

American Legal History – Russell

ELLIS V. MARSHALL, 2 Mass. 269 (1807)

[*276] We are therefore necessarily brought to the question, indeed the only one in the case, whether *Marshall*, by virtue of the act aforesaid, became a member of the said corporation, subject to its rules and regulations, and liable to be assessed for the purpose of building said street.

The counsel for the plaintiff have contended,

1st. That by virtue of the act itself, *Marshall* being named therein, he became, *ipso facto*, a member of the corporation, the legislature having competent power to compel him thereto.

2d. That should this not be the case, the foregoing facts contain sufficient evidence of his consent, tacit at least, to the passing of said act, and the insertion of his name therein.

The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitation of individuals, for their private emolument, or for the improvement of their estates, it must be construed, as to its effect and operation, like a grant. We are all of opinion that this was a grant or charter to the individuals who prayed for it, and those should associate with them; and all incorporations to make turnpikes, canals, and bridges, must be so considered.

Can then one, whose name is, by mistake or misrepresentation, inserted in such an act, refuse the privileges it confers, and avoid the burdens it imposes? If he cannot, then the legislature may, at all times, press into the service of such corporations those whose lands may be wanted for such objects, whenever they may be prevailed on to insert the names of such persons by the intrigue or mistake of those more interested in the success of the object. No apprehension exists in the community that the legislature has such power. That the land of any person, over or through which a turnpike or canal may

pass, may be taken for that purpose, if the legislature deem it proper, is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known that they have power over the person, to make him a member of a corporation, and subject him [*277] to taxation, *nolens volens*, for the promotion of a private enterprise.

That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities. That he may decline to improve his land, no one will doubt. Although the legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to judge for himself on points of this nature. The fact therefore in the case that *Marshall* is benefited equally with the other owners by the making of this street, is of no importance. In *Bagg's* case (3) it seems to be agreed by the Court, that a patent procured by some persons of a corporation shall not bind the rest, unless they assent. And in *Brownlow's* Reports, 100, there is this passage: "It was said that inhabitants of a town cannot be incorporated without the consent of the major part of them, and an incorporation without their consent is void."

In *Comberbach*, 316, *Holt*, speaking of a new charter made to the city of *Norwich* by *Henry 4*, and confirmed by *Charles 2*, says, the new charter had been void if the corporation had refused it; but when they accept it, and put it in execution, it is good.

If these principles were correct in *England* in times when prerogative ran high,--and the crown or the Parliament could not force charters or patents upon the subject without his assent,--surely in this free country, where the legislature derives its power from the people, such authority cannot be contended for.

It being, then, the opinion of the Court that this act is of a nature to require the assent of *Marshall*, either express or implied, before it can operate upon him, it is necessary to inquire into the second point, *viz.*, whether the facts agreed on in this case furnish evidence of such assent.

[The court held that he did not assent.]

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