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The Case of Archie P. Webb, a Free Negro

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THE CASE OF ARCHIE P. WEBB, A FREE NEGRO.

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In Polk County litigation one of the judicial reviews that was of keenest local interest, and under a different combination of circumstances might have been as famous as the Dred Scott case, is that entitled "Archie P. Webb vs. I. W. Griffith." The judge, John Henry Gray, was born in Prince George's County, Maryland, October 16, 1831, and was only thirty-one years of age when he rendered this opinion. His ancestors came to that state with Lord Baltimore, and were prominent in building up some of the towns on the Potomac and Patuxent Rivers, among which were Benedict and Leonard Town.

Having passed through the common school with much credit to himself, he entered Allegheny College, Meadville, Pennsylvania, where he graduated with honors in 1853. Subsequently he studied law and was admitted to practice in Newark, Ohio. In a few months he went to Fort Wayne, Indiana, where, in May, 1855, he was married to Miss Maria Freeman, a native of Massachusetts, who was at that time Preceptress in Fort Wayne Male and Female College. Miss Freeman graduated at the Wesleyan Seminary, Wilbraham, Massachusetts, and came West as a teacher in 1852, under the auspices of the National Board of Popular Education. Immediately after their marriage Mr. Gray and his wife started for Des Moines, Iowa.

In the fall of 1856, Mr. Gray was elected Prosecuting Attorney of Polk County, which place he filled until he was elected Judge of the Fifth Judicial District in 1858. Having served the people faithfully during one term, he was re-elected in 1862 by a large majority, and, though in failing health, continued his official work until a few days before his death, which occurred on October 14, 1865, at his home in Des Moines.

Archie P. Webb, while employed as a laborer in Delaware township, Polk County, and quietly earning his livelihood, was notified by a gang of persecutors to leave the State. This he refused to do. By order of the Justice of the Peace he was arrested, fined, and sent to jail. He was forthwith released by a writ of *habeas corpus,* issued by Judge Gray, and when the case was brought before him, the Judge gave it a patient hearing, and with a full appreciation of its importance, bestowed upon it thoughtful attention.

Chapter 32, Acts of the Third General Assembly, which was the basis of the suit, is as follows:

AN ACT to prohibit the immigration of free negroes into this State:

Section 1. *Be it enacted by the General Assembly of the State of Iowa,* That from and after the passage of this act, no free negro or mulatto, shall be permitted to settle in this State.

Sec. 2. It shall be the duty of all township and county officers, to notify all free negroes who may immigrate to this State, to leave the same within three days from the time of notice, and upon their failure to do so, it shall be the duty of the constable of the proper township, sheriff of the county, marshal or other police officer of the town, to arrest such free negro, and take him or her before a justice of the peace or county judge, and it shall be the duty of such justice or judge to fine such free negro, the sum of two dollars, for each day he may remain in the State after such notice, and costs of such prosecution; and to commit such free negro to the jail of the county or the nearest one thereto, until such fine and costs are paid, or until he will consent to leave the state; *Provided,* it shall be ascertained that he or she is unable to pay such fine or costs.

Sec. 3. That all free negroes now living in this State, who have complied with the laws now in force, shall be permitted to remain here, and enjoy such property as they may now possess, or may hereafter acquire.

Sec. 4. On the trial of any free negro under this act, the justice or judge shall determine from, and irrespective of his person, whether the person on trial comes under the denomination of free negro or mulatto.

Sec. 5. This act to take effect, and be in force, by publication in the Iowa True Democrat, a weekly newspaper published in Mount Pleasant.

Approved February 5th, 1851.

The petition for the writ of habeas corpus filed January 20, 1863, in Polk county, alleged that the defendant was sheriff of Polk County, Iowa; that plaintiff, Archie P. Webb, was imprisoned in the Polk County jail and that according to his best information and belief he was so restrained under a pretended order issued by Stephen Harvey, a justice of the peace in Delaware Township, Polk County, Iowa, and that said order purported to be issued by virtue of proceedings against plaintiff as a free negro living in the State of Iowa after notice to leave; that said restraint was illegal because plaintiff was not arrested on any warrant for the commission of any crime and was allowed no trial by jury and did not waive a trial by jury; that he was tried for no crime or offense against the laws of Iowa or the United States and was confronted with no witnesses and was ordered imprisoned without proof or trial and fined in the sum of Twelve Dollars and costs and in default of payment was ordered imprisoned as aforesaid; and that these illegal proceedings were had on the 20th day of January, A. D. 1863. Plaintiff further alleged that he was informed and believed that the proceedings were void and of no effect and that the pretended law under which the proceedings were had, was never in force and was unconstitutional and void. Wherefore he asked that a writ of habeas corpus issue in order that he might be discharged from imprisonment. The petition is sworn to and the affidavit is signed by Webb in a clear and legible hand. Stephen Sibley appeared as attorney for plaintiff.

Six days later, Webb filed an amendment to his original petition in which amendment he sets out a copy of the order of the writ issued by Justice Harvey to the sheriff of Polk County, Iowa, commanding the sheriff to receive Webb into custody and detain him in the Polk County jail until legally discharged because of his default to answer to the fine of Twelve Dollars and costs amounting to $2.90. In this amendment, Webb further alleges that his restraint is illegal in that he was arrested upon no warrant, nor in the act of committing any crime and that no information was filed before said justice of any character whatever; and that he was accused before said justice

of no crime whatever; and that he was ordered imprisoned without any trial whatever; and without the production of a single witness against him; and was imprisoned without due process of law and without a trial by jury and without the benefit of any counsellor at law; and further alleges that he is informed and believes that said pretended trial and proceedings were under and by virtue of a pretended law that the State of Iowa passed February 5, 1851, to prohibit the immigration of free negroes into this State, which he avers is not a valid, constitutional or existing law in this State. Wherefore he asks to be granted his liberty.

Upon the filing of the petition, Judge J. H. Gray issued an order directed to I. W. Griffith, Sheriff of Polk County, Iowa, commanding him to have the body of Archie P. Webb before the court at 9:00 A. M. of the 21st day of January, A. D. 1863. The sheriff appeared in person and by his attorney J. S. Polk and stated that he now had the body of the said Archie P. Webb before his honor J. H. Gray, Judge, and was detaining him under and by virtue of a writ issued by S. Harvey, Justice of the Peace. Sheriff Griffith also filed an answer, setting up a copy of said writ. The cause appears to have been tried before Judge Gray, and the court upon due consideration ordered the defendant released on the 2d day of February, 1863.

Webb also appears to have appealed to the district court from the fine, in January, 1863, but this appeal was probably dropped. Both parties filed bills of exceptions in the Habeas Corpus case so as to have the record in shape for an appeal.

It is shown in the plaintiff's bill of exceptions that the plaintiff introduced one James Wright, a witness who testified that he was Secretary of State for the State of Iowa and had searched his office for any certificate of publication of the laws passed by the Third General Assembly of the State, exclusive of the code, as well as for any certificate for the distribution of said laws and also for any certificate of the publication in the *True Democrat* newspaper of an act entitled "An act to prohibit the immigration of Free Negroes to the State," and no certificate of any of the above mentioned facts could be found in his office. And plaintiff's attorney also introduced

the pamphlet edition of the said session laws wherein there is no certificate of publication of said act in said *True Democrat,* nor is there printed nor appended to said volume any certificate of publication or the distribution of said law. As these matters were not included in the bill of exceptions filed by the defendant Griffith, the judge made them also a part of the record, upon request of plaintiff.

The defendant's bill of exceptions merely recited that the only evidence offered and read to the court was the plaintiff's admissions that he was born a slave in the state of Mississippi but was a free negro and immigrated to the State of Iowa from the State of Arkansas since 1861 and that he had taken an appeal from the justice court to the district court in the case in which the fine was levied; and that the mittimus under which he was imprisoned was in due form of law.

The defendant through his attorneys, Casady & Polk, served notice of appeal to the Supreme Court of Iowa, but the case was evidently never docketed in the Supreme Court, as it does not appear in list of decided cases as found in McClain's Iowa Digest, nor in the Supreme Court reports. It is the recollection of the family of Judge Gray, however, that the case was appealed and was affirmed by the Supreme Court.

The opinion in full, rendered by Judge J. H. Gray on February 2, 1863, was published in the *Iowa State Register* next day, and was as follows:

ARCHIE P. WEBB, vs. I. W. GRIFFITH, SHERIFF:—This cause came before me in vacation, and at the suggestion of defendant's counsel, an agreement was entered into with the counsel for the plaintiff to continue the hearing thereof until the first day of the present term of court. The facts are briefly these: The plaintiff herein was notified by one of the trustees of Delaware township, in Polk county, to leave the State within three days. He refused. An order was made by Stephen Harvey, a justice of the peace, in and for said township, for the plaintiff's arrest. The sheriff arrested him, took him before the said justice, and he was then tried and fined in the sum of twelve dollars and costs and sent to jail until he should pay the fine and costs or consent to leave the State. In vacation a writ was issued to the sheriff to bring the plaintiff before me to inquire into the legality of his imprisonment. On the trial it was agreed

that plaintiff is a free negro, born in the United States, and that he came from the State of Arkansas to this State since the passage of the law of 1851 excluding free negroes from this State. Upon these facts this cause is submitted to this court. This action arises under that which purports to be a law enacted by the Third General Assembly of the State of Iowa, held in January, 1851, and entitled, "An Act to prohibit the immigration of Free Negroes into this State," and approved February 5, 1851. The first section thereof *excludes free negroes and mulattoes*, from and after the passage of this act, *from settling in this State*. The second section makes it "the duty of all township and county officers to notify all *free negroes* who may immigrate to this State, to leave the same within three days from the time of notice, and upon their failure so to do, it shall be the duty of the constable of the proper township, sheriff of the county, marshal or other police officer of the town, to arrest such free negro and take him or her before a justice of the peace or county judge, and it shall be the duty of such justice or judge to fine such free negro the sum of two dollars for each day he may remain in the State after such notice, and costs of such prosecution, and to commit such free negro to the jail of the county or to the nearest one thereto, until such fine and costs are paid, or until he will consent to leave the State; provided that it shall be ascertained that he or she is unable to pay such fine and costs." The third section provides that "all free negroes now living in this State who have complied with the laws now in force, shall be permitted to remain," etc. The fourth section provides "that on the trial of any such free negro under this act, the justice or judge shall determine from and irrespective of his person, whether the person on trial comes under the denomination of free negro and mulatto." The fifth section provides for its publication, and says, "that it shall take effect and be in force *by publication* in the *Iowa True Democrat*."

The time consumed in the argument, the ability and zeal manifested by the counsel on either side, the very considerable interest manifested by the public and the importance necessarily attached to this case have induced the court to give it a patient hearing and justify an opinion in writing upon the material points urged. In doing so the court will indulge in no evasion nor admit of any equivocation.

The questions to be determined in the case pertain to the validity of this law, and the main points urged by counsel are embraced in the following inquiries:

1st. Has the court jurisdiction of this case?

2d. Is this law in conflict with the Constitution of the United States?

3d. Did it conflict with the old Constitution of this State under which it was enacted?

4th. Has it ever been repealed, either by subsequent legislation or by the adoption of our new Constitution?

5th. Was the law ever legally published?

I.—Has this court jurisdiction to hear and determine this case on writ of *habeas corpus?* There can be no doubt of the proposition urged by defendant's counsel that where a justice of the peace, or inferior court, has *jurisdiction* of a cause, and proceeds to try and *determine* the same and *render final judgment*, that a superior court will not review such proceedings on writ of *habeas corpus*. Had this justice the jurisdiction to try and determine this cause? Section 4427 of the revision says that "A crime or public offense in the meaning of this Code is any act or omission forbidden by law and to which is annexed upon conviction thereof a punishment." Section 4432 of the revision says that "*every* offense *must* be prosecuted by *indictment*, except—1st, Offenses of public officers, when a different mode of procedure is prescribed by law; 2d, Offenses *exclusively* within the jurisdiction of a justice of the peace, or of police or city courts; 3rd, Offenses in cases arising in the army," &c. Every offense, therefore, that does not come within some one of these three exceptions, the law says *must* be prosecuted by *indictment*. Is this case embraced in either one of these exceptions? No one can contend that it is embraced in either, unless it be in the 2nd. Then is it an offense *exclusively* within the jurisdiction of a justice of the peace or of a police or city court? It cannot be *exclusively* within the jurisdiction of the justice when the law says in terms expressly that *either* a *justice* or a *county judge* shall have *jurisdiction* to hear and determine the case. It cannot be asserted that a county judge can hold either a police or city court. Therefore, it being a public offense—neither within the *exclusive* jurisdiction of a justice, or city or police court—it must be prosecuted by indictment. But should it be contended that the sections to which the court has referred are in conflict with the eleventh section of the Bill of Rights of the new constitution—a question which is not here decided—then had the justice jurisdiction under that section, which says that his jurisdiction in criminal causes shall extend only to a fine of one hundred dollars or imprisonment for thirty days? Clearly not. For, suppose the plaintiff to have had notice to leave the State and did not leave, but remained here two months or sixty days *after* he *received* such *notice* and *before* he was *arrested!* Suppose him then to have been arrested and brought before the justice under this law!—what would have been his duty? First, to have found him guilty; then the number of days he had remained since notice, and then to impose the fine of two dollars per day—for such the law

says he *shall* do. What would have been the fine in such case? Certainly *more* than *one hundred dollars*, and this the justice, by the positive terms of this law, could not escape. A justice, under this section, has no jurisdiction to hear and finally determine any offense the penalty to which can, on any contingency, exceed the sum of one hundred dollars or thirty days' imprisonment. The Court is therefore of the opinion that the justice had not jurisdiction to finally determine this case and that the cause is properly before this Court.

II.—Was this Act of the Legislature a violation of the second clause of the fourth Article of the Constitution of the United States, which says: "That the citizens of *each State* shall be entitled to all the privileges and immunities of the citizens of the several States"? The Court understands this to mean that the citizens of any one *State* have the right to go into any other State and enjoy the same privileges that such State has conferred upon its own citizens of the same description—(See 2nd Kent, 7th ed., page 35.) To illustrate:—If citizen women or minors from another State come to Iowa—and they have the same privileges here as are given by the laws of this State to women and minors in Iowa—if, therefore, the Constitution or paramount law of this State withholds the privilege of the elective franchise from women and minors in Iowa, the same description of citizens subsequently immigrating to Iowa cannot claim that privilege. But they are entitled to all other privileges not thus expressly denied to such citizens in this State. And if the Constitution secures to them all *privileges* not thus expressly denied—how much more does it secure to them absolute and natural *rights* expressly guaranteed by the Constitution of this State to all such citizens in this State! Or to more aptly illustrate: If free negroes, born in allegiance to the United States, are citizens of the United States, and residing in any other State, remove from thence to this State, they have all the privileges that are not expressly withheld by the laws of Iowa from free negroes residing in Iowa; and if the Constitution of the United States thus secures to them such *privileges* how much more does it secure all natural and absolute rights, which are guaranteed by the Constitution of this State to such citizens in this State? But it is urged that a negro, though he be free and was born in the United States, of parents whose ancestors were here at the time of the Revolution and thereafter remained loyal to this Government, is, nevertheless, not a citizen within the meaning of the Constitution of the United States. A question of so much importance, rendered complex by precedents of great authority on both sides, and urged at a time when the nation struggles as in the agonies of death, and when the horrors of civil war remind us of our misfortunes relative to this unfortunate race, presents no pleasant or easy task for a court. But it is far better that it be settled by the

courts of this State soon—that the question may be at rest—and the validity of this law determined. Nearly all the authorities cited upon this question are reviewed or alluded to in a note to Kent's Commentaries (vol. 2, 7th ed., page 278), and the doctrine is there laid down, that citizens under our Constitutions and Laws mean free inhabitants, born within the United States, or naturalized by the laws of Congress; that negroes born free, or slaves native born but manumitted, are citizens, but under such disabilities as may be imposed by the laws of a State. The authorities upon this question are divided, and as every freeman born in allegiance to this Government is, or ought to be, considered *prima facie* a citizen, a safer conclusion may be drawn from a consideration of the reasons urged to deprive such a person of his citizenship.

III.—The reasons urged for the support of the doctrine that free, native born persons of color are not citizens of the United States are: 1st—They are a degraded race; 2d—They are not in any of the States admitted to all the privileges and immunities of white citizens; 3d—That they were not represented in that body which formed our National Constitution and therefore are not embraced in the words, "We, the people," &c., which are the first words of our Constitution. As to the first of these reasons: It is more a question of history than of law, and I propose to leave to history that which in my judgment can in no wise affect the law. It may be submitted to the enlightened conscience and the determination of a Christian world whether a race of men forced from home to foreign shores, which they never sought, and sold into bondage, should be more despised than pitied. The second reason urged is: That they are not in any of the States admitted to all the rights and immunities of white *citizens*. Suppose that be true. Does it follow that they are not citizens? The privileges usually withheld from them by a majority of the States are those of voting, holding office, being militiamen and attending school with white children, and the Court is of the opinion without doubt that these privileges may be legally and properly withheld from them by the laws of any State. There is a distinction between rights and privileges. The Constitution *guarantees* to us our natural rights and the means of enjoying them. But it may confer or withhold political privileges and such are those we have enumerated. Do not the Constitution and laws of nearly all the States withhold privileges from some and confer them upon others of their white citizens? In nearly all the States the laws create certain offices, as for instance Governor; but withhold the privilege of any white person from holding it until he arrives at a certain age. Yet, they are *citizens* before they attain that age, though not eligible to that privileged position. Will it do to say that because the elective franchise is withheld from some,

yea, many white citizens—that therefore they are not citizens? The Constitution neither by letter nor spirit has imposed any such conditions for citizenship. It leaves to the several States the right to bestow or withhold the elective franchise as a privilege upon the citizens thereof, as each State may see proper. And each State by its constitution has declared who shall and who shall not enjoy that privilege. Hence all the States exclude females and minors from voting; and some of the States formerly confined the privilege of voting to *owners of real estate.* Some of them now impose property qualifications upon adult white citizens as a requisite to the privilege of voting. The right to *base* the privilege of voting upon such a condition, is coupled with the right to entirely withhold it—because the subject may never be able to perform the condition, and therefore never able to enjoy the right depending upon it. Will anyone maintain that females, and native white persons whose right to the elective franchise thus depended upon conditions which they have never performed—have not the constitutional right to go into any of the States over which that Constitution extends its authority? Suppose the Legislature of the State of Iowa to have passed a law excluding from Iowa all adult native white men of the State of Virginia, whose right to vote in that State depended upon a property qualification, imposed by the laws of Virginia, which they never possessed and were therefore not voters in that State; would it be contended that they were not citizens of the United States, because their poverty had prevented their voting in Virginia, and that therefore the law so excluding them was valid? Or suppose it excluded females and minors from the State—would it be contended that the fundamental principles securing the right to life, liberty and property, laid down in the Constitution, do not go with them and protect them in every State of this Union, though no State has conferred on them the privilege of voting? I urge this to show that the authorities most fully sustain—that citizenship under the Constitution of the United States does not in any manner depend upon the right to vote or upon privileges granted. That by virtue of a man or woman being born in allegiance to this Government, and being free—the Constitution confers upon him or her the high prerogative of citizenship—requires of *all their support* in whatever State they may be found, and guarantees to each its protection in whatever State he or she may enter. The third reason upon which this doctrine has been urged remains to be considered. That is, that they were not represented in that body which formed our National Constitution, and therefore are not embraced in the words, "We, the people," which are the first words of our Constitution. At the time of the ratification of the articles of confederation all free native-born inhabitants of New Hampshire, Massachusetts, New

York, New Jersey, and North Carolina, who had other necessary qualifications, though descended from African slaves, were not only citizens but voters in each of those States. When the Articles of Confederation were under consideration by Congress, a member from South Carolina offered to amend the fourth article by inserting after the word "free" and before the word "inhabitant" the word "white" so that the article would then read the "free white inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States;" &c. But it was voted *down* by a large majority. Thus these persons still exercised the rights of citizens and even voted in those States under the Confederation. When, therefore, these States were called upon to send delegates or representatives to that body which framed our National Constitution, it is reasonable to suppose that these same colored freemen in those States exercised the privilege of suffrage—at least they enjoyed the right so to do. It therefore follows that they who represented those states represented all who had the privilege of the elective franchise in those States. And it is untrue that they were not a part of the *people* so represented. Nay, more: In those States above mentioned, they had the privilege of voting and doubtless did vote upon the ratification of our Constitution. After an examination of the authorities upon this question, together with the reasons upon which they are founded, it appears that a native-born free man of color, whether born free or a slave and manumitted, is a citizen within the meaning of the National Constitution.

If therefore they be citizens of the United States, they are entitled to all the rights guaranteed to, and privileges conferred upon, citizens of the same description in this State. What rights are guaranteed to such citizens in this State by the Constitution thereof? What privileges are withheld from them by our Constitution and laws? The privileges withheld are those of the elective franchise, to hold office and to be militiamen. The rights guaranteed to such citizens in this State by the Constitution under which this law was enacted are, those of "enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." And these rights are guaranteed to such citizens in this State who resided here at the adoption of the Old Constitution. Therefore under the Constitution of the United States the same description of citizens in other States could enjoy these rights in this State. The Constitution of this State is in perfect harmony with the Constitution of the United States in denying to free negroes the privilege of voting, of holding office and being militiamen. But the Legislature had no right to pass a law denying them the right to live in the State when the Constitution guarantees this right to all such citizens in this State at its

adoption. But stress may be placed upon the words "citizens of each State" in this clause, that, therefore, this plaintiff not being a citizen of the *State of Arkansas* is not referred to or embraced under the meaning of this clause. But free negroes *are citizens* of some of the New England States by the laws thereof. Hence, this law if valid, would equally exclude them though citizens of those States. But if this clause refers only to citizens in the sense of citizens of a *State* merely—then it is equally invalid because it *excludes* a description of persons who *are* citizens in some States by the laws thereof. But it cannot be valid as to the citizens of some of the States, and inoperative as to others. If there be one State, the citizens whereof it cannot exclude, neither can it exclude the same description of citizens in any other State. If therefore they have the right to reside in the State and possess property here, how can they enjoy these rights in Iowa when the law, if *valid*, says that they shall not enter the State, directs its officers to arrest and fine them, and forces upon them the entertainment and hospitality of our jails?

IV.—Was this law a violation of the old Constitution of this State under which it was enacted? Article 1st of the Bill of Rights says that "All *men* are by nature free and independent, and have certain inalienable rights, among which are life and liberty—acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." For whose benefit was this clause adopted? Manifestly for all men who were and should thereafter be a part and portion of the PEOPLE of Iowa. What is here meant by *all men?* The term defines itself—it can mean nothing less than all the human race, and when used in this clause means such of the human race as may be within the bounds of the State of Iowa. It is not hard to see that a negro is one of the human race, but it is very difficult to see how he can enjoy the right of life, liberty, acquire, possess, and protect *property*, and obtain happiness and safety in the State of Iowa when the law banishes him from the State. It will be observed that there can be no nice technicalities about citizenship here, for the term used is, *all men.* But again, Section 8, of the Bill of Rights says "that the right of the *people* to be secure in their *persons*, houses, papers and effects against *unreasonable seizures* and *searches* shall not be violated. Is a law reasonable that *arrests* and imprisons a man where the only *crime charged* is that he is a *freeman* and has settled in the State of Iowa? And where the only issue that can be tried is, is he a free negro or mulatto? And has he come to Iowa *since* the passage of this law? And has he had notice to leave the State? If this law authorizes a reasonable seizure, then what *would* be an *unreasonable* seizure? But again, Section 10 of the old Constitution says that in ALL *criminal prosecutions* the

accused shall have a right to a speedy trial by an impartial jury and be *informed* of the accusation *against* him." It cannot be maintained that this is not a *criminal* prosecution, for the law itself *directs*, first, a notice to leave, then his arrest, then his trial, then a fine and payment of all "costs of the *prosecution*," and then his imprisonment. What more can be added to complete a criminal prosecution? But the Constitution says: "*In* ALL *criminal prosecutions*." If this *is one*, then it is clearly embraced in the term "*all*," and is covered directly by this clause. It says that the *accused shall have the right* to a speedy trial by an impartial jury. Here no technical doubts can arise, either as to citizenship, color or condition, for the language is plain. It is "the *accused* shall have", etc. This *law fixes* upon the negro the accusation and designates *him* as the *accused*. Then the Constitution says he *shall have* the right to a speedy trial by an impartial JURY. But what does this law say? It says that "on the trial of any free negro under this act, the *justice* or *judge* shall determine from, and irrespective of his person, whether *the person* on trial comes under the denomination of a free negro or mulatto." How can he have an impartial trial by jury, when the law says that the justice or judge *shall determine* the only issue that can be tried? Can a law so at variance with the Constitution be valid? But can this section of the law be void and the remaining sections of it be in force? By close attention to the reading of the law it will be observed that this is the only section that legally defines the crime by stating *the issue* to be *tried*. A law that only fixes a penalty without *defining* the crime, when it is one of statutory creation and unknown to common law, is inoperative and void, and such is the case with this law under the constitution in force at its enactment.

V.—As to the repeal of this law, but a word need be added. What has been said relative to the old Constitution applies with still *greater* force under the new Constitution, and if the law had been in force under a Constitution allowing its enactment—it would have been repealed by the adoption of our new Constitution. Section 4426 of the revision says that "all laws coming within the purview of this act, shall become repealed when this act goes into effect, except as hereinafter provided." The Court is of the opinion that the fourth section of this act does come within the purview of Section 4432, which says that "every public offense must be prosecuted by indictment, except (see 2d clause) offenses *exclusively* within the jurisdiction of justices of the peace or of police or city courts, etc., and that, therefore, so much of this law was thereby repealed. This section being the only one legally stating the issue to be tried, or crime, created by the law, the law itself is therefore rendered of no effect.

The position assumed, that the law was repealed by *non user*, is so untenable as to need no refutation. For the law is well settled that before custom can make or *non user* repeal a law, either must be of such duration as that the memory of men runneth not to the contrary. The fact that the law has remained a dead letter and has not been enforced for twelve years is not a sufficient *non user* to repeal it.

The last inquiry is as to whether this law, if valid, was ever legally published. The evidence before the court shows clearly that the Session Laws of 1851 were distributed as required by the law, though there are informalities about the evidence of that fact. The position that the law authorizes its taking effect "by publication" in a newspaper, and that it was never so published, and therefore it never did become a law, is in the opinion of the court equally unfounded. The code passed at that session, made provision for the taking effect of all laws not published as directed in newspapers. This construction certainly introduces too technical a practice, and therefore should not maintain. If therefore the law had been valid, it would have gone into effect as did other laws of that session.

Having thus disposed of all material points urged by counsel the judgment of the Court is that the law under which the plaintiff was arrested is inoperative and void; that the proceedings thereunder were therefore unauthorized, that the plaintiff herein is entitled to his liberty, and that he is hereby discharged from imprisonment.

Of the opinion rendered in the case editorial comment ran as follows:

We publish in full in this issue of the REGISTER the Decision of Judge Gray, rendered on the 2d inst. in the case of ARCHIE P. WEBB. The case was one of great interest, and the Judge, with a full appreciation of its importance, has bestowed upon it thoughtful attention. His opinion is one of marked ability, and will be read with satisfaction by every citizen who cares to see justice impartially administered among men.

What other scheme of rascality the miserable demagogues who impelled this prosecution will attempt next, time will probably develop. They have been marked by a reading and thinking public, and will not be soon forgiven or forgotten![1]

(Special Dispatch to the Chicago Tribune.)

Des Moines, Iowa, Feb. 2d, 1863.—Judge Gray of the District Court today read his decision in the *habeas corpus* case of the negro, Archie P. Webb. The court house was filled by an anxious

[1]Editorial, *Des Moines Daily State Register*, February 3, 1863.

audience, and the reading of the decision was listened to with breathless attention. The Judge held that under the Constitution of the United States a free negro is entitled to the rights of citizenship; that Archie P. Webb is a free negro, and as such entered the State of Iowa; that the act of 1851, under which he had been arrested and imprisoned, was in flagrant violation of the old Constitution then in force, and the new, which is now the fundamental law of the State, and overrides the plainest principles of the common law. He held the act to be null and void, and his decision, therefore, was that Archie has been unwarrantably arrested and imprisoned, and must be immediately set at liberty.

The opinion had been prepared with care and will be published in full. Thus has ended a wicked scheme of a gang of semi-traitors to inaugurate a general system of persecution against the free negroes in this State, and to that extent embarrass the execution of the President's Emancipation Proclamation in the Mississippi Valley

The *Burlington Hawk-Eye* published a lengthy article upon this decision from which the following is quoted:

The Judge gave his opinion today. It was elaborate and forcible, covering all the ground necessary to a complete vindication of the right of every man to liberty who has not forfeited it by crime. With a frankness and boldness that does him honor, Judge Gray met the case before him. He rejoiced in the opportunity to establish in this case the unity of justice and law. The people of Iowa will thank Judge Gray for vindicating the charter of their liberties, and throwing the shield of the law over the weak and helpless, who have sought a refuge in our midst. When he decreed the freedom of Archie P. Webb, and snapped the meshes that had been so artfully thrown around an innocent and unoffending man, he gave a verdict that will be sustained by the highest legal tribunals of the Country and the chancery of Heaven.

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25 CENTS REWARD.

Ran away from the subscriber on the night of the 19th instant, an indented apprentice, named DENA KILLING, about 12 years of age. Any person returning said apprentice shall receive the above reward but no charges.

ELIJAH BUEL.

Lyons, Sept. 25, '39.

—*Iowa Sun*, Davenport, November 13, 1839.