Supplementary Material

Chapter 6: The Civil War and Reconstruction—Individual Rights/Property/Contracts/Slavery

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Osborn v. Nicholson, 80 U.S. 654 (1871)

In 1861, Henry Osborn sold a slave for $1,300 to A. G. Nicholson. The contract required Nicholson to pay Osborn at the end of the year. Before payment was made, the slave was liberated by the Union army. In 1865, the Thirteenth Amendment was ratified. Osborn nevertheless sued Nicholson for the original purchase price. Federal District Judge Henry Clay Caldwell found for Nicholson on the ground that relief was inconsistent with the Thirteenth Amendment and a provision in the Constitution of Arkansas prohibiting courts from enforcing contracts for the sale of slaves. Caldwell's opinion asserted that the post–Civil War Amendments had "effected the repeal to annihilate slavery, and all its incidents, and all rights and obligations growing out of it." Osborn appealed to the Supreme Court of the United States.

The Supreme Court reversed the lower federal court, holding that sellers could sue for the purchase price whenever their contracts for the sale of slaves were made before the Thirteenth Amendment or Emancipation Proclamation. Justice Swayne's majority opinion insisted that civilized countries enforce contracts that were legal when made, no matter how abhorrent the subject of the contract. The contract clause, he contended, adopted this principle. Why did Justice Swayne insist that the Thirteenth and Fourteenth Amendments did not modify the contracts clause? Why did Chief Justice Chase disagree? What is your opinion? What do you believe best explains why a Lincoln judicial appointee (Swayne) insisted that a contract for the sale of slaves is judicially enforceable?

JUSTICE SWAYNE stated the case, and delivered the opinion of the court.

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. . . [T]he constitution of Arkansas of 1868 . . . annuls all contracts for the purchase or sale of slaves, and declares that no court of the State should take cognizance of any suit founded on such a contract. . . . It is sufficient to remark that as to all prior transactions the constitution is in each of the particulars specified clearly in conflict with that clause of the Constitution of the United States, which ordains that 'no State shall' . . . 'pass any law impairing the obligation of contracts.' Nor do we deem it necessary to discuss the validity of the contract here in question when it was entered into. Being valid when and where it was made, it was so everywhere. With certain qualifications not necessary to be considered in this case, this is the rule of the law of nations. . . .

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. . . Let it be supposed that, subsequently, a lesion of the brain of the slave occurred, and that permanent insanity ensued, or that, from subsequent disease, he became a cripple for life or died, or that, by the subsequent exercise of the power of eminent domain, the State appropriated his ownership and possession to herself, can there be a doubt that neither of these things would have involved any liability on the part of the seller? He was not a perpetual assurer of soundness of mind, health of body, or continuity of title. A change of the ownership and possession of real estate by the process of eminent domain is not a violation of the covenant for quiet enjoyment. . . .

. . . Emancipation and the eminent domain work the same result as regards the title and possession of the owner. Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim.

. . . The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties, but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted. We can neither detract from one nor supply the other.

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All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the National Constitution which forbids a State to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself.

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It has been earnestly insisted that contracts for the purchase and sale of slaves are contrary to natural justice and right, and have no validity unless sustained by positive law; that the right to enforce them rests upon the same foundation, and that when the institution is abolished all such contracts and the means of their enforcement, unless expressly saved, are thereby destroyed. . . .

. . . [Slavery] has existed largely under the authority of the most enlightened nations of ancient and modern times. Wherever found, the rights of the owner have been regarded there as surrounded by the same sanctions and covered by the same protection as other property. The British government paid for the slaves carried off by its troops from this country, in the war of 1812, as they did for other private property in the same category. The Constitution of the United States guaranteed the return of persons 'held to service or labor in one State under the laws thereof, escaping into another.' 'The object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State in the Union, into which they might escape.' Historically it is known that without this provision, the Constitution would not have been adopted, and the Union could not have been formed.

But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the thirteenth amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law.' This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation. What would be the effect of an amendment of the National Constitution reaching so far—if such a thing should occur—it is not necessary to consider, as no such question is presented in the case before us.

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Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy, as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the civil law, is there anything to warrant the result contended for by the defendants in error. Neither the rights nor the

interests of those of the colored race lately in bondage are affected by the conclusions we have reached. . . .

THE CHIEF JUSTICE dissented . . .

1st. That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law.

2d. That the laws of the several States by which alone slavery and slave contracts could be supported, were annulled by the thirteenth amendment of the Constitution which abolished slavery.

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4th. That the clause in the fourteenth amendment of the Constitution which forbids compensation for slaves emancipated by the thirteenth, can be vindicated only on these principles.

5th. That clauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.