AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Individual Rights/Property/Due Process

Hoke v. Henderson, 4 Dev. 1 (NC 1833)

In 1807, *Lawson Henderson was appointed the clerk of the superior court of Lincoln, North Carolina. North Carolina law vested all court clerks with life tenure. In 1832, the state legislature passed a law requiring elections for court clerks. John Hoke won the first election for clerk of the superior court of Lincoln. When Henderson refused to vacate the office, Hoke filed a lawsuit. The trial court ruled that the 1832 North Carolina law unconstitutionally deprived previously appointed clerks of their offices. Hoke appealed that decision to the Supreme Court of North Carolina.*

Chief Justice Thomas Carter Ruffin (1787–1870) sustained the lower court ruling that the North Carolina law was unconstitutional. He insisted that disputes over who owned property were for justices, not legislatures to decide. Ruffin then claimed that public office was a form of property. North Carolina could no more deprive Henderson of his public office than the state legislature could deprive him of his horse. On what basis did Ruffin reach these conclusions? How did he interpret the due process clause of the state constitution? When do persons have a property right to their jobs?

CHIEF JUSTICE RUFFIN

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The act transfers the office of clerk from one of these parties to the other, without any default of the former, or any judicial sentence of removal. The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the legislature in the constitutions of the country; or is null, as being contrary to and inconsistent with the provisions of those instruments. To the determination of this question the judicial function is competent. It involves no collateral considerations of abstract justice or political expediency. It depends upon the comparison of the intentions and will of the people as expressed in the constitution, as the fundamental law, unalterable except by the people themselves, with the intentions and will of the agents chosen under that instrument, to whom is confided the exercise of the powers therein delegated or not prohibited. . . . It is competent for the judiciary to declare an Act of Assembly to be unconstitutional and void.

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. . . The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less personal liberty of the citizen, and the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things, or at their pleasure, abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best, which forbids the government to abolish the right, or which restrains the government from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present constitution it was asserted by our ancestors on various occasions; and, in one sense of it, its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and of right was ardent, and the weakness of the individual citizen against the claims of unrestricted power in the government was consciously felt, the people formed the constitution of this state; and therein declared "that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property,* but by the law of the land." . . .

. . . Whenever an act of the Assembly therefore is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right: which is not a legislative, but a judicial function. . . .

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A determination of conflicting rights between two classes of persons is a judicial act, although pronounced in the form of a statute.

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The act of 1832 does not modify the tenure of the office of clerk; neither does it affect the interest of the incumbents, but leaving the office and its privileges untouched, it directs the Courts to remove one class of individuals without a trial, and induct another, it is then judicial in its character and effects.

. . . Creating a right or conferring it on one, when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it, *without default,* is equally so and still more indefensible. The Legislature cannot act in that character; and therefore, although their act has the forms of law, it is not one of those *laws of the land,* by which alone a freeman can be *deprived* of his *property.*

A legislative act which deprives one person of a right and vests it in another, is not a "law of the land" within the meaning of the Bill of Rights.

Those terms "law of the land" do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer, than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? Yet all this he may suffer, if an act of Assembly simply denouncing those penalties on particular persons, or a particular class of persons be in itself, a law of the land within the sense of the constitution; for what is in that sense, the law of the land, must be duly observed by all, and upheld and enforced by the Courts. . . .

The sole inquiry that remains is, whether the office of which the act deprives Mr. *Henderson,* is property. It is scarcely possible to make the proposition clearer to a plain mind, accustomed to regard things according to practical results and realities, than by barely stating it. For what is *property;* that is, what do we understand by the term? It means, in reference to the thing, whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property thus explained, is well understood by every one, as well as distinctly stated in the law books from the earliest times. . . . That the purpose of creating public offices is the common good is not doubted. . . . Hence they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property, as far as they can be so in safety to the general interest, involved in the discharge of their duties.—This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. . . . But with these limitations and the like, a public office is the subject of property, as every other thing corporeal or incorporeal, from which men can earn a livelihood and make gain. The office is created for public purposes; but it is conferred on a particular man and accepted by him as a source of individual emolument. To the extent of that emolument it is private property, as much as the land which he tills, or the horse he rides or the debt which is owing to him. Between him and another man, none will deny the right of property. For if one usurp an office which belongs to another, the owner may have an action for damages for the expulsion. . . .

An office is the property of the incumbent.

These are the general principles that lead the court to the conclusion that the act of Assembly is invalid.