



# Society Update

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## Slavery's Legacy in Michigan Law

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*\*\*Attendees at the April 2024 Annual Luncheon may recall the excellent keynote address given by Professor Justin Simard and two of his students. Professor Simard and Ms. Maxwell have since provided the Society with the article below.\*\**

The law was critical to the establishment and growth of American slavery. Judges authored thousands of opinions on the subject, yet the influence of these cases remains underappreciated. The Citing Slavery Project at Michigan State University works to uncover this legacy. Our team has developed a database at <http://www.citing-slavery.org> to track the history and continued citation of cases involving enslaved people. Our work reveals that, even in Michigan, cases involving enslaved people have influenced the law in unexpected ways.

Slavery was a colossal institution. By the time of secession, enslaved people made up approximately thirty percent of the population of slave states. The market value of enslaved people alone accounted for fifteen to twenty percent of wealth in the United States. The slave economy extended outside the South as well, fueling industry, finance, and trade in the North and around the

world. This economic activity generated thousands of cases involving enslaved people in subjects from contracts to criminal law.

The Citing Slavery Project has collected more than 15,000 slave cases, which we define as any case involving enslaved people as parties to the case or as property related to the dispute. Despite their prevalence, slave cases, especially those involving routine legal matters, have received little attention from legal scholars. This is partly because lawyers usually treated slave cases no differently than cases involving non-human property. For them, a warranty on an enslaved person was like a warranty on a horse; a fraudulent conveyance of an enslaved person looked like a fraudulent conveyance of crops; and even the inheritance of an enslaved family resembled bequests of farm animals.

Translating slave commerce into the common law supported the system of slavery. Resolving basic questions of inheritance allowed Southerners to bequeath the enslaved people they owned to their heirs. Mortgaging enslaved people allowed slaveholders to capitalize on their human assets and created a market for collateralized slave securities. Regulating the practices of hiring out enslaved people stabilized an active market in the rental of human beings. All these practices exposed the enslaved to appraisal, sale, and permanent separation from their family and friends.

Here in Michigan, the cases the courts considered related more directly to the ground rules of slavery. Michigan has only three published appellate cases that directly involve an enslaved person: *In re Denison* (1807)<sup>1</sup> involved an unsuccessful freedom suit in Michigan Territorial court; *In re Pattinson* (1807)<sup>2</sup> was

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1. *In re Denison*, 1 Blume Sup Ct Trans 319 (Mich Terr 1807).

2. *In re Pattinson*, 1 Blume Sup Ct Trans 321 (Mich Terr 1807).

a fugitive slave suit on behalf of a Canadian citizen; and *People ex rel Hedgman v. Board of Registration* (1872)<sup>3</sup> involved questions of the citizenship of formerly enslaved people. Although Michigan courts were not directly involved in commercial decisions about enslaved people, the state was economically connected to the world that other slave cases helped create.

Even after the Civil War, lawyers and judges around the country continued to treat cases involving enslaved people as if they had involved non-human property. In 1871, for example, the U.S. Supreme Court in *Osborn v Nicholson*<sup>4</sup> held that outstanding contracts for payments for purchases of enslaved people were still enforceable after slavery. Although slavery had been abolished for over five years by the time the *Osborn* opinion was published, slavery's legal legacy remained.

Even now, Judges continue to cite slave cases for fundamental legal propositions. Our research has uncovered more than 50,000 citations to slave cases by American judges and lawyers. These citations occur not only in the former Confederate states but also across the northern U.S. from New York to California. Lawyers generally treat cases involving enslaved people in traditional legal categories. Roughly eighty percent of the cases we have found that cite slave cases do not acknowledge a case's slave context. The lack of acknowledgment of these citations by legal professionals makes the influence of slavery harder to trace.

Here in Michigan, our latest count found 578 cases that directly cite cases involving enslaved people. Such citations appear most frequently in late-nineteenth-century cases, but some also appear in the twentieth and twenty-first centuries.<sup>5</sup> We have found citations both in judicial opinions and in attorneys' arguments reproduced at the beginning of case reports. These citations generally support propositions related to private and procedural issues. Issues involving contracts, torts, wills and trusts, evidence, and civil procedure all appear frequently.

One of the earliest cases in Michigan that directly cites

a slave case is *Fitch v Newberry* (1843).<sup>6</sup> *Fitch* involves an action to recover personal property, specifically sixty-five kegs of nails, a barrel of apples, and an unidentified box of "goods." The plaintiffs had contracted with a Michigan company to ship the plaintiffs' property, but the goods ended up in the defendants' possession; the defendants did not know about the plaintiffs' contract to transport these goods to an alternative location. When the plaintiffs demanded their property back, the defendants refused unless the plaintiffs provided additional payment. In the *Fitch* opinion, the court cites *Dunbar v Williams*.<sup>7</sup> In *Dunbar*, a physician sought compensation for providing medical assistance to an enslaved person from his enslaver; however, the physician had provided care without the slaveholder's knowledge. The *Dunbar* court held that the slaveholder was not indebted to the physician because the aid was unnecessary and provided without the slaveholder's consent. In *Fitch*, the court cites *Dunbar* to support the assertion that Person A's acts (done without Person B's consent) do not inherently make Person B indebted to Person A; the court applied this reasoning to the issue in *Fitch*. Although from the nineteenth century, *Fitch* was most recently cited in 1985 by the Supreme Court of New Hampshire. Because so many cases are closely related to slavery, untangling its influence on the law is challenging.

Direct citations even occur in the twenty-first century. In 2001, the Michigan Court of Appeals considered a challenge to a ballot referendum in *Michigan United Conservation Clubs v Secretary of State*.<sup>8</sup> This case required the court to interpret Michigan's constitutional prohibition of referendums that make appropriations for state institutions. In this case, the Court of Appeals cites a Michigan Supreme Court Case from 1967 for principles of constitutional interpretation. The Michigan Supreme Court notes that these principles derived from *Prigg v Pennsylvania*,<sup>9</sup> an 1842 U.S. Supreme Court case dealing with the Constitution's Fugitive Slave Clause. In *Prigg*, Justice Story struck down a suit against a man who had seized Margaret Morgan and her children from the free state of Pennsylvania, alleging that they were slave property. Writing for the major-

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3. *People ex rel Henderson v Bd. of Registration*, 26 Mich 51 (1872).

4. *Osborn v Nicholson*, 80 US 654 (1871).

5. See CITING SLAVERY PROJECT, <[https://www.citing-slavery.org/court\\_cases?state\\_code=US-MI](https://www.citing-slavery.org/court_cases?state_code=US-MI)> (last visited Oct. 8, 2024).

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6. *Fitch v Newberry*, 1 Doug 1 (Mich. 1843).

7. *Dunbar v Williams*, 10 Johns 249 (NY Sup Ct 1813).

8. *Mich. United Conservation Clubs v Sec. of State*, 246 Mich App 82 (2001).

9. *Prigg v Pennsylvania*, 41 US 539 (1842).

ity, Justice Story concluded that the U.S. Constitution “contemplate[d] the existence of a positive unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain.” The Michigan Court of Appeals, therefore, was citing the same interpretive principles that Justice Story had used to find that states could not provide procedural protections to residents alleged to be fugitive slaves. Recent reliance on such an infamous case shows that the persistent influence of slavery is not confined to the South.

Similarly, in *People v Davis* (2005),<sup>10</sup> the Michigan Supreme Court relies on the 1852 U.S. Supreme Court case *Moore v Illinois*.<sup>11</sup> In its opinion, the Michigan Supreme Court quotes *Moore* to support its holding that a defendant’s single act may constitute two distinct “offenses” if he violates the laws of two different sovereigns: “[A]n offense, in its legal signification, means the transgression of a law.” *Moore* involved a defendant who violated an Illinois law that prohibited the harboring of an enslaved person who “ow[ed] service or labor to any other persons.” In that case, the U.S. Supreme Court affirmed the defendant’s conviction and upheld the Illinois statute, explaining that “any State law or regulation which interrupts, impedes, limits, embarrasses, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service, is void.” *Moore*’s bottom-line rule is that an individual has the inherent right to own another person; by citing *Moore* in *Davis*, *Davis* is—even inadvertently—continuing *Moore*’s legacy.

Finally, as recently as 2015, in *Aroma Wines & Equipment, Inc. v Columbian Distribution Services, Inc.*,<sup>12</sup> the Michigan Supreme Court relies on a quote from *Liptrot v Holmes*,<sup>13</sup> an 1846 Georgia case in which the litigant was attempting to “recover the possession of fourteen slaves.” The Michigan case involved a suit between a wine merchant who had rented climate-controlled space to store wine and then sued when the storage company moved that wine out of the space. The Michigan Supreme Court quotes part of Justice Cooley’s treatise on torts, and the treatise itself quotes *Liptrot*. The Court

quotes the treatise to show the historical background of Michigan’s conversion law. Although this link is more attenuated than other examples, it provides further evidence of the citation of slave cases in unexpected places.

Slavery has influenced the law more significantly than even these direct citations suggest. Although we have found only 578 Michigan cases that directly cite slave cases, just the four cases we discussed above have been cited 322 times, one as recently as February 2024.<sup>14</sup> The influence of slave cases continues to grow, even if courts do not directly cite them. Across the country, we estimate that approximately 1,000,000 cases—18% of all published American cases—either cite a slave case directly or cite to a case that cites one. Much more research is needed to understand the profound influence of these cases. We hope that our research will encourage lawyers, judges, and historians in Michigan to undertake this work.

### **Author Biographies**

**Anna M. Maxwell** is a third-year law student at Michigan State University College of Law. In addition to being the Director of Case Collection and Research on the Citing Slavery Project, she is also Editor-in-Chief of the Michigan State Law Review and part of MSU’s Moot Court Competition teams. After law school, she will spend a year clerking in the United States District Court for the Eastern District of Virginia before returning home to Michigan to work at Bodman PLC.

**Justin Simard** is an Associate Professor of Law at the MSU College of Law where he teaches Professional Responsibility, Commercial Law, and Legal History and directs the Citing Slavery Project and the Kelley Center for Ethics and the Legal Profession.

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10. *People v Davis*, 472 Mich 156 (2005).

11. *Moore v Illinois*, 55 US 13 (1852).

12. *Aroma Wines & Equip., Inc. v Columbian Distrib. Servs., Inc.*, 497 Mich 337 (2015).

13. *Liptrot v Holmes*, 1 Ga 381 (1846).

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14. See *People v Jackson*, No. 365018, 2024 WL 402189, at \*6 (Mich Ct App 2024) (citing *Davis*, 472 Mich at 159).



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### ***Mission Statement***

The Michigan Supreme Court Historical Society, a non-profit 501(c)(3) corporation, collects, preserves, and displays documents, records, and memorabilia relating to the Michigan Supreme Court and the other Courts of Michigan, promotes the study of the history of Michigan's courts, and seeks to increase public awareness of Michigan's legal heritage. The Society sponsors and conducts historical research, provides speakers and educational materials for students, and sponsors and provides publications, portraits and memorials, special events, and projects consistent with its mission.

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