AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 5: The Jacksonian Era—Individual Rights/Property

**State v. Hawthorn, 9 Mo. 389** (1845)

*Benjamin Hawthorn, an agent of Walter Gregory, sold lottery tickets to support the Saint Louis Hospital. The Missouri legislature originally authorized the sale of these lottery tickets in 1833. In 1835, the state legislature authorized government agents to make contracts with private parties to manage the lottery. Walter Gregory subsequently purchased the right to sell those lottery tickets from Dudley Gregory, the original party to the contract with the state. In 1842, Hawthorn was charged with selling lottery tickets unauthorized by Missouri law, which at the time specified that the lottery would cease after $10,000 had been raised for the hospital. The trial judge ruled that Hawthorn had not violated state law. After Missouri appealed that decision to the Supreme Court of Missouri, the state legislature passed a law prohibiting all lotteries within the state. Hawthorn and Gregory claimed that the state prohibition on lotteries violated the contracts clause of the Constitution because they had a preexisting agreement with the state that authorized them to sell lottery tickets.*

*The Supreme Court of Missouri unanimously ruled that Hawthorn had a constitutional right to continue selling lottery tickets. Judge Napton’s majority opinion held that the state had made a contract with Gregory and that the state ban on lotteries violated the contracts clause. Judge Napton insisted that the state could have prohibited all lotteries in 1835, two years after the lottery was authorized. Why did the events of 1835 change the result in this case? More than thirty years later, the Supreme Court of the United States in* Stone v. Mississippi *(1880) unanimously reached a different result, holding that states could not contract away the power to ban such public nuisances as lotteries. What changed from 1845 to 1880? Notions of law? Beliefs about lotteries?*

NAPTON, J.

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. . . . By th[e] act [of February 26th, 1835], the commissioners were authorized “to contract with any person to have said lottery drawn in any part of the United States, on such terms as they shall consider most advantageous.” We have no difficulty in saying that a contract made in pursuance of this act, is as much obligatory upon the State as upon the other contracting party, and the Legislature could pass no law impairing its obligation. . . . The right to sell the tickets was transferred to Gregory, until that portion of the proceeds of their sale, which belonged to the hospital, should amount to the sum authorized to be raised by the act.

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It has been argued that Gregory, by his contract with the commissioners, became thereby a mere sub-agent of the State, and as such could exercise no powers, or acquire any interests, which were not conferred upon the manager appointed by the commissioners under the act of 1833. If this construction of the contract be warranted, the whole subject remained in the power of the Legislature, upon the principles heretofore assumed. But an examination of this contract will, we apprehend, show a material difference between the cases. Under the act of 1833, the manager appointed by the commissioners received a fixed salary, we suppose proportioned to the value of his services; the entire expense, responsibility and risk, if there were any, rested on the commissioners. He was a mere agent of the commissioners, subject to their control, and therefore indirectly the agent of the State. Gregory, on the other hand, agrees to pay a definite percentage upon the sale of tickets, and assumes upon himself the entire expense of managing the lottery, takes upon himself all the risks, and makes himself responsible for the payment of all prizes. Under the act of 1833, the manager took upon himself no risk whatever, and was a mere agent, with or without a compensation. If he received a compensation, as we may assume that he did, that compensation ceased by the will of the Legislature, whose agent he was, and from whom he derived his authority; he was in no worse condition than any officer of the State, whose fees may be reduced or entirely taken away at the pleasure of the Legislature. Not so with the contractors under the act of 1835. The privilege of selling tickets within this State, until a certain sum of money is raised, is sold to them. The value of this privilege may depend very much on its duration. The first drawings may be very unprofitable, and yet the percent upon the sale of tickets which belongs to the hospital remains the same. Although bound to pay this percent only upon the tickets actually sold, the willingness of this contractor to give this rate of profit, may have been owing to calculations upon the sale of all the tickets authorized to be sold. Had the commissioners been authorized to raise only five instead of ten thousand dollars, would the purchasers of such a privilege have been willing to give as large a percent upon the sale of tickets in the one case as in the other? This it is manifest must depend upon the expense necessary to be encountered in conducting such operations, a matter about which there is no evidence, and concerning which we are left to mere conjecture. The validity of the law cannot depend upon the value of the contract, and though we may infer from the peculiar character of this contract, that the interference of the Legislature with it, before its completion, would not occasion any pecuniary loss to Gregory or his assignee, that circumstance does not affect the right of the defendant to insist upon his entire contract.

It is observed that Gregory reserved to himself the right of abandoning this contract on sixty days’ notice, or upon an interference by the Legislature or judiciary. Had the State or the commissioners reserved a similar privilege, the question now presented would not have arisen. This only shows that the commissioners were willing to extend a privilege to the contractor, which they did not think proper to reserve to themselves. The right of the Legislature to rescind the bargain is not anywhere recognized by either party, but the actual interference with its execution on the part of the State is merely recognized as an occurrence which may authorize the vendee to abandon his bargain. This however is left to his option. He has not thought proper to take this course, but insists upon his rights under the contract.

We are aware that it is at all times a delicate task, for a court to question the validity of a legislative enactment. It is certainly an unpleasant one, where the court feels every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals. These considerations however cannot be permitted to discharge us from the performance of a duty imposed by the Constitution, and especially where reason and justice unite with the constitutional prohibition in teaching that a Legislature can no more violate a contract made by themselves, or under their authority, than they can rescind or alter, or impair the obligation of one made between private individuals.