Supplementary Material

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

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**Parham v. Justices of Inferior Court of Decatur County, 9 Ga. 341** (1851)

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*The Inferior Court and Commissioner of Roads of Decatur County planned a new road across property owned by Ransom Parham. Parham had fenced some of that land, but left other lots unenclosed. Georgia statutes required state officials to pay compensation only when they took "enclosed land." Parham insisted he had a right to be compensated for both his enclosed and unenclosed property. The constitution of Georgia did not include a provision analogous to the takings clause of the Fifth Amendment. Instead, Parham claimed, the state constitution incorporated the common law principle that all takings required compensation. The Decatur Superior Court denied that claim. Parham appealed that verdict to the state supreme court.*

*The Georgia Supreme Court accepted Parham's claim that eminent domain always required compensation. They reversed the lower court and granted an injunction prohibiting the state from building on the unenclosed land without compensating the owners. On what basis did Justice Nisbet insist that the constitution of Georgia protects an unenumerated right against uncompensated takings? Why did he reject the state legislative decision to distinguish between enclosed and unenclosed lands?*

JUSTICE NISBET writing for the Court.

. . . It is very clear, that the Legislature may take the property of a citizen for purposes of public necessity or public utility. All grants of land are in subordination to the eminent domain which remains in the State; and from the necessities of the social compact, they are subject to this condition. The sovereign authority of the State, acting through the Legislature, is bound to protect and defend the State, and to promote the public happiness and prosperity of the people; and the Legislature is to judge when the public necessity or public utility requires the appropriation of the property of the citizen. . . . Nor do we deny, that a highway is a work of public utility. It is necessary to commerce and intercourse. Nothing can be more conducive to the social well-being and commercial prosperity of a State, than roads. . . . Our doctrine farther is, however, that the property of the citizen cannot be taken for any purpose of public utility or convenience, unless the law which appropriates it, makes provision for a just compensation to the proprietor. . . .

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This law makes provision for compensating the owner only when a public road is laid out through his enclosed ground. There is not, so far as I can ascertain, any provision in our laws for compensating the owner, where a road is laid out through his unenclosed or wild lands. Nor does it seem that this is a legislative oversight, for by designating enclosed grounds, they are to be held, as of purpose, excluding all other grounds. . . .

It may be, it doubtless is true, that our people have as good reason to confide in the justice and forbearance of the Legislature as they ever had. It may be, that in all the future, the Legislature may not, in a single instance, assume the land of the citizen, without a just compensation. We know not. But this we do know, that the power of government ever tends towards enhancement and encroachment. Corporation influence may become too strong for legislative resistance. . . . The sacredness of private property ought not to be confided to the uncertain virtue of those who govern. . . .

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It is not to be doubted but that there are cases in which private property may be taken for a public use, without the consent of the owner, and without compensation, and without any provision of law for making compensation. These are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the Legislature. In such cases, the injured individual has no redress at law—those who seize the property are not trespassers, and there is no relief for him but by petition to the Legislature. For example: the pulling down houses, and raising bulwarks for the defense of the State against an enemy; seizing corn and other provisions for the sustenance of an army in time of war . . .

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This rule of necessity has a very narrow application, and is an exception, indeed, to the general rule, which is, that when public necessity of utility requires the assumption of private property, it can only be done by the Act of the Legislature, and the Legislature must make provision for compensation. If it does not, the Courts may pronounce the law a nullity.

This was the law of the land in England, before Magna Charta. . . . and this great rule of right and liberty was the law of this State at the adoption of the Constitution. It is not, therefore, necessary to go to the Federal Constitution for it. It came to us with the Common Law—it is part and parcel of our social polity—it is inherent in ours, as well as every other free government. . . .

This great and indispensable rule of property is embodied . . . in the Constitution of several of our States, in the bill of rights of others, and in the Constitution of the United States. . . . The Constitution of the United States upon this point, I know, has been held to be a restraint upon federal legislation alone, and not to apply to the States. If that be admitted, yet it is still authority, most significant, for the application of the rule in the States. . . . it would be weak reasoning to say, that because the people of the States have denied to the Federal Government the right to assume private property for public use without compensation, they have thereby conceded it to the State Governments. The contrary inference is irresistible, to wit: that the people, feeling protected in the States by this limitation on the power of the State Governments, were induced to make sure of the same protection from the Federal Government, and that the fifth article of the amendments to the Constitution is to be held and taken as a solemn avowal, by the people, that a power to take private property, without compensation, does not belong to any government. . . .

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