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TRUSTEES of the UNIVERSITY
vs.
FOY.—EJECTMENT.

Haywood for the Trustees.

(Concluded from our last.)

"The next step in the line of progression is, whether the Legislature had authority to make an act divesting one citizen of his freehold and vesting it in another, even with compensation? That the Legislature in certain emergencies, had authority to exercise this high power, has been urged from the nature of the social compact, and from the words of the Constitution; which says, that the house of representatives shall have all other powers necessary for the Legislature of a free state or commonwealth; but they shall have no power to add to, alter, abolish or infringe any part of this constitution. The course of reasoning on the part of the defendant may be comprised in very few words. The despotic power as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case it cannot be lodged any were, with so much safety as with the Legislature. The presumption is that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, dificult to form a case, in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen and giving it to another citizen. It is immaterial to the state in which of its citizens the land is vested; but it is of primary importance, that when vested it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles and renders it an holy thing. The present case is a case of landed property vested by law in one set of citizens, and attempted to be divested for the purpose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken and used in time of war, or famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself, in a pressing public emergency on the spur of the occasion. In the latter case, there is no change of property, no divestment of right; the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it. Then the right of necessity is satisfied and at an end; it does not effect the title, is temporary in its nature, and cannot exist forever. The constitution expressly declares that the right of acquiring posession and of protecting property, is natural, inherent and unalienable. It is a right, not *ex gratia* from the Legislature, but *ex debito* from the constitution. It is sacred, for it is further declared that the Legislature shall have no power to alter, abolish or infringe any part of the constitution. The constitution is the origin and measure of the Legislative authority. It says to the Legislature, thus far shall you go, and no farther; not a particle of it shall be shaken, not a pebble shall be removed. Innovations are dangerous; one encroachment leads to another; precedent give birth to precedent; what has been done may be done again: thus radical principles are genetally broken in upon, and the constitution destroyed. Where is the security? Where is the inviolability of property, if the Legislature by a positive act, affecting particular persons only, can take land from one citizen, who acquired it legally, and vest in another? The rights of private property are regularly protected and governed by general, known and established laws; and decided upon by general, known and established tribunals.—Laws and tribunals not made and created on an instant exigency, or an urgent emergency to give a present turn, or the instant of a moment: their operations and influence are equal and universal. They press equally on all, dence security and safety, tranquility & peace; one man is not afraid of another, and no man afraid of the Legislature.

It is infinitely wiser and safer to risque some possible mischiefs, than to vest in the Legislature so unnecessary, dangerous and enormous a power as that, which has been exercised on the present occasion; a power that according to the full extent of the argument, is bound less and omnipotent; for the Legislature judged of the necessity of the case, and also of the nature and value of the equivalent. Such a use of necessity and judging too of the compensation, can never occur in any nation. Singular indeed and untoward must be the state of things that would induce the Legislature, supposing they had the power to divest one individual of his landed estate, merely for the purpose of vesting it in another, even upon full indemnification, unless that indemnification be ascertained in the manner I shall mention hereafter.

"But admitting that the Legislature can take the real estate of A and give it to B on making compensation; the principle and reasoning upon it go no farther than to shew that the Legislature are the sole and exclusive judges of the necessity of the case in which this despotic power should be called into action. It cannot on the principles of the social alliance or of the constitution, be extended beyond the power of judging upon every existing case of necessity. The Legislature declare and enacts that such are the public exigencies or necessities of the state as to authorise them to take the land of A and give it to B. The dictates of reason and the eternal principles of justice as well as the sacred principles of the social contract and the constitution, directs and they accordingly declare and ordain, that A shall receive compensation for the land. But here the Legislature must stop; they have run the full length of their authority and can go no further. They cannot constitutionally determine upon the amount of the compensation or value of the land; public exigencies do not require, necessity does not demand, that the Legislature should of themselves without the participation of the proprietor or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it."

Here I will stop, tho' the Judge continues to make many other remarks of great importance. Let us pause now a little and ruminate on the sentiments here delivered. They are the genuine effusions of a mind devoted to liberty and ardently anxious to proclaim its true principles to the world. It seeks to recommend them by shewing these principles in their native simplicity; and are they not worthy in the most exalted degree of the admiration of every citizen? Would to God I could exhibit them in their most engaging form! How soon should I succeed in repelling the attempts that are made to cover them in obscurity! How soon would they be enshrined in the temple of our hearts and guarded by the affections of the people from every danger!

No freeman ought to be deprived of his property but by the verdict of a jury or the law of the land is a part of the clause to be remarked, on it immediately respects the private rights of individuals. Other parts of it I shall presently shew respects the property of corporations as well as the personal liberty of the citizen. There is no doubt but the convention intended this clause as a restriction upon some of the branches of the government, which might otherwise use the powers prohibited. And what branch of the government was so much to be dreaded as the Legislature? The authority of the Executive is too confined to have given cause for apprehension, and the authority of the Judges is here asserted as I shall presently prove, not restrained or diminished.—The things here prohibited cannot be done but in courts of justice regularly constituted, and proceeding according to the known and steady modes of trial, used and practised in all cases. I have heard it argued, that as the Legislature can make the law of the land by passing an act for that purpose, that therefore this clause of the bill of rights, if taken as restrictive of their power, is of little or no effect. And can there be a stronger argument to prove that the term *law of the land*, has some other meaning? Would the Convention, that wise body of men, when perfecting the most important instrument that ever came under the consideration of a deliberative body, have intended to restrain the future Legislature in matters of the most momentous concern, by a provision which they might render nugatory at pleasure? Is it any way consistent with the dignity of that body or that noble love of liberty which characterised them to attribute to them such language as this? These are powers too dangerous to be entrusted with the Legislature, and they shall not exercise them, but if they pass an act for the purpose, they may exercise them? The words *law of the land* therefore, mean something other than an act of the Legislature. If we resort for its meaning to the history of the times in which it was at first used in national instruments, we shall discover its genuine signification. It was first used in the 29th article of the magna charta of England, extorted by force from the King, and explicitly declaring the rights of the people in instances in which he had formerly violated them. It declared not that these rights could not be forfeited at all, but that they could not be forfeited at the will and pleasure of the executive, nor in other manner than by a fair trial in a court of justice by jury, where the facts were disputed, or where the facts were not disputed by such other modes as were agreeable to the law of the land or recognized by it. In either of which cases, the judgment of the regular tribunals of the country must be pronounced before the party could lose his rights. This was what was then and is now meant by the term *law of the land*. Sir Edward Coke, in his 2d Institute, page 50, expounds this sentence to mean *due process of law*. In Shower's Parliament cases and Hargrave's preface to C. Littleton, it is expounded to refer to such cases as are not triable by the judgment of one's peers: And Sullivan, page 491 and page 493, explains it to mean modes of proceeding to judgment in a court of justice legally constituted; which modes are prescribed by law, and take place in cases where the trial by jury cannot be used; for instance, if the party plead guilty or will not appear, or suffer judgment by default, or if there be a demurrer upon the pleadings of the parties where all matters of fact are truly stated and admitted by both parties, or where the court passss judgment for a contempt committed in the face of the court. In page 515, Mr. Sullivan says, no freeholder shall be disseized of his freehold but by the verdict of a jury or the *law of the land, as upon default, not pleading or being outlawed.* The meaning then of the term we are considering, was that a man should not be deprived of his freehold, &c. but by the judgment of a *court of justice* regularly constituted and authorised to decide what the law is, and to pronounce it in cases coming before them: which court shall ascertain facts by the verdict of a jury where proper, or where that would be improper by such other means as the law has appointed. How different is this from the idea which makes every act of the Legislature a law of the land, and vests in them the arbitrary and despotic power of prostrating all those rights so dear to mankind whenever they please! The term law of the law had a precise legal meaning when used by the convention, and signified the lawful proceedings of the *proper tribunals* of the country. How much more for the advantage of the citizen is it that this should be the meaning of the constitution than the other before adverted to? If a court of justice injures an individual from unjustifiable motives, the Judge who injures him may be impeached and removed from office; or he may carry his case before a superior tribunal; but who shall procure him redress against the Legislature? The experience of ages evinces this truth, that the judiciary generally acts with coolness and reason; but it is know to all persons of political experience, that the best and most enlightened men when placed in large assemblies, will so far partake of the heats of the moment as frequently to concur in measures which in their calm and retired moments they find much cause to regret. Had the Assembly the powers which are expressly denied them by this clause of the Constitution; there is reason to fear that many would be the victims of the indiscreet exercise of them; whose property would be safe or whose life, if an Assembly infuriated by the opposition of party as in the times of Cæsar and Pompey, or inflamed by artful accusations or otherwise roused to act against individuals obnoxious to the public, could deprive them of either without further ceremony than that of passing an act for the purpose, and without more responsibility than to the tribunal of their own consciences. Such times of trouble may come upon us as they have come upon other nations, and it is the interest as well as duty of every good man to shut up as far as possible every avenue to cruelty, injustice and persecution, or we know not upon whom the evil is to fall.—In such a state of things with no bridle upon the malignant passions; how often should we see the mask of patriotism assumed as a prelude to sacrifice! how often should we see our best citizens sinking under the weight of unprincipled persecution! Who is there in the least acquainted with the excesses into which numerous bodies are apt to run, that would be willing to see the dangerous power I am contending against, vesteded in the Legislature. May I never see it yielded to them; for then will my country be covered with the mantle of mourning, and the spirit of confiscation like that which appeared to Brutus will follow on the footsteps of her patriots! Thank God, no man in North-Carolina can be deprived of his life or property but by the regular judgment of a lawful court who cannot oppress because they cannot originate any law of themselves, but act upon those made by others. It is sometimes argued that the Constitution did not mean to hinder the Legislature, but all other persons and bodies of men from medling with the individual rights specified in this 10th article, but that unlimited powers may be safely intrusted with the Legislature. Answer. The Convention clearly thought otherwise; for the 24th section of the Bill of Rights prohibits the passing of any *ex post facto* law, and why? doubtles from an apprehension, that if not prohibited to exercise such a power, it would be used to the injury of individuals. It was equally necessary and essential to liberty, that the property of individuals and their personal liberty should be guarded against the encroachments of the Legislature. This 10th section furnishes that guard, or it is not furnished at all; and this is a consideration which gives additional strength to the argument that this 10th section acts as a limitation upon the powers of the Legislature. As to private property therefore I may venture to affirm it is beyond the reach of the Assembly, and cannot be taken from the owner by any act they can pass for the purpose.

Neither can they take away the property of a *corporation.* It is remarkable that in the 10th section of the Bill of Rights, the word *liberty* twice occurs, once in the plural and again in the singular; *no freeman ought* to be *disseized of his liberties, &c. or deprived of his liberty but by the verdict of a jury or the law of the land.* A *disseisin* of liberties has a legal and technical meaning, well known to lawyers to be altogether distinct from the deprivation of personal freedom or the power of going whither we please; it regards property and its possessor, while the other phrase *deprived of his liberty* regards his freedom from unjust confinement; *disseisin* of liberties, must in the opinion of the convention, mean something different from *deprivation of liberty*, otherwise it would not have been used in the same clause; it is a term which peculiarly signifies those privileges and *possessions* which corporations have by virtue and in consequence of the instruments which incorporate them. It is defined in 2 Bl. Com. 37 and Sullivan page 516, commentary upon the word *liberties* used in the 29th article of the Magna Charta, from whence it has been translated into our Bill of Rights, says "it signifies the privileges which some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the King, as the chattels of felons or outlaws *and the lands* and privileges of corporations." It means therefore in our Constitution the *possessions and privileges* of corporations, and in conjunction with the other words of that article, amount to this; that the possions of a corporation, like those of an individual, shall not be taken away but by the verdict of a jury or the judgment of a court of justice. If then the Trustees of the University be considered in the light of individuals, or of a common corporation, the property which they had acquired could not be affected by any act of the Legislature; nor could it be taken from them, but by the judgment of some proper court, having sufficient jurisdiction, and proceeding according to the known and established law of the land.

And if so, I would ask, is the University distinguished to its disadvantage from other corporations? or is there any circumstance which renders its property less sacred than that of an individual or common corporation? It is certainly a correct idea, that where the Assembly are directed by the people in their constitution, to do any special act, and they do it accordingly, the Assembly are to be considered in relation to that act, as the attornies of the people, appointed to do it, & consequently, that the act itself is to be considered as the *act of the people*: In like manner as a deed executed by my attorney in my name, is my act and deed and *not his.* Thus if a Judge or Attorney General is to be appointed, the Legislature as the attornies or agents of the people elect him; but when he is elected, he is the officer of the people not of the Assembly, and cannot be turned out of office by them. How is the case of the University different in principle from the case here put: The 40th section of the Constitution, directs that "A school or schools shall be established by the Legislature for the convenient "instruction of youth, with such salaries to the "masters to be paid by the public as may enable "them to instruct at low prices, and all useful "learing shall be promoted and encouraged in "one or more Universities." Now, when the Legislature have, pursuant to this direction, erected and established an Univerty, have they any more power over it, than they have over the judges is it not as much the work of the people as if they had established it themselves by the Constitution, without the agency or intervention of the Assembly? surely it stands upon the same basis as the Legislature itself does. It is as much the will of the people, that there should be an University, and that it should continue, as it is that there should be a Legislature. When the Legislature endowed it, they did so as the organs of the people, and they cannot avoid the gift, before they have received an authority from the people, as express for its dissolution, as they had for its establishment. It may be said, the Assembly are directed to establish schools, and one or more Universities; but not to endow them, and that therefore they alone and not the people, have given the escheated and confiscated lands to the University. I answer, whenever a principal thing is directed to be done, all the necessary means of doing it are given to the agent. An University cannot be established without funds, and therefore it is necessarily implied that they are to provide funds for it, as well as pass a law for bringing it into existence. When the Assembly accordingly pointed out the escheated and confiscated property for this purpose; it from that moment became a gift of the people, ratified through the medium of their organ the Legislature; which none but the people assembled in convention can resume. It has been said this is a public institution for public purposes, and therefore is subject