

RECLAMATION OF FUGITIVES FROM SERVICE.

AN ARGUMENT

FOR THE DEFENDANT.

SUBMITTED TO

THE SUPREME COURT OF THE UNITED STATES,

AT THE DECEMBER TERM, 1846.

IN THE CASE OF

WHARTON JONES vs. JOHN VANZANDT.

BY S. P. CHASE.

CINCINNATI.

I have no doubt that both first and second counts of the plaintiff's declaration—the only counts now open to investigation—are insufficient.

It has never been controverted, that the provisions of the act of 1793, denouncing the penalty claimed by the plaintiff, is penal in its character. The declaration charges the defendant with an offence under this act, and demands the penalty. It is a penal action under a penal statute; and he who seeks a penalty, in addition to the damage he has actually sustained, is entitled to no favor in a Court of Justice. The act, under which he claims, must be strictly construed: and the declaration, by which he claims, must present a case within the precise terms of the act. No matter what injury may be suffered by the claimant of a fugitive servant, in consequence of the acts of a third person, if those acts do not make the very case described by the law, or if he does not state in his declaration, with strict certainty, the facts which make that case, he must resort to such remedies as the common law, or other provisions afford him. He cannot be heard to demand the penalties given by the act.

It may be said that the act gives a remedy, as well as denounces a penalty, and must therefore be construed as a remedial law. The answer is,—if it be admitted that the last clause of the act is remedial in its character,—that the rule is well settled, that where an act is reme-

poses a penalty has been construed otherwise than strictly, with whatever other provisions it may stand associated. There is no more reason for construing a penal provision liberally, because it is preceded or followed by a remedial provision, than may be urged for construing a penal act liberally, because other acts on the same subject matter, in the same statute book, are remedial in their nature.

To array authority on points like these may seem vain parade; but I deem it my duty, in this case, to risk the imputation, rather than hazard, by possibility, the cause committed to my defence.

A penal statute, as defined by Mr. Dwarris, is a legislative act, "whereby a forfeiture is inflicted for transgressing the provision therein contained."¹ Such a law, we are assured by the same author, "must receive a strict construction. It cannot be extended by construction.—The law does not allow of constructive offences or of arbitrary punishments. *No man incurs a PENALTY, unless the act, which subjects him to it, is CLEARLY within the SPIRIT AND THE LETTER of the statute imposing such penalty.*" "If these rules are violated, the fate of accused persons is decided by the arbitrary caprice of judges and not by the express authority of the laws."² And these rules are said to be "of that higher sort of maxims, that as *regulæ rationales*, and not *positivæ*, and the law will rather endure a particular offence to escape without punish-

where the citizen is liable to be deprived, under penal laws, of life, liberty or property, in any case where the offence is not brought, by allegation and proof, strictly within the terms used by the Legislature in the definition or description of it.

And these rules have received the fullest sanction from the writings of American Jurists and the decisions of American Courts.

“To recover a penalty on a statute,” says Mr. Dane, in his valuable Abridgment of American Law, “the *express mode*, therein named, must be adopted and pursued, for the statute gives the right, *and it is penal*, and must be *strictly* adhered to.”¹

In a case where the statute subjected the “sheriff or officer,” to whom an execution was “*directed*” to the payment of the debt and costs, and thirty per cent. damages, for failure to return the writ, and judgment had been rendered against a deputy sheriff for such a failure, the Court of Appeals of Kentucky reversed the judgment, on the ground that executions were always “*directed*” to the “*sheriff*,” and therefore, a deputy sheriff could not be made liable. The Court said, “The act is certainly of a highly penal character, and, consequently, in deciding upon cases attempted to be brought within its operation, *no liberality of construction ought to be indulged*. Observing a strict construction, therefore, and deciding according to the LITERAL IMPORT of the act, we

can have but little hesitation in affirming that the motion against the deputy sheriff cannot be sustained."¹

In a later case, under a statute which prohibited the keeping of gaming tables, at which any game of chance should be "played for money or any other thing,"² a person was indicted for keeping such a table, at which the game of faro was played for "*money*," and the proof was that the money played for was bank notes, and the defendant was convicted. The Court of Appeals, however, reversed the judgment, on the ground that, in penal actions, the charge must be proved as laid, and proof of play for *bank notes* was not proof of play for *money*. The Court said: "Though the betting of bank notes is *equally illegal*, and would render the defendant liable to the same penalty as the betting of money, yet, *as the proof must fit the charge laid*, the charge was not made out in this case."³

In another case the same Court reversed a judgment for a fine and treble tax, and said: "The proceedings are variant from the mode prescribed by the law; which being penal must be strictly and literally pursued."⁴

Under a statute of Maryland, any person who gives a pass, assists by loan or otherwise, the transporting of slaves out of the State, or unlawfully otherwise deprives a master of his slave, is subjected to a fine, and also to a civil suit for damages. Under the penal provision of this act, judgment for the penalty was rendered in an inferior Court, upon an indictment which contained no allegation

cause the circumstances were such as would put a prudent man upon enquiry. But to apply such a rule in the construction of a penal statute, and to say that whatever is sufficient to put a party upon enquiry is such notice as the act requires, in order to charge him with a penalty, seems to me wholly unreasonable and indefensible.

The act of Congress plainly contemplates a very different kind of notice. In fact, the words "after notice" are wholly superfluous, upon the hypothesis that notice is knowledge. The act provides that if any person shall *knowingly* and *willingly* harbor or conceal *such* person, *after notice*, &c. Erase the words "after notice," and is not knowledge still essential to the offence of harboring? Must not the claimant of the penalty, before he can entitle himself to a recovery, aver and prove that the harborer *knew* that the person harbored was a fugitive from labor, who had been held to service in one state under its laws, and had escaped into another? The words "*knowingly and willingly*" qualify the words "*harbor or conceal*," as much as they do the words "*obstruct or hinder*," or the word "*rescue*;" and the words "*such* person" mean such a fugitive servant as is described in the preceding section of the act. I think there can be no doubt as to this. If then the act had never contained the words "after notice," &c., the averment of knowledge would, nevertheless, have