SLAVERY, OR INVOLUNTARY SERVITUDE: DOES IT LEGALLY EXIST IN THE STATE OF NEW YORK? POINTS ON ARGUMENT IN COURT OF APPEALS; OPINIONS IN COURT OF APPEALS

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IN THE

STATE OF NEW YORK?

POINTS ON ARGUMENT IN COURT OF APPEALS.

OPINIONS IN COURT OF APPEALS.

ALBANY:
J. MUNSELL, 78 STATE STREET.
1864.

SLAVERY, OR INVOLUNTARY SERVITUDE.

To Martinus Lansing, William Heidorn, William Witbeck, David Rector, John N. Smith, Albert Slingerland, John Ried, Nicholas Houck, Lawrence Fenner, Peter Ball, Denison Fish, Thomas B. Petrie, Jacob White, Louis Allendorph, John D. Wood, DeWitt C. Thomas, William Carmichael, and others.

GENTLEMEN ;

Having been employed by you to resist demands of rent made by parties who have falsely assumed to be your landlords, we take this mode of addressing you upon that subject. We trust we have an excuse, if an excuse be necessary, in the importance of the questions involved, and the fact that so great a number are directly interested, and reside so remote from each other, that it would be exceedingly inconvenient, if not impracticable, to communicate personally, or address you individually.

The immediate occasion for allowing you opportunity of information, arises from the latest decisions of the Courts. Copies of the opinions are annexed. But to read them understandingly, you should take a brief retrospect of the past. To aid you in that respect, we will direct your attention to some of the more prominent aspects which the subject has been made to assume, and the remarkable mutations which have attended its progress.

The practical question forced upon you, was, whether you were *persons held to service* according to the laws of this State, and liable to forfeiture of your property for refusing to serve.

So far the question is personal to yourselves, and comparatively unimportant to the public. But as there are no facts or circumstances pressing upon you, except such as are common to great numbers of men, and capable of extension so as to embrace every owner of land in the state, there are great public questions involved, namely; whether we have, in this State, an institution of servitude ; and, if so, whether it is a relic of the past soon to wear out, or a thing just beginning life and vigor, fitted to grow and expand to an indefinite extent ; whether it came from the feudal contrivances used for the oppression of labor in the Old World or is one of our own : and, if the latter, by what malign influences it was generated and nourished, and is now sustained in the midst of our free institutions.

The first inquiry is, whether we have an institution of servitude now existing in the State. This must be answered in the affirmative, if the opinions referred to contain the law of the State, or are to be adopted as the law of the State. If such be the law, we not only have such an institution, but it is a thing capable of extension and expansion without limit. The service, in these cases, was a single day in the year, but the principle would just as well sustain a claim for every day in the year: The money or things in kind provided for, are comparatively small in amount. But, by the same rule, if the owner of lands should covenant to serve three hundred and sixty-five days in the year, or should covenant to pay as a tribute, all he could raise, or by any means acquire, and should covenant for his heirs and assgins, every succeeding owner of the same lands, would be liable to perform the covenant. The covenantor might except himself from the obligations of his covenants, by fixing the time they were to begin. It is easy to perceive, that by adopting a rule which allows one man to bind another, and one generation of men to bind all other generations, you have an institution of servitude likely to take to itself giant proportions.

The second inquiry relates to the assumed origin of the institution. The facts relied upon, stated in a general manner, are as follows; Some seventy years ago, certain contracts were made by men, of course, long since dead, and with whom the defendants had neither relation nor connection. Those contracts were, in form and effect, conveyances in fee from the one party, with an agreement by the other, to perform a day's service, and deliver an annual tribute of wheat and hens as the price or consideration of the conveyance. The language of the covenants embraced the heirs and assigns. The defendants, fifty years or more after, became owners of the same lands.

Those are the facts upon which you are held to service, and upon which the Courts assume to establish an institution of servitude.

The subject, in its servile phase, is of modern date, in this State. The parties who made the contracts, fulfiled them as they did other personal undertakings. Whether they attached to the lands as obligations on their successors in ownership, was a question which could not, and did not arise while they were owners, and was consequently postponed until a later period. It is not much, if any, over a quarter of a century, since the servile aspect of these contracts began to be pressed upon the attention of the people. It naturally produced excitement and resentment amongst those upon whom it was claimed to fall. They had been educated as freemen in a State which boasted of its free institutions. To submit peaceably, or even passively, to such servile exactions, appeared to them self-degradation.

Great effort was made, by interested parties, to create in the public mind the impression that the repugnance manifested was the result of bad faith and a general disposition to repudiate honest debts, and defraud honest creditors. A more unfounded slander was never attempted. The frauds and bankruptcies which have sometimes reduced competence to want, and made paupers of the widows and the fatherless, have not sprung from that source.

There were extraneous considerations which deepened the resent-

ment of the people. Such obligations could not have been imposed in England. There was a statute existing there as early as 1290, which made them impossible. It was claimed that the people of this State, in their general adoption of English laws, had omitted that statute; and the omission was credited to the influence of the large landholders.

While the system was denounced by men prominent in authority, by governors and by the legislature, as inconsistent with the genius of our government and prejudicial to the public welfare, active measures were put in operation to rid the state of the admitted evil. But before they were brought to a final result, the subject came before the Court of Appeals, and that court unanimously decided that the English statute of 1290 making the creation of feudal servitude an impossibility, had been embodied in our act concerning tenures passed in 1787; that it "put an end to all feudal tenure between one citizen and another, and substituted in its place a tenure between each landholder and the people in their sovereign capacity;" and "placed the law of this state, in respect to the question in controversy, on the same footing on which the law of England now stands and has stood since the reign of Edward the First." (2 Selden, 504-5).

Thus in about a dozen years after the contest began, it was finally decided that feudal tenures, and of course, feudal servitude, did not and could not exist in the state, by conveyances in fee made since July 4, 1776. On a subsequent occasion, the same court reiterated the same decision, and extended it so as to embrace the colonial period alike with the state. (19 N. Y. 76).

The decision of that point put an end to all such claims, so far as the laws of the state were concerned. This was conceded by counsel of the claimants. They never have, personally or by counsel, contended that they could enforce their demands against third parties upon any other theory than that of feudal tenures. That theory was pronounced by the court untenable; and it follows, that if we have an institution of servitude, by which defendants in such cases can be held legally liable, it has sprung from other than a feudal source.

The next epoch of the subject began in 1858. The claimants having sold and assigned in fee, had no lands and no estate in lands. The law was so clearly settled against them, that no lawyer off the bench could design a theory which he dare put forth as an advocate in their favor. They were more fortunate in finding an advocate on the bench. By that means, the Supreme Court of the third judicial district, was induced to direct its energies to uphold the system from the crushing effects of the decision of 1852. They could find nothing in the common law to help; nothing in the laws of any state or nation, except our own. So they proclaimed. (See 27 Barb., 164).

Chapter 98 of the laws of 1895—passed years after the contracts sued upon were made—was the particular act selected.

The selection and application of that act, were extraordinary; but the manner of making it work out the result, was more extraordinary than the application itself. We give that part of their labors in their own language: "Applying an act, enabling grantees of reversions to hold certain rights and enforce certain remedies, by reason of being assignees of reversions, it, of necessity, *makes* the lessor's

interest in such a lease, — as well in his own hands, as in those of his assignees, *pro hac vice* equivalent to a reversion." And "being subsequent (as was the act it amended) to the law concerning tenures, it is, if, and so far as, repugnant to that law, a repealing act, even without the express words, 'any law,' &c." (27 Barb., 152).

The plain meaning of this is, that the contracts sued upon were, when made, assignments, by force of the express provisions of the statute concerning tenures; that subsequently, and by the retroaction of the statute of 1805, the assignments were changed to leases.

Had the statute clearly expressed such an intention, no one will deny, but that it would have been a flagrant attempt, on the part of the legislature, to exercise an extraordinary power; no less than making contracts to differ in meaning and effect from what the parties had made them. Of course, if the legislature could change an assignment into a lease, they could change a lease into an assignment. If they could create the relations of landlord and tenant where those relations did not exist, they could dissolve those relations where they did exist.

But the statute of 1805 expressed no such intention. No such meaning can be deduced from the language. It merely gave certain rights of action to the grantees of reversions of leases in fee. The language is too explicit for cavil. It did not include assignments, nor reach other parties than grantees of reversions. Thus by the very terms of the statute, it could not apply to the plaintiff, nor to the contracts sued upon.

It was not the statute which did the work. An act of the legislature which should declare all assignments leases, or all leases assignments, with a view to create obligations where none existed, or discharge them where they did exist, would be so obvious an outrage that no court would dare to give to it effect. The statute was used only as a mask. The mode of construction demonstrates this. "Law is the perfection of reason," says the judge: (27 Barb., 143) and he proceeds to demonstrate his maxim upon the materials before him. The first thing was to assume that the legislature intended to apply the statute to assignments, and to parties other than grantees of reversions; and, consequently, that the court were not at liberty to refuse so to apply it. But the language of the statute, by reason of its insptitude, would not apply. They make that the fortunate feature for their purpose. They could not change the language of the act, and must therefore change the thing to which they were forced to apply it. In other words, as the legislature had not fitted the statute to the thing, the court must fit the thing to the statute. Hence, "of necessity," as they reason, they are forced to "make" an *assignment* into a *lease*, and a thing which is not a *reversion* and bears no resemblance to a *reversion*, into a *pro hac vice* equivalent to a reversion.

This mode of construing statutes by the rule of contraries, and upon the maxim that "law is the perfection of reason," will be more readily understood by the common mind, on applying it to familiar objects. For example: We have statutes which, according to their express language, apply only to dogs. Suppose some one could profit by applying the same statutes to horses, instead of dogs. He has only to convince the judges that the legislature, in using the word

dogs, really meant horses. It would be a task of no greater apparent difficulty then to convince them that in using the word lease, the legislature meant assignment. The conviction once produced, no matter how, or by what means, all the rest would come easy. The judges would find no difficulty in adapting their formula of logic to meet the case. They have only to say, "applying a statute to a horse, which by its language applies only to a dog, of necessity *makes* the horse a dog, or — which is the same thing — *pro hac vice*, equivalent to a dog." And who doubts that the horse would become just as good a dog as the assignment would a lease?

This theory of making law by a forced process of reasoning, passed in review before the Court of Appeals in 1859, and received the sanction of that court in an elaborate opinion, which has been reported (19 N. Y., 68). That court, in commenting on the statute of 1805, declared that it placed "the assignees of both parties upon grants in fee, upon the same footing which was occupied by the assignees of the parties to a lease for life or years" (19 N. Y., 92).

There was only one point in the argument of the court below, which they sought to strengthen. It might be contended that leases in fee did exist here before the institution of the state government. The Court of Appeals so held in 1852 (2 Selden, 503). That being so, the court seemed to have feared that the statute of 1805 might have a legitimate application, and thus weaken that law of "necessity," by which they sought to force it into an illegitimate connection. "It was in part to furnish an answer to that suggestion," says the learned judge, "that I have taken the pains to show that there was never a period in this state when conveyances in fee between individuals created a tenure" (19 N. Y., 84).

With that point thus fortified, the learned author of that opinion expressed his unqualified conviction that the intent of the legislature to embrace assignments was "plain and certain;" and, that effect must be given to that intent, though the language was "incongruous," (19 N. Y., 84).

The intended force of that point is evident. There being no leases in fee in the state, to which the statute could apply, in obedience to its language, it must be applied to assignments in disobedience to its language; and that application, "of necessity," changed all assignments to leases.

The cogency of this point also will be more impressive by applying it to the supposed case before put. Thus, could it be shown with equal certainty that there was not a dog in the state, and never had been, and never could be, then the statutes in regard to dogs would just as clearly have been intended for horses, and the court just as stringently coerced to so apply it. Hence it would need no argument, according to the judicial dialectics, to show that the whole equine race would be changed to canine, and therefore subject to all the muzzle-wearing, sheep-killing penalties of the statute.

That was all there was of the triumph of "the feudal lords" by the decisions of 1858 and 1859. They had not acquired proprietorship in the lands; they had only what their friends on the bench called a "*pro hac vice* equivalent." In the language of the court, they were by those decisions, based expressly upon the statute of 1805,

placed on the *same footing* of the owners of lands who had tenants under them for life or years. It was an easy matter to say so, but quite another to realize it. There were two parties to that arrangement. The courts had seen but one. They could not give to one party without taking from the other. The court overlooked that feature of the case. The losing parties did not.

Moreover, those decisions were not placed before the public in a way to command a great degree of respect. There were weak points in the argument, so obvious that they could not escape observation.

In the first place there was a decisive admission that the plaintiffs were not what they pretended to be, that is, they were not the reversioners of the lands with tenants under them. Had they been so, the task of the court was an easy one, for then no defence was pretended. By trying to get up an equivalent for the reversion, they admitted that the plaintiffs had not the reversion, and thereby admitted, as a question of law ,the other point of the defence, that the plaintiffs not having the reversion, could not recover; for if that was not true, there was no necessity for contriving something equivalent to a reversion to supply the want.

In the second place, the manner of making the "equivalent" was not one calculated to command the respect of an intelligent people. It was the first time that a court had ever assumed that a statute meant just the opposite of what its language expressed. And then the mode of what they call "the perfection of reason," by which they assumed "of necessity" to change one thing to another, has had no parallel.

At the next session of the legislature an act was passed declaring "that the act of 1805 and its subsequent reenactments shall not apply to deeds of conveyance in fee made before the passage of that act, nor to such deeds hereafter to be made" (Laws of 1860, p. 675).

The Legislature undoubtedly acted under the belief, that if the Courts were relieved from applying the act of 1805, they would be relieved from the necessity of *making* an *assignment* into a *lease*, and of *placing* those who owned no lands on the "same footing" with those who did own.

The Supreme Court of the third district refused to be relieved, and reiterated the argument of the 27, Barb. before cited, about making "*Legislative reversions*," and "*Statute reversions*" in order to enforce the claims of the plaintiffs. They assumed that there was no liability of the defendents, except as it was created by the Act of 1805; and that the repeal of that act would destroy the liability, by destroying the "Legislative reversion," which that act created. Hence they would not believe that the legislature meant what they expressly declared; and, moreover, they denied that the Legislature had the constitutional right to pass an act of such meaning. According to their logic the Legislature could create a liability, but could not remove it. But there was nothing new in the argument, and nothing which has since commanded any attention from the parties or their counsel, or the Court above. We need, therefore, bestow no more space upon that decision. The leading opinion will be found reported in 33 Barb. 136.

Next in order, come the opinions hereto annexed. We do not in-