AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 6: Civil War and Reconstruction – Individual Rights/Property/Takings

**United States v. Russell, 80 U.S. 623 (1871)**

*During the Civil War, Union forces commandeered three steamboats to ferry troops and freight. The military had commandeered the boats as an “imperative military necessity” The owner operated the steamships at his own expense, but under military direction, during this period. The government made some payments to the owner of the steamboats, but the owner demanded more. The owner filed suit in the federal court of claims for full payment for the services that he had rendered to the government during the war, and the court found in his favor. The government appealed, arguing that the court of claims did not have proper jurisdiction over the case because Congress had stripped the court of jurisdiction over any cases involving the “destruction or appropriation of, or damage to, property by the army or navy . . . engaged in the suppression of the rebellion.” The Supreme Court unanimously affirmed the ruling the court of the claims, holding that the army had not damaged, destroyed or appropriated the steamships during the war but had instead commandeered their use out of military necessity and in doing so had created an implied contract for payment. The government did not owe compensation to owners for property that was destroyed out of military necessity during the war, but it did owe compensation to owners for property that was used by Union forces during the conflict.*

JUSTICE CLIFFORD, delivered the opinion of the Court.

Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use.

Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.

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. . . . Unexplained and uncontradicted the findings of the court show a state of facts which plainly lead to the conclusion that the emergency was such that it justified the officers in each case in ordering the steamboat into the service of the United States, as the orders purport to have been issued from an imperative military necessity, and if so they show beyond all doubt that the officers who issued them were not trespassers, and that the government of the United States is bound to make full compensation to the owner for the services rendered.

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.

Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law.

Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the executive department, and not to the Court of Claims.

. . . . Claims of the kind before the court would certainly be within the jurisdiction of that court were it not that Congress has passed a later act restricting to some extent the jurisdiction conferred by that provision. By the act of July 4th, 1864, it is provided that the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement thereof to the close.

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Briefly stated, the findings of the court in that behalf are as follows: That the military officers did not intend to appropriate the steamboats to the United States, nor even their services; that they did intend to compel the masters and crews, with the steamers, to perform the services needed and that the United States should pay a reasonable compensation for such services, and that such was the understanding of the owner; that the steamers, as soon as the services for which they were required had been performed, were returned to the exclusive possession and control of the owner. They were equipped, victualled, and manned by the owner, and he, or persons by him appointed, continued in their command throughout the entire period of the service. He yielded at once to the military order and entered into the service of the government, and the court here fully concur with the Court of Claims that there was not such an appropriation of the steamboats or of the services of the masters and crews as prohibited the court below from taking jurisdiction of the case. On the contrary, the court is of the opinion that the findings of the Court of Claims show that the employment and use of the steamboats were such as raise an implied promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the Court of Claims. . . .

*Affirmed*.