AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 5: The Jacksonian Era – Individual Rights/Property/Takings

**American Print Works v. Lawrence, 21 N.J.L. 248 (NJ 1847)**

*In December 1835, a fire ravaged New York City, burning hundreds of buildings. Numerous buildings, including many warehouses filled with goods, were purposefully blown up at the order of the mayor in order to try to stop the spread of the fire. A state law empowered the mayor, in the case of a fire in the city, to direct any building he deemed “hazardous” to be pulled down and destroyed. The state made provision for compensating the owners of buildings destroyed under the statute, but the state did not provide compensation to the owners of property that was destroyed along with the buildings.*

*Several lawsuits were filed by owners of the buildings to recover damages for destruction. The New York state courts held that city was not liable for any damage to property in the fire. Several owners of personal property that had been destroyed along with the buildings turned to the New Jersey courts in an effort to recover monetary damages from the mayor personally. The plaintiffs argued that no constitutionally valid statute could authorize the destruction of private property without compensation. The New Jersey state supreme court unanimously rejected this argument, holding that the destruction of property in order to protect public safety was not a constitutional taking for public use that required compensation and was not a violation of private property rights that created liability on the part of the government or government official.*

Chief Justice GREEN.

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[I]s property, destroyed to arrest the progress of a conflagration, taken for public use, within the constitutional sense of the term?

The right to take private property for public use is an attribute of sovereignty — it is inseparable from the sovereign power. It is the right of eminent domain, of sovereign or transcendental property in the goods of the subject. It is a right founded on the nature and end of sovereignty, growing out of the nature of the social compact, by virtue of which every member of society holds his property upon condition that it is subject to be taken for the use of the State whenever the public good requires it. It is justified on the ground of state necessity. It is founded on the same principle as the right of raising taxes and subsidies for the support of government and the right of regulating the use of private property by sumptuary laws.

But the right to destroy property to prevent the spread of a conflagration rests upon other and very different grounds. It appertains to individuals, not to the State. It has no necessary connection with, or dependence upon the sovereign power. It is a natural right existing independently of civil government.

It is both anterior and superior to the rights derived from the social compact. It springs not from any right of property claimed or exercised by the agent of destruction in the property destroyed, but from the law of necessity. The principle as it is usually found stated in the books is, that “if a house in a street be on fire, the adjoining houses may be pulled down to save the city.” But this is obviously intended as an example of the principle, rather than as a precise definition of its limits. The principle applies as well to personal as to real estate; to goods as to houses; to life as to property — in solitude as in a crowded city; in a state of nature as in civil society. It is referred by moralists and by jurists to the same great principle, which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy the instant demands of hunger with trespassing upon the land of another to escape death from an enemy. It rests upon the maxim, “Necessitas inducit privilegium quoad jura privata.” [“From necessity spring privileges upon private rights”] And the common law adopts the principle of the natural law, and places the justification of an act otherwise tortious, precisely upon the same ground of necessity.

It must be so pleaded in justification. Hence the plea in such case is not the public good, the eminent domain, the sovereign power, but necessity.

It is true that by many writers of high authority the ground of justification of an act done for the public good, and of an act committed through necessity, are not accurately distinguished. They are both spoken of as grounded on necessity, and they doubtless are so. But the one is a state, the other an individual necessity, though ofttimes resulting in a public or general good. The one is a civil, the other a natural right. The one is founded on property and is an exercise of sovereignty. The other has no connection with, or dependence upon, the one or the other.

Nor can property destroyed to prevent the spread of a conflagration, be said in any appropriate sense to be destroyed for the public good. It may be destroyed for the benefit of one, of a few, or of many; but it is not destroyed for the benefit of the State; nor is it taken in aid of any of these public objects, which it is the peculiar and appropriate duty of every State to foster and promote. I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the constitution.

Nor is the principle altered by the fact that the destruction in the present instance was committed under Legislative sanction. The right of destruction existed prior to the enactment. The statute created no new power. It conferred no new right. It merely converted a right of necessity into a legal right. It regulated the mode in which a previously existing power should be exercised.

The statute does not authorize the destruction. It could not do so. It would be an attempt to take private property for private use. Nor did the statute deprive any citizen of his natural right to destroy buildings to prevent the spread of a fire in a case of necessity. Every citizen may, notwithstanding the statute, still exercise that right at the peril of being held responsible for an error of judgment as to the existence of the necessity. But the statute vested the power of judging of the existence of the necessity in the discretion of certain officers designated by the statute, and made their judgment conclusive of the existence of that necessity. In so doing, I do not perceive that the Legislature acted unconstitutionally. The policy of the statute, and whether upon principles of equity, provision should have been made to indemnify those whose property has been sacrificed for the safety of the city, are points upon which a difference of opinion may exist, but with which this court has no concern.

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The act . . . which constitutes the Mayor and Aider-men judges of the necessity of destroying the building, must of consequence make them judges also of the time at which the act of destruction becomes necessary. It must be assumed, therefore, upon the pleadings, that the building was destroyed at the time, and in the manner, demanded by the immanency of the danger. It must further be assumed, that the destruction .of the building necessarily involved the destruction of the goods.

The defendant, then, in this action, is attempted to be made responsible for the consequences of an act which, by the statute, he was especially authorized to perform, for the performance of a duty which, as a public officer, he was bound to execute. He was acting for no private emolument, but in the discharge of a public duty. The act was not done for his individual benefit. He derived from it no advantage not shared in common with his fellow-citizens. In the performance of his duty he acted, it must be assumed, with due skill and caution. There is no allegation or pretense to the contrary. Under these circumstances I deem it clear that the defendant is not liable for the destruction of the plaintiff’s goods, or for any other inevitable consequence of the destruction of a building.

It is a well settled principle, that where a person in discharge of a public duty, not acting for private emolument, unwittingly injures another in the performance of the act while acting with due skill and caution, he is not answerable for damages. . . .

Justice WHITEHEAD, concurring.

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. . . . I do not know what public officer would ever be willing to perform so responsible a duty as that required here, if he must be answerable in damages to the whole amount of property destroyed for a mere act of misjudgment, and that to be determined by a jury on the evidence or opinion of the bystanders, grown much wiser after, than they were before, the transaction. It is correctly made the duty of those required to act, to judge of the time and necessity for the action, the same, of course, as in all other cases of the performance of public duty by an officer or agent, rendering him liable for any wanton exercise of authority. In matters of this kind, and of assessment, no jury is necessary under the constitution, the case not being a suit or action at common law, or in which a trial by jury “ has been heretofore used,” as expressed in the constitution.

. . . . Waiving any consideration of the term “public use,” and of its applicability to a case wherein the state or its citizens generally have not, and can have no real interest . . . I come at once to the real point in the case, and that is, that in my opinion here is no appropriating or taking of private property for public use. This is very unlike the cases where the State, by virtue of its right of eminent domain, resumes the property of a citizen, and appropriates it to the use of the public; or in prosecuting some great public work, such as a canal or railroad, even in its sovereign capacity, or through the power-delegated to an incorporated company, finds it necessary not merely to take the soil and property of the citizen, but to destroy his mill seat, divest his water course, or commit other irreparable damage to private rights in order to effect the great object in view. In such cases not only must private rights yield to the interest and wishes of the State, but it is a positive evil suffered by an individual for the supposed gain of the whole community, at the will of that community, and upon every principle of justice the public should make compensation, and this has accordingly been provided for by the Constitution of the United States, and of most of the State governments. But where a ship is in danger of foundering, and a part of the cargo is thrown overboard to save the residue, or where a house in the midst of the city is infected with a dangerous disease, and is pulled down, and the place purified to prevent the spread of contagion, or where a fire occurs in a city, and to stay its desolating ravages it is necessary to pull down or destroy the adjoining buildings — in each of these cases the individual suffers; his property is destroyed in order that other property in the vicinity may be saved, and he may, or may not have redress under the common or statute law, but he will have no right to resort to the State, under the idea that it was taken for the public use.

This was a case where inevitable danger arose to a community of goods or persons, and the law of necessity would authorize the use or the destruction of the first property that would avert that danger, no matter whose or what it was; the whole community were in the same situation; all had equal rights, and were subject to equal liabilities; and if A’s property was destroyed, and B’s saved, it was merely the misfortune of the one and the good fortune of the other, which strict equity might require to be equalized in that immediate community - but if the law afforded no redress, the constitution could not. The statute of New York has given relief to certain classes of sufferers, requiring the corporation to make compensation; but the class to which the plaintiffs in their suits belong, the statute does not extend. In those cases, it was the bounty of the law that provided a remedy where none before existed: to these cases that bounty has not been extended. Whether the reasons for the distinction are satisfactory, or otherwise, is not for us to determine; it is sufficient for us to know that the difference exists.

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