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Groves Vs. Slaughter

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SooperKanoon Citation : sooperkanoon.com/79760

Court : US Supreme Court

Decided On : 1841

Appeal No. : 40 U.S. 449

Appellant : Groves

Respondent : Slaughter

Judgement :

Groves v. Slaughter - 40 U.S. 449 (1841)
U.S. Supreme Court Groves v. Slaughter, 40 U.S. 15 Pet. 449 449 (1841)

Groves v. Slaughter

40 U.S. (15 Pet.) 449

ERROR TO THE CIRCUIT COURT FOR

THE EASTERN DISTRICT OF LOUISIANA

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In the first case, the defendant in error, on 11 February, 1839, had instituted a suit by petition in the Circuit

Court of Louisiana against the plaintiffs in error on a promissory note for the sum of $7,875, dated at Natchez, on 20 December, 1836, payable at the Commercial Bank at Natchez, drawn by John W. Brown, to the order of and endorsed by R. M. Roberts, and also endorsed by Moses Groves and James Graham, payable at the Commercial Bank at Natchez twenty-four months after date, which note had been regularly protested for nonpayment.

In the second case, the suit had been instituted on 5 April, 1838, on a promissory note for $7,000, also drawn by John W. Brown, payable at the Commercial Bank at Natchez to R. M. Roberts or order at Natchez and endorsed by him and the other plaintiffs in error, dated 20 December, 1836, payable and negotiable twelve months after date, and regularly protested for nonpayment.

The answers of the plaintiffs in error in both the cases stated that the notes were given by the maker, Brown, to the plaintiff in part payment of the price of certain slaves purchased by him from the plaintiff, and the notes were given at Natchez, in the State of Mississippi, on or about the day of their dates respectively. That the petitioner, Robert Slaughter, did introduce into the State of Mississippi, after 1 May, 1833, the slaves for which the notes were given, as merchandise and for sale, and did sell the slaves so imported to the said Brown, and did take in part payment thereof the said notes, which had been endorsed in bank by the respondents to accommodate the said Brown. The respondents alleged that the cause or consideration for which the notes were given was null and void, the notes were null and void and of no effect, because the contracts on which they are found were in direct violation of the constitution of the State of Mississippi, which expressly prohibits the introduction of slaves into that state as merchandise or for sale after 1 May, 1833.

Afterwards, on 14 June, 1839, the following agreement was filed in each of the cases as a statement of facts by the parties.

"In this case it is consented that the question of fraud is waived by defendants except as hereinafter reserved; the case

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is to be defended solely on the question of the legality and validity of the consideration for which the notes sued on were given. It is admitted that the slaves for which said notes were given were imported into Mississippi as merchandise and for sale in the year 1835 and 1836 by plaintiff, but without any previous agreement or understanding, express or implied, between plaintiff and any of the parties to the note, but for sale generally to any person who might wish to purchase. The slaves have never been returned to plaintiff nor tendered to him by any of the parties to the notes sued on."

The Constitution of the State of Mississippi, adopted in 1832, provided in the 2d section, title "slaves," as follows:

"The introduction of slaves into this state as merchandise or for sale shall be prohibited from and after 1 May, 1833, provided that actual settler or settlers shall not be prohibited from purchasing slaves in any state in this Union and bringing them into this state for their own individual use till the year 1845

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"

THOMPSON, Justice, delivered the opinion of the Court.

On 5 April, 1838, a suit was commenced by the defendant in error against the plaintiffs in error in the Circuit Court of the United States for the Eastern District of Louisiana upon a note, a copy of which is set out in the record as follows:

"Natchez, December 20, 1836"

"Twelve months after date, I promise to pay to R. M. Roberts, or order, the sum of $7,000 for value received, payable and negotiable at the Commercial Bank of

Natchez, State of Mississippi."

"JOHN W. BROWN"

"Endorsed by -- R. M. ROBERTS, MOSES GROVES, JAMES GRAHAM"

In the course of the proceedings in the cause, the following agreement or admitted statement of facts was entered into between the parties.

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"In this case it is consented that the question of fraud is waived by the defendants except as hereinafter reserved. The case is to be defended solely on the question of the legality and validity of the consideration for which the note sued on was given. It is admitted that the slaves for which said note was given were imported into Mississippi as merchandise and for sale in the years 1835 and 1836 by the plaintiff, but without any previous agreement or understanding, express or implied, between the plaintiff and any of the parties to the note, but for sale generally to any person who might wish to purchase. The slaves have never been returned to the plaintiff nor tendered to him by any of the parties to the note sued on."

Whereupon the court gave judgment for the plaintiff below for $7,000, with the interest and costs. And this judgment is brought here by writ of error for revision.

It will be seen from this statement of the case that the defense rested entirely upon the alleged illegality of the consideration in the note. And the validity of the defense must turn upon the construction and operation of the following article in the Constitution of Mississippi adopted on 26 October, 1832.

"The introduction of slaves into this state as merchandise or for sale shall be prohibited from and after 1 May, 1833, provided that the actual settler or settlers shall not be prohibited from purchasing slaves in any state of this Union and bringing them into this state for their own individual use until the year 1845."

It has been urged on the argument, by way of preliminary objection to an examination of the construction of the Constitution, that this article has received a judicial interpretation in the courts of Mississippi which, according to the doctrine of this Court, with respect to state decisions upon their own laws and Constitutions, will control the judgment of this Court upon this question. It becomes necessary therefore to look into those decisions to see whether there has been such a fixed and settled construction given to the Constitution as to preclude this Court from considering it an open question.

The case chiefly relied upon is that of *Glidewell v. Hite,* a newspaper report of which has been

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furnished to the court. It was a bill in equity filed sometime in the year 1839, since the commencement of the suit now before this Court, and the decree of the chancellor, affirmed in the court of appeals by a divided court since the judgment was affirmed in this cause. But if we look into that case and the points there discussed and the diversity of opinion entertained by the judges, we cannot consider it as settling the construction of the Constitution. It was a bill filed in the court of chancery to enjoin a judgment recovered at law upon a bond for the purchase of slaves introduced in that state after 1 May, 1833. The chancellor refused to continue the injunction, on the ground that the matter relied upon to obtain the injunction should have been set up as a defense in the suit at law, and this view of the case, he adds, might be decisive; but another question of some moment is raised which must frequently arise in our courts and which it is well to put in a train for ultimate decision, clearly announcing that the question he was about to discuss was not involved in the decision of the case before him, and of course all opinion which he might express would be extrajudicial.

He then proceeds to examine the Constitution in reference to its operation on the bond upon which the judgment at law had been obtained, and concludes that the violation of the Constitution consisted in the introduction of the slaves, and not in the sale, and that therefore a subsequent sale after the introduction was not

unlawful, and of course the bond given for the purchase was not void on the ground of illegal consideration, and he adds if the contract should be considered void, the defendants would be entitled to the negroes, for although their introduction might be illegal and subject the party to criminal prosecution, yet the title to the negroes would not be forfeited. And to show more fully, he says, his understanding of the Constitution:

"I mean to declare that the moment the negroes were introduced as merchandise or for sale, the offense was at once complete; no further step was necessary to bring it within the intent and meaning of the prohibiting clause of the Constitution; that it was perfectly immaterial whether the negroes were or were not sold or offered for sale afterwards; such act would not in any way affect its legal character.

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The case went up to the court of appeals, and was there affirmed, by a divided court, two only of the judges being present: Judge Trotter concurring with the chancellor that the defense should have been made in the suit at law, but the other judge dissented upon this point. This was, of course, the only question in judgment in that case, and whatever opinions might have been expressed upon other questions, they were extrajudicial. Judge Trotter went into an examination of the questions suggested by the chancellor, and differed entirely from him as to the effect and operation of the prohibition in the Constitution. He considered the sale of the slaves the great object intended by the prohibition, with a view to suppress the slave trade in that state. But he thought it immaterial to inquire whether the Constitution be considered merely directory or containing within itself an absolute prohibition. In either case, he thought it fixed the policy of the state on the subject, and rendered illegal the practice designed to be suppressed. Had Judge Trotter concurred with the chancellor in his views of the Constitution, the decree of the chancellor must have been reversed. Thus we see the different views taken by the courts in Mississippi, as to the object, policy and effect of this article in the Constitution. And as the whole of this discussion arose upon points not necessarily involved in the decision of the case before the court, it may well be considered as extrajudicial. It is unnecessary for this Court to express any opinion as to the

correctness of one or the other of the views taken by the different judges. But this difference of opinion is certainly sufficient to justify this Court in considering that the construction of the Constitution in that state is not so fixed and settled as to preclude us from regarding it an open question."

The question arising under the Constitution of Mississippi is whether this prohibition, *per se,* interdicts the introduction of slaves as merchandise, or for sale, after a given time, or is only directory to the legislature, and requiring their action, in order to bring it into full operation, and render unlawful the introduction of the slaves for sale, at any time prior to the Act of 13 May, 1837.

The language of the Constitution is, "the introduction of slaves into this state as merchandise or for sale shall be prohibited from

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and after the 1st day of May 1833," with an exception, as to such as may be introduced by actual settlers, previous to the year 1845. This obviously points to something more to be done, and looks to some future time, not only for its fulfillment but for the means by which it was to be accomplished. But the more grammatical construction ought not to control the interpretation unless it is warranted by the general scope and object of the provision. Under the Constitution of 1817, it is declared that the legislature shall have power to prevent slaves being brought into the state as merchandise. The time and manner in which this was to be done, was left to the discretion of the legislature. And by the Constitution of 1832 it was no longer left a matter of discretion, when this prohibition is to take effect, but 1 May, 1833, is fixed as the time. But there is nothing in this provision which looks like withdrawing the whole subject from the action of the legislature. On the contrary, there is every reason to believe, from the mere naked prohibition, that it looked to legislative enactments to carry it into full operation.

And indeed this is indispensable. There are no penalties or sanctions provided in the Constitution for its due and effectual operation. The Constitution of 1832 looks to a change of policy on the subject, and fixes the time when the entire prohibition

shall take effect. And it is a fair and reasonable conclusion that this was the only material change from the Constitution of 1817. It will not answer to say this arose from any distrust of the legislature. Such a supposition would be entirely gratuitous, and a reflection that could not be justified. And besides, if any such conjecture is to be indulged, it is inconceivable why some further provision was not made in the Constitution to insure obedience to the prohibition by declaring the effect of a violation thereof. Admitting the Constitution is mandatory upon the legislature, and that they have neglected their duty in not carrying it into execution, it can have no effect upon the construction of this article. Legislative provision is indispensable to carry into effect the object of this prohibition.

It requires the sanction of penalties to effect this object. How is a violation of this prohibition to be punished? Admitting it would be a misdemeanor punishable by fine, this would be entirely inadequate to the full execution of the object intended to be accomplished. What would

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become of the slaves thus introduced? Will they become free immediately upon their introduction, or do they become forfeited to the state? These are questions not easily answered. And although these difficulties may be removed by subsequent legislation, yet they are proper circumstances to be taken into consideration when we are inquiring into the intention of the convention in thus framing thus article. It is unreasonable to suppose that if this prohibition was intended *per se* to operate without any legislative aid, that there would not have been some guards and checks thrown around it, to insure its execution. But if it is considered merely directory to the legislature, it is open to all necessary provisions to accomplish the end intended. The proviso in this article that actual settlers "shall not be prohibited" from bringing in slaves for their own use until the year 1845, must necessarily be considered as addressed to the legislature, and must be construed as a restriction upon their power. The enacting part of the article, "shall be prohibited," is also addressed to the legislature, and is a command to do a certain act. The legislative enactments on this subject strongly fortify the conclusion, that this provision in the Constitution was not understood as a

prohibition *per se,* but only directory to the legislature. On 2 March, 1833, which was previous to the time when this prohibition was to go into operation, a law was passed to alter and amend this article, as follows:

"The legislature of this state shall have, and are hereby vested with, power to pass, from time to time, such laws, regulating or prohibiting the introduction of slaves in this state, as may be deemed proper and expedient."

This required, under the Constitution, the concurrence of two-thirds of each branch of the legislature. Notice was accordingly given, as required by the Constitution, to take the sense of the qualified electors of the state upon the proposed amendment. It certainly could not have been the understanding of the legislature that the prohibition in the Constitution was actually in full force and operation from 1 May, 1833, whilst these proceedings to obtain an amendment of the Constitution were going on, and especially when, in December, 1833, a law was passed laying a tax on slaves so brought in. This would be an unreasonable construction and would be holding out false and deceptive colors to those engaged in that traffic. It is more reasonable

to conclude, that the legislature supposed some legislative action on their part was necessary, to carry into operation the prohibition, assuming on themselves to postpone such legislation until the sense of the people could be taken on the proposed amendment. That such must have been the understanding of the legislature is obvious from the provisions of the act of December, 1833, laying a tax on slaves thus brought in for sale. If the Constitution *per se* operated as an absolute prohibition to bring in slaves as merchandise, after 1 May, 1833, the law of December, 1833 would be laying a tax upon slaves illegally introduced. This would be impliedly sanctioning the illegal introduction of the slaves, and would present an incongruity in legislation that never ought to be presumed. But to construe the Constitution as directory only to the legislature, the whole will be consistent and stand together. Although the legislature may have omitted to do what the Constitution enjoined upon them, this is a matter with which this Court

can have no concern.

But if anything more can be wanting to show that the legislative interpretations of the Constitution from the year 1832 to 1837 has been that this article does not *per se* operate as a prohibition to the introduction of slaves as merchandise, but required legislative action to bring it into complete operation, it will be found in that Act of 13 May, 1837. Until that time, it is manifest from the whole current of legislation upon that subject and the proposition to amend the Constitution in that particular that there was great diversity of opinion in relation to this matter. But the act of 1837 purports to carry into effect the injunctions in the Constitution. It adopts the words of the Constitution and declares that, "hereafter, the business of introducing or importing slaves into this state, as merchandise, or for sale, be and the same is hereby prohibited." Here, then, is a compliance with the injunction in the Constitution, by a direct prohibition. This law does not assume that such prohibition was in force, by virtue of the constitutional provision. Upon such hypothesis, this prohibition in the law would be entirely superfluous, and the act would have proceeded to provide for enforcing the constitutional prohibitions. But to consider the article in the Constitution as directory to the legislature to prohibit the introduction of slaves,

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this law is a literal compliance with the injunction, and not only enacts a prohibition, but provides the necessary penalties for a violation of that prohibition, and declares all contracts made in relation thereto to be void. This is carrying into full execution the injunction of the Constitution, and affords a strong and irresistible conclusion that, in the opinion of the legislature, that prohibition had not been in operation until the passage of that law. To declare all contracts made for the purchase of slaves introduced as merchandise from 1 May, 1833, until the passage of this law, in 1837, illegal and void, when there was such an unsettled state of opinion and course of policy pursued by the legislature, would be a severe and rigid construction of the Constitution, and one that ought not to be adopted, unless called for by the most plain and unequivocal language. It is said by Judge Trotter that he considers it immaterial, whether the Constitution be construed as

merely directory, or as containing within itself an absolute prohibition. In either case, it fixes the policy of the state. His idea, however, of the policy of the state upon this subject differs essentially from that of the chancellor. We do not mean to say that if there appeared to have been a fixed and settled course of policy in that state, against allowing the introduction of slaves, as merchandise, or for sale, that a contract, made in violation of such policy, would not be void. But we cannot think that this principle applies to this case. When the sale of the slaves in question was made, there was certainly no fixed and settled course of policy which would make void or illegal such contracts.

The judgment of the circuit court is accordingly

Affirmed.

And this view of the case makes it unnecessary to inquire whether this article in the Constitution of Mississippi is repugnant to the Constitution of the United States, and indeed such inquiry is not properly in the case, as the decision has been placed entirely upon the construction of the Constitution of Mississippi.

Mc LEAN, JUSTICE.

As one view of this case involves the construction of the Constitution of the United States in a most important part, and in regard to its bearing upon a momentous and most delicate subject, I will state in a few words my own views on that branch

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of the case. The case has been argued with surpassing ability on both sides. And although the question I am to consider is not necessary to a decision of the case, yet, it is so intimately connected with it, and has been so elaborately argued, that under existing circumstances, I deem it fit and proper to express my opinion upon it.

The second section of the Constitution of Mississippi, adopted 26 October, 1832, declares that the introduction of slaves into that state as merchandise or for sale shall be prohibited from and after 1 May, 1833, provided that the actual settlers

shall not be prohibited from purchasing slaves in any state in the Union and bringing them into that state for their own individual use until the year 1845, and the question is whether this provision is in conflict with that part of the Constitution of the United States, which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states."

In the case of *Gibbons v. Ogden,* 9 Wheat. 186, this Court decided that the power to regulate commerce is exclusively vested in Congress and that no part of it can be exercised by a state. The necessity of a uniform commercial regulation, more than any other consideration, led to the adoption of the federal Constitution. And unless the power be not only paramount, but exclusive, the Constitution must fail to attain one of the principal objects of its formation. It has been contended that a state may exercise a commercial power if the same has not been exercised by Congress. And that this power of the state ceased when the federal authority was exerted over the same subject matter. This argument is founded upon the supposition that a state may exercise a power which is expressly given to the federal government if it shall not exert the power, in all the modes, and over all the subjects to which it can be applied. If this rule of construction were generally adopted and practically enforced, it would be as fatal to the spirit of the Constitution, as it is opposed to its letter. If a commercial power may be exercised by a state because it has not been exercised by Congress, the same rule must apply to other powers expressly delegated to the federal government.

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It is admitted that the power of taxation is common to the state and federal governments, but this is not in its nature or effect a repugnant power, and its exercise is vital to both governments. A power may remain dormant, though the expediency of its exercise has been fully considered. It is often wiser and more politic to forbear than to exercise a power. A state regulates its own internal commerce may pass inspection and police laws, designed to guard the health and protect the rights of its citizens. But these laws must not be extended so as to come in conflict with a power expressly given to the federal government. It is

enough to say that the commercial power, as it regards foreign commerce, and commerce among the several states, has been decided by this Court to be exclusively vested in Congress.

Under the power to regulate foreign commerce, Congress imposes duties on importations, gives drawbacks, passes embargo and nonintercourse laws, and makes all other regulations necessary to navigation to the safety of passengers and the protection of property. Here is an ample range, extending to the remotest seas where the commercial enterprise of our citizens shall go, for the exercise of this power. The power to regulate commerce among the several states is given in the same section and in the same language. But it does not follow that the power may be exercised to the same extent.

The transportation of slaves from a foreign country, before the abolition of that traffic, was subject to this commercial power. This would seem to be admitted in the Constitution, as it provides

"The importation of such persons as any of the states, now existing, shall think proper to admit shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

An exception to a rule is said to prove the existence of the rule, and this exception to the exercise of the commercial power, may well be considered as a clear recognition of the power in the case stated. * The United States are considered as a unit, in all regulations of foreign commerce. But this cannot be the case,

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where the regulations are to operate among the several states. The law must be equal and general in its provisions. Congress cannot pass a nonintercourse law as among the several states, nor impose an embargo that shall affect only a part of them. Navigation, whether on the high seas or in the coasting trade, is a part of our commerce, and when extended beyond the limits of any state, is subject to the power of Congress. And as regards this intercourse, internal or foreign, it is

immaterial whether the cargo of the vessel consists of passengers or articles of commerce.

Can the transfer and sale of slaves from one state to another, be regulated by Congress under the commercial power? If a state may admit or prohibit slaves at its discretion, this power must be in the state, and not in Congress. The Constitution seems to recognize the power to be in the states. The importation of certain persons, meaning slaves, which was not to be prohibited before 1808, was limited to such states, then existing, as shall think proper to admit them. Some of the states at that time prohibited the admission of slaves, and their right to do so was as strongly implied by this provision, as the right of other states that admitted them.

The Constitution treats slaves as persons. In the second section of the first article, which apportions representatives and directs taxes among the states, it provides,

"The numbers shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

And again, in the third section of the fourth article, it is declared that

"No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

By the laws of certain states, slaves are treated as property, and the Constitution of Mississippi prohibits their being brought into that state, by citizens of other states, for sale, or as merchandise. "Merchandise" is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which

is properly embraced by a commercial regulation. But if slaves are considered in some of the states, as merchandise, that cannot divest them of the leading and

controlling quality of persons, by which they are designated in the Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the federal authorities, but the Constitution acts upon slaves as persons, and not as property.

In all the old states, at the time of the revolution, slavery existed in a greater or less degree. By more than one-half of them, including those that have been since admitted into the Union, it has been abolished or prohibited. And in these states, a slave cannot be brought as merchandise or held to labor in any of them, except as a transient person. The Constitution of Ohio declares, that there shall be neither slavery nor involuntary servitude in the state, except for the punishment of crimes. Is this provision in conflict with the power in Congress to regulate commerce? It goes much further than the Constitution of Mississippi. That prohibits only the introduction of slaves into the state, by the citizens of other states, as merchandise, but the Constitution of Ohio not only does this, but it declares that slavery shall not exist in the state. Does not the greater power include the lesser? If Ohio may prohibit the introduction of slaves into it altogether, may not the State of Mississippi regulate their admission? The Constitution of the United States operates alike on all the states, and one state has the same power over the subject of slavery as every other state.

If it be constitutional in one state, to abolish or prohibit slavery, it cannot be unconstitutional in another, within its discretion, to regulate it. Could Ohio, in her Constitution, have prohibited the introduction into the state, of the cotton of the south, or the manufactured articles of the north? If a state may exercise this power, it may establish a nonintercourse with the other states. This no one will pretend, is within the power of a state. Such a measure would be repugnant to the Constitution, and it would strike at the foundation of the Union. The power vested in Congress to regulate commerce among the several states, was designed to prevent commercial conflicts among them. But whilst Ohio

could not proscribe the productions of the south, nor the fabrics of the north, no one doubts its power to prohibit slavery. And what can more unanswerably establish the doctrine, that a state may prohibit slavery, or, in its discretion, regulate it, without trenching upon the commercial power of Congress? The power over slavery belongs to the states respectively. It is local in its character, and in its effects, and the transfer or sale of slaves cannot be separated from this power. It is indeed an essential part of it. Each state has a right to protect itself against the avarice and intrusion of the slave dealer, to guard its citizens against the inconveniences and dangers of a slave population. The right to exercise this power, by a state, is higher and deeper than the Constitution. The evil involves the prosperity, and may endanger the existence of a state. Its power to guard against, or to remedy the evil, rests upon the law of self-preservation; a law vital to every community, and especially to a sovereign state.

* The meaning of this maxim is greatly misapprehended; that an exception proves the rule, properly interpreted, means that an exception tests or tries the rule. For this, *see* Worcester's Dict. *verb.* Prove; as in 1 Thess. v. 21, "Prove all things; hold fast that which is good."

TANEY, Ch.J.

I had not intended to express an opinion upon the question raised in the argument in relation to the power of Congress to regulate the traffic in slaves between the different states, because the Court has come to the conclusion, in which I concur, that the point is not involved in the case before us. But as my brother Mc LEAN has stated his opinion upon it, I am not willing, by remaining silent, to leave any doubt as to mine.

In my judgment, the power over this subject is exclusively with the several states, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits, from another state, either for sale, or for any other purpose, and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories, and the action of the several states upon this

subject cannot be controlled by Congress, either by virtue of its power to regulate commerce or by virtue of any power conferred by the Constitution of the United States. I do not, however, mean to argue this question, and I state my opinion upon it on account

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of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that may silence, when another member of the court has delivered his opinion, might be misconstrued.

Another question of constitutional law has also been brought into discussion -- that is to say whether the grant of power to the general government to regulate commerce does not carry with it an implied prohibition to the states to make any regulations upon the subject, even although they should be altogether consistent with those made by Congress. I decline expressing any opinion upon this question because it is one step further out of the case really before us, and there is nothing in the character of the point that seems to require a voluntary declaration of opinion by the members of the Court.

It is admitted on all hands that if a state makes any regulation of commerce inconsistent with those made by Congress or in any degree interfering with them, the regulation of the state must yield to those of the general government. No one, I believe, doubts the controlling power of Congress in this respect, nor their right to abrogate and annual any and every regulation of commerce made by a state. But the question upon which different opinions have been entertained is this: would a regulation of commerce by a state be valid until Congress should otherwise direct, provided such regulation was consistent with the regulations of Congress, and did not in any manner conflict with them? No case has yet arisen which made it necessary in the judgment of the court to decide this question. It was treated as an open one in the case of *New York v. Miln,* 11 Pet. 102, decided at January term, 1837, as will appear by the opinions then delivered, and since that time the point has never in any form come before the Court. Nor am I aware that there is any reason for supposing that such a case is likely to arise. For the states have very

little temptation to make a regulation of commerce when they know it may be immediately annulled by an act of Congress, even if it does not, at the time it is made by the state, conflict with any law of the general government. Besides, the regulations of Congress, already made, appear to cover the whole, or very nearly the whole, ground, and in the very few

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instances in which the laws of states have been held to be regulations of commerce, and on that account declared to be void, the state regulation was found to be in conflict with some existing regulation of the general government, and consequently the question above stated did not arise. The point in dispute, therefore, would seem to be but little more than an abstract question which the court may never be called on to decide, and perhaps, like other abstract questions, it is destined on that very account to be more frequently and earnestly discussed. But until some case shall bring it here for decision, and until some practical purpose is to be answered by deciding it, I do not propose to engage in the discussion, nor to express an opinion.

STORY, THOMPSON, WAYNE and Mc KINLEY, JUSTICES, concurred with the majority of the Court in opinion that the provision of the Constitution of the United States which gives the regulation of commerce to Congress did not interfere with the provision of the Constitution of the State of Mississippi which relates to the introduction of slaves as merchandise or for sale.

BALDWIN, JUSTICE.

As this case has been decided on its merits, and the opinion of the Court covers every point directly involved, I had not thought that any merely collateral question would have been noticed, for I cannot believe that in the opinion of any of the judges, it is at all necessary to inquire what would have been the result if the Court had held that the contract on which this suit was brought was void by the laws or Constitution of Mississippi. The questions which would have arisen in such an event are of the highest importance to the country, and in my opinion ought not to

be considered by us unless a case arise in which their decision becomes indispensable when too much deliberation cannot be had before a judgment is pronounced upon them. But since a different course has been taken by the judges who have preceded me, I am not willing to remain silent, lest it may be inferred that my opinion coincides with that of the judges who have now expressed theirs.

That the power of Congress "to regulate commerce among

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the several states" is exclusive of any interference by the states has been in my opinion conclusively settled by the solemn opinions of this Court in *Gibbons v. Ogden,* 9 Wheat. 186-222, and in *Brown v. Maryland,* 12 Wheat. 438-446. If these decisions are not to be taken as the established construction of this clause of the Constitution, I know of none which is not yet open to doubt; nor can there be any adjudications of this Court, which must be considered as authoritative upon any question, if these are not to be so on this.

Cases may indeed arise wherein there may be found difficulty in discriminating between regulations of "commerce among the several states" and the regulations of "the internal police of a state," but the subject matter of such regulations of either description will lead to the true line which separates them when they are examined with a disposition to avoid a collision between the powers granted to the federal government by the people of the several states and those which they have reserved exclusively to themselves. "Commerce among the states," as defined by the Court, is "trade," "traffic," "intercourse," and dealing in articles of commerce between states, by its citizens or others, and carried on in more than one state. "Police" relates only to the internal concerns of one state, and commerce within it is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to Congress, and that those regulations which affect only the commerce carried on within one state or which refer only to subjects of internal police, are within the

powers reserved. The opinion of this Court in *New York v. Miln,* 11 Pet. 130, draws the true line between the two classes of regulations, and gives an easy solution to any doubt which may arise on the clause of the Constitution of Mississippi, which has been under our consideration. It does not purport to be a regulation of police, for any defined object connected with the internal tranquility of the state, the health or morals of the people -- it is general in its terms, it is aimed at the introduction of slaves, as merchandise,

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from other states, not with the intention of excluding diseased, convicted, or insurgent slaves, or such as may be otherwise dangerous to the peace or welfare of the state.

Its avowed object is to prevent them from being the subjects of commercial intercourse with other states, when introduced for the purpose of sale, while the next clause expressly legalizes their introduction, by settlers within the state for their own use, leaving them at liberty to sell the slaves so introduced immediately afterwards. It was not intended to affect the condition of the slaves, for there is no provision for their emancipation, or other disposition, when introduced into the state for sale, so that the only effect which the broadest construction could give to the Constitution of Mississippi, would be, to prohibit the introduction into that state, of slaves from other states, as articles of commerce, without the least reference to any object of internal police. Their introduction was legal or illegal, according to their disposition when introduced; if intended for sale, it was illegal; if for use by settlers in the state, it was legal, whatever might be the condition of the slave as to health, or his character as to morals. If we adopt the construction contended for by the plaintiffs in error, that it operates by its own force, the Constitution of Mississippi must be taken to be a law of that state in relation to the regulation of the traffic or dealing in slaves brought there for the purpose of sale; in other words, a regulation of commerce among the several states, if slaves are the subjects of such commerce, according to the true meaning of the Constitution of the United States, as expounded by this Court.

Other judges consider the Constitution as referring to slaves only as persons, and as property, in no other sense than as persons escaping from service; they do not consider them to be recognized as subjects of commerce, either "with foreign nations," or "among the several states;" but I cannot acquiesce in this position. In other times, and in another department of this government, I have expressed my opinion on this subject; I have done it in judgment in another place, 1 Bald. 576 &c.;, and feel it a duty to do it here, however unexpectedly the occasion may have arisen, and to speak plainly and explicitly, however unsuited to the spirit of the times, or prevalent opinions anywhere,

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or by any persons, my views may be. That I may stand alone among the members of this Court does not deter me from declaring that I feel bound to consider slaves as property by the law of the states before the adoption of the Constitution and from the first settlement of the colonies; that this right of property exists independently of the Constitution, which does not create, but recognizes and protects it from violation by any law or regulation of any state in the cases to which the Constitution applies.

It was a principle of the revolution and the practical construction of the Declaration of Independence that "necessity or expediency" justified "the refusal of liberty in certain circumstances to persons of a particular color," and that those to whom their services and labor were due were their owners." 1 Laws U.S. 24-25. In the 7th article of the preliminary treaty of peace with Great Britain, there is this expression, "negroes, or other property," *id.,* 198; also, in the 7th article of the definitive treaty, *id.,* 204, which conclusively shows the then accepted understanding of the country. And that it was not different after the adoption of the Constitution appears as conclusively, by the 1st article of the Treaty of Ghent, which refers to "any slaves, or other private property." *Id.,* 694. It would be a strange position indeed if we were to consider slaves as persons merely, and not property, in our commercial relations with foreign nations, and yet declare them to be "private property," in our diplomatic relations with them, and in the most solemn international acts, from 1782 to 1815.

At the adoption of the Constitution, slaves were as much the subjects and articles of "commerce with foreign nations," and among "the several states," as any other species of merchandise; they were property for all purposes and to all intents; they were bought and sold as chattels; the property in them passed by a bill of sale, by descent, or by will, and they were sold on execution wherever slavery existed. Their importation was lawful, and all power was taken from Congress to prohibit it, prior to 1808, so long as the states should think proper to admit them; though a duty or tax might be imposed on such persons, not exceeding ten dollars for each. Art. 1, 9.

This clause of the Constitution has been held to be an exception

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to the power of Congress to regulate commerce, the word "migration" applying to those persons who come voluntarily, and "importation" applying to those persons who are brought involuntarily, 22 U. S. 9 Wheat. 216; so that if this clause had not been introduced, the power to prohibit the importation would have resulted from the general grant of power to regulate commerce. For no rule is better settled than that the effect of an exception is to take the case excepted out of the general provision, thereby excluding what would otherwise be embraced. 25 U. S. 12 Wheat. 440. The conclusion therefore is inevitable that slaves were embraced by the Constitution as the subjects of commerce and commercial regulations to the same extent as other goods, wares, or merchandise. On no other construction can the ninth section of the first article be taken as an exception to the third clause of the eighth section, and when so taken, there is no escape from the construction declared in the opinion of the Court in *Gibbons v. Ogden.* Besides, if the power to regulate commerce does not include the power to prohibit the importation of slaves into the United States after 1808, when the exception in the ninth section of the first article does not operate, such power is not to be found in any other grant by the Constitution, the consequence of which will be that all the existing laws for abolishing the slave trade are unconstitutional, or at the best their power will rest entirely on the remote and doubtful implication of a new grant, by the ninth section, of a power, after 1808, which would not have existed had not that section been

introduced. This would be a dangerous rule by which to construe the Constitution, and as inconsistent with its whole scope, as it would be hazardous to its permanency. On the other hand, by holding the power to regulate commerce to be the grant of a power to abolish the foreign slave trade, by taking the ninth section as a temporary exception, and the exception to be inoperative after 1808, the slave trade laws since passed are clearly constitutional, under an expressly granted power, which is a much more satisfactory position on which to plant them, than any implication or inference.

Slaves, then, being articles of commerce with foreign nations up to 1808 and until their importation was prohibited by Congress, they were also articles of commerce among the several states, which recognized them as property capable of being transferred

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from hand to hand as chattels. Whether they should be so held or not, or what should be the extent of the right of property in the owner of a slave, depended on the law of each state; that was and is a subject on which no power is granted by the Constitution to Congress; consequently none can be exercised, directly or indirectly. It is a matter of internal police over which the states have reserved the entire control; they and they alone can declare what is property capable of ownership, absolute or qualified; they may continue or abolish slavery at their pleasure, as was done before, and has been done since the Constitution, which leaves this subject untouched and intangible, except by the states.

As each state has plenary power to legislate on this subject, its laws are the test of what is property; if they recognize slaves as the property of those who hold them, they become the subjects of commerce between the states which so recognize them, and the traffic in them may be regulated by Congress, as the traffic in other articles, but no further. Being property by the law of any state, the owners are protected from any violations of the rights of property by Congress, under the Fifth Amendment of the Constitution; these rights do not consist merely in ownership; the right of disposing of property of all kinds is incident to it, which Congress

cannot touch. The mode of disposition is regulated by the state of common law, and but for the first clause in the second section of the Fourth Article of the Constitution of the United States, a state might authorize its own citizens to deal in slaves and prohibit it to all others. But that clause secures to the citizens of all the states "all privileges and immunities of citizens" of any other state, whereby any traffic in slaves or other property, which is lawful to the citizens or settlers of Mississippi, with each other, is equally protected when carried on between them and the citizens of Virginia. Hence it is apparent that no state can control this traffic so long as it may be carried on by its own citizens within its own limits; as part of its purely internal commerce, any state may regulate it according to its own policy, but when such regulation purports to extend to other states or their citizens, it is limited by the Constitution, putting the citizens of all on the same footing as their own. It follows likewise that any power

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of Congress over the subject is, as has been well expressed by one of the plaintiffs' counsel, conservative in its character, for the purpose of protecting the property of the citizens of the United States, which is a lawful subject of commerce among the states, from any state law which affects to prohibit its transmission for sale from one state to another, through a third or more states.

Thus, in Ohio and those states to which the ordinance of 1787 applies or in those where slaves are not property, not subjects of dealing or traffic among its own citizens, they cannot become so when brought from other states; their condition is the same as those persons of the same color already in the state, subject in all respects to the provisions of its law, if brought there for the purposes of residence or sale. If, however, the owner of slaves in Maryland, in transporting them to Kentucky or Missouri, should pass through Pennsylvania or Ohio, no law of either state could take away or affect his right of property, nor, if passing from one slave state to another, accident or distress should compel him to touch at any place within a state, where slavery did not exist. Such transit of property, whether of slaves or bales of goods, is lawful commerce among the several states which none can prohibit or regulate, which the Constitution protects, and Congress may

and ought to preserve from violation.

Any reasoning or principle which would authorize any state to interfere with such transit of a slave, would equally apply to a bale of cotton, or cotton goods, and thus leave the whole commercial intercourse between the states liable to interruption to extinction by state laws, or Constitutions. It is fully within the power of any state to entirely prohibit the importation of slaves, of all descriptions, or of those who are diseased, convicts, or of dangerous or immoral habits or conduct; this is a regulation of police, for purposes of internal safety to the state, or the health and morals of its citizens, or to effectuate its system of policy in the abolition of slavery. But where no object of police is discernible in a state law of Constitution, nor any rule of policy, other than that which gives to its own citizens a "privilege," which is denied to citizens of other states, it is wholly different. The direct tendency of all such laws is partial, antinational, subversive of the harmony which should exist among the states, as well as inconsistent with the most

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sacred principles of the Constitution which on this subject have prevailed through all time, in and among the colonies and states, and will be found embodied in the second resolution of the Virginia legislature in 1785. 1 Laws U.S. 53. For these reasons, my opinion is that had the contract in question been invalid by the Constitution of Mississippi, it would be valid by the Constitution of the United States. These reasons are drawn from those principles on which alone this government must be sustained, the leading one of which is that wherever slavery exists, by the laws of a state, slaves are property in every constitutional sense, and for every purpose, whether as subjects of taxation, as the basis of representation, as articles of commerce, or fugitives from service. To consider them as persons merely, and not property, is, in my settled opinion, the first step towards state of things to be avoided only by a firm adherence to the fundamental principles of the state and federal governments, in relation to this species of property. If the first step taken be a mistaken one, the successive ones will be fatal to the whole system. I have taken my stand on the only position which, in my judgment, is impregnable, and feel confident in its strength, however it may be

assailed in public opinion, here or elsewhere.

CATRON, JUSTICE, having been indisposed, did not sit in this case. Mc KINLEY, JUSTICE, dissented from the opinion of the court, as delivered by THOMPSON, JUSTICE, and STORY, JUSTICE, also dissented;@ both these justices considering the notes sued upon void. BARBOUR, JUSTICE, died before the case was decided.

These causes came on to be heard, on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and were argued by counsel, on consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six percentum per annum.

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