

M'KEAN, *Chief Justice*.—Wood is a writer of great authority, and frequently cited with respect in *Westminster-Hall*. In the case before us, the execution has regularly issued, upon a judgment regularly obtained; and although we should certainly protect suitors, witnesses, and jurors, from an arrest on *mesne* process, during their attendance upon the Court, and for a reasonable time in coming and going, yet no case has been shewn, which will justify our interference to discharge a man taken in execution on the ground of such a protection. It is, indeed, the privilege of the Court that is infringed; and, it is discretionary, to grant it on some occasions, and to refuse it upon others.

BY THE COURT:—The prisoner must be remanded.

RESPUBLICA *versus* SPARHAWK.

THIS was an appeal from the *Comptroller General's* decision, on the trial of which, by consent of the *Attorney General*, *Sparhawk* was considered as Plaintiff.

There was a verdict and judgment *nisi* for the Commonwealth, when *Ingersol* obtained a rule to shew cause why a new trial should not be granted.

The case was this:—Congress, perceiving that it was the intention of the *British* army to possess themselves of *Philadelphia*, and being informed that considerable deposits of provisions &c. were made in that city, entered into a resolution on the 11th of *April*, 1777, that “a Committee should be appointed to examine into the truth of their information; and, if it was found true, to take effectual measures, in conjunction with the *Pennsylvania* Board of War, to prevent such provisions from falling into the hands of the enemy.”

On the 13th of the same month, the *Pennsylvania* Board of War, in aid of this resolution, addressed a circular letter to a number of citizens in each ward of the city, requesting them “to obtain from every family a return of the provisions &c. then in possession, and the number of persons that composed the families respectively, in order that proper measures might be pursued for removing any unnecessary quantity of supplies to a place of security.” At the same time, it was mentioned, that “this proceeding was not intended to alter or divest the property in the articles removed; but, on the contrary, that the same should be at all times liable to the order of the respective owners, provided they were not exposed to be taken by the enemy.”

That no precaution might be omitted upon this occasion, the *Pennsylvania* Board of War, on the succeeding day, desired General *Schuyler* to prevent the introduction of further supplies, and to adopt the most effectual means for preventing the departure of the waggons which were then in the city, and for procuring as many more as would

* Determined at *Sunbury*. N. P. on the 11th of *November*, 1782; before the CHIEF JUSTICE, and Mr. Justice RUSH.

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would be necessary to transport, not only the public stores, but also such private effects, as it might be thought expedient to remove.

Several intercepted letters having encreased the apprehensions of Congress, on the 16th of *April*, 1777, they resolved, "that it be recommended to the President and Members of the executive authority of this State, to request the commanding officer of the continental forces in this city, to take the most effectual means, that all provisions, and every other article, which, by falling into the hands of the enemy, may aid them in their operations of war against the *United States*, or the loss of which might distress the continental army, be immediately removed to such places, as shall be deemed most convenient and secure."

This recommendation was transmitted by the Executive Council to the *Pennsylvania* Board of War, who, on the 18th of *April*, passed an order, that "houses, barns, stores, &c. should be hired or seized, for the reception of such articles, as should be sent out of the city by their direction or that of Congress;" and, accordingly, a very considerable quantity of property was soon removed to *Chestnut-Hill*, and placed under the care of Messrs. *Loughead* and *Barnhill*; who gave receipts to the owners, promising "to restore what belonged to them respectively, or to deliver the same to their respective orders."

The enemy, not approaching so rapidly as was expected, a considerable part of this property had, accordingly, been re-delivered to the order of the owners, before the city was entered by the *British* troops; when, however, the depot at *Chestnut-Hill* fell, likewise, into their hands, and, with it, 227 barrels of flour, belonging to *Sparhawk*; being the remainder of 323 barrels that had been originally removed thither; in consequence of the above mentioned proceedings.

For the price of these 227 barrels of flour, with interest from the time of their being taken, *Sparhawk* exhibited an account, amounting to £919 6 6 against the public; upon which the *Comptroller-General* reported to the *Executive Council*, that "neither the principal, the interest, nor any part of either, could be allowed;" and against this decision the present appeal was entered.

The question, therefore, on the motion for a new trial, was, whether this claim, under all the circumstances, ought to be admitted? and it was argued on the 28th of *April*, by *Ingersol*, for the Appellant; and the *Attorney General*, for the Commonwealth.

On the part of the *Appellant*, it was premised, that, in a season of *peace*, the law had so great a regard for private property, that it would not authorize the least violation of it; no, not even for the general good of the whole community. 1 *Black. Com.* 139. And, it was contended, that, although a state of *war* entitled one nation to seize and lay waste the property of another, and their respective subjects to molest the persons, and to seize the effects of their opponents, yet, as between a state and its own citizens, the principle, with respect to the rights of property, is immutably the same, in war as well as peace. Sometimes, indeed, the welfare of the public

tic may be allowed to interfere with the immediate possessions of an individual; but these must be cases of absolute necessity, in which every good citizen ought cheerfully to acquiesce: Yet, even then, justice requires, and the law declares, that an adequate compensation should be made for the wrong that is done. For, the burthen of the war ought to be equally borne by all who are interested in it, and not fall disproportionately heavy upon a few. These general principles are fortified by the explicit language of the *Declaration of Rights, Sect. 8.* which provides, that “no part of a man’s property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal Representatives.” In the present case the Appellant did not voluntarily surrender his property, nor was it taken from him by any legislative sanction.

That there are, however, some instances where an individual is not entitled to redress for injuries committed on his property in the prosecution of public objects, must be admitted; but these instances are carefully distinguished by the writers on the law of nations; *Vatt. B. 3. Sect. 232.* and are in no degree analogous to the foundation of the Appellant’s claim. If, indeed, the property in question had remained in *Philadelphia*, and had there been seized by the enemy, there could have been no reason to claim an indemnification from the public; but, when it was taken out of the possession of the owner by the executive authority of the State, and removed to a distant place, with a promise of restoring it on demand, the subsequent capture being clearly a consequence of this interference, the government is bound to indemnify the Appellant for his loss.

It is unnecessary to travel into an investigation of the various modes, by which an individual may seek for redress and compensation, where his property has been divested for the use of the public. The right is clear, and that every right must have a remedy, is a principle of general law, which the Legislature of *Pennsylvania* has expressly recognized; directing, by an early Act of Assembly, the settlement of the accounts of the Committee and Council of Safety; and prescribing in what manner the claims of individuals should be settled and discharged. *2 State Laws 144.* To these bodies, the *Pennsylvania* Board of War succeeded; the business of the Board was transacted in the same way; and there can be no good reason, why the obligations which they incurred, should not be as fairly and fully adjusted and satisfied. The Legislature, indeed, must have regarded the matter in the same light; for, finding that the former law was inadequate to its objects, another was enacted to appoint a *Comptroller General*, and to authorize him “to liquidate and settle, according to law and equity, all claims against *the Commonwealth*, for services performed, monies advanced, or articles furnished, by order of the legislative, or executive powers, for the use of the same, or for any other purpose whatever.”—This authority embraced the Appellant’s claim, and the Comptroller General has erred in deciding against it.

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The *Attorney General*, for the *Commonwealth*, stated the case to be briefly this; that the *Pennsylvania* Board of War, acting under the recommendations of *Congress*, removed, among other things, a quantity of flour belonging to the Appellant, in order to prevent its falling into the hands of the enemy: declaring, however, that the removal was not intended to divest the property, but that the flour should still be subject to the order of the owner, provided it was not exposed to a capture. The flour being afterwards seized by the *British* troops at the place where the *Pennsylvania* Board of War had deposited it, two questions arise:—1st. Whether this Court has power to grant relief to the Appellant, if any ought to be granted. And, 2dly. Whether, on principles of law and equity, he is entitled to be relieved.

-I. Considering this as a case immediately between *Sparhawk* and the *Commonwealth*, it is clear, that a sovereign is not amenable in any Court, unless by his own consent; 1 *Black. Com.* 242. And, therefore, unless the *Commonwealth* has expressly consented, there is nothing in the constitution of this Court, which can warrant their sustaining the present proceedings. What then is the evidence of consent? We are referred to the law appointing the *Comptroller General*. Let us examine this law; and as the case comes by appeal from the *Comptroller*, if it appears that he had no authority to liquidate and settle *Sparhawk's* claim, it follows, as a necessary consequence, that this Court, also, has no jurisdiction for that purpose.

By the Act of Assembly which gives the appeal from the *Comptroller General's* decision to the *Supreme Court*, 3 *State Laws* 44. this is restricted to such accounts as he shall settle in pursuance of the preceding Act, by which he was appointed; 3 *State Laws* 57. and there, we find, the specific object of his authority to be, the liquidation and settlement of all claims against the *Commonwealth*, "for services performed, monies advanced, or articles furnished, by order of the legislative, or executive powers, &c." In order, therefore, to found the jurisdiction of the *Comptroller*, two things must concur—1st. that the claim be for services performed, monies advanced, or articles furnished; and 2dly. that the debt has been incurred by order of the legislative or executive power.

Now, in the present case, the Appellant makes no claim for services performed, or money advanced, and it is impossible for the most ingenious fancy to bring his demand within the description of articles furnished. It is conceded, indeed, that the law does not, in peace, acknowledge any authority to violate the rights of property, or to interfere with the possessions of individuals; but there is in war a transcendant power, which is connected with the fundamental principle of all governments, the preservation of the whole; and the interest of private persons may certainly, in that season, be sacrificed, *ne quid respublica detrimenti capiat*. The loss, of which the Appellant complains, was occasioned by the exercise of this power. As a tort it cannot be charged against the *Commonwealth*; for, a declaration stating it so would be cause of demurrer: And, therefore, as it is only

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in cases of contract, either express or implied, that the *Comptroller General* is authorized to act, there is no jurisdiction which can relieve him, but that of the Legislature.

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But, in the next place, the claim does not originate upon any order of the legislative, or executive, power, agreeably to the terms of the act. The order for the removal of the provision, &c. to *Chestnut-Hill* was issued by the *Pennsylvania Board of war*, not in obedience to the Executive Council, but in pursuance of a recommendation from Congress, which the Executive Council merely transmitted to the Board. Even, indeed, if the Executive Council had undertaken to direct this proceeding, a question would still arise, whether they had a right to do so? for, the act of Assembly, providing for the settlement of claims against the public by order of the Executive Council, though not in express words, yet, by a necessary implication, must intend a legitimate order, founded upon the constitutional powers of that department, or issued under the authority of some law. The Executive Council cannot otherwise charge the public; without the legislative sanction they cannot erect magazines, or any other public buildings; nor enter into the most trifling contract; of which, indeed, a recent proof appears, in the refusal of the General Assembly to pay for the arms of the State, that had been placed in the Supreme Court; or to discharge the additional expence of the *Triumphal Arch*, which had been incurred by the direction and upon the faith of the Executive Council.

II. But, it is further to be shewn; that, even supposing the *Comptroller General*, or this Court upon appeal, had the power of granting *Sparhawk's* claim, yet, that the claim itself is not founded in law or equity, and ought, therefore, to be rejected.—If the Appellant's claim is just, he ought either to urge it against the immediate agent in the wrong which he has sustained, or travel to the source, and demand reparation from Congress. The *Commonwealth of Pennsylvania* cannot be liable; for, the persons who took and kept the provisions, &c. at *Chestnut-Hill*, acted under the authority of the Board of war, who, it is true, were appointed by the Executive Council; but, in this instance, proceeded entirely upon the recommendation of Congress, which the Executive Council did not, and could not legally, enjoin or enforce. It is possible, however, that, in strict law, Messrs. *Loughead* and *Barnhill* would have been liable as trespassers, had not the Legislature interfered to protect persons in their situation from vexatious prosecutions: *3 State Laws. 178.* And this act, although it relates immediately to individuals, shews, generally, that the temporary bodies, by whose orders such individuals were governed, are, likewise, to be exempted from suits, on account of their conduct in the service of their country.

But, on what ground can redress be at all expected on this occasion? The removal of the Appellant's property arose from the necessity of the war; it was not done to convert the flour to the public use, nor to deprive the owner of the advantages of it, any farther than the paramount consideration of the public welfare required.

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The object was to secure it from the depredations of the enemy; and, that it, afterwards, fell into their hands, was an event involuntary, and merely accidental, in which case *Vattel* expressly says, no compensation shall be made. *Vatt. lib. 3. sect. 232*. If the Appellant is entitled to relief, every farmer whose cattle have been driven from his plantation to avoid the enemy; every man whose liquors have been staved, or provisions destroyed, upon the approach of the *British* troops; all the owners of *Tynicum* island, which was deluged by a military mandate; and, in short, every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice, be effectually indemnified.—What nation could sustain the enormous load of debt which so ruinous a doctrine would create!

Ingersoll, in reply.—With respect to the *first* point made on the part of the Commonwealth, it is not contended, for the Appellant, that, generally speaking, citizens may sue the State; but only that every Government, which is not absolutely despotic, has provided some means (in *England*, for instance, by petition in Chancery) to obtain a redress of injuries from the Sovereign.

As to the *second* point;—The Pennsylvania Board of war acted under the authority of the Executive Council; and the principal is responsible for the agent. When the Appellant's property was taken out of his own custody, the Government stood in his place, and undertook all the consequent risks. The individuals, who were charged with the care of it, are protected by the act of Assembly; but the State, upon every principle of justice, is still liable for the loss; and the authority of the *Comptroller General* was intended, and has always been understood, to be competent for granting the satisfaction which is now claimed.

The CHIEF JUSTICE, after stating the case, delivered the opinion of the Court as follows:

M'KEAN, *Chief Justice*.—On the circumstances of this case, two points arise:

1st, Whether the appellant ought to receive any compensation, or not? And

2dly, Whether this Court can grant the relief which is claimed?

Upon the *first* point we are to be governed by reason, by the law of nations, and by precedents analogous to the subject before us. The transaction, it must be remembered, happened *flagrante bello*; and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a *trespass*; which, from the very nature of the term, *transgressio*, imports to go beyond what is right. 5 *Bac. Abr.* 150. It is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity, form a part of our law.

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Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure 2 *Black. Com.* 36. So, if a man is assaulted, he may fly through another's close. 5 *Bac. Abr.* 173. In time of war, bulwarks may be built on private ground. *Dyer.* 8. *Brook. trespass.* 213. 5 *Bac. Abr.* 175. and the reason assigned is particularly applicable to the present case, because it is for the *public safety.* 20 *Vin. Abr. (trespass)* B. a. *sec. 4. fo.* 476. Thus, also, every man may, of common right, justify the going of his servants, or horses, upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs. 1 *Ld. Raym.* 725. The pursuit of Foxes through another's ground is allowed, because the destruction of such animals is for the *public good,* 2 *Buls.* 62. *Cro. I.* 321. And, as the safety of the people is a law above all others, it is lawful to part affrayers in the house of another man. *Keyl.* 46. 5 *Bac. Abr.* 177. 20 *Vin. Abr. fo.* 407. *sec. 14.* Houses may be razed to prevent the spreading of fire, because for the public good. *Dyer.* 36. *Rud. L. and E.* 312. See *Puff. lib. 2. c. 6. sec. 8. Hutch. Mar. Philosf. lib. 2. c. 16.* We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History,* where it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.

We are clearly of opinion, that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: And, having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss.

With respect to the *second* point;—This Court has authority to confirm, or alter, any proceedings, that come properly before the *Comptroller General*; but if he had no jurisdiction, we can have none. It appears then, that his power is expressly limited to claims “for services performed, monies advanced, or articles furnished,” by order of the Legislature, or the Executive Council. And, as he has no right to adjudge a compensation from the State for damages, which individuals may have suffered in the course of our military operations, we are of opinion, that we could grant no relief, even if the Appellant was entitled to it.

BY THE COURT:—Let the rule be discharged; and the Judgment for the Commonwealth be made absolute.