Strader Vs. Graham

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Appeal No. : 51 U.S. 82

Appellant : Strader

Respondent : Graham

Judgement :

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Strader v. Graham

1 U.S. (10 How.) 82

ERROR TO THE COURT OF APPEALS

FOR THE STATE OF KENTUCKY

SYLLABUS

Under the 25th section of the Judiciary Act, this Court has no jurisdiction over the following question, *viz.,*

"Whether slaves who had been permitted by their master to pass occasionally from Kentucky into Ohio acquired thereby a right to freedom after their return to Kentucky?"

The laws of Kentucky alone could decide upon the domestic and social condition of the persons domiciled within its territory, except so far as the powers of the states in this respect are restrained or duties and obligations imposed upon them by the Constitution of the United States.

There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject.

The Ordinance of 1787 cannot confer jurisdiction upon this Court. It was itself superseded by the adoption of the Constitution of the United States, which placed all the states of the Union upon a perfect equality, which they would not be if the Ordinance continued to be in force after its adoption.

Such of the provisions of the Ordinance as are yet in force owed their validity to

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acts of Congress passed under the present Constitution, during the territorial government of the Northwest territory, and since to the constitutions and laws of the states formed in it.

The defendant in error, who was a citizen of Kentucky, filed his bill in the Louisville Chancery Court against Jacob Strader and James Gorman, who were citizens of Ohio and owners of the steamboat *Pike,* which plied between Louisville, Kentucky, and Cincinnati, Ohio, and John Armstrong, who was the captain of said steamboat.

The bill alleged that the complainant was the owner of three negro slaves, George, Henry, and Reuben, of the value of about fifteen hundred dollars each, who had left his residence at Harrodsburg, Kentucky, and made their way to Louisville, whence they were taken on board of said steamboat *Pike* and carried to Cincinnati, from which place they escaped to Canada and were lost to their owner.

Complainant averred that he had a lien on said boat by reason of the asportation of said slaves, for the damages he had sustained, and prayed an attachment and sale of said boat, and general relief.

An attachment was ordered and served, but the boat was relieved upon bond's being given to perform all orders of the court or to have the boat forthcoming.

Two of the defendants in the court below (Strader and Gorman), in their answer, stated that they were not on board the boat at the time of the alleged transportation, had no knowledge of such transportation, and they therefore denied it. They alleged that the boat was under the command of the defendant Armstrong, her captain, and that the negroes in question had been permitted by the complainant to travel out of the commonwealth as if free, and in an amended answer they averred that long before the alleged transportation, the said negroes had actually become free. The answer of Armstrong was substantially to the same effect. There were various proceedings had in the state courts, the case having been twice carried to the Court of Appeals, when Graham finally succeeded in obtaining a decree in the Louisville chancery Court for $3,000 damages, to be paid before a day named, or the boat, her furniture, tackle &c.;, to be sold if forthcoming, and if not forthcoming, the court to make the necessary order against the obligors, in said forthcoming bond, which decree was affirmed by the Court of Appeals. To reverse the decree of affirmance this writ of error was sued out.

By the statute of Kentucky approved 7 January, 1824, any master or commander of a steamboat or other vessel who shall hire or employ, or take as passengers on board of such

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steamboat or other vessel or suffer it to be done or otherwise take out of the limits of the commonwealth any slave or slaves without permission of the master of such slave or slaves shall be liable to damages to the party aggrieved by such removal, and the steamboat or other vessel on board of which such offense was committed shall be liable, and may be proceeded against in chancery, and may be

condemned and sold to pay such damages and costs of suit.

The amended act, approved 12 February, 1828, extends the remedies given by the former act so as to embrace the owners, mate, clerk, pilot, and engineer, as well as the master, and they are declared to be liable to the action of the party aggrieved, "either jointly with the masters, or severally, and either at law or in chancery."

It appeared in evidence that the negroes were the slaves of Graham, and that they were musicians; that for their improvement in music two of them were placed under the care of one Williams, who was a skillful performer and leader of a band, and were permitted to go with him to Louisville and other places and play with him at public entertainments. The following permit was filed as an exhibit, and proved.

"Harrodsburg, August 30, 1837"

"This is to give liberty to my boys, Henry and Reuben, to go to Louisville, with Williams and to play with him till I may wish to call them home. Should Williams find it his interest to take them to Cincinnati, New Albany, or any part of the South, even so far as New Orleans, he is at liberty to do so. I receive no compensation for their services except that he is to board and clothe them."

"My object is to have them well trained in music. They are young, one 17 and the other 19 years of age. They are both of good disposition and strictly honest, and such is my confidence in them that I have no fear that they will ever [act] knowingly wrong, or put me to trouble. They are slaves for life, and I paid for them an unusual sum; they have been faithful, hard-working servants, and I have no fear but that they will always be true to their duty, no matter in what situation they may be placed."

"C. GRAHAM, M.D."

"P.S. Should they not attend properly to their music, or disobey Williams, he is not only at liberty, but requested, to bring them directly home."

"C. GRAHAM"

Under this permission, Williams, in the year 1837, made several excursions with his band, including the slaves Reuben and Henry, to Cincinnati, Ohio, and New Albany and Madison,

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Indiana, for the purpose of playing at balls or public entertainments, after which he returned to Louisville, his place of residence, said slaves returning with him, from which time to the time of their escape in 1841 they had remained within the State of Kentucky.

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MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

The facts in the case, so far as they are material to the decision of this Court, are briefly as follows:

The defendant in error is a citizen of the State of Kentucky, and three negro men whom he claimed and held as his slaves were received on board the steamboat *Pike* at Louisville without his knowledge

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or consent and transported to Cincinnati, and from that place escaped to Canada and were finally lost to him.

The proceedings before us were instituted under a statute of Kentucky in the Louisville Chancery Court against the plaintiffs in error to recover the value of the slaves which had thus escaped, and, in default of payment by them, to charge the boat itself with the damages sustained. Strader and Gorman were the owners of the boat and Armstrong the master.

The plaintiffs in error, among other defenses, insisted that the negroes claimed as slaves were free, averring that sometime before they were taken on board the steamboat they had been sent, by the permission of the defendant in error, to the

State of Ohio to perform service as slaves, and that in consequence thereof they had acquired their freedom and were free when received on board the boat.

It appears by the evidence that these men were musicians and had gone to Ohio on one or more occasions to perform at public entertainments; that they had been taken there for this purpose, with the permission of the defendant in error, by a man by the name of Williams, under whose care and direction he had for a time placed them; that they had always returned to Kentucky as soon as this brief service was over, and for the two years preceding their escape they had not left the State of Kentucky, and had remained there in the service of the defendant in error as their lawful owner.

The Louisville chancery Court finally decided that the negroes in question were his slaves and that he was entitled to recover $3,000 for his damages. And if that sum was not paid by a certain day specified in the decree, it directed that the steamboat should be sold for the purpose of raising it, together with the costs of suit. This decree was afterwards affirmed in the Court of Appeals of Kentucky, and the case is brought here by writ of error upon that judgment.

Much of the argument on the part of the plaintiffs in error has been offered for the purpose of showing that the judgment of the state court was erroneous in deciding that these negroes were slaves. And it is insisted that their previous employment in Ohio had made them free when they returned to Kentucky.

But this question is not before us. Every state has an undoubted right to determine the status, or domestic and social condition of the persons domiciled within its territory except insofar as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control

the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery after their return depended altogether upon the laws of

that state, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free on their return. The Court of Appeals has determined that by the laws of the state, they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this Court, and we have no jurisdiction over it.

But it seems to be supposed in the argument, that the law of Ohio upon this subject has some peculiar force by virtue of the Ordinance of 1787, for the government of the Northwestern territory, Ohio being one of the states carved out of it.

One of the articles of this Ordinance provides that

"There shall be neither slavery nor involuntary servitude in the said territory otherwise than in punishment for crimes whereof the party shall have been duly convicted, provided always that any person escaping into the same from whom labor or service is lawfully claimed in anyone of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid."

And this article is one of the six which the Ordinance declares shall be a compact between the original states and the people and states in the said territory, and forever remain unalterable unless by common consent.

The argument assumes that the six articles which that Ordinance declares to be perpetual are still in force in the states since formed within the territory and admitted into the Union.

If this proposition could be maintained, it would not alter the question. For the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory could have no force beyond its limits. It certainly could not restrict the power of the states within their respective territories, nor in any manner interfere with their laws and institutions, nor give this Court any control over them. T he Ordinance in question, if still in force, could have no more

operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that state, nor give this Court jurisdiction upon the subject.

But it has been settled by judicial decision in this Court that this Ordinance is not in force.

The case of *Permoli v. First Municipality,* 3 How. 589, depended upon the same principles with the case before us. It

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is true that the question in that case arose in Louisiana. But the Act of Congress of April 7, 1798, chap. 28, 1 Stat. 549, extended the Ordinance of 1787 to the then Territory of Mississippi, with the exception of the anti-slavery clause, and declared that the people of that territory should be entitled to and enjoy all the rights, privileges, and advantages granted to the people of the territory northwest of the Ohio. And by the Act of March 2, 1805, chap. 23, 2 Stat. 322, it was enacted that the inhabitants of the then Territory of Orleans should be entitled to and enjoy all the rights, privileges, and advantages secured by the Ordinance of 1787 and at that time enjoyed by the people of the Mississippi territory.

In the case above mentioned, Permoli claimed the protection of the clause in one of the six articles which provides for the freedom of religion, alleging that it had been violated by the First Municipality. And he brought the question before this Court upon the ground that it had jurisdiction under the Ordinance. But the Court held that the Ordinance ceased to be in force when Louisiana became a state, and dismissed the case for want of jurisdiction. This opinion is indeed confined to the territory in which the case arose. But it is evident that the Ordinance cannot be in force in the states formed in the Northwestern Territory and at the same time not in force in the states formed in the Southwestern Territory, to which it was extended by the present government. For the ordinances and pledges of the Congress of the old Confederation cannot be more enduring and obligatory than those of the new government, nor can there be any reason for giving a different interpretation

to the same words used in similar instruments because the one is by the old Confederation and the other by the present government. And when it is decided that this Ordinance is not in force in Louisiana, it follows that it cannot be in force in Ohio.

But the whole question upon the Ordinance of 1787, and the acts of Congress extending it to other territory afterwards acquired, was carefully considered in *Pollard v. Hagan,* 3 How. 212. The subject is fully examined in the opinion pronounced in that case, with which we concur, and it is sufficient now to refer to the reasoning and principles by which that judgment is maintained, without entering again upon a full examination of the question.

Indeed, it is impossible to look at the six articles which are supposed in the argument to be still in force without seeing at once that many of the provisions contained in them are inconsistent with the present Constitution. And if they could be regarded as yet in operation in the states formed within the

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limits of the Northwestern Territory, it would place them in an inferior condition as compared with the other states and subject their domestic institutions and municipal regulations to the constant supervision and control of this Court. The Constitution was, in the language of the Ordinance, "adopted by common consent," and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing states. It became the supreme law throughout the United States. And so far as any obligations of good faith had been previously incurred by the Ordinance, they were faithfully carried into execution by the power and authority of the new government.

In fact, when the Constitution was adopted, the settlement of that vast territory was hardly begun, and the people who filled it and formed the great and populous states that now cover it became inhabitants of the territory after the Constitution was adopted, and migrated upon the faith that its protection and benefits would be

extended to them and that they would in due time, according to its provisions and spirit, be admitted into the Union upon an equal footing with the old states. For the new government secured to them all the public rights of navigation and commerce which the Ordinance did or could provide for, and moreover extended to them when they should become states much greater power over their municipal regulations and domestic concerns than the Confederation had agreed to concede. The six articles, said to be perpetual as a compact, are not made a part of the new Constitution. They certainly are not superior and paramount to the Constitution, and cannot confer power and jurisdiction upon this Court. The whole judicial authority of the courts of the United States is derived from the Constitution itself and the laws made under it.

It is undoubtedly true that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed, and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the Act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787 and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the states since formed in the territory, these provisions, so far as they have been preserved, own their validity and authority to the Constitution of the

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United States and the constitutions and laws of the respective states, and not to the authority of the Ordinance of the old Confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this Court.

In every view of the subject, therefore, this Court has no jurisdiction of the case, and the writ of error must on that ground be

Dismissed.

MR. JUSTICE Mc LEAN.

I agree that there is no jurisdiction in this case, and that it must be dismissed.

The plaintiffs obtained this writ of error to reverse a judgment of the Court of Appeals of Kentucky which affirmed the judgment of the inferior court, in which Graham obtained a verdict and judgment against the defendants below for three thousand dollars on the ground that three of the servants of the plaintiff had been conveyed from Louisville, Kentucky, to Cincinnati, in the steamboat of defendants, by which means they escaped and the plaintiff lost their services.

The defendants set up in their defense the Ordinance of 1787 for the government of the Northwestern territory, which prohibited slavery in the sixth article of the compact, and which was declared "to be unalterable unless by common consent." The defendants alleged that, with the permission of Graham, the slaves had been permitted to visit Ohio and Indiana as musicians, by which they were entitled to their freedom, although they had returned voluntarily to their master, in Kentucky. And the right to their freedom was asserted under the Ordinance, which, it is insisted, brings the case within the twenty-fifth section of the Judiciary Act of 1789, and gives jurisdiction to this Court.

The provision of the Ordinance in regard to slavery was incorporated into the Constitution of Ohio, which received the sanction of Congress when the state was admitted into the Union. The constitution of the state, having thus received the consent of the original parties to the compact, must be considered, in regard to the prohibition of slavery, as substituted for the Ordinance, and consequently all questions of freedom must arise under the Constitution, and not under the Ordinance.

This, in my judgment, decides the question of jurisdiction, which is the only question before us. And anything that is said in the opinion of the Court in relation to the Ordinance beyond this is not in the case, and is consequently extrajudicial

MR. JUSTICE CATRON.

The Ordinance of 1787 provides that the six articles contained in it shall be unalterable, and remain a compact between the original states and the people of the Northwestern territory "unless altered by common consent."

1. The sixth article declares that slavery shall be prohibited. 2. And that absconding slaves there found shall be surrendered to their owners.

The Constitution of Ohio incorporates the first part of the sixth article, but leaves out the second part. The state constitution having received the sanction of Congress, the alteration was made by common consent, as this was the mode of consent contemplated by the compact -- that is to say, by the states in Congress assembled, whether under the Confederation or present Constitution. This being an "engagement entered into" before the adoption of the Constitution, was equally binding on the one Congress as the other according to the sixth article of the new Constitution, and the new Congress, equally with the former one, had power to consent to alterations. The power to alter necessarily involves the power to annul or to suspend, and when the state constitution of Ohio was assented to by Congress, the article stood suspended or abolished as an engagement among the states, and can now only be recognized as part of the organic state law. And as this law is drawn in question here, no jurisdiction exists to examine the state decision.

But in regard to parts of the other five articles, I am unwilling to express any opinion, as no part of either is in any degree involved in this controversy.

The fourth article secured the free navigation of the waters leading into the Rivers Mississippi and St. Lawrence, and the carrying-places between them, as common highways, and exempted them from tax, impost, or duty. The mouths of the two great rivers were in possession of foreign powers, and closed to our commerce, at the date of the Ordinance and Constitution, and therefore it was more necessary

that the tributaries should be always open, and the carrying-places free, so that the Ohio and St. Lawrence could be reached from the Great Lakes and back and forth either way. Some of these tributary rivers and the carrying places, it was known, would fall into a single new state, as contemplated by the Ordinance. This is true of every carrying-place, and is equally true as respects most of the rivers leading to the carrying-places, and as Congress had only power given by the new Constitution "to regulate commerce among the states," it is a question now unsettled whether such inland rivers and carrying-places

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could be regulated where the navigation and carrying-places began and ended in a single state.

For thirty years, the state courts within the territory ceded by Virginia have held this part of the fourth article to be in force, and binding on them respectively, and I feel unwilling to disturb this wholesome course of decision, which is so conservative to the rights of others, in a case where the fourth article is in no wise involved and when our opinion might be disregarded by the state courts as *obiter,* and a *dictum* uncalled for. When the question arises here on the fourth article, it is desired by me that no such embarrassment should be imposed on this Court as necessarily must be by now passing judgment on the force of the fourth article and pronouncing that it stand superseded and annulled.

ORDER

This cause came on to be heard on the transcript of the record from the Court of Appeals for the State of Kentucky, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that this cause be and the same is hereby dismissed for the want of jurisdiction.