

Menard Vs. Aspasia

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Decided On : 1831

Appeal No. : 30 U.S. 505

Appellant : Menard

Respondent : Aspasia

Judgement :

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Menard v. Aspasia

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ERROR TO THE SUPREME COURT

OF THE STATE OF MISSOURI

SYLLABUS

The mother of Aspasia, a colored woman, was born a slave at Kaskaskia, in Illinois, previous to 1787 and before that country was conquered for Virginia. Aspasia was born in Illinois subsequent to the passage of the ordinance for the

government of that territory. Aspasia was afterwards sent as a slave to the State of Missouri. In Missouri, Aspasia claimed to be free under the "Ordinance for the government of the territory of the United States northwest of the River Ohio," passed 13 July, 1787. The Supreme Court of Missouri decided that Aspasia was free, and Menard, who claimed her as his slave, brought this writ of error under the 25th section of the act of 1789, claiming to reverse the judgment of that court. *Held* that the case is not within the provisions, of the 25th section of the act of 1789.

The provisions of the compact which relate to "property" and to "rights" are general. They refer to no specific property or class of rights; it is impossible, therefore, judicially to limit their application. If it were admitted that Aspasia is the property of the plaintiff in error, and the Court were to take jurisdiction of the cause under the provisions of the ordinance, must it not on the same ground interpose its jurisdiction in all other controversies respecting property which was acquired in the Northwestern Territory?

Whatever right may be claimed to have originated under the Ordinance of 1787, it would seem that a right to the involuntary service of an individual could not have had its source in that instrument. It declares that "there shall not be slavery nor involuntary servitude in the territory." If this did not destroy a vested right in slaves, it at least did not create or strengthen that right.

If the decision of the Supreme Court of Missouri had been against Aspasia, it might have been contended that the revising power of this Court, under the 25th section of the Judiciary Act, could be exercised. In such a case, the decision would have been against the express provision of the ordinance in favor of liberty, and on that ground, if that instrument could be considered under the circumstances as an act of Congress within the 25th section, the jurisdiction of this Court would be unquestionable. But the decision was not against, but in favor, of the express provision of the ordinance.

The general provisions of the Ordinance of 1787 as to the rights of property cannot give jurisdiction to this Court. They do not come within the 25th section of the

Judiciary Act.

An action of assault and battery was instituted in the Circuit Court for the County of St. Louis in the State of Missouri, by Aspasia, a woman of color, to establish her right to freedom. By consent of the parties, and in conformity with the law of that state, the facts were submitted to the determination of the court without the intervention of a jury.

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The evidence, as disclosed in the bill of exceptions, established the following case:

The mother of Aspasia, the defendant in error, was born a slave, and was held as such by a French inhabitant of Kaskaskia, Illinois, previous to the year 1787, and after that year was held as a slave by the same individual who was a citizen of that country before its conquest by Virginia, and before the passage of the ordinance for the government of the Northwestern Territory, and who continued to be such afterwards, and was such at the time of Aspasia's birth. Aspasia was born after the year 1787, and from the time of her birth she was raised and held as a slave till sometime in the year 1821, when she was purchased by the plaintiff in error, who immediately after gave her to his son-in-law, Francis Chouteau, then and now residing in St. Louis, Missouri, who held her as a slave till 10 October, 1827, when he returned her to the plaintiff in error in consequence of the claim she set up for her freedom.

Upon the evidence thus given, Menard, by his counsel, moved the court to decide 1. that if it was found from the testimony that the mother of the plaintiff, Aspasia, was a negro woman, and legally held in slavery before and at and after the date of the ordinance passed by the Congress of the United States on 13 July, 1787, entitled, "An ordinance for the government of the Territory of the United States, northwest of the River Ohio," at the Village of Kaskaskia, in the late Northwestern Territory, and the plaintiff, Aspasia, was born of such mother subsequent to the adoption of the ordinance aforesaid at the Village of Kaskaskia aforesaid, the plaintiff is not entitled to her freedom, which instruction the court refused to give.

The same party, by his counsel, moved the court to decide 2. that if it was found from the testimony that the mother of Aspasia was a negro woman, legally held in slavery before and at and after the adoption of the ordinance entitled, "An ordinance for the government of the Territory of the United States northwest of the River Ohio," passed by the Congress of the United States, on 13 July, 1787, by a French inhabitant of the Village of Kaskaskia in the Northwestern Territory, and who was a citizen of the same before the conquest of the country by Virginia and afterwards, and that the plaintiff was born at the Village of Kaskaskia aforesaid

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of such mother while so held in slavery by such French inhabitant, although subsequent to the date of the ordinance aforesaid she, the plaintiff (Aspasia) was not entitled to her freedom, which instructions the court refused to give. To which refusal in both instances the counsel of Menard excepted, &c.; And the court decided that the defendant Menard was guilty, &c.;, and that Aspasia was not a slave, but free.

This cause was taken to the Supreme Court of Missouri, and the decision aforesaid was affirmed.

This writ of error was prosecuted under the 25th section of the Judiciary Act, passed in 1789.

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MR. JUSTICE Mc LEAN delivered the opinion of the Court.

An action for false imprisonment was commenced in the Circuit Court for the County of St. Louis by the defendant in error to establish her freedom. By the consent of counsel, under the statute of Missouri, the facts and law of the case were submitted to the court.

The facts as stated in the bill of exceptions are these:

The mother of Aspasia was born at Kaskaskia, Illinois, previous to the year 1787, and was held as a slave from her birth by a citizen of that country. His residence commenced before the country was conquered by Virginia, and continued until after the birth of Aspasia, which was several years subsequent to the passage of the ordinance for the government of the Northwestern Territory. She was born a slave at the Village of Kaskaskia and held as such. In the year 1821, she

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was purchased by the plaintiff in error, who immediately afterwards gave her to his son-in-law, Francis Chouteau, a resident of St. Louis. He held her as a slave until October, 1827, when he returned her to the plaintiff in error in consequence of the claim she set up for her freedom.

Upon this evidence, Menard claimed Aspasia as his slave, but the circuit court decided against him. He appealed to the supreme court of the state, and in that court the judgment of the circuit court was affirmed.

To reverse this judgment a writ of error is now prosecuted, and two errors are assigned.

1. Slaves in the Northwestern Territory, before and at the time of the adoption of the Ordinance of 1787, were not liberated by that instrument, but continued slaves.
2. That the offspring of such slaves follow the condition of the mother, and are also slaves. To understand the nature of the right asserted by the plaintiff in error, a reference to the civil history of the Illinois country is necessary. By the treaty of peace concluded in 1763 between England and France, the latter ceded to the former the country out of a part of which the State of Illinois was formed. In the colonies of both France and England, it is well known that slavery is tolerated.

It was stipulated in the treaty

"That those who chose to retain their lands and become subjects of his Majesty the King of England shall enjoy the same rights and privileges, the same security for their persons and effects, and liberty of trade as the old subjects of the King."

The same assurance was given to the inhabitants of the country in the proclamation of General Gage in 1764.

In 1778, a military force organized under the authority of Virginia and commanded by General Clarke subdued Kaskaskia and Post Vincent and drove the British forces from the country. Soon after this occurrence, by an act of the Virginia Legislature, a county called Illinois was organized embracing the conquered district, and its citizens were admitted on an equality of rights with the other citizens of Virginia.

This country was ceded to the United States by Virginia in 1784 with certain stipulations, one of which was that

"The French and Canadian inhabitants and other settlers of the

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Kaskaskias, St. Vincents, and the neighboring villages who have professed themselves citizens of Virginia shall have their possessions and titles confirmed to them and be protected in the enjoyment of their rights and liberties."

Under the laws of Virginia, the citizens of Illinois County had a right to purchase and hold slaves, and that right was not abrogated, but protected by the cession of 1784 to the United States.

In April, 1784, Congress passed certain resolutions securing to the people north of the Ohio certain rights and privileges by which they were governed, and which remained in force until the adoption of the Ordinance of 1787.

By these resolutions the existence of slavery is not referred to except by implication, in using the words, "free males of full age," being entitled to certain privileges, and also "free inhabitants." Under these resolutions, in the manner prescribed, the free inhabitants were authorized to adopt the laws of anyone of the original states.

On 13 July, 1787, Congress passed the ordinance for the government of the territory northwest of the River Ohio and repealed the resolutions of 1784.

In this ordinance, ten articles are adopted which are declared to be articles of compact "between the original states and the people and states in the said territory, and to remain unalterable forever unless by common consent." Among these articles is the following:

"There shall be neither slavery nor involuntary servitude in the said territory otherwise than in the punishment of crimes whereof the party shall have been duly convicted."

By an act of Congress of 1789 and another of 1800, certain provisions were made to regulate the government of the territory and make a division of it, but they do not affect the question which is made in the case under consideration.

In the second section of the act of 1800,

"The inhabitants of the territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages granted and received by the said ordinance."

This provision was reenacted in the Act of 3 February, 1809, which established the Illinois Territory.

By an Act of Congress of 18 April, 1818, the people

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of the territory were authorized to form a constitution and state government, and on 3 December following, by a joint resolution of the Senate and House of Representatives, the State of Illinois was admitted into the union "on an equal footing with the original states in all respects whatever."

The provision of the Ordinance of 1787 prohibiting slavery was incorporated into the Constitution. This provision of the ordinance, it is contended, could only operate prospectively, and was never designed to impair vested rights; that such

was the construction uniformly given to it under the territorial government; that the provision was understood to prohibit the introduction of slaves into the territory by purchase or otherwise, but those who were held in slavery at the time the ordinance was adopted were not liberated by it.

That this was the understanding of the people of the territory at the time the Constitution was adopted, it is argued, appears from the frequent reference made in that instrument, to "free white male inhabitants," in contradistinction from those who were not free, and from a law which was subsequently passed by the legislature of the state imposing a tax on slaves. The rights of persons who claimed a property in slaves, it is urged, were not affected by the provisions of the Ordinance of 1787 or of the Constitution, but remain as they were prior to the adoption of either. That a construction different from this would be destructive of those rights which the citizens of the country enjoyed under the French and British governments and which were guaranteed by Virginia and provided for in her cession of the country to the Union.

The slavery of the mother of Aspasia being established, it is contended that, under the ordinance, her offspring must follow the same condition.

This is beyond dispute the principle of the civil law, and is recognized in Virginia and other states where slavery is tolerated. Whether the same principle be applicable to the case under consideration is a question which it may not be necessary now to determine.

The plaintiff in error insists on his right to the services of Aspasia as his slave, and attempts to enforce it. To try this right the present action was instituted, and a decision having been given against the right, the plaintiff prosecutes a

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writ of error in this Court to reverse the judgment. Can this Court take jurisdiction of the case?

By the 25th section of the Judiciary Act of 1789 it is provided that

"A final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the construction of any clause of the Constitution or of any treaty, or statute of the United States and the decision is against the title, right, privilege, &c.;, under the statute, may be reexamined and reversed or affirmed in this Court."

Does the right asserted by the plaintiff in error come within any of the provisions of this section? Under what statute of the United States is the right set up? The answer must be under the Ordinance of 1787 and the statutes that have been subsequently enacted which have a bearing on the question.

In the second articles of the compact contained in the ordinances, it is provided that

"No man shall be deprived of his liberty or property but by the judgment of his peers. . . . And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the said territory that shall in any manner effect private contracts."

This compact was formed between the original states and the people of the territory, and that part of it which prohibits slavery is embodied in the Constitution of Illinois. In thus being made a part of the fundamental law of the state, a guarantee against slavery of as high obligation as on any other subjects embraced by the Constitution is given to the people of the state.

There are various provisions in the compact which are deeply interesting to the people of Illinois and which, it is presumed, no one would contend could give a supervising jurisdiction to this Court.

In the third article it is provided that

"Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

And in the third article,

"That all fines shall be moderate, and no cruel or unusual punishment shall be inflicted. . . . All persons shall be bailable

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unless for capital offenses, where the proof shall be evident or the presumption great."

These and other provisions contained in the compact were designed to secure the rights of the people of the territory as a basis of future legislation and to have that moral and political influence that arises from a solemn recognition of principles which lie at the foundation of our institutions. The same may be said as to the provisions respecting the rights of property.

The provisions in the compact which relate to "property" and to "rights" are general. They refer to no specific property or class of rights. It is impossible, therefore, judicially to limit their application. If it were admitted that *Aspasia* is the property of the plaintiff in error, and the Court were to take jurisdiction of the case under the provisions of the ordinance, must it not on the same ground interpose its jurisdiction in all other controversies respecting property which was acquired in the Northwestern Territory?

Whatever right may be claimed to have originated under the Ordinance of 1787, it would seem that a right to the involuntary service of an individual could not have had its source in that instrument. It declares that "there shall be neither slavery nor involuntary servitude in the territory." If this did not destroy a vested right in slaves, it at least did not create or strengthen that right.

If the decision of the Supreme Court of Missouri had been against *Aspasia*, it might have been contended that the revising power of this Court under the twenty-fifth section of the Judiciary Act could be exercised.

In such a case, the decision would have been against the express provision of the ordinance in favor of liberty, and on that ground, if that instrument could be considered under the circumstances as an act of Congress within the twenty-fifth

section, the jurisdiction of this Court would be unquestionable.

But the decision was not against, but in favor, of the express provision of the ordinance. Was it opposed to any other part of the instrument? It is possible that opposing rights may arise out of the same instrument, although it contain no contradictory provisions.

The right asserted by the plaintiff in error had not its origin under any express provision of the ordinance. It is only

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contended that that instrument did not destroy this right, which had its commencement in other laws and compacts. A sanction of the right implied more from the force of construction than the words used in the ordinance is all that can be urged.

No substantial ground of difference is perceived between the assertion of any other right to property and that which is set up in the present case. The provisions of the ordinance will equally apply to every description of claim to property, personal or real. And if, from the general provisions respecting property, this Court shall take jurisdiction in this case, on the same principle it may revise the decisions of the Supreme Courts of Illinois, Indiana and Ohio: at least in all cases which involve rights that existed under the territorial government. Give perpetuity to this general provision and consider it as binding upon the people of these states, and it must have an important bearing upon their interests.

Instead of looking to their constitutions as the fundamental law, they must look to the Ordinance of 1787. In this instrument their rights are defined and their privileges guaranteed. And instead of finding an end of legal controversies respecting property in the decisions of their own courts of judicature, they must look to this Court.

This cannot be the true construction of this instrument. Its general provisions as to the rights of property cannot give jurisdiction to this Court. They do not come

within the twenty-fifth section of the Judiciary Act. The complaint is not that property has been taken from the plaintiff in error, in the language of the ordinance, "without the judgment of his peers," nor that his right has been affected by any law of the territory or of the state.

It is not pretended that his right, whatever it may be, is not secured as fully under the Constitution and laws of Illinois as under the ordinance. In support of his claim, a reference is made to the judicial decisions of the state under its own laws.

If, then, a suit be brought by a citizen of Illinois to enforce a right in the courts of Missouri, which exists to as great an extent under the Constitution and laws of the State of Illinois, as in the territorial government under the ordinance, and a

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decision be given against the right, can the party asserting it ask the interposition of this Court?

The prosecution of this writ of error presents the question to this Court in the same point of view as if the suit in Missouri had been commenced by the plaintiff in error.

His title does not arise under an act of Congress. This is essential to give jurisdiction under this head. It is not enough to give jurisdiction that the act of Congress did not take away a right which previously existed. Such an act cannot be said to give the right, though it may not destroy it.

This suit must therefore be

Dismissed, as this Court has no jurisdiction of the case.