Supplementary Material

Chapter 5: The Jacksonian Era—Equality/Race/Slavery in the Free States

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Lemmon v. the People, 6 E.P. Smith 562 (NY 1860)

Juliet and Jonathan Lemmon traveled with eight slaves from Richmond, Virginia, to Texas. Their itinerary required a brief stop in New York City in order to board a steamboat to their final destination. While the Lemmons waited for their boat, Louis Napoleon, a free person of color, sought a writ of habeas corpus for their slaves. Napoleon based his claim on a New York statute declaring, "every person brought into this state as a slave . . . shall be free." The Lemmons claimed that the New York law violated the privileges and immunities clause in Article IV as well as the commerce clause. The Supreme Court of New York granted the writ of habeas corpus. The Lemmons appealed that decision to the Court of Appeals of New York.

Northern judges frequently freed slaves taken by their traveling masters into free states. Commonwealth v. Aves *(1836) was the most important precedent supporting that practice. Chief Justice Shaw claimed that Massachusetts law incorporated the common law antipathy to slavery. He employed that principle to free slaves who entered Massachusetts with permission of their masters. The crucial passage of his opinion asserted,*

> *That, as a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, civil and criminal, and entitled to the privileges which those laws confer; that this rule applies as well to blacks as whites, except in the case of fugitives, to be afterwards considered; that if such persons have been slaves, they become free, not so much because any alteration is made in their status, or condition, as because there is no law which will warrant, but there are laws, if they choose to avail themselves of them, which prohibit, their forcible detention or forcible removal.*

Some commentators in the late 1850s thought the Dred Scott *decision was inconsistent with* Aves *and similar state court precedents. If persons had a due process right to bring slaves in American territories, perhaps persons had a due process right to bring slaves into free states.*

The Court of Appeals of New York by a 5–3 vote sustained the lower court decision to grant the writ of habeas corpus. The judicial majority ruled that the Lemmon slaves became free when they entered New York. Judge Denio's majority opinion concluded that New York could free all slaves who were ***voluntarily*** *taken into the state. Why does Denio reject the privileges and immunities clause argument? Judge Wright insisted that the slaves would have been free even if New York had no law on the subject. Why does he claim* Somerset v. Stewart *(1772) supports his conclusion?*

The Lemmons appealed to the Supreme Court of the United States, but their appeal was mooted by the Civil War. How would the Taney court have decided that case? Suppose the Lemmons had moved to New York with their slaves. Abraham Lincoln insisted that the Supreme Court might have sustained their right to bring slaves permanently into a free state. Can you find reason in either Dred Scott *or in the* Lemmon *dissent to support this prediction?*

JUDGE DENIO

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The Constitution declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. No provision in that instrument has so strongly tended to constitute the citizens of the United States one people as this. . . . The question now to be considered is, how far the State jurisdiction over the subjects just mentioned is restricted by the provision we are

considering; or, to come at once to the precise point in controversy, whether it obliges the State governments to recognize, in any way, within their own jurisdiction, the property in slaves which the citizens of States in which slavery prevails may lawfully claim within their own States—beyond the case of fugitive slaves. . .

The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported. . . . Our laws declare contracts depending upon games of chance or skill, lotteries, wagering policies of insurance, bargains for more than 7 per cent per annum of interest, and many others, void. In other States such contracts, or some of them, may be lawful. But no one would contend that if made within this State by a citizen of another State where they would have been lawful, they would be enforced in our courts. . . .

The Legislature has declared, in effect, that no person shall bring a slave into this State, even in the course of a journey between two slaveholding States, and that if he does, the slave shall be free. Our own citizens are of course bound by this regulation. If the owner of these slaves is not in like manner bound it is because, in her quality of citizen of another State, she has rights superior to those of any citizen of New York, and because, in coming here, or sending her slaves here for a temporary purpose, she has brought with her, or sent with them, the laws of Virginia, and is entitled to have those laws enforced in the courts, notwithstanding the mandate of our own laws to the contrary. . . . I concede that this clause gives to citizens of each State entire freedom of intercourse with every other State, and that any law which should attempt to deny them free ingress or egress would be void. But it is citizens only who possess these rights, and slaves certainly are not citizens. . . . But it is not the right of the slave but of the master which is supposed to be protected under the clause respecting citizenship. The answer to the claim in that aspect has been already given. It is that the owner cannot lawfully do anything which our laws do not permit to be done by one of our own citizens, and as a citizen of this State cannot bring a slave within its limits except under the condition that he shall immediately become free, the owner of these slaves could not do it without involving herself in the same consequences.

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. . . I have come to the conclusion that there is nothing in the National Constitution or the laws of Congress to preclude the State judicial authorities from declaring these slaves thus introduced into the territory of this State, free, and setting them at liberty, according to the direction of the statute referred to.

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JUDGE WRIGHT

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. . . [L]iberty is the natural condition of men, and is world-wide: whilst slavery is local, and beginning in physical force, can only be supported and sustained by positive law. . . .

It is not denied that New York has effectually exerted her sovereignty to the extent that the relation of slave owner and slave cannot be maintained by her citizens, or persons or citizens of any other State or nation domiciled within her territory, or who make any stay beyond the reasonable halt of wayfarers, and that this she might rightfully do. . . .

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. . . It is entirely clear that the [Constitutional] Convention [of the United States] was averse to giving any sanction to the law of slavery, by an express or implied acknowledgment that human beings could be made the subject of property; and it is moreover manifest from all the provisions of the Constitution, and from contemporaneous history, that the ultimate extinction of slavery in the United States, by the legislation and action of the State governments (instead of adopting or devising any means or legal machinery for perpetuating it), was contemplated by many of the eminent statesmen and patriots who framed the Federal Constitution, and their contemporaries both north and south. The provision in relation to fugitives from service, is the only one in the Constitution that, by an intendment, supports the right of a slave owner in his own State, or in any other State. This, by its terms, is limited to its special case, and necessarily excludes federal intervention in every other. This has been always so regarded by the federal courts and the cases uniformly recognize the doctrine, that both the Constitution and laws of

the United States apply only to fugitives escaping from one State and fleeing to another; that beyond this the power over the subject of slavery is exclusively with the several States, and that their action cannot be controlled by the Federal Government. . . .

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The constitutional provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" . . . is also invoked as having some bearing on the question of the appellant's right. I think this is the first occasion in the juridical history of the country that an attempt has been made to torture this provision into a guaranty of the right of a slave owner to bring his slaves into, and hold them for any purpose in, a non-slaveholding State. The provision was always understood as having but one design and meaning, viz., to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens. . . .

. . . The State has declared, through her Legislature, that the *status* of African slavery shall not exist, and her laws transform the slave into a freeman the instant he is brought voluntarily upon her soil. . . . But if there were no actual legislation reaching the case of slavery in transit, the policy of the State would forbid the sanction of law, and the aid of public force, to the proscribed *status* in the case of strangers within our territory. It is the *status,* the unjust and unnatural relation, which the policy of the State aims to suppress, and her policy fails, at least in part, if the *status* be upheld at all. . . . The State deems that the public peace, her internal safety and domestic interests, require the total suppression of a social condition that violates the law of nature . . . ; a *status,* declared by Lord MANSFIELD, in *Somerset's case,* to be "of such a nature that it is incapable of being introduced on any reasons, moral or political;" that originates in the predominance of physical force, and is continued by the mere predominance of social force, the subject knowing or obedient to no law but the will of the master, and all of whose issue is involved in the misfortune of the parent; a *status* which the law of nations treats as resting on force against right, and finding no support outside of the municipal law which establishes it. . . . . Men are not the subject of property by such law, nor by any law, except that of the State in which the *status* exists; not even by the Federal Constitution, which is supposed by some to have been made only to guard and protect the rights of a particular race; for in that human beings, without regard to color or country, are treated as persons and not as property. The public law exacts no obligation from this State to enforce the municipal law which makes men the subject of property; but by that law the strangers stand upon our soil in their natural condition as men. . . .

My conclusions are, that legal cause was not shown for restraining the colored persons, in whose behalf the writ of *habeas corpus* was issued, of their liberty; and that they were rightly discharged. I have aimed to examine the question involved in a legal, and not in a political aspect; the only view, in my judgment, becoming a judicial tribunal to take. Our laws declare these persons to be free; and there is nothing which can claim the authority of law within this State, by which they may be held as slaves. Neither the law of nature or nations, nor the Federal Constitution, impose any duty or obligation on the State to maintain the state of slavery within her territory, in any form or under any circumstances, or to recognize and give effect to the law of Virginia, by which alone the relation exists, nor does it find any support or recognition in the common law.

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JUDGE CLERKE, dissenting

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If . . . by the law of nations, the citizen of one government has a right of passage with what is recognized as property by that law, through the territory of another, peaceably, and that too without the latter's acquiring any right of control over the person or property, is not a citizen of any State of this confederacy entitled, under the compact upon which it is founded, to a right of passage through the territory of any other State, with what that compact recognises as property, without the latter's acquiring any right of control over that property.

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Every State is at liberty, in reference to all who come within its territory, with the intent of taking up their abode in it for any length of time, to declare what can or cannot be held as property. As, however, by the law or implied agreement which regulates the intercourse of separate and independent nations towards each other, all things belonging to the citizen of anyone nation, recognized as property by that law, are exempt in their passage through the territory of any other, from all interference and control of the latter; so, *a fortiori,* by the positive compact which regulates the dealings and intercourse of these States towards each other, things belonging to the citizen of any one State, recognized as property by that compact, are exempt, in their passage through the territory of any other State, from all interference and control of the latter. The right to the labor and service of persons held in slavery, is incontestably recognized as property in the Constitution of the United States. The right yielded by what is termed comity under the law of nations, ripens, in necessary accordance with the declared purpose and tenor of the Constitution of the United States, into a conventional obligation, essential to its contemplated and thorough operation as an instrument of federative and national government. While the violation of the right yielded by what is termed comity under the law of nations, would, under certain circumstances, be a just cause of war, the rights growing out of this conventional obligation are properly within the cognizance of the judicial tribunals, which they are bound to recognize and enforce.

That portion of the act of the Legislature of this State which declares that a slave brought into it belonging to a person not an inhabitant of it shall be free, is unconstitutional and void, so far as it applies to a citizen of any other State of this Union, where the right to property in the service and labor of slaves exists, who is passing through this State, and who has no intention of remaining here a moment longer than the exigencies of his journey require.