWARD,

Of counsel for defendant Van Zandt."

The evidence thus adopted by agreement was stated by Mr. Justice McLean, in the trial below, as follows. See 2 McLean's Reports, 597.

"Jones, a witness called by the plaintiff, stated that the plaintiff owned nine negroes (naming them), and resided in Boone county, Kentucky. That the greater part of them were born his, and that he purchased the others. That on Saturday evening, the 23d of April, 1842, about nine o'clock, he was at the house of the plaintiff, and saw the negroes; the next day, at about 12 o'clock, he saw the *same negroes, with the exception of two of them, in the jail at Covington. The plaintiff lives ten miles below Covington. Jackson, one of the absent negroes, returned in a few days; but Andrew remained absent, and has not been reclaimed. [*219

"The plaintiff paid a reward to the persons who returned the negroes, of four hundred and fifty dollars, and other expenses which were incurred, amounting in the whole to about the sum of six hundred dollars. Andrew was about thirty years old, and his services were worth to the plaintiff six hundred dollars. That he could be sold in Kentucky for that sum.

"Several other witnesses corroborated the statements of this witness, as to the ownership of the negroes, the reward paid, and the value of the services of Andrew.

"Hefferman, a witness, stated, that he lives in Sharon, thirteen miles north of Cincinnati, on the road to Lebanon. That on Sunday morning, a little after daylight, he saw a wagon which was rapidly passing through Sharon. It was covered, and both the hind and fore part of the wagon were closed; a colored man was driving it. He knew the wagon belonged to the defendant, and his suspicion was excited. The witness, and one Hargrave, another witness, started, in a short time, in pursuit of the wagon. They overtook it near Bates's, about

six miles from Sharon. The defendant lives near Sharon. On coming up with the wagon, the boy driving it was ordered by Hargrave to stop; he checked the horses, but a voice from within the wagon directed the boy to drive over him. The wagon horses were then whipped, running against Hargrave's horse, which threw him off. The horses were driven in a run some two hundred yards, but at length were overtaken by the witness, who, seizing the reins of the horses, drew them up into a corner of a fence. The driver jumped off and ran some distance; Van Zandt, the defendant, then came out of the wagon, and took the lines, but the witness refused to let the horses proceed. Eight negroes were in the wagon; one of them, called Jackson, and Andrew, the driver, escaped; the other seven were brought back to Covington, and lodged in jail.

"Hargrave,—accompanied the above witness in pursuit of the wagon, which he knew to belong to the defendant. Being acquainted with the defendant, he knew it to be his voice which directed the colored boy to drive over the witness. That the wagon tongue being driven against the horse of the witness, he was thrown, and the wagon horses were driven on the run, until overtaken and stopped. Seeing the defendant in the wagon, with the negroes, the witness asked him if he did not know they were slaves. The defendant replied, that he knew they were slaves, but that they were born free. He said he was going to Springboro', a village in Warren county. This witness, and also Hefferman, stated the amount paid as a reward, for bringing the negroes to Covington, as above.

*220] *"Hume,—very early on Sunday morning saw the wagon moving very rapidly, and two men on horseback pursuing it, near Bates's. Looked into the wagon, after it was stopped, and saw the defendant in it, with the negroes. He was asked if he did not know that they were slaves, and he replied, that by nature they were as free as any one. Witness took the negroes to Covington in a wagon. Some time after this, he saw the defendant, who said to him, 'If you had let me alone, the negroes would have been free, but now they are in bondage.' And the defendant said it was a Christian act to take slaves and set them at liberty.

"Bates, a witness, states that he went to the wagon after it had been stopped, looked into it, and saw the defendant with the negroes. The witness said, 'Van Zandt, is that you? have you a load of runaways?' The defendant replied, 'They are, by nature, as free as you and I.' The witness heard the defendant say that, having been at market in the city of Cin-

cinnati, he returned to Lane Seminary, a distance of two or three miles, to spend the night with Mr. Moore. That he left his wagon standing in the road, and when he came to it, about three o'clock the next morning, he found the negroes standing near it; that he did not know how they came there, or where they wished to go. He had no conversation with them. He geared his horses, hitched them to the wagon, and the negroes got into it. He afterwards said that he had received the blacks from Mr. Alley.

"McDonald, a witness, stated that he heard the defendant say he received the negroes on Walnut Hills, the same place as Lane Seminary. That, at three o'clock on Sunday morning, he found the negroes standing near his wagon, in the road; they got into it, and he started for home. That he rose early to have the cool of the morning. Defendant said he had done right. That he would at all times help his fellow-man out of bondage; and that what he had done he would do again.

"Thurman, a witness, stated that he saw the defendant in the wagon with the negroes, the cover closed behind and before. The defendant said to Hefferman, the negroes ought to be free, but he knew they were not. The defendant lives at Sharon, and this was six or seven miles beyond, on the road to Lebanon."

After the rendition of the verdict in the court below, the counsel for the defendant filed reasons in support of a motion for a new trial, and also reasons in support of a motion for arrest of judgment, which were, respectively, as follows, viz.:—

JOHN VAN ZANDT ads. WHARTON JONES.

Circuit Court of United States, 7th Circuit and District of Ohio.—In Debt.—Verdict $500.

The defendant, John Van Zandt, by his counsel, moves the court for a new trial, and assigns the following reasons:—

*1. The court erred in charging the jury that it was [*221
not necessary to prove that the defendant intentionally placed the colored persons in question out of view, for the purpose of eluding the search of the master or his agent, in order to establish the fact of concealment, or to prove that he received, sheltered, and placed them out of view for said purpose, in order to establish the fact of harbouring; but charged that it was sufficient, if the jury believed, from the evidence, that the defendant received the colored persons into his wagon, and transported them to Bates's from Walnut Hills, with intent to facilitate their escape from their master.

2. The court erred in charging the jury that it was not necessary, in order to establish the plaintiff's right to recover, to prove actual notice to the defendant from the claimant, or some one acting in his behalf, that the persons alleged to be harboured or concealed by him were fugitives from labor, within the meaning of the act of Congress; but charged, that it was sufficient if the jury should be satisfied, from the evidence, that the defendant knew that such persons were fugitives from labor.

3. The verdict is against evidence.

4. The verdict is against law.

CHASE & BALL, *Attorneys for Def't.*

JOHN VAN ZANDT ads. WHARTON JONES.

Circuit Court of United States, 7th Circuit and District of Ohio.—In Debt.

The defendant, by his counsel, moves the court to arrest judgment on the verdict rendered in this cause for the following reasons:—

I. Because the plaintiff's declaration, and the allegations therein contained, are insufficient in law to warrant said judgment.

1. In this, that in no count of said declaration has the plaintiff averred that the person or persons therein described as fugitives from labor were held to service under the laws of the State of Kentucky, and, being so held, escaped from that State into the State of Ohio.

2. In this, that the act of Congress referred to in said declaration is unwarranted by, or repugnant to, the constitution of the United States, and therefore null and void.

3. That the said act, so far as it applies to the case made in the plaintiff's declaration, is repugnant to the sixth article of the ordinance for the government of the territory of the United States northwest of the river Ohio, and therefore, so far, null and void.

4. In other respects.

II. Because the verdict rendered by the jury is general, whereas it ought to have been confined to the good count, or counts, in said declaration.

CHASE & BALL, *Attorneys for Def't.*

*222] *In order to bring these questions before the Supreme Court, the judges below differed *pro formâ*, and a certificate was made out, showing that their opinions were opposed on the following points:—

First. Whether, under the 4th section of the act of 12th February, 1793, "respecting fugitives from justice, and persons escaping from the service of their masters, on a charge for habouring and concealing a fugitive from labor," the notice must be in writing by the claimant, or his agent, stating that such person is a fugitive from labor, under the 3d section of the above act, and served on the person harbouring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

Secondly. Whether such notice, if not in writing and served as aforesaid, must be given verbally by the claimant or his agent to the person who harbours or conceals the fugitive; or whether, to charge him under the statute, a general notice to the public in a newspaper is necessary.

Thirdly. Whether clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is not sufficient to charge him with notice.

Fourthly. Whether receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is not a harbouring or concealing of the fugitive within the statute.

Fifthly. Whether a transportation, under the above circumstances, though the boy should be recaptured by his master, is not a harbouring or concealing of him within the statute.

Sixthly. Whether such a transportation, in an open wagon, whereby the services of the boy were entirely lost to his master is not a harbouring of him within the statute.

Seventhly. Whether a claim of the fugitive from the person harbouring or concealing him must precede or accompany the notice.

Eighthly. Whether any overt act, so marked in its character as to show an intention to elude the vigilance of the master or his agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute.

The cause having progressed, and the jury brought in their verdict, the defendant moved in arrest of judgment, and assigned sundry reasons in support of his motion, on some of

which points the opinions of the judges were opposed, to wit:—

First. Whether the first and second counts contain the *223] necessary *averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

Secondly. Whether said counts contain the necessary averments of notice that said Andrew was a fugitive from labor, within the description of the act of Congress.

Thirdly. Whether the averments in said counts, that the defendant harboured said Andrew, are sufficient.

Fourthly. Whether said counts are otherwise sufficient.

Fifthly. Whether the act of Congress, approved February 12th, 1793, be repugnant to the constitution of the United States.

Sixthly. Whether said act be repugnant to the ordinance of Congress, adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio."

The case was submitted on printed argument, by *Mr. Morehead*, for the plaintiff, and *Mr. Chase* and *Mr. Seward*, for the defendant. It is impossible to insert the whole of these arguments, as that of Mr. Chase is upwards of one hundred pages, and that of Mr. Seward forty pages, in length.

The points stated and argued by *Mr. Chase* were the following:—

1. Whether the plaintiff's declaration be sufficient; and, under this head, what are the requisites of notice under the act of 1793?

2. What acts constitute the offence of harbouring or concealing, under the statute?

3. Whether the act of 1793 be consistent with the provisions of the ordinance of July 13, 1787?

4. Whether the act of 1793 be not repugnant to the constitution of the United States?

Mr. Seward stated his point as follows:—

1. The declaration is insufficient.

2. The evidence was improper and insufficient.

3. The act of 1793, so far as the present subject is involved, is void, because it violates the ordinance of 1787.

4. The act of 1793 conflicts with the constitution of the United States, and is therefore void.

Mr. Justice WOODBURY delivered the opinion of the court.

This case comes here on a division of opinion in the Circuit Court of Ohio.

The subject matter of the original suit was debt for a penalty of $500, under the act of Congress of February 12th, 1793, for concealing and harbouring a fugitive slave belonging to the plaintiff.

The certificate of the division of opinion, as will be seen in the record, relates to various questions, arising under two heads.

*First, on rulings made at the trial, and, secondly, on a motion in arrest of judgment. [*224

These questions extend to the unusual number of fourteen. Not, however, that the presiding judge in the circuit and his associate entertained strong doubts concerning the general principles involved in them all, as may be seen in the report of the case (2 McLean, 615), but because the questions involved could not otherwise be brought here; and they possessed so wide and deep an interest, as to render it desirable they should come under the revision of this court.

For that purpose, in conformity to what is understood to have been the usage in the circuits, they accommodated the parties by letting a division *pro formâ* be entered on all the points presented.[1]

It is not understood that any of them embrace things urged merely as reasons for a new trial. For if they did,—as such a trial rests in the discretion of the court, and is not a matter of strict right,—a division of opinion in relation to it furnishes no cause for bringing the case here for our decision on questions certified. *United States* v. *Daniell*, 6 Wheat., 542; 4 Id., 213; 5 Cranch, 11, 187; 4 Wash. C. C., 333.

Before entering on the examination of the points, it will make several of them more intelligible, if we advert to the clause in the constitution bearing on this subject, and the act of Congress under which the action was instituted.

The former is, 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."— Art. IV., § 2.

[1] See *United States* v. *Chicago*, 7 How., 192.

In respect to the statute, it will not be necessary to repeat here any of it, except portions of the 3d and 4th sections;—

§ 3. "And be it also enacted, That when a person, held to labor in any of the United States or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor."

§ 4. "And be it further enacted, that any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars."—1 Stat. at L., 303, 305, Act of Feb. 12, 1793.

*225] *The first question at the trial on which a division arose was, in substance, whether the "notice" referred to in the 4th section must be in writing.

No doubt exists with this court that it may be otherwise than in writing, if it only bring home clearly to the defendant knowledge that the person he concealed was "a fugitive from labor."

The offence consists in continuing to secrete from the owner what the acts of Congress and the constitution, as well as the laws of several of the States, treat for certain purposes, as property, after knowing that claims of property exist in respect to the fugitive.

Now the act of Congress does not, in terms, require the notice to be in writing, nor does the reason of the provision, nor the evil to be guarded against, nor any sound analogy.

The reason of the provision is merely, that the party shall have notice or information sufficient to put him on inquiry, whether he is not intermeddling with what belongs to another.

If the information given to him, orally or in writing, is such as ought to satisfy a fair-minded man that he is concealing the property of another, it is his duty under the constitution and laws to cease to do it longer. *Eades* v. *Vandeput*, 5 East, 39, note; *Blake* v. *Lanyon*, 6 T. R., 221.

Such a notice is sufficient also by way of analogy; as, for instance, notice in relation to a prior claim on property purchased. *The Ploughboy*, 1 Gall., 41; 9 Ju., 649; 1 Sumn.,

173; 1 Cranch, 45. Or of a prior defence or set-off against a demand assigned to him. *Humphries* v. *Blight's Assignees*, 4 Dall., 370. Or even in crimes, that the notes or coin one is passing away are counterfeit.

Any other construction would go, likewise, beyond the evil to be avoided by the notice, which was the punishment of an individual for harbouring or concealing a person, without having reasonable grounds to believe he was thereby injuring another.

Any other construction, too, would be suicidal to the law itself, as before a notice in writing could be prepared and served on the defendant, the fugitives would be carried beyond the reach of recovery in many cases, and in others would have passed into unknown hands.

This is not a case like some cited in the argument, where the party prosecuted was not concerned in getting away the apprentice or person harboured, but merely entertained him afterwards from hospitality, or in ignorance of his true character and condition.

Then a more formal notice and demand of restoration may be proper, before suit, in order to remove any doubts as to the condition of the fugitive who is thus entertained, or the intent of the master to enforce his rights and reclaim his property. 1 Chit. Gen. Pr., 449. But verbal notice is enough then. See the cases in East and T. R., just cited.

*Besides this, the present is a case where the defendant was a partaker in accomplishing the escape [*226 itself, like a *particeps criminis*, and where the concealment and harbouring were not after the escape was over, but during its progress, while the slaves were *in transitu;* and where the notice is not exclusively with a view to procure their restoration, but is also an element in the case to show whether the party was, knowingly or ignorantly as to their condition, rendering them assistance to escape by temporarily harbouring or secreting them. So far as regards this point, it is a question merely of *scienter*. No matter how or whence the knowledge came, if it only existed. The concealment here was practised during fresh pursuit to retake the slaves; and hence, without any formal notice or demand, no doubt could exist as to the wish to reclaim them, as well as the fact of their being slaves. See *Hart* v. *Aldridge*, Cowp., 54.

Furthermore, that the defendant has not suffered by the charge to the jury on this point is manifest from his own declarations at the time, that he knew the fugitives to be slaves (*Jones* v. *Van Zandt*, 2 McLean, 559), and from the

instruction to the jury that this fact must be clearly proved before they ought to convict him (p. 607).

This view of the subject disposes of several other points of division connected with it. Because every purpose contemplated by the notice is accomplished, without a publication of it previously in a newspaper, which is the second question.

To require such a publication would be entirely arbitrary, and would still more surely defeat the whole law than to hold the notice must be in writing, and served on the defendant, before he is liable.

So, as to the third question, whether the information be sufficient if acquired from the slave himself,—it is manifest that such a source of information for that fact is one of the most satisfactory, as he has good means of knowing it, and is not likely to admit his want of freedom, unless it actually exist.

The next question relates to what constitutes concealment or harbouring of a slave, within the meaning of this statute.

It seems from the facts, which by agreement are all those reported in the printed case as tried in the court below (2 McLean, 596), as well as those inserted in this record, that several slaves, owned by the plaintiff in Kentucky, escaped from him and fled to Ohio, adjoining, and, aided by some person not named, and when about twelve miles distant from their master's residence, were taken into a covered wagon by the defendant in the night, and driven with speed twelve or fourteen miles, so that one was never retaken, though fresh suit was made for the whole.

Now, whatever technical definition may exist of the word *conceal* or *harbour*, as applied to apprentices or other sub-
*227] jects, no *doubt can exist, that these words and their derivatives must here be construed in reference to the matter of the statute, and the nature of the offence to be punished.

These show this offence to consist often in assistance to escape, and reach speedily some distant place, where the master cannot find or reclaim such fugitives, rather than in detaining them long in the neighbourhood, or secreting them about one's premises.

We see nothing, then, in the facts here, or in the instruction of the judge on them, *secundum subjectam materiam*, which shows this case not to have been, as the jury found it to be, one within the manifest design of the statute against harbouring and concealing persons who were fugitives from labor, after notice, or full knowledge of their character.

Indeed, the general definition of the word *harbour* in 1

Bouvier, 460, as quoted by the defendant's counsel,—saying nothing as to the authority of that work,—is such as to be fully covered by the facts in this case, as stated in the record, and as found by the jury. It is,—"to receive clandestinely, and without lawful authority, a person for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same."

There was a clandestine reception of the slaves, and without lawful authority, and a concealment of them in a covered wagon, and carrying them onward and away, so as to deprive the owner of their custody. "To harbour" is also admitted in the argument often to mean "to secrete." Such is one of the established definitions by the best lexicographers. Yet here they were secreted, not only, as just stated, by being placed in a covered wagon, and carried to a greater distance from their master, but it was done rapidly, and in part under the shades of night.

That no mistake on this point occurred at the trial is likewise manifest from the fact, that the judge charged the jury, the defendant must not be considered as harbouring or concealing the slaves, unless his conduct was such, "as not only to show an intention to elude the vigilance of the master, but such as is calculated to attain that object." 2 McLean, 615.

Nor can the recovery of one of the slaves afterwards, who was thus concealed and transported, vary the previous fact of secreting and harbouring him. That is the fifth inquiry. The answer to the sixth is involved in that to the fourth and fifth; as is an answer to the seventh in that to the first question. Because, if the notice need not come from the claimant himself, nor be in writing, it need not be preceded or accompanied by a claim, which is the seventh inquiry. A claim subsequently made must be equally valid with one before the notice, whether looking to the reason of the case, or the language of the statute.

The gist of the offence consists in the concealment of another's *property, under knowledge that it belongs to another, and not in a claim being previously made [*228 and refused. That refusal might constitute a separate wrong, or be another species of evidence to prove a harbouring of the slave, but it is not the offence itself, for which the penalty now sued for is imposed.

The eighth and last question under this head seems to be an abstract proposition, and does not refer to any particular facts in the case. But if it was laid down in relation to some of them, as it must be presumed to have been in order to make it a proper subject for a division of opinion, to be

reconsidered here, we are not aware of any thing objectionable in it. The "overt act" spoken of was required to be one both intended and calculated to elude the master's vigilance. If so, it showed acts and designs of the defendant, which in the words and spirit of the statute amount or tend directly to "*harbour* or *conceal*" the fugitive from labor.

We shall now proceed to the points of division in respect to the motion in arrest. They are, firstly, whether the counts contain the necessary averments, that the slave Andrew escaped from Kentucky to Ohio.

It is admitted that, this prosecution being a penal one, the declaration must bring it within the statute clearly, whether looking to its language or spirit. Dwarr. Stat., 736; 5 Dane, Abr., 244, § 8; *Simmon's case*, 4 Wash. C. C., 397. It is not necessary to multiply authorities on so elementary a proposition.

On turning to the counts, however, it will be seen that they allege the residence of the plaintiff in Kentucky,—the ownership by him of these slaves, held to labor there,—and their "unlawfully," and "without his consent," going from that place to Ohio, as "fugitives from labor." All these allegations combined, and not merely the *going* away, are a clear and sufficient averment of an escape of the slave Andrew under the first objection in arrest. If they contain sufficient matter to show an escape, it need not be alleged in the very words, *ipsissimis verbis*, of the statute. 1 Chit. Pl., 357; *The King* v. *Stevens et al.*, 5 East, 244.

The ungrammatical use of the word "was" for "were," in speaking of both slaves, is urged as an uncertainty which vitiates this part of the declaration. But no one can doubt that both are referred to, and the more especially after a verdict. As to what is thus covered by a verdict, see *Garland* v. *Davies*, 4 How., 131, and the cases there cited, and 11 Wend. (N. Y.), 374.

The second point certified under the motion in arrest is, whether the "counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress."

We cannot doubt that they do, when the first count alleges that said Andrew was in Ohio, "a fugitive from labor, and the defendant, well *knowing* that said Andrew was the slave of the plaintiff, and a fugitive from labor," &c., did harbour and conceal him.

*229] *So in respect to the third question connected with the arrest of judgment, which is, whether the averments are sufficient under the statute as to harbouring the

slave Andrew, the answer can be but one way. However strict the construction should be, yet the count alleges, in so many words, that the defendant did "knowingly and willfully *harbour*, detain, *conceal*, and keep said slave."

Under the fourth general objection of insufficiency in the declaration, no specific point, not otherwise designated, has been called to our attention, except that all the acts alleged in the declaration are not said to be "contrary to the statute." This last expression follows the concluding portion of the count, and this expression may be necessary in a penal declaration. *Lee* v. *Clark*, 2 East, 332; 1 Gall., 259, 265, 271; 1 Chit. Pl., 358.

But all know, that where it is inserted at the end of a declaration or indictment, it does not, as a general rule, relate to the last preceding averments alone, but the whole subject-matter before alleged to constitute an offence. It is all that misconduct which is contrary to the statute, and not the concluding part of it only.

It remains to consider the fifth and sixth divisions of opinion under this head. They are, whether the act of Congress, under which the action is brought, is repugnant either to the constitution, or the ordinance "for the government of the territory northwest of the river Ohio."

This court has already, after much deliberation, decided that the act of February 12th, 1793, was not repugnant to the constitution. The reasons for their opinion are fully explained by Justice Story in *Prigg* v. *Pennsylvania*, 16 Pet., 611.

In coming to that conclusion they were fortified by the idea, that the constitution itself, in the clause before cited, flung its shield, for security, over such property as is in controversy in the present case, and the right to pursue and reclaim it within the limits of another State.

This was only carrying out, in our confederate form of government, the clear right of every man at common law to make fresh suit and recapture of his own property within the realm. 3 Bl. Com., 4.

But the power by national law to pursue and regain most kinds of property, in the limits of a foreign government, is rather an act of comity than strict right; and hence, as the property in persons might not thus be recognized in some of the States in the Union, and its reclamation not be allowed through either courtesy or right, this clause was undoubtedly introduced into the constitution, as one of its compromises, for the safety of that portion of the Union which did permit such property, and which otherwise might often be deprived

of it entirely by its merely crossing the line of an adjoining State. 3 Madison Papers, 1569, 1589.

This was thought to be too harsh a doctrine in respect to *230] any *title to property,—of a friendly neighbour, not brought nor placed in another State, under its laws, by the owner himself, but escaping there against his consent, and often forthwith pursued in order to be reclaimed.

The act of Congress, passed only four years after the constitution was adopted, was therefore designed merely to render effective the guaranty of the constitution itself; and a course of decisions since, in the courts of the States and general government, has for half a century exhibited great uniformity in favor of the validity as well as expediency of the act. 5 Serg. & R. (La.), 62; 9 Johns. (N. Y.), 67; 12 Wend. (N. Y.), 311, 507; 2 Pick. (Mass.), 11; Baldw., 326; 4 Wash. C. C., 326; 18 Pick., 215.

While the compromises of the constitution exist, it is impossible to do justice to their requirements, or fulfil the duty incumbent on us towards all the members of the Union, under its provisions, without sustaining such enactments as those of the statute of 1793.

We do not now propose to review at length the reasoning on which this act has been pronounced constitutional. All of its provisions have been found necessary to protect private rights, under the cause in the constitution relating to this subject, and to execute the duties imposed on the general government to aid by legislation in enforcing every constitutional provision, whether in favor of itself or others. This grows out of the position and nature of such a government, and is as imperative on it in cases not enumerated specially, in respect to such legislation, as in others.

That this act of Congress, then, is not repugnant to the constitution, must be considered as among the settled adjudications of this court.

The last question on which a division is certified relates to the ordinance of 1787, and the supposed repugnancy to it of the act of Congress of 1793.

The ordinance prohibited the existence of slavery in the territory northwest of the river Ohio among only its own people. Similar prohibitions have from time to time been introduced into many of the old States. But this circumstance does not affect the domestic institution of slavery, as other States may choose to allow it among their people, nor impair their rights of property under it, when their slaves happen to escape to other States. These other States, whether northwest of the river Ohio, or on the eastern side of the

Alleghanies, if out of the Union, would not be bound to surrender fugitives, even for crimes, it being, as before remarked, an act of comity, or imperfect obligation. *Holmes* v. *Jennison et al.*, 14 Pet., 540. But while within the Union, and under the obligations of the constitution and laws of the Union, requiring that this kind of property in citizens of other States —the right to "service or labor"—be not discharged or destroy it, they must not interfere to impair or destroy it, but, if one so held to labor escape into *their limits, [*231 should allow him to be retaken and returned to the place where he belongs. In all this there is no repugnance to the ordinance. Wherever that existed, States still maintain their own laws, as well as the ordinance, by not allowing slavery to exist among their own citizens (4 Mart. (La.), 385). But in relation to inhabitants of other States, if they escape into the limits of States within the ordinance, and if the constitution allow them, when fugitives from labor, to be reclaimed, this does not interfere with their own laws as to their own people, nor do acts of Congress interfere with them, which are rightfully passed to carry these constitutional rights into effect there, as fully as in other portions of the Union.

Before concluding, it may be expected by the defendant that some notice should be taken of the argument, urging on us a disregard of the constitution and the act of Congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule.

Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and laws with fidelity to their duties and their oaths. Their path is a strait and narrow one, to go where that constitution and the laws lead, and not to break both, by travelling without or beyond them.

Let our opinion on the several points raised be certified to the Circuit Court of Ohio in conformity to these views.

ORDER.

This cause came on to be heard on the transcript of the

record from the Circuit Court of the United States for the District of Ohio, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court,—

1st. That, under the fourth section of the act of 12th February, 1793, respecting fugitives from justice, and persons escaping from the service of their master, on a charge for harbouring and concealing fugitives from labor, the notice need not be in writing by the claimant or his agent, stating that such person is a fugitive from labor, under the third section of the above act, and served on the person harbouring or concealing such fugitive, to make him liable to the penalty of five hundred dollars under the act.

*232] *2d. That such notice, if not in writing and served as aforesaid, may be given verbally by the claimant or his agent, to the person who harbours or conceals the fugitive, and that to charge him under the statute, a general notice to the public in a newspaper is not necessary.

3d. That clear proof of the knowledge of the defendant, by his own confession or otherwise, that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice.

4th. That receiving the fugitive from labor at three o'clock in the morning, at a place in the State of Ohio, about twelve miles distant from the place in Kentucky where the fugitive was held to labor, from a certain individual, and transporting him in a closely covered wagon twelve or fourteen miles, so that the boy thereby escaped pursuit, and his services were thereby lost to his master, is a harbouring or concealing of the fugitive within the statute.

5th. That a transportation under the above circumstances, though the boy should be recaptured by his master, is a harbouring or concealing of him within the statute.

6th. That such a transportation, in such a wagon, whereby the services of the boy were entirely lost to his master, is a harbouring of him within the statute.

7th. That a claim of the fugitive from the person harbouring or concealing him need not precede or accompany the notice.

8th. That any overt act, so marked in its character as to show an intention to elude the vigilance of the master or his

agent, and which is calculated to attain such an object, is a harbouring of the fugitive within the statute.

9th. That the first and second counts contain the necessary averments, that Andrew, the colored man, escaped from the State of Kentucky into the State of Ohio.

10th. That said counts contain the necessary averments of notice that said Andrew was a fugitive from labor within the description of the act of Congress.

11th. That the averments in said counts, that the defendant harboured said Andrew, are sufficient.

12th. That said counts are otherwise sufficient.

13th. That the act of Congress approved February 12th, 1793, is not repugnant to the constitution of the United States. And,

Lastly. That the said act is not repugnant to the ordinance of Congress adopted July, 1787, entitled, "An ordinance for the government of the territory of the United States northwest of the river Ohio."

It is thereupon now here ordered and adjudged by this court, that it be so certified to the said Circuit Court of the United States for the District of Ohio.

---

*WILLIAM TAYLOR, GEORGE TAYLOR, WILLIAM PRIMROSE, AND ELIZA, HIS WIFE, GEORGE PORTER, AND ELSPET, HIS WIFE, WILLIAM RAINEY, ALEXANDER RAINEY, AND ELIZABETH RAINEY, COMPLAINANTS AND APPELLANTS, *v.* VINCENT M. BENHAM, ADMINISTRATOR DE BONIS NON, WITH THE WILL ANNEXED, OF SAMUEL SAVAGE, DECEASED, RESPONDENT AND APPELLEE. [*233

VINCENT M. BENHAM, &c., *v.* GEORGE TAYLOR, &c.

By the laws of Alabama, an administrator *de bonis non*, with the will annexed, is liable for assets in the hands of a former executor.[1]

Where an executor has settled what appears to be a final account, it must be a very strong case of fraud proved in such a settlement, or of clear accident

[1] See *Chew* v. *Hyman*, 10 Biss., 250; *Wilkinson* v. *Hunter*, 37 Ala., 268; but the general rule is, that the succeeding executor or administrator is not liable for moneys collected by the former administrator or executor, or the value of chattels to the use of which a legatee is entitled for life by the will. *In Re Place*, 1 Redf. (N. Y.), 276; *Brownlee* v. *Lockwood*, 5 C. E. Gr. (N. J.), 239; *Anderson* v. *Miller*, 6 J. J. Marsh. (Ky.), 568; *Smithers* v. *Hooper*, 23 Md., 273; *Ruff* v. *Smith*, 31 Miss., 59; nor any *devastavit* or default of his predecessors. *Alsop* v. *Mather*, 8 Conn., 584.