

Case No. 1,000.

EX PARTE BARNARD.

[4 Cranch, C. C. 294.]¹

Circuit Court, District of Columbia.

March Term, 1833.

CONSTITUTIONAL LAW—EMINENT DAMAIN.

1. The act of Maryland of 1785, c. 49, respecting [the taking of land for] private roads or ways, is not repugnant to the constitution of the United States.
2. And [such act] is in force in the county of “Washington, D. C.

[Petition by Robert Barnard and William Morton to condemn land for a private way under Act Md. 1785, c. 49. Surveyor’s report confirmed.]

The surveyor having laid out a way according to a former order of the court, and having made his report, and a rule having been served on the possessors of the land through which, &c. to show cause, &c.

Mr. R. S. Coxe, for Mr. Mackall, objected.

The act of Maryland of 1785, c. 49, was passed before the amendment of the constitution of the United States, which forbids the taking of private property for public use without just compensation. The act of 1785 does not provide for just compensation, and being repugnant to the constitution of the United States, is void. But this land is not to be taken for public use. It is to be a private way, for private use; and it is not competent for any legislature to take the property of one man and give it to another, even with compensation. By that act, the court, and not the jury, is to ascertain the compensation; which is unconstitutional. *Van Horn v. Dorrance*, [Case No. 16,857.] Besides, the petitioners have not made out a case of necessity. The old way cannot now be lawfully stopped. It has been opened and used for forty years, and a grant may now be presumed. *Aspindall v. Brown*, 3 Term R. 265; 2 Dane, Abr. p. 256, c. 79, art 4; *Alban v. Brounsall*, Tel. 163; *Chichester v. Lethbridge*, Willes, 71; *Relgnolds v. Edwards*, Id. 282; *Gayetty v. Bethune*, 14 Mass. 49; 3 Dane, Abr. p. 250, art. 13; *Campbell v. Wilson*, 3 Bast, 294; *Dexter v. Hazen*, 10 Johns. 246; 3 Dane, Abr. p. 252, arts. 16,17; 2 Johns. 424; *Cincinnati v. White*, 6 Pet [31 U. S.] 431.

Mr. Redin, for the petitioners, referred to the following act of Maryland respecting streets in Georgetown, namely, 1797, c. 56, § 6, and the acts of congress of March 3, 1805. § 12, (2 Stat 334.) and March 3, 1809, § 4, (2 Stat 538.) He also cited *Greenwood v. Stoner*, 3 Har. & J. 435; *Howton v. Frearson*, 8 Term R. 50; *Dutton v. Tayler*, 2 Lutw. 1487; *Clark v. Cogge*, Cro. Jac. 170; *Staple v. Heydon*, 6 Mod. 3, 4; 1 Rolle, Abr. p. 936, pi. 10.

Ex parte BARNARD.

Mr. Key, on the same side.

The constitutional objection has been overruled in the cases of the Chesapeake & Ohio Canal Co. The act of 1785 has always been acted upon in Maryland.

THE COURT (nem. con.) confirmed the report of the surveyor, and allowed \$130 for compensation, namely, 2½ acres at \$30, and \$55 for fencing.

¹ [Reported by Hon. William Cranch, Chief Judge.]