WAS THE FUGITIVE SLAVE CLAUSE OF THE CONSTITUTION NECESSARY?

Among historians at the North as well as at the South the claim is generally, if not universally, made that the Fugitive Slave Clause of the Constitution of the United States was essential to the adoption of that instrument; and it is even often spoken of as a part of the famous compromises. Mr. Rhodes, in his *History of the United States from the Compromise of 1850*, states that it is unquestionable that the stipulation in reference to fugitive slaves was necessary to the adoption of the Constitution.[1] Mr. Blaine, in his *Twenty Years of Congress*, also assures us that "if it had not been agreed that fugitives from service should be returned to their owners, the Thirteen States would not have been able to form a more perfect union."[2] Mr. Benton, in his *Thirty Years' View*, states even more emphatically that the Constitution could not have been formed without this clause, and that it was a compromise between the slave and the free States.[3]

As a typical representation of the southern view we have that of Mr. Alexander H. Stephens in his *War Between the States* wherein he asserts that "of all the new obligations assumed by the States, the most important, and one without which, *it was universally admitted*,[4] the Constitution could

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[1] Rhodes's *History of the United States from the Compromise of 1850*, Vol. I p. 18.

[2] Blaine's *Twenty Years of Congress*, Vol. I, p. 1.

[3] Benton's *Thirty Years' View*, Vol. II, p. 773.

[4] The italics are the writer's.

not be formed, is that which provides for the rendition of fugitives from service from one State to another."[1]

This otherwise universally accepted view is attacked only by Mr. Charles Sumner, who, in his speech against the Fugitive Slave Act of 1850,[2] might be thought to be using it more especially for his immediate purpose, than for historical criticism. But so pointedly does he oppose the current view and so logical is he in the presentation of his proof that an investigation of the historic foundation for his assertions is demanded. The inquiry whether the Fugitive Slave Clause was essential to the adoption of the Constitution is then the purpose of this paper.

The immediate origin of the clause must be sought in the journal of the Federal Convention where in the minutes of July 23, 1787, is found the first statement which could be interpreted as the germ of the future clause. On that date, just as the Convention was about to refer the draft of the Constitution to the committee, General Pinckney reminded the members that "if the committee should fail to insert some security to the Southern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to his state to vote against their report."[3] Again on August 28, 1787, it is stated that "General Pinckney was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves."[4] Now neither of these remarks positively refers to fugitive slaves,

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[1] Stephens's *War Between the States*, Vol. I, p. 202.

[2] August 26th, 1852,—Sumner's *Works*, Vol. III, p. 137.

[3] Elliot's *Debates*, Vol. V, p. 357.

[4] Elliot's *Debates*, Vol. V, p. 487.

and there is no direct evidence that it is correct so to construe them other than the fact that Butler and Pinckney thereafter moved to require fugitive slaves to be delivered up like criminals. Upon August 29, Butler moved the insertion in Article xv of what was practically the fugitive clause as finally adopted.[1] This was uninamously agreed to without any discussion. These are the only statements in reference to the clause to be found anywhere in the proceedings of the Convention; and special attention is called here to the fact that no discussions whatever arose over the clause as might be expected if it were so essential or a compromise of the Constitution.

The State conventions, called for the ratification of the Constitution, alike fail to disclose any marked objections to the clause. General Pinckney, in the South Carolina Convention, simply mentioned the clause as a newly acquired right,[2] and nowhere even hinted that the clause was a matter of discussion by the committee appointed to settle the matter of the non-importation of slaves from whose work the famous compromise appeared. Mr. Iredell, in the North Carolina Convention, stated that some of the northern States, having emancipated their slaves, the clause was inserted to prevent the fugitive slaves of the South enjoying the freedom which otherwise would come from a short residence in the North.[3] There is but one mention of the clause in the *Journal* of the Virginia Convention, in which George Mason said that there was really no security in the clause as

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[1] Elliot's *Debates*, Vol. V, p. 492.

[2] Elliot's *Debates*, Vol. IV, p. 286.

[3] Elliot's *Debates*, Vol. IV, p. 176.

it only meant that slaves should not be protected in other States.[1] No references were made to the clause in the conventions of the other States, all the attention in reference to slavery being directed to the non-importation clause.

But this absence in the constitutional conventions of any evidence of reasons for the insertion of the clause only increases our determination to seek if possible the true explanation for the introduction of the clause into the Constitution. Story says that "this clause was introduced into the Constitution solely for the benefit of the slave-holding States, and that the want of such a provision under the Confederation was felt as an inconvenience by the southern States."[2]

No reference to specific complaints of the slave States is given; and a careful search reveals none. This does not disprove necessarily the statement of Story. But, in view of the non-appearance of any evidence presented by him or by any one else, such a definite statement is assuredly unwarranted.

Then Henry Wilson asserts positively that Charles C. Pinckney in the Federal Convention stated that South Carolina could enter no Union "unless slaves should enter into the basis of representation, the slave trade be continued, and provision be made for the rendition of slaves escaping from their master."[3] In the citations of everything said in the Convention on the matter, as given above, is found the direct proof of the inaccuracy of this statement by Wilson.

But possibly from a discovery of the precedents, if any,

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[1] Elliot's *Debates*, Vol. III, p. 458.

[2] Story's *Commentaries*, Vol. II, p. 589.

[3] Wilson's *Rise and Fall of Slave Power in America*, Vol. I, p. 53.

for such a clause in the Constitution we may upon learning the reason for those precedents at the same time draw justifiable inferences regarding the object of the insertion of a similar clause in the Constitution. Professor Alexander Johnston suggests as a precedent for the clause the eighth article of the New England Confederation of 1643, and asserts that "if the convention did not avail itself of the experience of its predecessor of the previous century, is it not a little odd that it should happen to bring just these provisons together as the second section of Article IV."[1] That the salient features of the clause are in the articles of the New England Confederation in much different phraseology is true,[2] but in the absence of any evidence whatever that the members of the Constitutional Convention had made any special study of the Confederation of 1643, and in view of the fact that they went at their work in the most practical manner and sought to remedy the conditions of their own time (conditions so entirely different from those of 1643 as to preclude any comparison) it is clear that little explanation for this clause of the Constitution can be found in that of the New England Confederation.

But it is in the similiar clause of the Ordinance of 1787 that Curtis,[3] Justice Miller,[4] Benton, and others find the precedent for the clause in the Constitution. Then in view of the fact that Benton not only states that the clause was also necessary to the adoption of the Ordinance of 1787, but further that both clauses were practically formed simul-

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[1] *New Princeton Review*, Vol. IV, p. 183.

[2] Preston's *Documents, American History*, p. 92.

[3] Curtis's *History of the Constitution*, Vol. II, p. 455.

[4] Miller's *Constitution of United States*, p. 638.

taneously, and by the same men, and forcibly asserts that the same reasons existed for the insertion of each,[1] we are necessarily led to a study of the clause in the Ordinance to just such an extent as it may throw light upon the real significance of the clause in the Constitution.

The first appearance of a fugitive slave clause among the various resolutions pertaining to the Northwest Territory was April 6, 1785, when the committee consisting of King Howell, and Ellery submitted a resolution containing it;[2] but there was no discussion whatsoever upon it, and the resolution does not even appear in the *Journal of Congress*. Although this Ordinance was first read in Congress on March 4, 1785,[3] and came up for discussion from time to time, and was again reported in another form on April 24,[4] and continued to be the subject of debate until May 20, when it was adopted,[5] yet the fugitive slave clause, after its first seemingly unnoticed appearance, was completely and inexplicably lost, never to reappear until its final insertion in the second reading of the final Ordinance upon July 12. The clause even then created no discussion; and Dane's letter to King, if consulted, will prove that the clause was no part of a compromise in the committee, since he states that "when I drew the ordinance I had no idea the states would agree to the sixth article prohibiting slavery as only Massachu-

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[1] Benton's *Thirty Years' View*, Vol. II, p. 773.

[2] Ford's *Bibliography of the Continental Congress* in *Boston Public Library Bulletin*, Vol. X, p. 160, cites Resolution found in Forty Broadsides, in State Department Library, Washington, D. C.

[3] *Journal of Congress*, Vol. X, p. 50.

[4] *Journal of Congress*, Vol. X, p. 87.

[5] *Journal of Congress*, Vol. X, p. 94.

setts of the Eastern States was present, and therefore omitted it in the draft; but finding the House favorably disposed on this subject after we had completed the other parts, I moved the article, which was agreed to without opposition."[1]

Thus there was, indeed, a marked similarity in the appearance of the clause in both the Ordinance and the Constitution in that in both it was inserted without any discussion. Apparently there seems to be nowhere in existence any history of its introduction or positive proof of the necessity of the clause in either document.

Now the interesting inquiry remains as to the apparent connection between the Fugitive Slave Clause in the two instruments. Benton, it should be recalled, made much of the simultaneous introduction of the clause in the two documents. As stated, the clause first appeared in a discussion of the Ordinance for the Northwest Territory on April 6, 1785; but the serious discussion of the Ordinance in the final form began July 11, 1787, the Fugitive Slave Clause was inserted July 12, and the Ordinance passed July 13, 1787. In the Constitutional Convention the clause passed on August 29, 1787. That the members of the Constitutional Convention were acquainted with the act as passed by Congress is clear, and there can be no positive objection to an assumption that the clause in the Ordinance of 1787, may have suggested a like clause in the Constitution; but an entire absence of proof of any direct connection between the two events disqualified such a positive statement as that of Benton's.

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[1] Letter of Dane to King, July 16, 1787.—*Life and Correspondence of Rufus King* Vol. I, p. 290.

Regarding the claim that the Fugitive Slave Clause was any part of the great compromise, it may be stated that the discussion over representation began on July 11, 1787, and it was on July 12 that Wilson suggested the final form of the three-fifths compromise which was passed on the same day.[1]

It has been previously shown that the first proposal of the Fugitive Slave Clause in the Constitutional Convention occurred August 29, and that Pinckney did not even speak of a guarantee to the southern States of their slaves before July 23. Moreover, the discussion in reference to the importation of slaves and a navigation act arose August 22,[2] upon which day it was referred to a special committee which reported August 24.[3] Then in the minutes of August 29 is found, appended to General Pinckney's remarks upon the liberal conduct of the eastern States towards the views of South Carolina, Madison's note that "an understanding on the subject of navigation and slavery had taken place."[4] So there is no doubt but that the compromises were all definitely arranged before the Fugitive Slave Clause was suggested by Pinckney and Butler.

In view of what Pinckney said in the State convention thereafter it can scarcely be believed that the clause was one of the conditions of union.

There was not only no realization by Mason, of Virginia, of the importance of the clause, but no evidence of any

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[1] Elliot's *Debates*, Vol. V, p. 294 to 306.

[2] Elliot's *Debates*, Vol. V, p. 457.

[3] Elliot's *Debates*, Vol. V, p. 461, 471.

[4] Elliot's *Debates*, Vol. V, p. 489.

battle over the insertion of the clause as seen in Pinckney's narration to his State of the events at Philadelphia. Pinckney would most certainly have spoken of it as he was very anxious to disclose to his State every victory won by the South in the Constitutional Convention, in the hope that South Carolina would more surely adopt the instrument as presented. The entire absence of any notice of the provisions in the discussions in the other ratifying conventions establishes, as securely as negative evidence can, the falsity of the statement that the clause could have been any part of the compromises. Compromises presuppose differences of opinion in which sides are taken and much bitterness is manifested. It is inconceivable that some of the wounds left from such a combat would not have been still unhealed at the time of the holding of the State conventions, and some of the old rancor would have reasserted itself as was true in reference to all of the real compromises between the South and the North. A compromise also assumes that each side gained some desired point from the adjustment. What was the favor secured the North here? No one has ever suggested any; and the discussions in the ratifying conventions in the northern States of the compromises actually arranged with the South disclose clearly that the North more than recognized that for each favor granted it, the South had secured an equally valuable one without attaching the Fugitive Slave Clause to any of the arrangements with a desire to even the scales.

All the evidence likewise points to the fact that there was no fight over the clause in Congress upon the enactment of the Ordinance of 1787. Dane does not recognize at all the

real significance of the clause and passes over it much too hurriedly for it to have been an object of any known value to the South.

The compromises had all been settled and Pinckney was much gratified at the liberal conduct of the eastern States. In the midst of the manifestations of good feeling among the members, and evident rejoicing over the peaceful settlement of the differences that had so long threatened the establishment of union at all, Pinckney and Butler possibly presumed upon the favorable attitude of the East and shrewdly presented the clause, trusting that it might be thus hurriedly inserted as it was, little realizing themselves the future trouble that it was to occasion. They undoubledly never conceived of it as essential to their signing the Constitution; and even a moderate opposition by the North would doubtless have secured its rejection, unless an agreement had been secretly reached to allow its insertion, which seems almost inconceivable.

Whether or not the clause was ever suggested or agreed upon in any of the meetings of the compromise committee, with the secret understanding that it was to be afterwards introduced, can never be known. Strict impartiality requires that we do not overlook the fact that on the very day of July 12, when Wilson proposed the three-fifths compromise, the Fugitive Slave Clause appeared in the Ordinance of 1787 through Mr. Dane's agency. There may be, of course, a meaning in this coincidence, but no proof is found. The fact that one body was holding its meetings in New York and the other in Philadelphia, together with the known facts herein given, would tend to disprove it. Then again,

it must not be forgotten that the Fugitive Slave Clause appeared first in the committee report of April 6, 1785, which destroys the idea that discussion in the Constitutional Convention could have suggested the first appearance of the clause before Congress in the report upon the Northwest Territory.

It is clearly seen that many misstatements have been made concerning the clause and that no positive evidence is extant to prove (1) that the clause was necessary to the adoption of the Constitution, (2) that it was a part of the famous compromise, or (3) that there is a direct connection between the clause in the Ordinance of 1787 and the one in the Constitution. On the other hand it is conceded that this reasoning from negative evidence is not positive proof of the position herein taken.

R. B. Way

Northwestern University
Evanston, Illinois