Supplementary Material

Chapter 5: The Jacksonian Era—Individual Rights/Property

State v. Phalen, 3 Harr. 441 (1842)

James Phalen and his associates in 1839 purchased the right to run a lottery to raise funds for local buildings from Jehu Stockley and others. Stockley and his associates had been appointed the managers of that lottery by an act passed by the Delaware legislature in 1827. That act explicitly gave Stockley the authority to sell the right to run the lottery to third parties. In 1841, the Delaware state legislature passed a law requiring persons conducting any lottery authorized by the state to pay additional fees for the privilege of continuing their business. The preface to that law asserted, "Whereas, the drawing of lotteries now under contract, and authorized by acts of the legislature of this State, cannot at present be prohibited, but may be, and it is expedient should be, regulated." When Delaware sued to collect the fees, Phalen claimed the state law violated the contracts clause of the Constitution of the United States. The trial court reserved that question for the Court of Errors and Appeals of Delaware.

The Court of Errors and Appeals of Delaware ruled that the additional fees violated the contracts clause. Chancellor Johns held that Phalen had a valid contract with the state and that the additional fees unconstitutionally increased the purchase price. Why did Johns insist that a contract existed? Suppose the Delaware legislature had not prefaced the act of 1841. Same result? How did Johns distinguish this case from Charles River Bridge v. Warren Bridge *(1837)? Do you find the distinction convincing?*

JOHNS, JR., CHANCELLOR-

The first question submitted for our consideration and decision relates to the constitutionality of the act of 1841, regarding the contract of 1839 under the protection of the tenth section of the first article of the constitution of the United States, which in the latter clause declares that no State shall pass "any law impairing the obligation of contracts." . . . The defendants insist upon their rights as derived from and exercised under a written contract, executed as they contend under the express sanction of a legislative act. It is against the right or power of the legislature to vary or impair vested rights thus acquired and for a valuable consideration purchased, that they rely upon the clause in the tenth section of the constitution of the United States as their shield and defense. . . . If we advert to the recital of the act of the 20th of February, 1841, it is apparent that the legislature by which that act was enacted, expressly recognize the existence of contracts under which lotteries were then drawing, and in consequence of the existence of such contracts, declare that the drawing cannot be prohibited but may be regulated. This legislative construction of their own powers and the admitted inability to prohibit in consequence of the existence of a contract, would seem fully to establish beyond all question, that the written instrument executed in 1839 is a contract. . . .

. . . . We all agree that the act of 1827 authorizing the lottery to be drawn, is neither a grant nor a contract. It is a bare delegation of authority by which the drawing of the lottery is sanctioned, until a certain amount or sum shall be raised for a certain purpose. If the act had confined the authority to the simple agency of the managers on behalf of the State, the question now presented might not have occurred. But in the act we find the managers are empowered to raise the sum of $10,000, either by drawing the lottery themselves or through their agents, or by a sale of the powers granted in the lottery act. Hence, although we regard the act as making no grant or contract with the managers, we cannot disregard the authority granted to them to make a contract with others for a valuable consideration,

which would be binding on the State. While the authority or power delegated remained in the hands of the managers or agents of the legislature, it was subject to the control of the legislature, either to repeal, modify or change. As a mere letter of attorney, it could be revoked. But from the time when a contract was made under the authority conferred by the act to make a sale, a new state of things took place: an authorized contract between the managers and third persons, for a valuable consideration, conferred new rights and imposed new obligations. The contract having been made in pursuance of the powers contained in the letter of attorney, and in strict conformity therewith, as also to give effect to the purpose therein intended, must be obligatory upon the principal; nor under such circumstances can it be competent for the principal, even should he revoke the letter of attorney, to annul or even impair the contract: its obligation rests upon him as strongly as if he had himself primarily made it and received the consideration paid. Regarding, therefore, the legislature as the principal, under whose authority the contract of 1839 was made, we do consider they had no right to violate this contract, or so revoke or modify the contract as to impair its obligation. But the act of 1841 does not assume to revoke its authority, but to modify by regulating the exercise of the powers delegated, after the same had become the property of third persons as purchasers by sale: that act recognizing the existence of certain lottery grants as under contract, and affirming that with respect to such they had no right to prohibit.

The question then recurs, was the modification of the lottery grant by act of 1841, being under contract at the time, an unconstitutional interference with the contract of 1839? The managers had by that contract for the consideration of $10,000, payable in semi-annual installments of $1,000 for five years, sold and transferred to Phalen & Co., the defendants, all the power, rights and privileges to draw the lottery as authorized by the act of 1827, during the period of five years. . . . Upon such a contract and the rights vested and exercised under it after the lapse of two years from its execution, the legislature by the act of 1841, declare that all persons drawing lotteries should pay to the school fund $10 for each drawing, and $50 to the parties entitled to the purchase money to be credited on account thereof. The simple question we have to settle in the present case is, does this addition of $10 on each drawing and variation of the time of payment of the installments of the purchase money by requiring $50 thereof to be paid at each drawing, interfere with the contract made with Phalen & Co., in the year 1839, so as to impair the obligation thereof? It has been said that this was no additional charge impairing the contract, because it would come in as a charge, and the defendants would have the right to draw on to realize the additional sum. We entertain a very different opinion: the parties by their contract agreed to no such thing. The defendants agreed to pay $10,000 for the privileges of the lottery act of 1827, with the then existing charges. If the legislature could add $10 on each drawing, they might add $1,000; it is a question of power and not of amount. So as to the imposition of $50; if they can vary the time of payment of a part of the purchase money, why not the whole; but we consider it our duty to say the legislature had no right thus to add to or vary the contract of 1839; and that such addition and variation thereof, as it increases the amount which the defendants agreed in five years to pay for the exercise of a privilege during five years, and also varies the mode and time of payment of the sum agreed to be paid, it necessarily has the effect of impairing the obligation of the contract. Independent of the constitution of the United States the act, although clearly contrary to right and incapable of being sustained, yet as the act of a sovereign power, might be valid; for it is not always that power regards right; experience teaches that power unlimited, often tramples upon and disregards private right. But when we turn to the clause in the constitution of the United States, which appears there inserted as a shield and defense against all legislative action by a State impairing the obligation of contracts, we feel authorized to say, not only that the legislature had no right, but they had no power to regulate in the manner attempted by the act of 1841, the existing contract of 1839.

In the argument of this case our attention has been drawn to the case of *the Charleston Bridge Co. v. The Warren Bridge* (1837). It does not appear to us analogous, or that the conclusion we have arrived at in reference to the questions submitted conflict with the decision in that case. It only establishes that where the legislature had made a grant out of one of the great powers of government for the purpose of authorizing a bridge to be made with the franchise of toll, it had not exhausted the power so as to prohibit it from granting a similar power to another company for the erection of another bridge (and a free bridge,) over the same stream, although such grant might in effect prejudice or destroy the first

bridge. The case before us is not the question whether the power of making other lottery acts still remains in the legislature after this was sold to defendants; nor whether such additional act, though to the injury of the defendants, would be unconstitutional; but it is whether the power still exists in the legislature by direct action, to burthen and impair the contract made and transferred under a subsisting act. The question in the case cited was whether a contract and sale of a certain legislative power or privilege to build a bridge was a monopoly, and restrained the legislature from granting a similar power to others. The question here is, whether the legislature could directly add to or vary a contract made under its authority.