


1-1-2008

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Recommended Citation

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NO COMPENSATION FOR SLAVE TRADERS: SOME IMPLICATIONS

Allen Kamp†

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I. INTRODUCTION

As we celebrate the 200th anniversary of the abolition of the slave trade, I want to examine some implications of what did not happen: the lack of compensation to the slave traders and the non-response of the law to the stopping of a global enterprise. This Essay will make two points, which are unrelated: first, the lack of any reported cases on claims of excuse for performance of contracts may indicate that we do not need any doctrines of excuse; and second, that the lack of compensation paid to those whose business was outlawed, while 20 million pounds was paid as compensation to the slave owners (because of abolition of slavery in 1832), indicates that there was no recognized property right in an ongoing enterprise.¹

Before entering into the body of my work, I want to discuss the moral problems with writing about slavery. This Essay analyzes the effects (or non-effects) of the abolition of slavery; but such an approach ignores the moral dimension and is, on a fundamental level, wrong. Slavery was a crime against humanity and has to be seen on those terms. The abolition of slavery, however, can be looked at from the stance of the legal academic, and the products of research into abolition and its effects can contribute to our understanding of legal doctrine. There is nothing wrong with such an exercise if the writer and reader realize that the problem with slavery and the slave trade was not a matter of legal doctrine.

There is an example of the problematic approach to classifying the slave trade while doing research at the Oak Park Public Library. Books on the slave trade are classified there, by the Dewey Decimal System, under "World Trade." Thus, books on the slave trade were

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1. See An Act for the Abolition of Slavery Throughout the British Colonies, 3^o h 4^o Gulielmi iv, cap. LXXIII., http://www.pdavis.nl/Legis_07.htm.

shelved next to those on the World Trade Organization and the North American Free Trade Agreement. So was the slave trade commerce or crime? It was both.

II. EXCUSE FOR NON-PERFORMANCE

In present contract law, there is a set of related doctrines that involve an excuse of contractual performance where some event occurs that the parties did not anticipate in their contract.² For the seller, the doctrine is called “impossibility” (now often termed “impracticability”); for the buyer, “frustration of purpose.” The idea behind the two doctrines is that there has been a supervening turn of events that has impeded the promisor’s performance or defeated a party’s purpose in making the contract. Professor Farnsworth, in his casebook, describes these cases:

Sections 2 and 3[of his casebook] feature obligations that are subverted by events occurring after the parties have contracted. When a promisor gets relief on the ground that a supervening turn of events has impeded its performance, the word “impossibility” or—now more commonly—the word “impracticability” is usually used in explanation. . . . The typical situation presented in Section 3 is somewhat singular in that the party claiming an excuse cannot say that its performance was impeded by a supervening event; rather, some turn of events has thwarted that party’s object in making the contract. Usually the phrase “frustration of purpose” is used in this connection.³

The topic has generated classic cases, which have been used by generations of law professors to bedevil and befuddle law students. Examples include *Taylor v. Caldwell*,⁴ in which the defendant music hall owners were excused from their contract to let their facilities to a group of musicians because the music hall had burned down; *Transatlantic Financing Corp. v. U.S.*,⁵ in which a shipper claimed, but did not get paid for, the extra distance traveled because of the closure of the Suez Canal; and *Krell v. Henry*,⁶ where the defendant did not have to pay the remaining balance under an agreement to rent a flat in order to see the coronation parade of Edward VII (the coronation had been postponed due to the King’s illness). As we will see, the abolition of the slave trade did not generate any such cases, although one would think that the abolition of a global commerce would have.

2. See, e.g., E. ALLAN FARNSWORTH, ET AL., *Basic Assumptions: Mistake, Impracticability and Frustration*, in *CONTRACTS*, Ch. 8 (6th ed. 2001).

3. *Id.* at 785.

4. See *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309 (K.B.).

5. See *Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 312 (D.C. Cir. 1966).

6. See *Krell v. Henry*, (1903) 2 K.B. 740 (Ct. of App.).

A. *The Slave Trade*

Around the time of the trade's abolition, the global commerce of slavery and slave production was booming. "[T]he abolitionists were facing a dynamic system."⁷ The rate of profit on invested capital for the slave trade was just under 10%, comparatively a high rate of return.⁸ The trade itself was one-fifth of Britain's overseas trade,⁹ and Britain accounted for half the world total of the slave trade in the period between 1791 and 1806. "First, in terms of the usual standards, the British trade was bigger and better over the period as a whole than it had ever been."¹⁰ Furthermore, there was an expanding market: slavery was expanding into the bigger islands of the West Indies and into the North American shores on the Gulf of Mexico and the Mississippi Valley.¹¹

B. *Abolition*

The abolition of the trade in 1807 was preceded by acts which regulated the trade. In response, British slave traders started sailing under neutral colors.¹² The volume of slaves landing in the New World declined after 1803. British trade to foreign areas was abolished in 1806.¹³ But even though the trade figures were in decline, abolition stopped the legal slave trade entirely.

This stopping of an entire sector of commerce did not cause any private law response, nor any development of common law doctrine. In recent history, upheavals in commerce have produced litigation by those seeking to get out of contracts due to a change in circumstances. The Suez Crisis in 1956 resulted in several cases (one of which has been noted above) in which shipping companies and shippers tried to readjust their contracts.¹⁴ The "energy crisis" of the early 1970s resulted in several cases where energy sellers and buyers sought to get out of long-term contracts.¹⁵

Certainly the trade was not stopped completely; much of it was just carried on illegally. According to Hugh Thomas, "the United States

7. SEYMOUR DRESCHER, *ECONCIDE, BRITISH SLAVERY IN THE ERA OF ABOLITION* 165 (1997).

8. *See id.* at 30 (examining the profitability of the British slave trade).

9. *See id.* at 165 (analyzing the abolitionists' fears that the British slave trade would increase with capitalism).

10. *Id.* at 75.

11. *See id.* at 98 (discussing the increasing geographic reach of the slave trade).

12. *See id.* at 30 (explaining why British slave ships sailed under neutral colors).

13. *Id.* at 29.

14. *See Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 312 (D.C. Cir. 1966).

15. *See, e.g., E. Airlines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 433-35 (S.D. Fla. 1975); *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981); *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 58-59 (W.D. Pa. 1980).

enjoyed a modest illegal international trade in slaves for fifty years.”¹⁶ The same English traders continued to operate and some sailed under foreign flags.¹⁷ Moreover, trading firms invested in Spanish or Portuguese ships.¹⁸

There were monetary penalties for engaging in the illegal trade, but not criminal ones. Ships involved in the trade were liable to be seized and condemned. “The master and owner were liable to be fined £100 per slave and the ships and goods forfeited to the Crown.”¹⁹

C. *The Legal Non-Reaction*

The lack of legal response to the outlawing of the slave trade may help us better understand the law of the impracticability and frustration of purpose cases. Professor Andrew Kull argues that the “true rule” here, as judged by a wide range of cases, “is to confirm the parties *in status quo*, granting relief to neither.”²⁰ Professor Kull maintains that the loss in these cases should be where it falls: “No set of judicially imposed default rules can usefully allocate unidentified risks; nor can judges do anything to optimize risk by spreading by their ex-post reallocation of losses.”²¹

This Essay argues that one can look at abolition of the slave trade as a gigantic experiment in which a global commercial activity was shut down. Yet, there was no litigation claiming excuse. Abolition did not create any new legal doctrine. The development of these legal concepts of excuse lay in the future, with *Taylor v. Caldwell* in 1863, which imported the civil law concept that a party “is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default.”²²

William W. Story’s *A Treatise on the Law of Contracts Not Under Seal*²³ does not cite any slave cases under the section dealing with excuse. Langdell’s *A Summary of the Law of Contracts* (1880) does not mention any cases involving the slave trade. So it would seem that Professor Kull is right—a business was able to be closed down and those participating in the trade could adjust, without the assistance of any doctrine of excuse. Thus, the “thing that did not happen”—the

16. HUGH THOMAS, *THE SLAVE TRADE/THE STORY OF THE ATLANTIC SLAVE TRADE 1440–1870*, 568 (1977).

17. *Id.* at 572.

18. *Id.*

19. The National Archives, *British Transatlantic Slave Trade: Abolition*, <http://www.nationalarchives.gov.uk/catalogue/RdLeaflet.asp?sLeafletID=409> (last visited Apr. 7, 2008).

20. Andrew Kull, *Mistake, Frustration, and the Windfall Principle and Contract Remedies*, 43 *HASTINGS L.J.* 1, 54 (1991–1992). Author’s full disclosure: Prof. Kull is my wife’s college roommate’s husband’s step-brother.

21. *Id.* at 55.

22. *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309, 313 (Q.B.).

23. WILLIAM W. STORY, *A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL* (3rd. ed. 1874).

non-development of any doctrine of excuse—supports his position that such a doctrine is unnecessary.

III. NON-COMPENSATION

The second point of this Essay discusses the significance of the fact the slave traders did not receive any compensation for the termination of their business, while twenty-three years later, the slave owners did.

Although I have not found any historical record of even a suggestion that slave traders should be compensated, there was social consensus that the slave owners should be compensated for the loss of their property. Professor Kathleen May Butler states that “most government officials, and indeed many abolitionists, believed that uncompensated emancipation would be unconstitutional and would set a dangerous precedent”²⁴ Professors Fogel and Engerman describe the deeply rooted conviction that the slave owner’s property rights in slaves had to be respected, both in the case of Great Britain and in the Northern States that abolished slavery before the Civil War:

These, of course, were not the only factors that influenced the timing or the content of British legislation on emancipation. Parliamentary action was no doubt also influenced by such matters as the rising concern over the condition of the English industrial classes, especially the children and women employed in the factories and mines. However, we believe that the factors we have singled out are relevant to an explanation not only of what was common to the British and northern cases, but also to certain important differences regarding the distribution of the financial burden of emancipation.

What was common to the two cases, of course, was agreement that the title of slaveholders to their chattels was a valid property right that had to be respected. There were some Britons who held that the claims of slaves to their freedom represented a higher morality than the claims of owners of property. But they were a small minority among the British public and were virtually without voice in Parliament. The merchants, lawyers, manufacturers, and landowners who dominated the antislavery bloc within Parliament showed no desire to bring into question so fundamental a tenet of their own social order. Forced emancipation, of course, even with full compensation to slaveholders, represented some degree of tampering with property rights. But taxes and governmental regulation of commerce were also intrusions. And so the parliamentary struggle for emancipation was generally confined to proposals that involved only degrees of interference consistent with the prevailing practices. This viewpoint was so widely accepted and deeply held that the proslavery bloc continually invoked the specter of an attack

24. KATHLEEN MARY BUTLER, *THE ECONOMICS OF EMANCIPATION, JAMAICA/ BARBADOS, 1823–1843*, xvi (1995).

on property rights to stave off legislation that moved in the direction of emancipation.²⁵

In the case of the slave traders, there was no such social norm, consensus, or fundamental tenet. The ending of the slave economy (“econcide,” as it was called by Seymour Drescher)²⁶ called for no compensation either for the destruction in value of the ships, insofar as they were adopted to the slave trade, or for the ending of the extra profit to be made in the trade.

The meaning of the Takings Clause (“Nor shall private property be taken for public use, without just compensation”²⁷) of the Fifth Amendment is a matter of current concern. (See, for example, the wide, frequently hostile reaction to the Court’s ruling that taking for a public purpose includes condemnation for a private shopping center.²⁸) The total lack of compensation given to the slave traders, in contrast to the great sum given later to the slave owners, tells us something of the meaning of the clause.

In the half-century following the adoption of the Takings Clause, property was seen as something tangible (here, the human beings owned as slaves) and not the economic profit enjoyed by a business or the property rights in a going business.

Professor Frank Snyder suggested that this differing view was class-based: the rights of landowners, who were the aristocracy or gentry, deserved protection, but the rights of the middle class in their business profits and trades did not.

Whatever the reason, one type of economic good was protected and another not. This non-protection argues against Richard Epstein’s position in his book, *Takings: Private Property and the Power of Eminent Domain*.²⁹

In *Takings*, Professor Epstein argues that any governmental deprivation of an individual’s property rights, broadly conceived (in fact “property” is defined by him to the maximum extreme), is a “taking” which should be compensated. This would include any hindrance of the right of disposition: “Let the state impose restrictions or conditions upon the right of disposition, let it block or hinder sale or lease or mortgage, then it too has taken property for which compensation is prima facie required.”³⁰ Thus, Epstein would see the restriction on the right of the slave trader to sell his slaves to be a taking.

25. Robert William Fogel & Stanley L. Engerman, *Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation*, 3 J. LEGAL STUD. 377, 383 (1974).

26. DRESCHER, *supra* note 7.

27. U.S. CONST. amend. V.

28. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that the city’s exercise of eminent domain power in furtherance of economic development plan satisfied constitutional “public use” requirement).

29. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

30. *Id.* at 74–75.

Moreover, such a restriction also “takes” the rights of the purchaser. “Any restriction that in form restricts only disposition by the owner perforce limits rights of others to acquire property in exchange for their cash, property, and perhaps labor. The Takings Clause reaches *both* the buyer and the seller, not just the seller.”³¹

Later in his book, Epstein goes from analyzing a taking from an individual to takings from many individuals by “taxation, regulation, and modifications of liability rules.”³² These mass takings, he concludes, “are amenable to the same form of analysis as garden-variety takings of land; they cannot be kept in a watertight compartment separate from takings of private property.”³³ Thus, regulation is a taking: “Regulations limit the goods that can be sold in commerce and the prices charged for them. . . . Yet these pro-tem forms of regulation all amount to partial takings of private policy.”³⁴

To be fair, Epstein does say that “[s]lavery by conquest is regarded as a categorical evil,” although he then appends a footnote stating, “The question of slavery by contract is far more difficult”³⁵ Because slavery is (or is regarded as) a categorical evil, presumably the slave trade and slave ownership could be banned.

But in giving compensation, the early nineteenth-century British and Americans distinguished between two types of economic rights, both seen to be evil—the slave trade and slave ownership. Engaging in the slave trade was just not seen as property, while owning slaves was.

This view of property was roughly contemporary with the drafting of the Takings Clause in the United States Constitution; and so Epstein’s argument is completely ahistorical. As such, his argument contradicts that of another conservative legal thinker, Justice Antonin Scalia, who claims that interpreting the Constitution by the original intent of the drafters and following the judicial interpretation contemporary with the drafting is the only valid approach.³⁶ Epstein and Scalia, both known as conservatives, cannot both be right.

IV. CONCLUSION

So this Essay ends negatively, stating that there is a historical argument or at least a negative inference from history. This Essay argues that two legal doctrines, one a secure part of contract doctrine and one a proposed interpretation of constitutional law, lack validity. It

31. *Id.* at 75.

32. *Id.* at 93.

33. *Id.*

34. *Id.* at 101.

35. *Id.* at 335.

36. See generally Allen R. Kamp, *The Counter-Revolutionary Nature of Justice Scalia’s Traditionalism*, 27 *Pac. L.J.* 99 (1995–1996) (investigating Justice Scalia’s traditionalism).

seems that if we once did without impracticability and frustration, we could do without them now. Professor Epstein may have a sound policy basis (actually, I think his proposal would lead to disaster) for his theory of takings, but his vision has no historical basis. The abolition of the slave trade, a victory for civilization, also contributes a little to the study of legal doctrine.