AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

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

**Surocco v. Geary, 3 CA 69 (CA 1853)**

*On Christmas Eve of 1849, a fire raged in the gold rush town of San Francisco. John Geary, as the alcalde (or mayor) of the city, ordered that a house and store owned by Pascal Surocco be blown up by gunpowder in an effort to stop the spread of the blaze. The effort was unsuccessful, and the fire passed beyond where the building had stood and devoured a significant portion of the city. In the aftermath of the first “great fire” of San Francisco, the city council resolved to form a fire brigade.*

*Surocco sued for the mayor for recovery of the damages to his destroyed property, and won a judgment in his favor. Surocco argued that he could have saved more of his property from his building if the mayor had not intervened, and the state constitution prohibited the taking of private property for public use without just compensation. The mayor appealed to the state supreme court. The supreme court held in the mayor’s favor, concluding that private property destroyed by the state in an emergency was not a constitutional taking requiring compensation.*

Chief Justice MURRAY.

. . . .

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed

This point has been so well settled in the courts of New Pork and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. “It is referred by moralists and 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 goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape the death by an enemy. It rests up the maxim, *Necessitas inducit privilegium quod jura private*.”

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. *American Print Works v. Lawrence* (NJ 1847).

This principle has been familiarly recognized by the books from the time of the saltpeter case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defense of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience and the interests of society. Were it otherwise, one stubborn person might involve the whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefore. This is not “a taking of private property for public use,” within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of State necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grown out of this rule, and property may often in such cases be destroyed without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening such events as those supposed by the respondent’s counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved: they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

*Reversed*.