Supplementary Material

Chapter 4: The Early National Era—Individual Rights/Property/Takings and Due Process

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Callender v. Marsh, 18 Mass. 418 (MA 1823)

Marsh was a surveyor employed by Boston. One of his responsibilities was keeping city streets in good order. When leveling one city street, Marsh weakened the foundation of Callender's house, causing crucial walls to crumble. Callender sued Marsh for damages. Callender's lawsuit claimed that if Marsh's actions were consistent with local law, that law violated the takings clause of the Massachusetts Constitution.

Chief Justice Parker rejected this constitutional argument. He insisted that a taking occurred only when government physically occupied property. Government actions that merely reduced the value of property were not takings and did not have to be compensated. Marsh had not taken possession or occupied Callender's property. His diggings were on state property. Hence, Marsh did not violate Callender's rights. Most state courts in the Early National Era made the same distinction between compensable physical takings and noncompensable actions that reduced the value of property. Why does Chief Justice Parker make that distinction? Was Callender claiming rights inconsistent with the public good? Could you argue that Callender should have been compensated because he was shouldering a greater burden than other property holders? Why does Parker reject that argument?

CHIEF JUSTICE PARKER

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But it is said, . . . the legislature exceeded its constitutional powers. . . . This objection is founded upon the last clause in the 10th article of the Declaration of Rights, which provides, "that whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

There has been no construction given to this provision, which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government. Thus, if by virtue of any legislative act the land of any citizen should be occupied by the public for the erection of a fort or any public edifice upon it, without any means provided to indemnify the owner of the property, the title of the owner could not be divested thereby, and he might maintain his action for possession, or of trespass, against those who were instrumental in the act; because such a statute would be directly contrary to the above cited provision; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation. . . .

The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of

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the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, everyone who purchases a lot upon the summit or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss.

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There are cases, without doubt, where an individual may suffer by the exercise of this power, and thus be made involuntarily to contribute much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is supposed to be governed by.

A fort may be erected on public ground so near to a man's dwellinghouse as materially to reduce its rent and value; the public would not be bound to indemnify the suffering party, for when he built so near to unoccupied ground, which the public had a right to occupy for any purpose its exigencies might require, he should have foreseen the possible purpose to which it might be applied, and should have guarded against a future loss, by abstaining from building there. So the location of schoolhouses upon public land may materially diminish the value of an adjoining or opposite dwellinghouse, on account of the crowd and noise which they usually occasion; but it cannot be imagined, that the public are obliged to consult the convenience of the individual so far as to abstain from erecting the schoolhouse, or to pay the owner of the dwellinghouse for its diminished value. . . .

The case of highways or public streets is analogous; when rightfully laid out, they are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing every thing with the soil over which the passage goes, which may render it safe and convenient. . .

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That it might be proper for the legislature, by some general act, to provide that losses of the kind complained of in this suit should be compensated by the town or city within which improvements may be made for the public good, or by the owners of land which may be particularly benefitted, is not for us to deny; but without such legislative provision, we have no authority upon the subject, it being clear that by the common law, as well as by our statutes, the defendant in this action is not liable to damages. . . .

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